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Witkin Summary of California Law, Tenth Edition
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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

A. Legislative Power Over Inheritance.

Witkin Sum. Cal. Law Wills § 1

[§ 1] Legislative Power Over Inheritance.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Federal Preemption.* See *Marshall v. Marshall* (2006) 547 U.S. 293, 126 S.Ct. 1735, 1746, 164 L.Ed.2d 480, 497 [scope of "probate exception" to federal court jurisdiction].



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

A. Legislative Power Over Inheritance.

14 Witkin Sum. Cal. Law Wills § 1

[§ 1] Legislative Power Over Inheritance.

(1) *In General.* The rights of inheritance and testamentary disposition are wholly statutory and subject to legislative control; the Legislature may even abolish the rights. (See *Magoun v. Illinois Trust & Savings Bank* (1898) 170 U.S. 283, 18 S.Ct. 594, 596, 42 L.Ed. 1037, 1041; *Irving Trust Co. v. Day* (1942) 314 U.S. 556, 62 S.Ct. 398, 401, 86 L.Ed. 452, 457; *Estate of Perkins* (1943) 21 C.2d 561, 569, 134 P.2d 231; *Estate of Watkinson* (1923) 191 C. 591, 595, 597, 217 P. 1073; *Estate of Knutzen* (1948) 31 C.2d 573, 578, 191 P.2d 747; *Estate of Burnison* (1949) 33 C.2d 638, 640, 204 P.2d 330 ["The Legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses. ... [I]t follows that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty"]; *Estate of Scott* (1949) 90 C.A.2d 21, 23, 202 P.2d 357 ["It is entirely immaterial whether the statutes relative to inheritance comport with the court's or counsel's idea of justice, morality or natural right. The matter is in the plenary control of the state Legislature and depends entirely upon the provisions of the statutes"]; *Estate of Guthman* (1954) 125 C.A.2d 408, 413, 270 P.2d 875; *Estate of Zimmermann* (1955) 132 C.A.2d 702, 704, 283 P.2d 68.)

Hence, the descent of property is governed by the law in force at the time of the decedent's death. It was on this principle that the 1923 amendment to former C.C. 1401 (now *Prob.C. 6101*), changing the right of succession to community property, was held to apply to property acquired before its passage. (*Estate of Phillips* (1928) 203 C. 106, 109, 263 P. 1017; see 23 *Am.Jur.2d* (2002 ed.), *Descent and Distribution* §6; 79 *Am.Jur.2d* (2002 ed.), *Wills* §49; 11 *Summary* (10th), *Community Property*, §249.) (On proposals for reform of inheritance system, see 22 *U.C.L.A. L. Rev.* 903; 31 *Hastings L. J.* 185.)

(2) *Limitations.* The legislative power is subject to two important limitations:

(a) *It cannot impair vested rights.* The estate of an heir or devisee vests in the heir or devisee at the time of the testator's death (*Prob.C. 7000*, *infra*, §404), and the Legislature cannot divest it by the retroactive application of any subsequent law. (*Estate of Wellings* (1925) 197 C. 189, 195, 240 P. 21; *Estate of Thramm* (1947) 80 C.A.2d 756, 765, 183 P.2d 97; *Estate of Giordano* (1948) 85 C.A.2d 588, 594, 193 P.2d 771; see 21 *So. Cal. L. Rev.* 109; 22 *So. Cal. L. Rev.* 194; 23 *Am.Jur.2d* (2002 ed.), *Descent and Distribution* §7.)

(b) *No local or special laws can be passed on the subject of descent or succession.* These were expressly prohibited by former Cal. Const., Art. IV, §25(30). Cal. Const., Art. IV, §16, now prohibits local or special statutes "in any case if a general statute can be made applicable," but no change in the law was intended. (See 8 *Summary* (10th),

Constitutional Law, §706.)

(3) *Federal Preemption*. An indirect limitation results from the supremacy of federal law. Federal regulations governing the rights of a beneficiary of United States savings bonds are a valid exercise of the federal money power, and prevail over the statutory right of testamentary disposition. (*Free v. Bland* (1962) 369 U.S. 663, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180, 185.) Likewise, the federal Servicemen's Group Life Insurance Act prevails over inconsistent state law on the issue of succession. (*Ridgway v. Ridgway* (1981) 454 U.S. 46, 102 S.Ct. 49, 55, 70 L.Ed.2d 39, 48.) (See 7 *Summary* (10th), *Constitutional Law*, §19.)

West's Key Number Digest, Wills k.1, 11, 13 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Federal Preemption*. See *Marshall v. Marshall* (2006) 547 U.S. 293, 126 S.Ct. 1735, 1746, 164 L.Ed.2d 480, 497 [scope of "probate exception" to federal court jurisdiction].



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

B. Uniform and Model Acts.

Witkin Sum. Cal. Law Wills § 2

[§ 2] Uniform and Model Acts.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Other Uniform Acts.*

(g) *Prudent Investor Act.* See 7B U.L.A. (Master Ed.), p. 1.

(h) *Principal and Income Act.* See 7A (Part III) U.L.A. (Master Ed.), p. 363.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
I. INTRODUCTION
B. Uniform and Model Acts.

14 Witkin Sum. Cal. Law Wills § 2

[§ 2] Uniform and Model Acts.

(1) *Model Probate Code*. In 1946, a Model Probate Code was approved by a special committee of the American Bar Association and published, with statutory notes and law review articles, as one of a series of studies by the University of Michigan Law School. The Model Code was not designed as a uniform act, but as a drafting guide for the improvement of probate procedures by state legislatures.

(2) *Uniform Probate Code*. In 1969, a Uniform Probate Code was approved by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. (See 8 (Parts I and II) U.L.A. (Master Ed.).) To date, the Code has been substantially adopted in 15 states. (See 8 (Part I) U.L.A. (Master Ed.), p. 1; 56 A.B.A.J. 636 [brief history and description by chief reporter]; 31 *Am.Jur.2d* (2002 ed.), *Executors and Administrators* §130 et seq.)

Two articles of the Uniform Probate Code have been substantially revised. Revised Article II (Intestacy, Wills, and Donative Transfers) was approved in 1990; Revised Article VI (Nonprobate Transfers on Death) was approved in 1989.

(3) *California Response*. A California State Bar Committee prepared an exhaustive report on the Code and opposed its adoption, primarily because the scope of the Code was too broad and because of a perceived lack of safeguards in provisions for independent administration. Nevertheless, the California Law Revision Commission used the Uniform Probate Code extensively as a source for its recommended revision of the Probate Code. (See *infra*, §22.)

(4) *Other Uniform Acts*. The following Uniform Acts have been adopted as part of the Probate Code:

(a) Simultaneous Death Act. (See 8B U.L.A. (Master Ed.), p. 141; *Prob.C.* 220 et seq.; *infra*, §288 et seq.)

(b) Transfers to Minors Act. (See 8C U.L.A. (Master Ed.), p. 1; *Prob.C.* 3900 et seq.; 13 *Summary* (10th), *Personal Property*, §140 et seq.)

(c) Statutory Form Power of Attorney Act. (See 8B U.L.A. (Master Ed.), p. 191; *Prob.C.* 4400 et seq.; *infra*, §839 et seq.)

(d) TOD [Transfer on Death] Security Registration Act. (See 8B U.L.A. (Master Ed.), p. 385; *Prob.C.* 5500 et seq.; *infra*, §313 et seq.)

- (e) Testamentary Additions to Trusts Act. (See 8B U.L.A. (Master Ed.), p. 355; *Prob.C.* 6300 et seq.; infra, §170.)
- (f) International Wills Act. (See 8 (Part I) U.L.A. (Master Ed.), p. 243; *Prob.C.* 6380 et seq.; infra, §71 et seq.)
- (g) Prudent Investor Act. (See 7B U.L.A. (Master Ed.), p. 280; *Prob.C.* 16045 et seq.; 13 *Summary* (10th), *Trusts*, §77 et seq.)
- (h) Principal and Income Act. (See 7B U.L.A. (Master Ed.), p. 131; *Prob.C.* 16320 et seq.; 13 *Summary* (10th), *Trusts*, §167 et seq.)
- (i) Statutory Rule Against Perpetuities. (See 8B U.L.A. (Master Ed.), p. 223; *Prob.C.* 21200 et seq.; 12 *Summary* (10th), *Real Property*, §175 et seq.)

The following uniform acts in other codes are also of note:

- (a) Determination of Death Act. (See 12A U.L.A. (Master Ed.), p. 589; *Health & Saf.C.* 7180 et seq.; infra, §§11, 12.)
- (b) Anatomical Gift Act. (See 8A U.L.A. (Master Ed.), p. 199; *Health & Saf.C.* 7150 et seq.; 13 *Summary* (10th), *Personal Property*, §6 et seq.)

West's Key Number Digest, Wills k.3

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Other Uniform Acts.*

- (g) *Prudent Investor Act.* See 7B U.L.A. (Master Ed.), p. 1.
- (h) *Principal and Income Act.* See 7A (Part III) U.L.A. (Master Ed.), p. 363.
- (j) *(New) Uniform Prudent Management of Institutional Funds Act.* See 7A (Part III) U.L.A. (Master Ed.), Supp. p. 3; *Prob.C.* 18501 et seq.

Uniform acts in other codes:

- (a) *Determination of Death Act.* See 12A U.L.A. (Master Ed.), p. 777.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
I. INTRODUCTION
C. Restatement.

14 Witkin Sum. Cal. Law Wills § 3

[§ 3] Restatement.

The Restatement 2d, Property (Donative Transfers), now in four volumes, addresses many topics within the scope of this chapter. It consists of the following:

Division I. Social Restrictions Imposed Upon the Creation of Property Interests by Donative Transfers. (See 12 Summary (10th), *Real Property*, §171 et seq. (Rule Against Perpetuities), §190 et seq. (other restraints).)

Division II. Powers of Appointment, Class Gifts, and Related Matters. (See 12 Summary (10th), *Real Property*, §145 et seq. (powers of appointment); *infra*, §222 (class gifts).)

Division III. Requirements for Effectuating a Donative Transfer. (See 13 Summary (10th), *Personal Property*, §125.) (A portion of Division III has been superseded.)

Two volumes of the Restatement 3d, Property (Wills and Other Donative Transfers) have been published, containing twelve chapters in four divisions:

Division I. Probate Transfers (Wills and Intestacy) has five chapters:

Chapter 1. Definitions and Basic Principles (§§1.1 to 1.3).

Chapter 2. Intestacy (§§2.1 to 2.7).

Chapter 3. Execution of Wills (§§3.1 to 3.9).

Chapter 4. Revocation of Wills (§§4.1 to 4.3).

Chapter 5. Post-Execution Events Affecting Wills (§§5.1 to 5.5).

Division II. Nonprobate Transfers (Gifts and Will Substitutes) has two chapters:

Chapter 6. Gifts (§§6.1 to 6.3).

Chapter 7. Will Substitutes (§§7.1 to 7.2).

Division III. Protective Doctrines has two chapters:

Chapter 8. Invalidity Due to the Donor's Incapacity or Another's Wrongdoing (§§8.1 to 8.5).

Chapter 9. Protections Against Disinheritance (§§9.1 to 9.7).

Division IV. Construction, Reformation, and Modification of Donative Documents has three chapters:

Chapter 10. General Principles (§§10.1 to 10.2).

Chapter 11. Resolving Ambiguities (§§11.1 to 11.3).

Chapter 12. Reforming and Modifying Donative Documents (§§12.1 to 12.2).

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
I. INTRODUCTION
D. Probate Rules.

Witkin Sum. Cal. Law Wills § 4

[§ 4] Probate Rules.

SUPPLEMENT: [This section is current through the latest supplement]

Chapter 1. General Provisions. Chapter 1 now includes C.R.C., Rules 7.1-7.4. *Chapter 4. Appointment of Executors and Administrators.* Chapter 4 now includes C.R.C., Rules 7.150-7.151.

Chapter 7. Spousal Property Petitions. Chapter 7 has been renamed Spousal or Domestic Partner Property Petitions.

Chapter 12. Accounts and Reports of Executors and Administrators. Chapter 12 now includes C.R.C., Rules 7.550-7.552.

Chapter 14. Preliminary and Final Distributions. Chapter 14 now includes C.R.C., Rules 7.650-7.652.

Chapter 19. Trusts. Chapter 19 now includes C.R.C., Rules 7.901-7.903.

Chapter 20. Minors' Claims. Chapter 20 has been renamed Claims of Minors and Persons with Disabilities.

Chapter 21. Guardianships. Chapter 21 now includes C.R.C., Rules 7.1001-7.1010.

Chapter 22. Conservatorships. Chapter 22 now includes C.R.C., Rules 7.1050-7.1060.

Chapter 23. Court-Appointed Counsel in Probate Proceedings. Chapter 23 has been renamed. It includes C.R.C., Rule 7.1101.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
I. INTRODUCTION
D. Probate Rules.

14 Witkin Sum. Cal. Law Wills § 4

[§ 4] Probate Rules.

Title Seven of the California Rules of Court, entitled Probate Rules, consists of the following chapters:

Chapter 1. General Provisions. (C.R.C., Rules 7.1 to 7.3.)

Chapter 2. Notices, Publication, and Service. (C.R.C., Rules 7.50 to 7.55.)

Chapter 3. Pleadings. (C.R.C., Rules 7.101 to 7.104.)

Chapter 4. Appointment of Executors and Administrators. (C.R.C., Rule 7.150.)

Chapter 5. Bonding of Personal Representatives, Guardians, Conservators, and Trustees. (C.R.C., Rules 7.201 to 7.206.)

Chapter 6. Independent Administration of Estates. (C.R.C., Rule 7.250.)

Chapter 7. Spousal Property Petitions. (C.R.C., Rule 7.301.)

Chapter 8. Petitions for Instructions. (Reserved.)

Chapter 9. Creditors' Claims. (C.R.C., Rules 7.401 to 7.403.)

Chapter 10. Sale of Real or Personal Property. (C.R.C., Rules 7.451 to 7.454.)

Chapter 11. Inventory and Appraisal. (C.R.C., Rule 7.501.)

Chapter 12. Accounts and Reports of Executors and Administrators. (C.R.C., Rule 7.550.)

Chapter 13. Taxes. (Reserved.)

Chapter 14. Preliminary and Final Distributions. (C.R.C., Rule 7.650.)

Chapter 15. Compensation of Personal Representatives and Attorneys. (C.R.C., Rules 7.700 to 7.707.)

Chapter 16. Compensation in All Matters Other Than Decedents' Estates. (C.R.C., Rules 7.750 to 7.756.)

Chapter 17. Contested Hearings and Trials. (C.R.C., Rule 7.801.)

Chapter 18. Discovery. (Reserved.)

Chapter 19. Trusts. (C.R.C., Rules 7.901 to 7.902.)

Chapter 20. Minors' Claims. (C.R.C., Rules 7.950 to 7.955.)

Chapter 21. Guardianships. (C.R.C., Rules 7.1001 to 7.1002.)

Chapter 22. Conservatorships. (C.R.C., Rules 7.1050 to 7.1051.)

Chapter 23. Alternative Dispute Resolution. (Reserved.)

Chapter 24. Miscellaneous. (Reserved.)

SUPPLEMENT: [This section is current through the latest supplement]

Chapter 1. General Provisions. Chapter 1 now includes C.R.C., Rules 7.1-7.4. *Chapter 4. Appointment of Executors and Administrators.* Chapter 4 now includes C.R.C., Rules 7.150-7.151.

Chapter 7. Spousal Property Petitions. Chapter 7 has been renamed Spousal or Domestic Partner Property Petitions.

Chapter 12. Accounts and Reports of Executors and Administrators. Chapter 12 now includes C.R.C., Rules 7.550-7.553.

Chapter 14. Preliminary and Final Distributions. Chapter 14 now includes C.R.C., Rules 7.650-7.652.

Chapter 19. Trusts. Chapter 19 now includes C.R.C., Rules 7.901-7.903.

Chapter 20. Minors' Claims. Chapter 20 has been renamed Claims of Minors and Persons with Disabilities.

Chapter 21. Guardianships. Chapter 21 now includes C.R.C., Rules 7.1001-7.1015.

Chapter 22. Conservatorships. Chapter 22 now includes C.R.C., Rules 7.1050-7.1063.

Chapter 23. Court-Appointed Counsel in Probate Proceedings. Chapter 23 has been renamed. It includes C.R.C., Rule 7.1101.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

E. Judicial Council Forms: Decedents' Estates.

Witkin Sum. Cal. Law Wills § 5

[§ 5] Judicial Council Forms: Decedents' Estates.

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form	Title

Number	Title

DE-121	Notice of Petition to Administer Estate (Probate--Decedents' Estates) [renamed]
DE-121(	Attachment to Notice of Petition to Administer Estate--Proof of
MA)	Service by Mail (Probate--Decedents' Estates) [added]
DE-122	Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-260	Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-265	Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-295	Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships) [added]
DE-350	Petition for Appointment of Guardian Ad Litem--Probate [renamed]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

E. Judicial Council Forms: Decedents' Estates.

14 Witkin Sum. Cal. Law Wills § 5

[§ 5] Judicial Council Forms: Decedents' Estates.

The Judicial Council has adopted the following forms for proceedings involving decedents' estates:

\$	IForm Number	\$
	ITitle	
D	E-111	P
	etition for Probate	
D	E-120	N
	otice of Hearing--Decedent's Estate or Trust (Probate--Decedents' Es- tates)	
D	E-120(MA)	A
	ttachment to Notice of Hear- ing Proof of Service by Mail (Probate--Decedents' Estates and Guardianships and Con- servatorships)	
D	E-120(P)	P
	roof of Personal Service of Notice of Hearing-	

	-Decedent's Estate or Trust (Probate--Decedents' Es- tates)	
D		
	E-120(PA) Attachment to Notice of Hear- ing Proof of Personal Ser- vice (Probate--Decedents' Estates and Guardianships and Conservatorships)	A
D		
	E-121 Notice of Petition To Admin- ister Estate	N
D		
	E-122 Petition (Probate) and Proof of Service	C
D		
	E-125 Summons (Probate)	S
D		
	E-131 Proof of Subscribing Witness	P
D		
	E-135 Proof of Holographic Instru- ment	P
D		
	E-140 Order for Probate	O
D		
	E-147 Duties and Liabilities of Per- sonal Representative	D
D		
	E-147S Confidential Supplement to Duties and Liabilities of Personal Representative	C
D		

14 Witkin Sum. Cal. Law Wills § 5

	E-150	L
	etters	
D		
	E-154	R
	request for Special Notice	
D		
	E-157	N
	otice of Administration to Creditors	
D		
	E-160	I
	nventory and Appraisal	
D		
	E-161	I
	nventory and Appraisal At- tachment	
D		
	E-165	N
	otice of Proposed Action (Objection--Consent)	
D		
	E-166	W
	aiver of Notice of Proposed Action	
D		
	E-172	C
	reditor's Claim	
D		
	E-174	A
	llowance or Rejection of Creditor's Claim	
D		
	E-200	O
	rder Prescribing Notice	
D		
	E-221	S
	pousal Property Petition	
D		
	E-226	S

	pousal Property Order	
D		
	E-260	R
	Report of Sale and Petition for Order Confirming Sale of Real Property	
D		
	E-265	O
	Order Confirming Sale of Real Property	
D		
	E-270	E
	Ex Parte Petition for Author- ity To Sell Securities and Order	
D		
	E-275	E
	Ex Parte Petition for Approv- al of Sale of Personal Prop- erty and Order	
D		
	E-305	A
	Affidavit re Real Property of Small Value (Probate)	
D		
	E-310	P
	Petition to Determine Succes- sion to Real Property (Probate)	
D		
	E-315	O
	Order Determining Succes- sion to Real Property (Probate)	
D		
	E-350	P
	Petition and Order for Ap- pointment of Guardian Ad Litem Under the Probate Code	

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form Number	Title
DE-121	Notice of Petition to Administer Estate (Probate--Decedents' Estates) [renamed]
DE-121(MA)	Attachment to Notice of Petition to Administer Estate--Proof of Service by Mail (Probate--Decedents' Estates) [added]
DE-122	Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-174	Allowance or Rejection of Creditor's Claim (Probate--Decedents' Estates) [renamed]
DE-260	Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-265	Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-295	Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships) [added]
DE-350	Petition for Appointment of Guardian Ad Litem--Probate [renamed]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

F. Judicial Council Forms: Guardianship and Conservatorship.

Witkin Sum. Cal. Law Wills § 6

[§ 6] Judicial Council Forms: Guardianship and Conservatorship.

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form Number	Title
GC-005	Declaration of Private Professional Conservator or Guardian--Qualifications (Probate--Guardianships and Conservatorships) [added]
GC-006	Declaration of Private Professional Conservator or Guardian--Continuing Education (Probate--Guardianships and Conservatorships) [added]
GC-020(P A)	Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships) [added]
GC-042	Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [added]
GC-042(M A)	Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [added]
GC-045	Objections to Inventory and Appraisal of Conservator or Guardian [added]
GC-051	Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe-Deposit Box (Probate--Guardianships and Conservatorships) [renamed]

- GC-060 Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
- GC-065 Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
- GC-079 Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward [added]
- GC-079(M Attachment to Pre-Move Notice of Proposed Change of Personal
A) Residence of Conservatee or Ward [added]
- GC-080(M Attachment to Post-Move Notice of Change of Residence of
A) Conservatee or Ward [added]
- GC-100 Petition for Appointment of Guardian Ad Litem--Probate [renamed]
- GC-101 Order Appointing Guardian Ad Litem--Probate [added]
- GC-110(P Petition for Appointment of Temporary Guardian of the Person [
) added]
- GC-210(C Guardianship Petition--Child Information Attachment
A) (Probate--Guardianships and Conservatorships) [added]
- GC-210(P Petition for Appointment of Guardian of the Person [added]
)
- GC-212 Confidential Guardian Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-255 Petition for Termination of Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-260 Order Terminating Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-310 Petition for Appointment of Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-314 Confidential Conservator Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-320 Citation for Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-322 Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [added]
- GC-340 Order Appointing Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-341 Notice of Conservatee's Rights [added]
- GC-341(M Attachment to Notice of Conservatee's Rights [added]
A)

- GC-395 Ex Parte Petition for Final Discharge and Order
(Probate--Decedents' Estates and Conservatorships and
Guardianships) [added]
- GC-400(A Schedule A, Receipts, Dividends--Standard Account [added]
) (1)
- GC-400(A Schedule A, Receipts, Interest--Standard Account [added]
) (2)
- GC-400(A Schedule A, Receipts, Pensions, Annuities, and Other Regular
) (3) Periodic Payments--Standard Account [added]
- GC-400(A Schedule A, Receipts, Rent--Standard Account [added]
) (4)
- GC-400(A Schedule A, Receipts, Social Security, Veterans' Benefits, Other
) (5) Public Benefits--Standard Account [added]
- GC-400(A Schedule A, Receipts, Other Receipts--Standard Account [added]
) (6)
- GC-400(A Schedule A and C, Receipts and Disbursements Worksheet--Standard
) (C) Account [added]
- GC-400(A Additional Property Received During Period of Account--Standard
) (P) and Simplified Accounts [added]
- GC-400(B Schedule B, Gains on Sales--Standard and Simplified Accounts [
) added]
- GC-400(C Schedule C, Disbursements, Conservatee's Caregiver
) (1) Expenses--Standard Account [added]
- GC-400(C Schedule C, Disbursements, Conservatee's Residential or Long-Term
) (2) Care Facility Living Expenses--Standard Account [added]
- GC-400(C Schedule C, Disbursements, Ward's Education Expenses--Standard
) (3) Account [added]
- GC-400(C Schedule C, Disbursements, Fiduciary and Attorney Fees--Standard
) (4) Account [added]
- GC-400(C Schedule C, Disbursements, General Administration
) (5) Expenses--Standard Account [added]
- GC-400(C Schedule C, Disbursements, Investment Expenses--Standard Account [
) (6) added]
- GC-400(C Schedule C, Disbursements, Living Expenses--Standard Account [
) (7) added]
- GC-400(C Schedule C, Disbursements, Medical Expenses--Standard Account [
) (8) added]
- GC-400(C Schedule C, Disbursements, Property Sale Expenses--Standard

-) (9) Account [added]
- GC-400(C Schedule C, Disbursements, Rental Property Expenses--Standard
-) (10) Account [added]
- GC-400(C Schedule C, Disbursements, Other Expenses--Standard Account [
-) (11) added]
- GC-400(D Schedule D, Losses on Sales--Standard and Simplified Accounts [
-) added]
- GC-400(D Distributions to Conservatee or Ward--Standard and Simplified
- IST) Accounts [added]
- GC-400(E Cash Assets on Hand at End of Account Period--Standard and
-) (1) Simplified Accounts [added]
- GC-400(E Non-Cash Assets on Hand at End of Account Period--Standard and
-) (2) Simplified Accounts [added]
- GC-400(F Schedule F, Changes in Form of Assets--Standard and Simplified
-) Accounts [added]
- GC-400(G Schedule G, Liabilities at End of Account Period--Standard and
-) Simplified Accounts [added]
- GC-400(N Net Income From a Trade or Business--Standard Account [added]
- I)
- GC-400(N Net Loss From a Trade or Business--Standard Account [added]
- L)
- GC-400(O Other Charges--Standard and Simplified Accounts [added]
- CH)
- GC-400(O Other Credits--Standard and Simplified Accounts [added]
- CR)
- GC-400(P Cash Assets on Hand at Beginning of Account Period--Standard and
- H) (1) Simplified Accounts [added]
- GC-400(P Non-Cash Assets on Hand at Beginning of Account Period--Standard
- H) (2) and Simplified Accounts [added]
- GC-400(S Summary of Account--Standard and Simplified Accounts [added]
- UM)
- GC-405(A Schedule A, Receipts--Simplified Account [added]
-)
- GC-405(A Additional Property Received During Period of Account--Standard
-) (P) and Simplified Accounts [added]
- GC-405(B Schedule B, Gains on Sales--Standard and Simplified Accounts [
-) added]
- GC-405(C Schedule C, Disbursements--Simplified Account [added]

-)
- GC-405(D Schedule D, Losses on Sales--Standard and Simplified Accounts [
 -) added]
- GC-405(D Distributions to Conservatee or Ward--Standard and Simplified
 - IST) Accounts [added]
- GC-405(E Cash Assets on Hand at End of Account Period--Standard and
 -)(1) Simplified Accounts [added]
- GC-405(E Non-Cash Assets on Hand at End of Account Period--Standard and
 -)(2) Simplified Accounts [added]
- GC-405(F Schedule F, Changes in Form of Assets--Standard and Simplified
 -) Accounts [added]
- GC-405(G Schedule G, Liabilities at End of Account Period--Standard and
 -) Simplified Accounts [added]
- GC-405(O Other Charges--Standard and Simplified Accounts [added]
 - CH)
- GC-405(O Other Credits--Standard and Simplified Accounts [added]
 - CR)
- GC-405(P Cash Assets on Hand at Beginning of Account Period--Standard and
 - H)(1) Simplified Accounts [added]
- GC-405(P Non-Cash Assets on Hand at Beginning of Account Period--Standard
 - H)(2) and Simplified Accounts [added]
- GC-405(S Summary of Account--Standard and Simplified Accounts [added]
 - UM)
- GC-505 Forms You Need to Ask the Court to Appoint a Guardian of the
 - Person (Probate--Conservatorships and Guardianships) [added]
- GC-510 What is "Proof of Service" in a Guardianship?
 - (Probate--Conservatorships and Guardianships) [added]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

F. Judicial Council Forms: Guardianship and Conservatorship.

14 Witkin Sum. Cal. Law Wills § 6

[§ 6] Judicial Council Forms: Guardianship and Conservatorship.

The Judicial Council has adopted the following forms for guardianship and conservatorship proceedings:

\$

IForm Number

\$

ITitle

G

C-020

N

Notice of Hearing-
-Guardianship or Conservat-
orship
(Probate--Guardianships and
Conservatorships)

G

C-021

O

Order Dispensing with Notice

G

C-022

O

Order Prescribing Notice

G

C-035

R

Request for Special Notice

G

C-040

I

Inventory and Appraisal

14 Witkin Sum. Cal. Law Wills § 6

G	C-041	I
	Inventory and Appraisal Attachment	
G	C-050	N
	Notice of Taking Possession or Control of an Asset of Minor or Conservatee	
G	C-051	N
	Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box	
G	C-060	R
	Report of Sale and Petition for Order Confirming Sale of Real Property	
G	C-065	O
	Order Confirming Sale of Real Property	
G	C-070	E
	Ex Parte Petition for Authority To Sell Securities and Order	
G	C-075	E
	Ex Parte Petition for Approval of Sale of Personal Property and Order	
G	C-080	C
	Change of Residence Notice	
G	C-085	P
	Petition to Fix Residence Outside the State of California	

G	C-090	O
	Order Fixing Residence Outside the State of California	
G	C-100	P
	Petition and Order for Appointment of Guardian Ad Litem Under the Probate Code	
G	C-110	P
	Petition for Appointment of Temporary Guardian or Conservator	
G	C-120	D
	Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)	
G	C-140	O
	Order Appointing Temporary Guardian or Conservator	
G	C-150	L
	Letters of Temporary Guardianship or Conservatorship	
G	C-205	G
	Guardianship Pamphlet	
G	C-210	P
	Petition for Appointment of Guardian of Minor	
G	C-211	C
	Consent of Guardian, Nomination, and Waiver of Notice	
G		

14 Witkin Sum. Cal. Law Wills § 6

	C-212	C
	Confidential Guardian Screening Form (Probate Guardianship)	
G		
	C-240	O
	Order Appointing Guardian of Minor	
G		
	C-248	D
	Duties of Guardian (Probate)	
G		
	C-250	L
	Letters of Guardianship	
G		
	C-255	P
	Petition for Termination of Guardianship	
G		
	C-260	O
	Order Terminating Guardian- ship	
G		
	C-310	P
	Petition for Appointment of Probate Conservator	
G		
	C-312	C
	Confidential Supplemental In- formation (Probate Conser- vatorship)	
G		
	C-313	A
	Attachment Requesting Spe- cial Orders Regarding De- mentia	
G		
	C-314	C
	Confidential Conservator Screening Form (Probate Conservatorship)	

14 Witkin Sum. Cal. Law Wills § 6

G	C-320	C
	itation for Conservatorship and Proof of Service	
G	C-330	O
	Order Appointing Court In- vestigator	
G	C-333	E
	Ex Parte Application for Or- der Authorizing Completion of Capacity Declaration- -HIPAA (Probate--Guardianships and Conservatorships)	
G	C-334	E
	Ex Parte Order Re Comple- tion of Capacity Declara- tion--HIPAA (Probate--Guardianships and Conservatorships)	
G	C-335	C
	Capacity Declaration- -Conservatorship	
G	C-340	O
	Order Appointing Probate Conservator	
G	C-348	D
	Duties of Conservator and Ac- knowledgement of Receipt of Handbook	
G	C-350	L
	Letters of Conservatorship	
G	C-380	P
	Petition for Exclusive Author-	

ity To Give Consent for
Medical Treatment

G

C-385

O

Order Authorizing Conservator
or To Give Consent for
Medical Treatment

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form Number	Title
GC-005	Declaration of Private Professional Conservator or Guardian--Qualifications (Probate--Guardianships and Conservatorships) [added]
GC-006	Declaration of Private Professional Conservator or Guardian--Continuing Education (Probate--Guardianships and Conservatorships) [added]
GC-010	Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships or Guardianships [added]
GC-011	Annual Certification of Court-Appointed Attorney (Probate--Guardianships and Conservatorships) [added]
GC-020(PA)	Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships) [added]
GC-042	Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [added]
GC-042(MA)	Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [added]
GC-045	Objections to Inventory and Appraisal of Conservator or Guardian [added]
GC-050	Notice of Taking Possession or Control of an Asset of Minor or Conservatee (Probate--Guardianships and Conservatorships) [renamed]
GC-051	Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe-Deposit Box (Probate--Guardianships and Conservatorships) [renamed]
GC-060	Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and

- Conservatorships) [renamed]
- GC-065 Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
- GC-079 Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward [added]
- GC-079(Attachment to Pre-Move Notice of Proposed Change of Personal MA) Residence of Conservatee or Ward [added]
- GC-080(Attachment to Post-Move Notice of Change of Residence of MA) Conservatee or Ward [added]
- GC-100 Petition for Appointment of Guardian Ad Litem--Probate [renamed]
- GC-101 Order Appointing Guardian Ad Litem--Probate [added]
- GC-110(Petition for Appointment of Temporary Guardian of the Person P) (Probate--Guardianships and Conservatorships) [added]
- GC-112 Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-112(Declaration in Support of Ex Parte Application for Good Cause A-1) Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-112(Declaration Continuation Page (Probate--Guardianships and A-2) Conservatorships) [added]
- GC-115 Order on Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-140 Order Appointing Temporary Guardian (Probate--Guardianships and Conservatorships) [renamed]
- GC-141 Order Appointing Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-150 Letters of Temporary Guardianship or Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-210(Guardianship Petition--Child Information Attachment CA) (Probate--Guardianships and Conservatorships) [added]
- GC-210(Petition for Appointment of Guardian of the Person [added] P)
- GC-212 Confidential Guardian Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-250 Letters of Guardianship (Probate--Guardianships and

- Conservatorships) [renamed]
- GC-255 Petition for Termination of Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-260 Order Terminating Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-310 Petition for Appointment of Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-314 Confidential Conservator Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-320 Citation for Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-322 Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [added]
- GC-340 Order Appointing Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-341 Notice of Conservatee's Rights [added]
- GC-341(MA) Attachment to Notice of Conservatee's Rights [added]
- GC-350 Letters of Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-395 Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships) [added]
- GC-400(A)(1) Schedule A, Receipts, Dividends--Standard Account [added]
- GC-400(A)(2) Schedule A, Receipts, Interest--Standard Account [added]
- GC-400(A)(3) Schedule A, Receipts, Pensions, Annuities, and Other Regular Periodic Payments--Standard Account [added]
- GC-400(A)(4) Schedule A, Receipts, Rent--Standard Account [added]
- GC-400(A)(5) Schedule A, Receipts, Social Security, Veterans' Benefits, Other Public Benefits--Standard Account [added]
- GC-400(A)(6) Schedule A, Receipts, Other Receipts--Standard Account [added]
- GC-400(A)(C) Schedule A and C, Receipts and Disbursements Worksheet--Standard Account [added]
- GC-400(AP) Additional Property Received During Period of Account--Standard and Simplified Accounts [added]

- GC-400(Schedule B, Gains on Sales--Standard and Simplified Accounts [
 - B) added]
- GC-400(Schedule C, Disbursements, Conservatee's Caregiver
 - C)(1) Expenses--Standard Account [added]
- GC-400(Schedule C, Disbursements, Conservatee's Residential or Long-Term
 - C)(2) Care Facility Living Expenses--Standard Account [added]
- GC-400(Schedule C, Disbursements, Ward's Education Expenses--Standard
 - C)(3) Account [added]
- GC-400(Schedule C, Disbursements, Fiduciary and Attorney Fees--Standard
 - C)(4) Account [added]
- GC-400(Schedule C, Disbursements, General Administration
 - C)(5) Expenses--Standard Account [added]
- GC-400(Schedule C, Disbursements, Investment Expenses--Standard Account [
 - C)(6) added]
- GC-400(Schedule C, Disbursements, Living Expenses--Standard Account [
 - C)(7) added]
- GC-400(Schedule C, Disbursements, Medical Expenses--Standard Account [
 - C)(8) added]
- GC-400(Schedule C, Disbursements, Property Sale Expenses--Standard Account
 - C)(9) [added]
- GC-400(Schedule C, Disbursements, Rental Property Expenses--Standard
 - C)(10) Account [added]
- GC-400(Schedule C, Disbursements, Other Expenses--Standard Account [added]
 - C)(11)
- GC-400(Schedule D, Losses on Sales--Standard and Simplified Accounts [
 - D) added]
- GC-400(Distributions to Conservatee or Ward--Standard and Simplified
 - DIST) Accounts [added]
- GC-400(Cash Assets on Hand at End of Account Period--Standard and
 - E)(1) Simplified Accounts [added]
- GC-400(Non-Cash Assets on Hand at End of Account Period--Standard and
 - E)(2) Simplified Accounts [added]
- GC-400(Schedule F, Changes in Form of Assets--Standard and Simplified
 - F) Accounts [added]
- GC-400(Schedule G, Liabilities at End of Account Period--Standard and
 - G) Simplified Accounts [added]
- GC-400(Net Income From a Trade or Business--Standard Account [added]
 - NI)

- GC-400(Net Loss From a Trade or Business--Standard Account [added]
NL)
- GC-400(Other Charges--Standard and Simplified Accounts [added]
OCH)
- GC-400(Other Credits--Standard and Simplified Accounts [added]
OCR)
- GC-400(Cash Assets on Hand at Beginning of Account Period--Standard and
PH)(1) Simplified Accounts [added]
- GC-400(Non-Cash Assets on Hand at Beginning of Account Period--Standard
PH)(2) and Simplified Accounts [added]
- GC-400(Summary of Account--Standard and Simplified Accounts [added]
SUM)
- GC-405(Schedule A, Receipts--Simplified Account [added]
A)
- GC-405(Additional Property Received During Period of Account--Standard and
AP) Simplified Accounts [added]
- GC-405(Schedule B, Gains on Sales--Standard and Simplified Accounts [
B) added]
- GC-405(Schedule C, Disbursements--Simplified Account [added]
C)
- GC-405(Schedule D, Losses on Sales--Standard and Simplified Accounts [
D) added]
- GC-405(Distributions to Conservatee or Ward--Standard and Simplified
DIST) Accounts [added]
- GC-405(Cash Assets on Hand at End of Account Period--Standard and
E)(1) Simplified Accounts [added]
- GC-405(Non-Cash Assets on Hand at End of Account Period--Standard and
E)(2) Simplified Accounts [added]
- GC-405(Schedule F, Changes in Form of Assets--Standard and Simplified
F) Accounts [added]
- GC-405(Schedule G, Liabilities at End of Account Period--Standard and
G) Simplified Accounts [added]
- GC-405(Other Charges--Standard and Simplified Accounts [added]
OCH)
- GC-405(Other Credits--Standard and Simplified Accounts [added]
OCR)
- GC-405(Cash Assets on Hand at Beginning of Account Period--Standard and
PH)(1) Simplified Accounts [added]

- GC-405(PH)(2) Non-Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts [added]
- GC-405(SUM) Summary of Account--Standard and Simplified Accounts [added]
- GC-505 Forms You Need to Ask the Court to Appoint a Guardian of the Person (Probate--Conservatorships and Guardianships) [added]
- GC-510 What is "Proof of Service" in a Guardianship? (Probate--Conservatorships and Guardianships) [added]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

G. Texts and Practice Works.

Witkin Sum. Cal. Law Wills § 7

[§ 7] Texts and Practice Works.

SUPPLEMENT: [This section is current through the latest supplement]

See 8B Am.Jur. P.P. Forms (2006 ed.), Descent and Distribution; 7A Am.Jur. Legal Forms (2007 ed.), Descent and Distribution; 20A, 20B Am.Jur. Legal Forms (2008 ed.), Wills.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
I. INTRODUCTION
G. Texts and Practice Works.

14 Witkin Sum. Cal. Law Wills § 7

[§ 7] Texts and Practice Works.

The following texts and practice works may be consulted concerning the various topics in this chapter:

West, California Civil Practice, Probate and Trust Proceedings.

West, California Transactions Forms, Estate Planning.

Rutter Group, California Practice Guide--Probate.

C.E.B., California Conservatorship Practice.

C.E.B., California Decedent Estate Practice.

C.E.B., California Durable Powers of Attorney.

C.E.B., California Estate Planning.

C.E.B., California Guardianship Practice.

C.E.B., California Local Probate Rules.

C.E.B., California Probate Workflow Manual.

C.E.B., California Trust and Probate Litigation.

C.E.B., California Will Drafting 3d.

C.E.B., Estate Planning for Special Assets.

C.E.B., Establishing a Conservatorship (action guide).

C.E.B., Handling a Probate (action guide).

C.E.B., Transferring Property Without Probate (action guide).

Estate Planning, Probate and Trust Law Section of the State Bar, Guide to the California Rules of Professional Conduct for Estate Planning, Probate and Trust Counsel (1997).

23 Am.Jur.2d (2002 ed.), Descent and Distribution; 31 Am.Jur.2d (2002 ed.), Executors and Administrators; 39 Am.Jur.2d (1999 ed.), Guardian and Ward; 79, 80 Am.Jur.2d (2002 ed.), Wills.

8B Am.Jur. P.P. Forms (1996 ed.), Descent and Distribution; 10, 10A Am.Jur. P.P. Forms (1998 ed.), Executors and Administrators; 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward; 25, 25A Am.Jur. P.P. Forms (2001 ed.), Wills.

7A Am.Jur. Legal Forms (1998 ed.), Descent and Distribution; 8 Am.Jur. Legal Forms (1998 ed.), Executors and Administrators; 9A Am.Jur. Legal Forms (2002 ed.), Guardian and Ward; 20A, 20B Am.Jur. Legal Forms (2000 ed.), Wills.

The issue of malpractice in estate planning is also of note. (On lawyer's duty to client's beneficiary, see 1 *Cal. Proc.* (4th), *Attorneys*, §322 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

C.E.B., California Durable Powers of Attorney has been replaced by California Powers of Attorney and Health Care Directives.

See 39 Am.Jur.2d (2008 ed.), Guardian and Ward; 8B Am.Jur. P.P. Forms (2006 ed.), Descent and Distribution; 13 Am.Jur. P.P. Forms (2009 ed.), Guardian and Ward; 7A Am.Jur. Legal Forms (2007 ed.), Descent and Distribution; 20A, 20B Am.Jur. Legal Forms (2008 ed.), Wills.

Malpractice in estate planning:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §297 et seq.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

H. Legal Capacity.

1. In General.

14 Witkin Sum. Cal. Law Wills § 8

[§ 8] In General.

(1) *Statutory Development.* The 1995 Legislature enacted a comprehensive statute governing legal capacity, encompassing the capacity to execute wills and trusts (*infra*, §9) and the capacity to consent to medical treatment (*infra*, §10). The provisions, *Prob.C. 810 et seq.*, are known as the Due Process in Competence Determinations Act. (Stats. 1995, Chap. 842, §12.) The statutes were revised and renumbered in 1996 and amended in 1998.

(2) *Legislative Findings.* The Legislature made the following findings:

(a) For purposes of legal capacity, there is "a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions." (*Prob.C. 810(a).*)

(b) "A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions." (*Prob.C. 810(b).*)

(c) "A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder." (*Prob.C. 810(c).*)

(3) *Conditions for Legal Capacity.* Except as otherwise provided by law (including *Prob.C. 813*, *infra*, §10, and the statutory and decisional law of testamentary capacity), a person lacks the capacity to make a decision unless the person has the ability to communicate the decision, verbally or by any other means, and to understand and appreciate, to the extent relevant, all the following:

(a) "The rights, duties, and responsibilities created by, or affected by the decision." (*Prob.C. 812(a).*)

(b) "The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision." (*Prob.C. 812(b).*)

(c) "The significant risks, benefits, and reasonable alternatives involved in the decision." (*Prob.C. 812(c).*)

(4) *Scope*. The Act applies only to evidence and findings in a court determination of capacity of a person to do an act or make a decision, including medical decisions. It does not affect the decisionmaking process set forth in *Health & Saf.C. 1418.8* (consent to medical intervention by resident of skilled nursing facility or intermediate care facility) or increase or decrease the documentation requirements or potential liability of health care providers who determine the capacity of patients to make medical decisions outside the judicial context. (*Prob.C. 811(e)*.) Nor does the Act apply to proceedings under the Welfare and Institutions Code. (Stats. 1995, Chap. 842, §13.) (See C.E.B., Durable Powers of Attorney, §1.21 et seq.)

West's Key Number Digest, Wills k.10

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Scope*. See C.E.B., Powers of Attorney and Health Care Directives, §§1.8, 3.28 et seq.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

H. Legal Capacity.

2. Determining Legal Capacity.

14 Witkin Sum. Cal. Law Wills § 9

[§ 9] Determining Legal Capacity.

(1) *Evidence of Deficit in Mental Function.* "A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act" must be supported by evidence of a deficit in a mental function. (*Prob.C. 811(a).*) For this purpose, lack of capacity includes, but is not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, or to execute wills or trusts. (*Prob.C. 811(a).*)

A deficit in a mental function "may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." (*Prob.C. 811(b).*)

In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do an act or make a decision, the court may take into consideration the frequency, severity, and duration of periods of impairment. (*Prob.C. 811(c).*)

The mere diagnosis of a mental or physical disorder is not sufficient by itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act. (*Prob.C. 811(d).*)

(2) *Mental Functions Considered.* A deficit in one of the following mental functions must be shown:

(a) *Alertness and attention.* This function includes, but is not limited to (1) level of arousal or consciousness, (2) orientation to time, place, person, and situation, and (3) ability to attend and concentrate. (*Prob.C. 811(a)(1).*)

(b) *Information processing.* This function includes, but is not limited to (1) short-term and long-term memory (including immediate recall), (2) ability to understand or communicate with others, either verbally or otherwise, (3) recognition of familiar objects and familiar persons, (4) ability to understand and appreciate quantities, (5) ability to reason using abstract concepts, (6) ability to plan, organize, and carry out actions in one's own rational self-interest, and (7) ability to reason logically. (*Prob.C. 811(a)(2).*)

(c) *Thought processes.* Deficits in these functions may be demonstrated by (1) severely disorganized thinking, (2) hallucinations, (3) delusions, or (4) uncontrollable, repetitive, or intrusive thoughts. (*Prob.C. 811(a)(3).*)

(d) *Ability to modulate mood and affect.* "Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, which is inappropriate in degree to the individual's circumstances." (*Prob.C. 811(a)(4).*)

In addition, there must be evidence of "a correlation between the deficit or deficits and the decision or acts in question." (*Prob.C. 811(a).*)

(3) *Judicial Council Forms.* The Judicial Council has adopted forms for an evaluation of mental functions in conservatorship proceedings. (See Judicial Council Form No. GC-335 [Capacity Declaration--Conservatorship]; Judicial Council Form No. GC-335A [Dementia Attachment to Capacity Declaration--Conservatorship].)

West's Key Number Digest, Wills k.10

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

I. INTRODUCTION

H. Legal Capacity.

3. Consent to Medical Treatment.

14 Witkin Sum. Cal. Law Wills § 10

[§ 10] Consent to Medical Treatment.

(1) *Capacity To Give Informed Consent.* For purposes of a judicial determination, a person has the capacity to give informed consent to proposed medical treatment if he or she is able to do all of the following:

(a) Respond "knowingly and intelligently" to questions about the medical treatment. (*Prob.C. 813(a)(1).*)

(b) Participate in the treatment decision "by means of a rational thought process." (*Prob.C. 813(a)(2).*)

(c) Understand minimum basic medical treatment information, including (1) the nature and seriousness of the illness, disorder, or defect, (2) the nature of the medical treatment recommended, (3) the probable degree and duration of any benefits and risks of any medical intervention and the consequences of lack of treatment, and (4) the nature, risks, and benefits of reasonable alternatives. (*Prob.C. 813(a)(3).*) (See generally C.E.B., Elder Law Resources, Benefits, and Planning, §4.70 et seq.; C.E.B., Durable Powers of Attorney, §6.4 et seq.)

(2) *Capacity To Refuse Consent.* "A person who has the capacity to give informed consent to a proposed medical treatment also has the capacity to refuse consent to that treatment." (*Prob.C. 813(b).*) (On determination whether conservatee is able to give informed consent to medical treatment, see *Prob.C. 1881*, infra, §956.)

(3) *Judicial Council Forms.* The Judicial Council has adopted forms for a medical consent capacity declaration in conservatorship proceedings. (See Judicial Council Form No. GC-335 [Capacity Declaration--Conservatorship]; Judicial Council Form No. GC-335A [Dementia Attachment to Capacity Declaration--Conservatorship].)

(4) *Health Care Decisions Law.* The Health Care Decisions Law (*Prob.C. 4600* et seq.) governs advance health care directives. (See infra, §876 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Capacity To Give Informed Consent.* See C.E.B., Powers of Attorney and Health Care Directives, §§3.28 et seq., 9.4 et seq.



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Witkin Summary of California Law

I. INTRODUCTION

I. Uniform Determination of Death Act.

1. Nature and Scope of Act.

14 Witkin Sum. Cal. Law Wills § 11

[§ 11] Nature and Scope of Act.

(1) *Uniform Act and California Statute.* The Uniform Determination of Death Act was approved by the National Conference of Commissioners on Uniform State Laws in 1980. (See 12A U.L.A. (Master Ed.), p. 589 [Act adopted in 33 jurisdictions].) The California statute, *Health & Saf.C. 7180 et seq.*, was enacted in 1982, and adds provisions governing confirmation of death (see *infra*, §12) and medical records that were part of the predecessor Health and Safety Code chapter entitled "Death."

(2) *Purpose of Statutes.* "A person may be artificially supported for respiration and circulation after all brain functions cease irreversibly. The medical profession, also, has developed techniques for determining loss of brain functions while cardiorespiratory support is administered. At the same time, the common law definition of death cannot assure recognition of these techniques. The common law standard for determining death is the cessation of all vital functions, traditionally demonstrated by 'an absence of spontaneous respiratory and cardiac functions.' There is, then, a potential disparity between current and accepted biomedical practice and the common law." (Uniform Act, Commissioners' Prefatory Note, p. 590.)

(3) *Drafting of Uniform Act.* In the 10-year period preceding the Uniform Act, various statutory proposals were made by the American Bar Association, the National Conference of Commissioners on Uniform State Laws, and the American Medical Association; and some 25 state Legislatures adopted statutes based on one or another of the existing models. All had the same principal goal--"extension of the common law to include the new techniques for determination of death." But the proliferation of model and uniform acts could cause confusion, and the present Act is the result of agreement reached by these organizations. (Commissioners' Prefatory Note, p. 590.)

(4) *What Act Does Not Cover.* The Commissioners' Prefatory Note (p. 591) lists a number of subjects beyond the scope of the Act:

(a) "This Act also does not concern itself with living wills, death with dignity, euthanasia, rules on death certificates, maintaining life support beyond brain death in cases of pregnant women or of organ donors, and protection for the dead body. These subjects are left to other law."

(b) "This Act is silent on acceptable diagnostic tests and medical procedures. It sets the general legal standard for

determining death, but not the medical criteria for doing so. The medical profession remains free to formulate acceptable medical practices and to utilize new biomedical knowledge, diagnostic tests, and equipment."

(c) "It is unnecessary for the Act to address specifically the liability of persons who make determinations. No person authorized by law to determine death, who makes such a determination in accordance with the Act, should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts or the acts of others based on that determination. No person who acts in good faith, in reliance on a determination of death, should, or will be, liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts. There is no need to deal with these issues in the text of this Act."

(d) "Time of death, also, is not specifically addressed. In those instances in which time of death affects legal rights, this Act states the bases for determining death. Time of death is a fact to be determined with all others in each individual case, and may be resolved, when in doubt, upon expert testimony before the appropriate court."

(e) "Finally, since this Act should apply to all situations, it should not be joined with the Uniform Anatomical Gift Act so that its application is limited to cases of organ donation." (On Anatomical Gift Act, see 13 *Summary* (10th), *Personal Property*, §6 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Uniform Act and California Statute*. See 12A U.L.A. (Master Ed.), p. 777.

(2) *Purpose of Statutes*. See 12A U.L.A. (Master Ed.), p. 778.

(3) *Drafting of Uniform Act*. See 12A U.L.A. (Master Ed.), p. 778. (4) *What Act Does Not Cover*. See 12A U.L.A. (Master Ed.), p. 779.



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- I. Uniform Determination of Death Act.
2. Determination and Confirmation of Death.

Witkin Sum. Cal. Law Wills § 12

[§ 12] Determination and Confirmation of Death.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Where Donor Gives Organ for Transplantation.* The Uniform Anatomical Gift Act was revised in 2007. The provision concerning the physician making the determination under the Act is now in *Health & Saf.C. 7150.65(i)*.



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- I. Uniform Determination of Death Act.
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14 Witkin Sum. Cal. Law Wills § 12

[§ 12] Determination and Confirmation of Death.

(1) *What Constitutes Death.* "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards." (*Health & Saf.C. 7180(a).*) (On preservation of medical records, see *Health & Saf.C. 7183.*)

The Commissioners' Prefatory Note (p. 590) explains the difference between the two parts of this definition:

(a) *Part (1)* codifies the existing common law basis for determining death--"total failure of the cardiorespiratory system." The overwhelming majority of cases will continue to be determined according to this part.

(b) *Part (2)* extends the common law to include the new procedures based upon "irreversible loss of all brain functions." When artificial means of support preclude a determination under Part (1), death can be determined by the alternative procedures. However: "[T]he entire brain must cease to function, irreversibly. The 'entire brain' includes the brain stem, as well as the neocortex. The concept of 'entire brain' distinguishes determination of death under this Act from 'neocortical death' or 'persistent vegetative state.' These are not deemed valid medical or legal bases for determining death."

(2) *General Requirement of Confirmation.* "When an individual is pronounced dead by determining that the individual has sustained an irreversible cessation of all functions of the entire brain, including the brain stem, there shall be independent confirmation by another physician." (*Health & Saf.C. 7181.*) (See *Dority v. Superior Court (1983) 145 C.A.3d 273, 278, 193 C.R. 288.*)

(3) *Where Donor Gives Organ for Transplantation.* When a part of the donor is used for direct transplantation pursuant to the Uniform Anatomical Gift Act (*Health & Saf.C. 7150 et seq., 13 Summary (10th), Personal Property, §6 et seq.*), and death of the donor is determined under Part (2), independent confirmation is also required; neither the physician making the determination under the Anatomical Gift Act (*Health & Saf.C. 7155.5*) nor the physician making the independent confirmation may participate in the procedures of removing or transplanting. (*Health & Saf.C. 7182.*) General acute care hospitals are required to develop plans for identifying potential organ and tissue donors. (*Health & Saf.C. 7184.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *What Constitutes Death.* *Commissioners' Prefatory Note:* See 12A U.L.A. (Master Ed.), pp. 778, 779.

(3) *Where Donor Gives Organ for Transplantation.* The Uniform Anatomical Gift Act was revised in 2007. The provision concerning the physician making the determination under the Act is now in *Health & Saf.C. 7150.65(i)*.



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J. Establishing and Reporting Fact of Death.

1. Law Revision Commission Report.

14 Witkin Sum. Cal. Law Wills § 13

[§ 13] Law Revision Commission Report.

The Law Revision Commission 1983 Recommendation Relating to Recording Affidavit of Death (17 Cal. Law Rev. Com. Reports, p. 497) explains the purpose of its proposed changes as follows:

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

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

"Although the court imprimatur is useful to establish the fact of death, in many cases there is no dispute and a court proceeding is wasteful. A practice has developed in such cases of simply recording an affidavit of the death of the decedent, which county recorders are willing to accept and record and which title insurers are willing to rely on, notwithstanding the fact that there is no legal authority for the practice. An affidavit of death is not an instrument for which recordation is permitted or required by statute, nor is such an affidavit entitled to any presumptive effect."

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

"The use of the affidavit procedure to establish the fact of death for the purpose of clearing real property titles

should be sanctioned by express statutory authority. This is consistent with legislation to achieve clear titles enacted in other jurisdictions, as well as with the declared California public policy to simplify and facilitate real property title transactions by enabling persons to rely on the record."

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

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

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

SUPPLEMENT: [This section is current through the latest supplement]



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- 2. Statutory Proceeding To Establish Death.

Witkin Sum. Cal. Law Wills § 14

[§ 14] Statutory Proceeding To Establish Death.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Petition*. The fee for filing a petition to establish the fact of death to determine title to real property under *Prob.C. 200* or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(4)*, added in 2005.)



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14 Witkin Sum. Cal. Law Wills § 14

[§ 14] Statutory Proceeding To Establish Death.

(1) *Nature of Proceeding.* "If title to or an interest in real or personal property is affected by the death of a person," one who claims an interest in the property may commence a proceeding to establish the fact of the death. (*Prob.C. 200.*)

The purpose of the statutory proceeding is not to adjudicate title, but merely to furnish record evidence of the death of a life tenant, joint tenant, or other person on whose death some interest vests. (See *Hansen v. Union Savings Bank* (1905) 148 C. 157, 159, 82 P. 768; *King v. Pauly* (1911) 159 C. 549, 555, 115 P. 210; 22A *Am.Jur.2d* (2003 ed.), *Death* §422 et seq.; 40 *Cal. L. Rev.* 513 [former mandatory proceeding]; *Cal. Civil Practice*, 1 Probate and Trust Proceedings, §2:7 et seq.; *C.E.B.*, 1 Decedent Estate Practice, §4.21 et seq.)

(2) *Venue.* The proceeding is commenced in the superior court of the county of the decedent's residence or of any county in which the property is situated. (*Prob.C. 201(a).*)

(3) *Petition.* A petition is filed, setting forth the jurisdictional facts, and a particular description of the affected property and the interest of the petitioner. (*Prob.C. 201(b).*) (See *Cal. Civil Practice*, 1 Probate and Trust Proceedings, §2:25; *Rutter Group*, *Cal. Practice Guide: Probate* §2:193 et seq., Form 2:I.)

(4) *Combined Proceedings.* If a proceeding for administration of the estate is pending, a proceeding to establish death may be combined with the administration proceeding in the following manner: (a) The person affected or the personal representative files the petition in the administration proceeding at any time before a petition for final distribution is filed. (b) The petition may be included in a petition for probate of the will or for letters of administration. (c) No additional fee is charged for filing. (*Prob.C. 202.*)

(5) *Hearing.* Ordinarily, notice of the hearing is given as provided in *Prob.C. 1220* (mailed notice; *infra*, §391). However, if the petitioner files an affidavit with the petition stating that the petitioner has no reason to believe that there is any opposition or contest, the court may act *ex parte*. (*Prob.C. 203.*) The petition and supporting affidavits "may be received in evidence and acted upon by the court with the same force and effect as if the petitioner and affiant were personally present and testified to the facts set forth." (*Prob.C. 204(a).*)

(6) *Prima Facie Evidence of Death.* The judgment establishing the fact of the death is prima facie evidence of death

(a presumption affecting the burden of producing evidence). (*Prob.C. 204(b)*.) The Law Revision Commission Comment notes that the judgment does *not* establish the petitioner's title to property. (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §2:26.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Petition*. The fee for filing a petition to establish the fact of death to determine title to real property under *Prob.C. 200* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(4)*), added in 2005 and amended in 2008.)



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3. Recording Evidence of Death.

14 Witkin Sum. Cal. Law Wills § 15

[§ 15] Recording Evidence of Death.

(1) *Documents That May Be Recorded.* If title to real property is affected by a person's death, any person may record the following documents in the county in which the property is situated:

(a) *Affidavit.* An affidavit of death executed by a person having knowledge of the facts. The affidavit must include (1) a particular description of the real property and (2) an attested or certified copy of a record of the death made and filed in a designated public office as required by law. (*Prob.C. 210(a).*)

(b) *Court Order.* A certified copy of a court order that determines the fact of death made pursuant to *Prob.C. 200* et seq. (*supra*, §14) or to another statute that provides for a determination of the fact of death. (*Prob.C. 210(b).*) Other statutes providing for a determination of the fact of death include *Health & Saf.C. 103450* et seq. (proceeding to establish record of death) and *Prob.C. 12400* et seq. (administration of estates of missing persons presumed dead; *infra*, §365 et seq.).

(2) *Recordation and Indexing.* A document establishing the fact of death recorded under *Prob.C. 200* is subject to the statutory requirements for recorded documents. (*Prob.C. 211(a).*) The county recorder must index a recorded document establishing the fact of death in the grantor-grantee index. The index entry must be for the grantor, and the person whose death is established is deemed to be the grantor. The Law Revision Commission Comment points out that recordation does *not* establish any person's claim to property. (*Prob.C. 211(b).*)

(3) *Prima Facie Evidence of Death.* A recorded document establishing the fact of the death of a person "is prima facie evidence of the death insofar as the document identifies real property located in the county, title to which is affected by the death." This presumption is a presumption affecting the burden of producing evidence. (*Prob.C. 212.*)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Reporting Fact of Death.

Witkin Sum. Cal. Law Wills § 16

[§ 16] Reporting Fact of Death.

SUPPLEMENT: [This section is current through the latest supplement]

(New) Notice of death where heir is incarcerated: Where a decedent's heir is incarcerated, "the estate attorney, or if there is no estate attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent" must give the Director of the California Victim Compensation and Government Claims Board notice of the decedent's death and the name and location of the decedent's heir "not later than 90 days after the date of death." The notice must be given as provided in *Prob.C. 1215* (text, §392), and must include a copy of the decedent's death certificate. (*Prob.C. 216*, added in 2005.) (See *Prob.C. 9202(b)*, Supp., infra, §622 [similar requirement].) The Director's Sacramento office mailing address is P.O. Box 3036, Sacramento, CA, 95812-9912.

(New) Notice to businesses providing services to decedent: A business that receives an oral or written request to cancel a decedent's services, from a family member, attorney, or personal representative, may not require cancellation in person. For this purpose, "services" includes gas, electrical, water, sewage, cable, satellite, and telephone services. (*Prob.C. 217*, added in 2007.)



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4. Reporting Fact of Death.

14 Witkin Sum. Cal. Law Wills § 16

[§ 16] Reporting Fact of Death.

Where a deceased person has received or may have received health care under Welf.C. 14000 et seq. or Welf.C. 14200 et seq., or was the surviving spouse of a person who received that health care, "the estate attorney, or if there is no estate attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent" must give the Director of Health Services (at the Sacramento office) notice of the decedent's death "not later than 90 days after the date of death." (*Prob.C. 215.*) (See *Prob.C. 9202*, infra, §622 [similar requirement].) The notice must be given as provided in *Prob.C. 1215* (infra, §392), and must include a copy of the decedent's death certificate. (*Prob.C. 215.*) (On procedure for acquiring certified copy of death certificate, see *Health & Saf.C. 103526.*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §2:27.) The Director's Sacramento office mailing address is P.O. Box 942732, Sacramento, CA 92434-7320.

SUPPLEMENT: [This section is current through the latest supplement]

(New) Notice of death where heir is incarcerated: Where a decedent's heir is incarcerated, "the estate attorney, or if there is no estate attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent" must give the Director of the California Victim Compensation and Government Claims Board notice of the decedent's death and the name and location of the decedent's heir "not later than 90 days after the date of death." The notice must be given as provided in *Prob.C. 1215* (text, §392), and must include a copy of the decedent's death certificate, the number and location of the probate case, and information about the location and identity of the heir. (*Prob.C. 216*, added in 2005 and amended in 2008.) (See *Prob.C. 9202(b)*, Supp., infra, §622 [similar requirement].) The Director's Sacramento office mailing address is P.O. Box 3036, Sacramento, CA, 95812-9912.

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K. Deposit of Estate Planning Documents.

1. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 17

[§ 17] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* In 1993, the California Law Revision Commission recommended statutes clarifying the rights and responsibilities involved when estate planning documents are deposited with an attorney for safekeeping. (See Deposit of Estate Planning Documents with Attorney, 23 Cal. Law Rev. Com. Reports, p. 965; Report of the California Law Revision Commission on Chapter 519 of the Statutes of 1993 (Assembly Bill 209), 23 Cal. Law Rev. Com. Reports, p. 989.)

(2) *Enactment.* The Commission's recommendation, with minor changes, was adopted in 1993 by the enactment of *Prob.C. 700* et seq. and conforming additions to the Government Code. (See 25 *Pacific L. J.* 384.) The statutes cover the following topics:

(a) *Nature and scope of deposit agreement: Prob.C. 710* et seq. (See *infra*, §18.)

(b) *Termination of deposit: Prob.C. 720* et seq. (See *infra*, §19.)

(c) *Transfer of documents: Prob.C. 732, 733.* (See *infra*, §20.)

(3) *Definitions.* Under *Prob.C. 700*, the following definitions apply:

(a) *Attorney* means an individual licensed to practice law in California. (*Prob.C. 701.*)

(b) *Depositor* means an individual who deposits a document with an attorney. (*Prob.C. 703.*) The Law Revision Commission Comment points out that a deposit may be accomplished by an agent, such as an attorney-in-fact.

(c) *Deposit* means delivery of a document to an attorney for safekeeping or authorization for an attorney to retain a document for safekeeping. (*Prob.C. 702.*)

(d) *Document* means a signed original will, trust, trust amendment, document modifying a will or trust, power of attorney, or nomination of conservator, or any other signed original that the parties agree in writing to make subject to *Prob.C. 700* et seq. (*Prob.C. 704.*)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Nature and Scope of Deposit Agreement.

14 Witkin Sum. Cal. Law Wills § 18

[§ 18] Nature and Scope of Deposit Agreement.

Prob.C. 710 et seq. govern the duties and liabilities of an attorney who accepts an estate planning document for safekeeping.

(1) *Notice and Acknowledgment of Deposit.* *Prob.C. 715* sets forth a statutory form for the attorney's notice and the depositor's acknowledgment of the deposit. The effect of giving the notice and receiving the acknowledgment is a reduction in the attorney's standard of care.

(2) *Standard of Care.* An attorney in possession of a deposited document (or a successor attorney who accepts transfer of the document; see *infra*, §20) is held to a standard of "ordinary care" in preserving the document, whether or not consideration is given. The document must be held in a secure place where it will be "reasonably protected against loss or destruction." (*Prob.C. 710.*) However, if written notice and acknowledgment have been given as provided by *Prob.C. 715*, and the requirements of *Prob.C. 732* (*infra*, §20) are met, the attorney is held to a standard of "slight care" in preserving the document. (*Prob.C. 716.*)

The Law Revision Commission Comment to *Prob.C. 710* makes the following points:

(a) The standard of care imposed by *Prob.C. 710* applies the rule of a deposit for hire (C.C. 1852; see 13 *Summary* (10th), *Personal Property*, §161) whether or not consideration is given, and is a departure from the standard of slight care generally applicable to a gratuitous deposit (C.C. 1846; see 13 *Summary* (10th), *Personal Property*, §163).

(b) *Prob.C. 710* applies to attorneys holding documents on or after July 1, 1994, but an attorney is not liable for an action taken before that date that was proper at the time.

(3) *No Duty To Inquire.* Accepting a document for deposit does not impose on the attorney any duty to inquire into the content, validity, accuracy, or completeness of the document. (*Prob.C. 713(a).*)

(4) *No Duty To Represent Depositor.* Accepting a document for deposit does not impose on the attorney any duty to provide continuing legal services to the depositor or to a beneficiary under the document. However, this provision does not affect any duty of the drafter of a document to provide continuing legal services. (*Prob.C. 713(b).*)

(5) *Compensation.* If a written agreement signed by the depositor so provides, the attorney may charge the depositor for compensation and expenses incurred in safekeeping or delivering a deposited document. However, no lien on the document arises, even if provided by agreement. (*Prob.C. 714.*)

(6) *Notice That Document Is Lost or Destroyed.* If a deposited document is lost or destroyed, the attorney must give notice of the loss or destruction either by mailing the notice to the depositor's last known address, or by the method most likely to give the depositor actual notice. (*Prob.C. 711.*)

(7) *Limit on Attorney's Liability for Loss or Destruction.* *Prob.C. 712* limits the attorney's liability for loss or destruction of a document, despite failure to satisfy the standard of care required by *Prob.C. 710* or *716*. The attorney is not liable if both of the following conditions occur:

(a) The depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document. (*Prob.C. 712.*)

(b) The attorney offers without charge to assist the depositor in replacing the document or to prepare a substantially similar document. (*Prob.C. 712.*)

SUPPLEMENT: [This section is current through the latest supplement]



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K. Deposit of Estate Planning Documents.

3. Termination of Deposit.

14 Witkin Sum. Cal. Law Wills § 19

[§ 19] Termination of Deposit.

(1) *Termination by Depositor.* The depositor may terminate a deposit on demand, in which case the attorney must deliver the document to the depositor. (*Prob.C. 720.*)

(2) *Termination by Attorney.* The attorney may terminate a deposit as provided by *Prob.C. 730* et seq. (*Prob.C. 730.*) The following methods are authorized:

- (a) Personal delivery of the document to the depositor. (*Prob.C. 731(a).*)
- (b) Mailing the document by registered or certified mail and receiving a signed receipt. (*Prob.C. 731(b).*)
- (c) A method agreed upon by the depositor and the attorney. (*Prob.C. 731(c).*)
- (d) Transfer to another attorney under *Prob.C. 732*. (See *infra*, §20.)
- (e) Transfer to the superior court under *Prob.C. 732*. (See *infra*, §20.)

(3) *Death of Depositor.* If the depositor is deceased, the deposit may be terminated as follows:

(a) If the document is a will and the attorney has actual knowledge that the depositor has died but not that a personal representative has been appointed, the deposit may be terminated only as provided by *Prob.C. 8200* (deposit with superior court; see *infra*, §543). (*Prob.C. 734(b).*) The Law Revision Commission Comment points out that this provision is mandatory.

(b) If the document is a trust, the deposit may be terminated by delivering the document to the personal representative or the trustee. (*Prob.C. 734(c).*)

(c) In other cases, the deposit may be terminated by delivering the document to the personal representative. (*Prob.C. 734(a).*)

(4) *Death or Incapacity of Attorney.* If the attorney is deceased or lacks legal capacity, the following persons may

terminate the deposit as provided by *Prob.C. 730* et seq.:

(a) The deposit may be terminated by a lawyer or nonlawyer in the attorney's firm, partnership, or corporation. (*Prob.C. 735(a).*)

(b) If the attorney lacks legal capacity and there is no person to act under *Prob.C. 735(a)*, the deposit may be terminated, without court approval, by the conservator of the attorney's estate or by the attorney in fact under a durable power of attorney. (*Prob.C. 735(b).*)

(c) If the attorney is dead and there is no person to act under *Prob.C. 735(a)*, the deposit may be terminated by the attorney's personal representative. (*Prob.C. 735(c).*)

A person terminating a deposit under *Prob.C. 735* must give the notice required by *Prob.C. 733* (infra, §20). (*Prob.C. 735(d).*)

SUPPLEMENT: [This section is current through the latest supplement]



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I. INTRODUCTION

K. Deposit of Estate Planning Documents.

4. Transfer of Documents.

Witkin Sum. Cal. Law Wills § 20

[§ 20] Transfer of Documents.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Methods of Transfer.* (b) *Transfer to superior court.*

Fees: In 2005, Govt.C. 26827.6 and 26827.7 were renumbered Govt.C. 20660 and 20661, respectively.



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[§ 20] Transfer of Documents.

(1) *Methods of Transfer.* *Prob.C. 732* provides two methods for terminating a deposit by transferring the deposited document from the original attorney to another holder:

(a) *Transfer to another attorney.* The attorney may terminate the deposit by transferring the document to another attorney. All documents transferred under this provision must be transferred to the same attorney. (*Prob.C. 732(b).*) The transferring attorney may not charge a fee for the transfer, but the receiving attorney may do so. (*Prob.C. 732(d).*) The Law Revision Commission Comment notes that the transferring attorney will presumably use this procedure when he or she retires or ceases to practice in the estate planning area.

(b) *Transfer to superior court.* If the attorney is deceased, lacks legal capacity, or is no longer an active member of the State Bar, the document may be transferred to the clerk of the superior court in the county of the depositor's last known domicile. (*Prob.C. 732(c).*) The clerk copies the documents and indexes and stores the copies. The original documents may then be destroyed. Before proof of the death of the maker of a document, the document is confidential. After proof of death, the document is public. (*Govt.C. 26810*; see *Govt.C. 26827.6* [fee for receiving and storing document]; *Govt.C. 26827.7* [fee for searching transferred document].)

(2) *Conditions.* Termination under *Prob.C. 732* is available if the following conditions are met:

(a) The attorney has mailed notice to reclaim the document to the depositor's last known address and the depositor has failed to reclaim within 90 days. (*Prob.C. 732(a).*)

(b) If the document is a will and the attorney has actual notice that the depositor is deceased, the deposit may be terminated only as provided by *Prob.C. 734* (*supra*, §19). (*Prob.C. 732(f).*)

(3) *Confidentiality and Privilege.* A transfer under *Prob.C. 732* is not a waiver or breach of any privilege or confidentiality associated with the document, and is not a violation of the Rules of Professional Conduct. If a document is privileged under *Ev.C. 950 et seq.* (see *2 Cal. Evidence (4th), Witnesses, §101 et seq.*), it remains so after the transfer. (*Prob.C. 732(e).*)

(4) *Notice to State Bar.* An attorney transferring documents under *Prob.C. 732* must notify the State Bar in a form

prescribed by the State Bar and provide relevant information about the transfer. The information is available from the State Bar to interested parties. (*Prob.C.* 733.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Methods of Transfer.*(b) *Transfer to superior court.*

Fees: In 2005, *Govt.C.* 26827.6 and 26827.7 were renumbered *Govt.C.* 20660 and 20661, respectively.



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A. Adoption and Early Amendments.

14 Witkin Sum. Cal. Law Wills § 21

[§ 21] Adoption and Early Amendments.

The Probate Code was adopted in 1931, superseding sections of the Civil Code and Code of Civil Procedure dealing with wills, succession, administration of estates of decedents, and guardians and wards. (See *Evans v. Superior Court* (1932) 215 C. 58, 63, 8 P.2d 467 [holding Act constitutional]; 19 Cal. L. Rev. 602 [comments by draftsman].) In 1935, it was amended to include estates of missing persons; in 1939, establishment of fact of death; in 1951, determination of simultaneous or other sequence of death; and in 1957, conservatorship.

Few changes in the law were made by the original Probate Code. Its purpose was to rearrange the existing statutes, correct obvious imperfections, and codify some of the important decisions. Minor revisions of the language of former statutes were not intended to effect changes in substance. Hence the bulk of the case law still remained applicable in these fields. (See *Estate of Armstrong* (1937) 8 C.2d 204, 208, 64 P.2d 1093; *Estate of Calhoun* (1955) 44 C.2d 378, 384, 282 P.2d 880; *Childs v. Gross* (1940) 41 C.A.2d 680, 687, 107 P.2d 424; *Estate of Hebert* (1941) 42 C.A.2d 664, 667, 109 P.2d 729; *Estate of Jamison* (1951) 107 C.A.2d 483, 485, 237 P.2d 546.) The only significant departure occurred in *Hunt v. Authier* (1946) 28 C.2d 288, 169 P.2d 913, where the court construed a modification of a statute as the enactment of a rule of survivability of causes of action for personal tort. (See 5 *Summary* (10th), *Torts*, §23.) A number of significant changes were made in later years:

(1) The Independent Administration of Estates Act, simplifying the procedure in uncontested probate matters, was adopted in 1975. (See *Prob.C. 10400* et seq., *infra*, §745 et seq.)

(2) The community property set-aside law, allowing community property to pass to the surviving spouse without administration, was adopted in 1975. (See *Prob.C. 13500* et seq., *infra*, §818 et seq.)

(3) The succession laws were revised in 1975 to conform to the Uniform Parentage Act, abolishing the distinction between legitimate and illegitimate children. (See 10 *Summary* (10th), *Parent and Child*, §17 et seq.)

(4) The Uniform International Wills Act, governing the formal validity of international wills, was adopted in 1979. (See *Prob.C. 6380* et seq., *infra*, §71 et seq.)

(5) The Guardianship-Conservatorship Law, replacing former statutes on guardianship, conservatorship, and related subjects, was adopted in 1979, effective January 1, 1981. (See *Prob.C. 1400* et seq., *infra*, §903 et seq.)

(6) Statutes creating a statutory form for wills, allowing certain testators to devise property easily and inexpensively, were adopted in 1982. (See *Prob.C.* 6200 et seq., *infra*, §115 et seq.)

(7) The rules for holographic wills were liberalized, and nuncupative wills were abolished in 1982. (See *Prob.C.* 6111, *infra*, §150.)

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1. Law Revision Commission Report.

14 Witkin Sum. Cal. Law Wills § 22

[§ 22] Law Revision Commission Report.

(1) *Study and Recommendation.* The 1980 Legislature directed the California Law Revision Commission to study whether the California Probate Code should be revised, "including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code." In 1982, the Commission recommended the enactment of a comprehensive revision of the Probate Code provisions on wills and intestate succession. (See 16 Cal. Law Rev. Com. Reports, p. 2301.) "These changes are designed primarily to simplify the administration of an intestate estate and to carry out more effectively the intent of the decedent who dies leaving a will. In some instances, the new statute adopts a Uniform Probate Code rule because national uniformity in that area of the law is particularly desirable and the Uniform Probate Code offers a sound rule that would help achieve national uniformity." (16 Cal. Law Rev. Com. Reports, p. 2305.)

(2) *Defects in Existing Law.* The Commission Report (pp. 2318, 2319) described the existing law as follows:

"The California law of wills and intestate succession has had no thorough substantive revision for over a century. Changes have been piecemeal. Much of the Probate Code has not changed since it was copied from the Texas Code in 1850 or modified by the Field Code in 1872. It remains a nineteenth century code in its premises, its phraseology, and its excessive detail."

"Existing California law contains technical requirements that often invalidate wills, even where there is no reasonable doubt that the testator intended the instrument as his or her will and there is no suspicion of fraud. Other provisions of existing law set forth mechanical rules that produce results that are inconsistent with the testator's intent."

"Although intestate succession rules should conform to what the testator probably would have wanted if he or she had made a will, many of the California intestate succession rules produce results that are inconsistent with what people want as shown by empirical studies."

"There have been many changes in the American family and in public attitudes since the last major revision of the California Probate Code in 1872: There are more divorces and a greater likelihood that decedents will leave separate property in their estates; more decedents have had plural families and leave adopted children, stepchildren, children born out of wedlock, and relatives of the halfblood; more decedents die with inherited property in their estates; more

decedents have moved to California with property acquired elsewhere. As a result, the California Probate Code is overdue for a comprehensive revision."

(3) *Uniform Probate Code, Draftsmen, and Consultants.* The principal source of changes was the Uniform Probate Code (see *supra*, §2), although in some instances the new California Probate Code sections differed from those of the Uniform Probate Code. (See Table, "Uniform Probate Code Sections to Proposed Law," 16 Cal. Law Rev. Com. Reports, p. 2511, and Law Rev. Com. Comments.) In drafting the new law, the Commission conferred with the Executive Committee of the Estate Planning, Probate and Trust Law Section of the State Bar, engaged nine law professors as expert consultants, and examined a considerable amount of published material on the Uniform Probate Code and the existing California law. (16 Cal. Law Rev. Com. Reports, pp. 2307, 2308, 2309.)

(4) *Recommendations, Enactments, and Major Changes.* For over 10 years, the Legislature made extensive Probate Code changes. The Law Revision Commission's Recommendations, the Legislature's annual enactments, and the major statutory changes are set forth in succeeding sections of the text.

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2. Law Revision Commission Comments.

14 Witkin Sum. Cal. Law Wills § 23

[§ 23] Law Revision Commission Comments.

As part of its various recommendations relating to revision of the Probate Code, the Law Revision Commission added explanatory Comments to the revised provisions, which have been extensively cited and quoted in this chapter. The Comment to *Prob.C.* 2 explains the terminology used by the Commission:

"A number of terms and phrases are used in the official comments to the sections of this code to indicate the sources of the new statutory provisions and describe how they compare with prior law. The following discussion is intended to provide guidance in interpreting the terminology most commonly used in the official comments."

"(1) *Continues without change.* A new provision 'continues' a former provision 'without change' if the two provisions are identical or nearly so. In some cases, there may be insignificant technical differences, such as where punctuation is changed without a change in meaning. Some comments may describe the relationship by simply stating that a new provision 'continues' or is 'the same as' a former provision."

"(2) *Restates without substantive change.* A new provision 'restates' a former provision 'without substantive change' if the substantive law remains the same but the language differs to a significant degree. Some comments may describe the new provision as being the 'same in substance.' "

"(3) *Exceptions, additions, omissions.* If part of a former provision is 'continued' or 'restated,' the comment may say that the former provision is continued or restated but also note the specific differences as 'exceptions to,' 'additions to,' or 'omissions from' the former provision."

"(4) *Generalizes, broadens, restates in general terms.* A new provision may be described as 'generalizing,' 'broadening,' or 'restating in general terms' a provision of prior law. This description means that a limited rule has been expanded to cover a broader class of cases."

"(5) *Supersedes, replaces.* A provision 'supersedes' or 'replaces' a former provision if the new provision deals with the same subject as the former provision but treats it in a significantly different manner."

"(6) *New.* A provision is described as 'new' where it has no direct source in prior statutes."

"(7) *Drawn from, comparable to, similar to, consistent with.* A variety of terms is used to indicate a source for a new provision, typically a source other than California statutes. For example, a provision may be 'drawn from' a uniform act, model code, Restatement, or the statutes of another state. In such cases, it may be useful to consult any available commentary or interpretation of the source from which the new provision is drawn for background information."

"(8) *Codifies.* A comment may state that a new provision 'codifies' a case-law rule that has not previously been enacted into statutory law. A provision may also be described as codifying a Restatement rule, which may or may not represent existing common law in California."

"(9) *Makes clear, clarifies.* A new provision may be described as 'making clear' a particular rule or 'clarifying' a rule as a way of emphasizing the rule, particularly if the situation under prior law was doubtful or contradictory."

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3. Revision in 1983.
a. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 24

[§ 24] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendation in 1982: Recommendation Relating to Wills and Intestate Succession (16 Cal. Law Rev. Com. Reports, p. 2301; see *supra*, §22).

(2) *Scope of Enactment.* The 1983 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1983, Chap. 842; see *15 Pacific L. J.* 423.) The new legislation superseded the introductory and general provisions of the Probate Code as well as existing sections on wills, intestate succession, and simultaneous death. (See Disposition of Existing Sections of Divisions 1, 2 and 2b of the Probate Code, 16 Cal. Law Rev. Com. Reports, p. 2499; Conforming Amendments, Additions, and Repeals, 16 Cal. Law Rev. Com. Reports, p. 2483.)

(3) *Operative Date.* The new law became operative on January 1, 1985. (Stats. 1983, Chap. 842, §58.)

(4) *Other Changes.* The 1983 Legislature also made changes in two other areas. Comprehensive disclaimer provisions were enacted. (See *Prob.C.* 260 et seq., *infra*, §329 et seq.) The former provisions governing missing persons were replaced with new statutes governing the administration of estates of persons presumed dead (see *Prob.C.* 12400 et seq., *infra*, §365 et seq.) and the conservatorship of missing persons (see *Prob.C.* 1845 et seq., *infra*, §949).

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b. Major Changes.

14 Witkin Sum. Cal. Law Wills § 25

[§ 25] Major Changes.

(1) *Formal Requirements of Execution.* The formal requirements for signing and witnessing wills were simplified. (See *Prob.C. 6110*, *infra*, §137.)

(2) *Interested Witnesses.* An interested witness is no longer automatically disqualified from taking under a will. (See *Prob.C. 6112*, *infra*, §145.) A gift to an interested witness may be challenged, however, without the disinheriting effect of a no-contest clause. (See *Prob.C. 21307*, *infra*, §568.)

(3) *Choice of Law.* A will executed in California by a nonresident is valid for California purposes if valid under the laws of another appropriate jurisdiction. (See *Prob.C. 6113*, *infra*, §55.)

(4) *Revocation by Destruction.* The two-witness requirement for proving destruction by another person at the testator's direction was eliminated. (See *Prob.C. 6120*, *infra*, §174.)

(5) *Revocation by Dissolution or Annulment.* Unless expressly provided otherwise, dissolution or annulment of a marriage now has the effect of revoking a will with respect to a prior spouse. (See *Prob.C. 6122*, *infra*, §177.)

(6) *Revival of Revoked Will.* Revocation of a subsequent will by a physical act now has the effect of reviving a former will, if the testator so intends. (See *Prob.C. 6123*, *infra*, §182.)

(7) *Missing Wills.* Proof of physical existence was eliminated as a condition for probate of a missing will, and the requirements for proof of the terms of a missing will were relaxed. (See *Prob.C. 8223*, *infra*, §550.)

(8) *Exoneration.* The doctrine of exoneration of encumbrances on real property was restricted. (See *Prob.C. 21131*, *infra*, §249.)

(9) *Ademption by Extinction.* Situations in which ademption by extinction does not apply were expanded. (See *Prob.C. 21133*, *infra*, §258.)

(10) *Ademption by Satisfaction.* The law of ademption by satisfaction was clarified. (See *Prob.C. 21135*, *infra*,

§252.)

(11) *Failed Residuary Gifts*. Failed residuary gifts that cannot be saved by anti-lapse provisions now pass to other residuary beneficiaries. (See *Prob.C. 21111*, *infra*, §214.)

(12) *Statutory Wills*. The substance of the 1982 legislation authorizing statutory wills was continued. (See *Prob.C. 6200* et seq., *infra*, §115 et seq.)

(13) *Heirs of Predeceased Spouse*. The right of the heirs of a predeceased spouse to inherit from an intestate decedent was restricted. (See *Prob.C. 6402.5*, *infra*, §83 et seq.)

(14) *Representation*. The rules of representation were modified to allow descendants of the same generation to share equally in some circumstances. (See *Prob.C. 240*, *infra*, §75.)

(15) *Stepparent Adoption*. Adoption by a stepparent no longer cuts off the right to inherit by, from, or through a natural parent who gives up the child for adoption. (See *Prob.C. 6408.5*, *infra*, §92.)

(16) *Advancements*. An advancement to a predeceased donee is no longer charged against the intestate share of the donee's issue. (See *Prob.C. 6409*, *infra*, §287.)

(17) *Family Allowance*. A dependent parent is now eligible for a family allowance. (See *Prob.C. 6540*, *infra*, §776.) Authority to continue administration in order to continue payment of a family allowance was restricted. (See *Prob.C. 6543*, *infra*, §778.)

(18) *Pretermitted Children*. The rules protecting pretermitted heirs were limited to afterborn children. Revised statutes governing pretermitted children were adopted in 1997. (See *Prob.C. 21620*, *infra*, §281 et seq.)

(19) *Spouse Omitted From Premarital Will*. The share of separate property passing to an unintentionally omitted spouse was limited to one-half. The scope of evidence admissible to show an intentional omission was expanded. Revised statutes governing pretermitted spouses were adopted in 1997. (See *Prob.C. 21610*, *infra*, §274 et seq.)

(20) *Simultaneous Death*. The standard of proof necessary to avoid application of the simultaneous death provisions was raised. (See *Prob.C. 220*, *infra*, §289.)

(21) *Effect of Homicide*. Disqualification was limited to intentional killing, the burden of proof in disqualification proceedings was lowered, and the conclusive effect of acquittal was eliminated. (See *Prob.C. 250* et seq., *infra*, §294 et seq.)

(22) *Waiver of Rights by Surviving Spouse*. The law of waiver was codified and clarified. (See *Prob.C. 140* et seq., *infra*, §322 et seq.)

(23) *Contract To Make Will*. The rules governing the proof necessary to prove a contract to make a will were codified and clarified. A revised statute governing contracts to make wills was adopted in 2000. (See *Prob.C. 21700*, *infra*, §326.)

(24) *Pay-on-Death Provisions*. Pay-on-death provisions not executed with the formalities required for wills are now valid. (See *Prob.C. 5000*, *infra*, §306.)

(25) *Disclaimers*. A disclaimer may no longer be used to defeat the general rules of intestate succession. (See *Prob.C. 282*, *infra*, §339.)

(26) *Community Property Acquired Elsewhere*. The treatment of community property acquired out of state was clarified. (See *Prob.C. 28*, *infra*, §264.)

(27) *Election To Take Quasi-Community Property Against Will*. The quasi-community election requirement was eliminated.

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a. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 26

[§ 26] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1983 and 1984:

(a) Recommendation Relating to Independent Administration of Decedent's Estate. (17 Cal. Law Rev. Com. Reports, p. 405.)

(b) Recommendation Relating to Distribution of Estates Without Administration. (17 Cal. Law Rev. Com. Reports, p. 421.)

(c) Recommendation Relating to Bonds of Personal Representatives. (17 Cal. Law Rev. Com. Reports, p. 483.)

(d) Recommendation Relating to Revision of Wills and Intestate Succession Law. (17 Cal. Law Rev. Com. Reports, p. 537.)

(e) Recommendation Relating to Uniform Transfers to Minors Act. (17 Cal. Law Rev. Com. Reports, p. 601.)

(2) *Scope of Enactment.* The 1984 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1984, Chap. 243; see Report of Senate Committee on Judiciary on Assembly Bill 2492, 18 Cal. Law Rev. Com. Reports, p. 105; Stats. 1984, Chap. 451; see Report of Senate Committee on Judiciary on Assembly Bill 2270, 18 Cal. Law Rev. Com. Reports, p. 63; Stats. 1984, Chap. 892; see Communication From Law Revision Commission Concerning Assembly Bill 2290, 18 Cal. Law Rev. Com. Reports, p. 77; 16 *Pacific L. J.* 483.)

(3) *Operative Date.* The new law became effective January 1, 1985.

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b. Major Changes.

14 Witkin Sum. Cal. Law Wills § 27

[§ 27] Major Changes.

The Legislature made the following significant changes in 1984:

(1) *Spouse's Waiver of Rights*. The provisions governing the enforcement and revocation of one spouse's waiver of rights in the estate of the other were clarified. (See *Prob.C. 140* et seq., infra, §322 et seq.)

(2) *Simultaneous Death*. In the event of the simultaneous death of spouses who are the insured and the beneficiary of an insurance policy, the proceeds of a policy that is community or quasi-community property are now distributed as though they were community property, not as though the insured survived the beneficiary, in the absence of an alternative beneficiary other than the insured's estate or personal representative. (See *Prob.C. 224*, infra, §290.)

(3) *Interested Witnesses*. The presumption that a devise to a subscribing witness was procured by duress, menace, fraud or undue influence does not apply where two other subscribing witnesses are disinterested. (See *Prob.C. 6112*, infra, §145.)

(4) *Class Gifts*. The constructional preference for including adopted, out of wedlock, and half-blood children in a class gift was extended to stepchildren and foster children. (See *Prob.C. 21115*, infra, §228.)

(5) *Pourover Trusts*. Unless a testator's will provides otherwise, testamentary assets in a pourover trust are now subject to postdeath amendments. (See *Prob.C. 6300*, infra, §170.)

(6) *Abatement*. Devises to all devisees under a will, including residuary devisees, now abate proportionally in the event of abatement to pay a statutory share to an omitted spouse or child. Revised statutes governing omitted spouses and children were adopted in 1997. (See *Prob.C. 21612*, infra, §274 et seq. [omitted spouse]; *Prob.C. 21623*, infra, §281 et seq. [omitted child].)

(7) *Spousal Property Set-Aside*. The procedure for setting aside property to a surviving spouse now applies to separate property, as well as community and quasi-community property. (See *Prob.C. 13500* et seq., infra, §818 et seq.)

(8) *Small Estate Set-Aside*. The maximum amount for collecting and transferring small estates without

administration was raised. (See *Prob.C. 13000* et seq., *infra*, §793 et seq.)

(9) *Independent Administration*. The Independent Administration of Estates Act was broadened to include more real property transactions, the requirements for advice of proposed action were modified, and a beneficiary's failure to object now constitutes waiver of the right to do so. (See *Prob.C. 10400* et seq., *infra*, §745 et seq.)

(10) *Waiver of Accounting*. Waivers of accounting were expressly authorized. (See *Prob.C. 10954*, *infra*, §712.)

(11) *Entitlement to Appointment as Administrator*. A surviving spouse's priority was reduced if the spouse and the decedent were parties to a proceeding for separate maintenance, annulment, or dissolution, or the spouse and the decedent were living apart at the decedent's death. (See *Prob.C. 8463*, *infra*, §438.)

(12) *Transfers to Minors*. The original Uniform Gifts to Minors Act was replaced with an expanded and reorganized statute, the California Uniform Transfers to Minors Act (*Prob.C. 3900* et seq.). (See 13 *Summary* (10th), *Personal Property*, §139 et seq.)

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a. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 28

[§ 28] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1984 and 1985:

(a) Recommendation Relating to Transfer Without Probate of Certain Property Registered by the State. (18 Cal. Law Rev. Com. Reports, p. 129.)

(b) Recommendation Relating to Distribution Under a Will or Trust. (18 Cal. Law Rev. Com. Reports, p. 269.)

(c) Recommendation Relating to Effect of Adoption or Out of Wedlock Birth on Rights at Death. (18 Cal. Law Rev. Com. Reports, p. 289.)

(2) *Scope of Enactment.* The 1985 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1985, Chap. 982; see Communication Concerning Assembly Bill 196, 18 Cal. Law Rev. Com. Reports, p. 367.)

(3) *Operative Date.* The 1985 changes became operative on January 1, 1986.

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14 *Witkin Sum. Cal. Law Wills* § 29

[§ 29] Major Changes.

The Legislature made the following significant changes in 1985:

(1) *Independent Administration*. A personal representative may now apply for limited authority under the Independent Administration of Estates Act, i.e., authority for all purposes other than real property transactions. A statutory form for advice of proposed action is available. Advice of proposed action may be waived. The rules governing real property sales were modified. (See *Prob.C. 10400* et seq., *infra*, §745 et seq.)

(2) *Probate Notices*. Notice to a decedent's beneficiaries, devisees, and heirs need not be given to persons who may be heirs or class devisees by reason of step or foster relationships in the absence of knowledge of facts giving rise to these relationships. (See *Prob.C. 1207*, *infra*, §388.)

(3) *Testamentary Capacity*. The case law concerning tests of testamentary capacity was codified. (See *Prob.C. 6100.5*, *infra*, §121.)

(4) *Presumption That Will Was Destroyed*. If the will of a competent testator was last in the testator's possession and neither the will nor a duplicate original can be discovered at death, it is presumed that the testator destroyed the will with intent to revoke. (See *Prob.C. 6124*, *infra*, §552.)

(5) *Anti-lapse*. A requirement that a devisee survive the decedent for a specified time or survive until a future time related to the administration of the decedent's estate prevents operation of the anti-lapse statute. (See *Prob.C. 21110*, *infra*, §263.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 30

[§ 30] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1985:

(a) Recommendation Relating to Disposition of Estates Without Administration. (18 Cal. Law Rev. Com. Reports, pp. 1005, 1501.)

(b) Recommendation Relating to Small Estate Set-Aside. (18 Cal. Law Rev. Com. Reports, pp. 1101, 1597.)

(c) Recommendation Relating to Proration of Estate Taxes. (18 Cal. Law Rev. Com. Reports, pp. 1127, 1623.)

(2) *Scope of Enactment.* The 1986 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1986, Chap. 783; see Communication From California Law Revision Commission Concerning Assembly Bill 2625, 18 Cal. Law Rev. Com. Reports, p. 1743.)

(3) *Operative Date.* Except for the provisions concerning the proration of estate taxes (effective January 1, 1987), the 1986 changes became operative July 1, 1987. (Stats. 1986, Chap. 783, §30.)

(4) *Other Changes.* The 1986 Legislature codified and organized the law of trusts by enacting a new division of the Probate Code (*Prob.C. 15000 et seq.*), effective July 1, 1987. (See 13 *Summary* (10th), *Trusts*, §17 et seq.)

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14 Witkin Sum. Cal. Law Wills § 31

[§ 31] Major Changes.

The Legislature made the following significant changes in 1986:

(1) *Title to Real Property in Small Estates*. In an estate in which administration is not required, succession to real property may be shown by recorded affidavit (see *Prob.C. 13200* et seq., infra, §807 et seq.) or by court order (see *Prob.C. 13150* et seq., infra, §813 et seq.). The attorneys' fee for a real property petition proceeding is now a matter of private agreement and is not subject to court approval. (See *Prob.C. 13157*, infra, §817.)

(2) *Marshaling Assets*. A personal representative is not criminally or civilly liable for taking possession in good faith of property that is later determined not to be part of the decedent's estate. The personal representative may be compensated for beneficial or necessary services in connection with the property. (See *Prob.C. 9651*, infra, §476.)

(3) *Proration of Taxes*. The procedure for prorating state and federal estate taxes was clarified. (See *Prob.C. 20100* et seq., infra, §662 et seq.)

(4) *Spousal Property Set-Aside*. The procedure for setting aside property to a surviving spouse now applies to all or a portion of the spousal property. A notice of an interest in the decedent's real property must be recorded within 40 days of death in order to prevent the spouse from encumbering or conveying the property. (See *Prob.C. 13500* et seq., infra, §818 et seq.) The attorneys' fee for a spousal property set-aside proceeding is now a matter of private agreement and is not subject to court approval. (See *Prob.C. 13660*, infra, §833.)

(5) *Small Estate Set-Aside*. The attorneys' fee for a small estate set-aside proceeding is now a matter of private agreement and is not subject to court approval. (See *Prob.C. 6613*, infra, §786.)

(6) *Intestate Succession by Relatives of Predeceased Spouse*. Intestate succession by relatives of the decedent's predeceased spouse was extended to specified personal property. (See *Prob.C. 6402.5*, infra, §85.)

(7) *Collection of Personal Property by Affidavit*. The former procedure for collecting personal property by affidavit was substantially reorganized. (See *Prob.C. 13100* et seq., infra, §796 et seq.)

(8) *Collection of Compensation by Surviving Spouse.* A decedent's surviving spouse may now collect the decedent's compensation for personal services by affidavit. (See *Prob.C. 13600* et seq., *infra*, §825 et seq.)

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a. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 32

[§ 32] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1986 and 1987:

(a) Recommendation Relating to Preliminary Provisions and Definitions of the Probate Code. (18 Cal. Law Rev. Com. Reports, p. 1807.)

(b) Recommendation Relating to Notice in Guardianship and Conservatorship Proceedings. (18 Cal. Law Rev. Com. Reports, p. 1793.)

(c) Recommendation Relating to Supervised Administration of Decedent's Estate. (19 Cal. Law Rev. Com. Reports, p. 5.)

(d) Recommendation Relating to Independent Administration of Estates Act. (19 Cal. Law Rev. Com. Reports, p. 205.)

(e) Recommendation Relating to Creditor Claims Against Decedent's Estate. (19 Cal. Law Rev. Com. Reports, p. 299.)

(f) Recommendation Relating to Notice in Probate Proceedings. (19 Cal. Law Rev. Com. Reports, p. 357.)

(g) Recommendation Relating to Marital Deduction Gifts. (19 Cal. Law Rev. Com. Reports, p. 615.)

(h) Recommendation Relating to Administration of Estates of Missing Persons. (19 Cal. Law Rev. Com. Reports, p. 637.)

(2) *Scope of Enactment.* The 1987 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1987, Chap. 923; see Communication from California Law Revision Commission Concerning Assembly Bill 708, 19 Cal. Law Rev. Com. Reports, p. 545; 19 *Pacific L. J.* 437.) The new legislation substantially revised and reorganized the statutes governing the supervised and independent administration of estates,

the procedure for notice in probate proceedings, and the claims of creditors. (See Comments to Conforming Revisions and Repeals, 19 Cal. Law Rev. Com. Reports, p. 393.)

(3) *Operative Date.* Except as specifically provided otherwise, the new law became operative on July 1, 1988. (Stats. 1987, Chap. 923, §103.)

(4) *Other Changes.* The 1987 Legislature also made changes in two other areas.

(a) Services for which an attorney may apply for compensation now include services performed by paralegals. (See *Prob.C. 10811*, *infra*, §534; *Prob.C. 2640, 2642*, *infra*, §1046.)

(b) Various technical changes were made in the Trust Law (*Prob.C. 15000 et seq.*). (See Stats. 1987, Chap. 128; 13 *Summary* (10th), *Trusts*, §18.)

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14 Witkin Sum. Cal. Law Wills § 33

[§ 33] Major Changes.

The Legislature made the following significant changes in 1987:

(1) *Probate Notices*. The general provisions governing notice in probate proceedings were revised and consolidated. (See *Prob.C. 1200* et seq., infra, §385 et seq.)

(2) *Creditor Claims*. Notice of administration must now be mailed to known creditors. (See *Prob.C. 9050* et seq., infra, §614 et seq.) Claims are now filed with both the court and the personal representative. (See *Prob.C. 9150*, infra, §636.) The personal representative may now waive formal defects in the claims procedure. (See *Prob.C. 9154*, infra, §639.) Claims of the personal representative's attorney must now be presented to the court. (See *Prob.C. 9252*, infra, §641.)

(3) *Estate Management*. The existing provisions governing estate management were reorganized and consolidated. (See *Prob.C. 9600* et seq., infra, §464 et seq.)

(4) *Petition To Compel Personal Representative To Act*. On a showing of great or irreparable injury to the estate, an interested person may now petition the court to direct the personal representative to act or not to act. (See *Prob.C. 9613*, infra, §470.)

(5) *Possession of Estate Property*. Real or tangible personal property of the estate may now be left with or surrendered to the person presumptively entitled to it until possession by the personal representative is necessary for administration. (See *Prob.C. 9650*, infra, §475.)

(6) *Deposits and Investments*. Authorized deposits and investments were expanded. (See *Prob.C. 9700* et seq., infra, §480 et seq.)

(7) *Abandonment of Estate Property*. A personal representative is now authorized to abandon tangible personal property of the estate in specified circumstances. (See *Prob.C. 9780* et seq., infra, §510.)

(8) *Purchase of Estate Property*. A personal representative or his or her attorney may now purchase estate property

with consent of the heirs and approval of the court. (See *Prob.C. 9880* et seq., infra, §§500, 501.)

(9) *Probate Sales*. The provisions governing probate sales were restated and the provisions governing brokers' commissions were clarified. (See *Prob.C. 10000* et seq., infra, §670 et seq.)

(10) *Independent Administration*. The maximum amount of bond was restated. (See *Prob.C. 10453*, infra, §749.) The list of acts requiring notice of proposed action was modified. (See *Prob.C. 10510* et seq., infra, §754 et seq.) The procedure for notice of proposed action may now be used even when not required by statute. (See *Prob.C. 10580*, infra, §758.)

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14 Witkin Sum. Cal. Law Wills § 34

[§ 34] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1987 and 1988:

- (a) Recommendation Relating to Public Guardians and Administrators. (19 Cal. Law Rev. Com. Reports, p. 707.)
- (b) Recommendation Relating to Inventory and Appraisal. (19 Cal. Law Rev. Com. Reports, p. 741.)
- (c) Recommendation Relating to Opening Estate Administration. (19 Cal. Law Rev. Com. Reports, p. 787.)
- (d) Recommendation Relating to Abatement. (19 Cal. Law Rev. Com. Reports, p. 865.)
- (e) Recommendation Relating to Accounts. (19 Cal. Law Rev. Com. Reports, p. 877.)
- (f) Recommendation Relating to Litigation Involving Decedents. (19 Cal. Law Rev. Com. Reports, p. 899.)
- (g) Recommendation Relating to Rules of Procedure in Probate. (19 Cal. Law Rev. Com. Reports, p. 917.)
- (h) Recommendation Relating to Distribution and Discharge. (19 Cal. Law Rev. Com. Reports, p. 953.)
- (i) Recommendation Relating to Nondomiciliary Decedents. (19 Cal. Law Rev. Com. Reports, p. 993.)
- (j) Recommendation Relating to Interest and Income During Administration. (19 Cal. Law Rev. Com. Reports, p. 1019.)

(2) *Scope of Enactment.* The 1988 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1988, Chap. 1199; see Communication from California Law Revision Commission Concerning Assembly Bill 2841, 19 Cal. Law Rev. Com. Reports, p. 1201; 20 *Pacific L. J.* 435, 899.) The new legislation substantially revised and reorganized the statutes governing actions and procedures concerning decedents' estates. (See Comments to Conforming Revisions and Repeals, 19 Cal. Law Rev. Com. Reports, p. 1033.)

(3) *Operative Date.* The new law became operative on July 1, 1989. (Stats. 1988, Chap. 1199, §119.)

(4) *Other Changes.* The 1988 Legislature also made technical corrections to the statutes enacted as part of the 1987 Probate Code revision (*supra*, §32). (See Stats. 1988, Chap. 113; Communication from the California Law Revision Commission Concerning Assembly Bill 2779, 19 Cal. Law Rev. Com. Reports, p. 1191.)

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14 Witkin Sum. Cal. Law Wills § 35

[§ 35] Major Changes.

The Legislature made the following significant changes in 1988:

(1) *Guardian Ad Litem*. The court's authority to appoint guardians ad litem was expanded. (See *Prob.C. 1003*, infra, §374.)

(2) *Verification*. The verification requirements were expanded. (See *Prob.C. 1021*, infra, §376.)

(3) *Will Contests*. The procedure for initiating will contests was modified. (See *Prob.C. 8250*, infra, §577.) The right to a jury trial was eliminated. (See *Prob.C. 8252*, infra, §578.) The burden of proof on various issues was clarified. (See *Prob.C. 8252*, infra, §578.)

(4) *Production of Will*. In addition to delivering a will to the superior court clerk within 30 days after knowledge of the death of the testator, the custodian of a will is now required to mail a copy to the named executor. (See *Prob.C. 8200*, infra, §543.)

(5) *Statement of Duties and Liabilities of Personal Representative*. A personal representative must now acknowledge receipt of a statement of duties and liabilities. (See *Prob.C. 8404*, infra, §447.)

(6) *Special Administrator*. Circumstances under which a special administrator may be appointed were expanded. (See *Prob.C. 8540 et seq.*, infra, §425.)

(7) *Inventory and Appraisal*. The time for filing the inventory and appraisal was extended to 4 months after appointment of the personal representative. (See *Prob.C. 8800*, infra, §592.) The list of assets that may be appraised by the personal representative was expanded. (See *Prob.C. 8901*, infra, §602.) The personal representative may now elect to have special items appraised by an independent expert. (See *Prob.C. 8904*, infra, §604.) The personal representative may now make a peremptory challenge to the designated probate referee. (See *Prob.C. 8924*, infra, §607.) A probate referee may now be required to provide supporting data and justify an appraisal. (See *Prob.C. 8908*, infra, §609.) The court may now waive appraisal by a probate referee on a showing of good cause. (See *Prob.C. 8903*, infra, §605.)

(8) *Creditor Claims*. The circumstances under which late claims may be filed were expanded. (See *Prob.C. 9103*, *infra*, §635.)

(9) *Accounting*. Jury trials are no longer available in contested accounting proceedings. A supplemental account following a final account is no longer required. An account must now include both a financial statement and a report of administration. (See *Prob.C. 10900 et seq.*, *infra*, §714 *et seq.*)

(10) *Determining Persons Entitled to Distribution*. The existing procedure to determine heirship was revised and renamed. (See *Prob.C. 11700 et seq.*, *infra*, §720.)

(11) *Distribution*. A personal representative is now required to obtain and file receipts from distributees of estate property. (See *Prob.C. 11751*, *infra*, §733.)

(12) *Abatement*. The rules of abatement were codified. (See *Prob.C. 21400 et seq.*, *infra*, §658 *et seq.*)

(13) *Probate Jurisdiction of Superior Court*. The court in probate proceedings is now a court of general jurisdiction, with all the powers of the superior court. (See *Prob.C. 7050*, *infra*, §348.)

(14) *Nondomiciliary Decedent*. The affidavit procedure for collecting personal property (*Prob.C. 13100 et seq.*) is now available to a sister state personal representative. (See *Prob.C. 12570*, *infra*, §69.)

(15) *Interest and Income During Administration*. Provisions governing the accrual of interest and income during estate administration were codified. (See *Prob.C. 12000 et seq.*, *infra*, §246.)

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14 Witkin Sum. Cal. Law Wills § 36

[§ 36] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1988 and 1989:

- (a) Recommendation Relating to No Contest Clauses. (20 Cal. Law Rev. Com. Reports, p. 7.)
- (b) Recommendation Relating to 120-Hour Survival Requirement. (20 Cal. Law Rev. Com. Reports, p. 21.)
- (c) Recommendation Relating to Multiple Party Accounts in Financial Institutions. (20 Cal. Law Rev. Com. Reports, p. 95.)
- (d) Recommendation Relating to Notice to Creditors in Probate Proceedings. (20 Cal. Law Rev. Com. Reports, p. 165.)

(2) *Scope of Enactment.* The 1989 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1989, Chap. 544; see Communication from California Law Revision Commission Concerning Assembly Bill 158, 20 Cal. Law Rev. Com. Reports, p. 235; Stats. 1989, Chap. 397; see Communication from California Law Revision Commission Concerning Senate Bill 985, 20 Cal. Law Rev. Com. Reports, p. 247.)

(3) *Other Changes.* The 1989 Legislature made technical corrections to the statutes enacted as part of the 1988 Probate Code revision (supra, §34). (See Stats. 1989, Chap. 21; Communication from the California Law Revision Commission Concerning Assembly Bill 156, 20 Cal. Law Rev. Com. Reports, p. 227.) In addition, the Legislature made various changes in the Guardianship-Conservatorship Law. (See Stats. 1989, Chap. 781; Stats. 1989, Chap. 1080.)

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14 Witkin Sum. Cal. Law Wills § 37

[§ 37] Major Changes.

The Legislature made the following significant changes in 1989:

(1) *Delivery of Decedent's Tangible Personal Property*. Public administrators, government officials, law enforcement agencies, and institutions in which a decedent died are now authorized to deliver tangible personal property in their possession to a decedent's surviving spouse, relative, or conservator or guardian of the estate, without waiting 40 days after death. (See *Prob.C. 330*, *infra*, §413.)

(2) *Bond*. The basis for computing a personal representative's bond in the event of independent administration now includes the estimated value of the decedent's interest in real property, not the estimated net proceeds in the event of a sale. (See *Prob.C. 8482*, *infra*, §449.)

(3) *Distribution*. Estate assets may now be distributed as soon as an order for final distribution is entered. (See *Prob.C. 11641*, *infra*, §731.)

(4) *Survivorship*. A 120-hour survivorship requirement now applies in cases of intestate succession. (See *Prob.C. 6403*, *infra*, §74.)

(5) *Commissions*. The provisions governing brokers' commissions were substantially modified. (See *Prob.C. 10160* et seq., *infra*, §680 et seq.)

(6) *No-Contest Clauses*. The common law governing no-contest clauses in wills, trusts, and other instruments was codified, with some modifications. (See *Prob.C. 21300* et seq.; *infra*, §561 et seq.)

(7) *Multiple-Party Accounts*. The Multiple Party Accounts Law was extended to accounts in banks, savings and loan associations, and similar financial institutions. (See *Prob.C. 5100*; 4 *Summary* (10th), *Negotiable Instruments*, §77 et seq.)

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14 Witkin Sum. Cal. Law Wills § 38

[§ 38] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1990:

- (a) Recommendation Proposing New Probate Code. (20 Cal. Law Rev. Com. Reports, p. 1001.)
- (b) Recommendation Relating to Notice to Creditors in Estate Administration. (20 Cal. Law Rev. Com. Reports, p. 507.)
- (c) Recommendation Relating to Disposition of Small Estate by Public Administrator. (20 Cal. Law Rev. Com. Reports, p. 529.)
- (d) Recommendation Relating to Court-Authorized Medical Treatment. (20 Cal. Law Rev. Com. Reports, p. 537.)
- (e) Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will. (20 Cal. Law Rev. Com. Reports, p. 549.)
- (f) Recommendation Relating to Modification of Lease Without Court Order. (20 Cal. Law Rev. Com. Reports, p. 557.)
- (g) Recommendation Relating to Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding. (20 Cal. Law Rev. Com. Reports, p. 565.)
- (h) Recommendation Relating to Priority of Conservator or Guardian for Appointment as Administrator. (20 Cal. Law Rev. Com. Reports, p. 607.)
- (i) Recommendation Relating to Notice in Probate Where Address Unknown. (20 Cal. Law Rev. Com. Reports, p. 2245.)
- (j) Recommendation Relating to Uniform Management of Institutional Funds Act. (20 Cal. Law Rev. Com. Reports, p. 2265.)

(2) *Scope of Enactment.* The 1990 Legislature enacted a substantial portion of the statute recommended by the Law Revision Commission. (Stats. 1990, Chap. 710.) In addition, the Legislature repealed the existing Probate Code and enacted a new Code. This revision made changes in approximately one-third of the sections of the Code, omitting obsolete material and making technical, clarifying, conforming, and minor substantive revisions. With few exceptions, the new Probate Code carries forward the section numbers of the former code. (See Conforming Revisions in Other Codes, 20 Cal. Law Rev. Com. Reports, p. 1995.)

(3) *Operative Date.* Most of the substantive recommendations adopted by the Legislature and the repeal and reenactment of the Probate Code were operative July 1, 1991. (See Stats. 1990, Chap. 79, §37; Stats. 1990, Chap. 710, §48.)

(4) *Law Revision Commission Comments.* In conjunction with the repeal and reenactment of the Probate Code, the Law Revision Commission revised its comments to many of the provisions in the Code. (See Comments to New Probate Code, 20 Cal. Law Rev. Com. Reports, p. 1127 et seq.; Revised and Supplemental Comments to the New Probate Code, 20 Cal. Law Rev. Com. Reports, p. 2085 et seq.; Report of the California Law Revision Commission on Chapter 140 of the Statutes of 1990 (Senate Bill 1855), 20 Cal. Law Rev. Com. Reports, p. 2287; Report of the California Law Revision Commission on Corrected Probate Code Comments, Appendix to Commission's 1991 Annual Report.)

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[§ 39] Major Changes.

(1) *Creditors' Claims.* Various statutes governing creditors' claims were revised, including those governing notice to known creditors (see *Prob.C. 9051*, *infra*, §614), the treatment of late claims (see *Prob.C. 9103*, *infra*, §635), the liability of estate distributees (see *Prob.C. 9392*, *infra*, §617), and the statute of limitations on claims against a decedent (see former *C.C.P. 353(b)*, *infra*, §512).

(2) *Holographic Wills.* Extrinsic evidence is admissible on certain issues concerning holographic wills (see *Prob.C. 6111.5*, *infra*, §137); a statement of testamentary intent in a holographic will may be set forth in either the testator's handwriting or as part of a commercially printed form (see *Prob.C. 6111*, *infra*, §150).

(3) *Survivorship Requirement.* The 120-hour survivorship requirement applicable to intestate succession was extended to inheritance under a statutory will. (See *Prob.C. 6211*, *infra*, §117.)

(4) *Probate Notices.* Notice must be given in the manner provided by *C.C.P. 413.30* if the address of a person to whom notice must be mailed or delivered is unknown. (*Prob.C. 1212*, *infra*, §391.)

(5) *Property Sales.* Cotenants may consent to the sale of undivided interests under *Prob.C. 10000* et seq. (See *Prob.C. 10006*, *infra*, §677.) Provisions were added governing brokerage commissions where the listing agreement precludes a commission in a sale to a specific party (see *Prob.C. 10162.6*, *infra*, §683) and commission-splitting agreements between brokers (see *Prob.C. 10168*, *infra*, §682).

(6) *Personal Liability of Personal Representative.* A personal representative is generally not personally liable for instruments executed in a fiduciary capacity unless the representative fails to reveal that capacity or identify the estate in the instrument. (See *Prob.C. 9606*, *infra*, §523.)

(7) *Limitation of Actions.* *C.C.P. 353(b)* was amended to impose a 1-year statute of limitations on all actions against a decedent on which the statute of limitations otherwise applicable has not run at the time of death. (*C.C.P. 353(b)* was repealed in 1992 and restated in *C.C.P. 366.2*; see *infra*, §517.)

(8) *Guardianship-Conservatorship Law.* In a number of areas, procedures applicable to guardianships and

conservatorships were changed to conform to those applicable to decedents' estates. The most significant are (a) liability of guardians and conservators for breach of fiduciary duties (see *Prob.C.* 2401.3 et seq., infra, §999), (b) requests for special notice (see *Prob.C.* 2700, infra, §987), and (c) examination concerning assets of the estate (see *Prob.C.* 2616, infra, §1035). Changes were also made concerning the assessment of developmentally disabled persons. (See *Prob.C.* 1827.5, infra, §942.)

(9) *Power of Attorney*. The statutes providing for a statutory short form power of attorney were repealed and replaced by the Uniform Statutory Form Power of Attorney Act. The witnessing requirements for a durable power of attorney for health care were modified. The statutes governing powers of attorney were further revised in 1994 and repealed and reenacted as part of the Probate Code. (See *Prob.C.* 4000 et seq.; infra, §837 et seq.)

(10) *Attorneys' Fees Proposal*. The Law Revision Commission proposed the repeal of the statutory fee schedule for attorney compensation, leaving fees as a matter of contract between attorneys and personal representatives. The original Probate Code repeal and reenactment contained statutory language based on the assumption that the compensation recommendation would be adopted by the Legislature. However, the recommendation was not followed, and the reenacted Probate Code was amended to correct the inappropriate references. The compensation statutes were restated in *Prob.C.* 10800 et seq. (See infra, §528 et seq.)

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14 Witkin Sum. Cal. Law Wills § 40

[§ 40] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1990:

(a) Recommendation Relating to Uniform Statutory Rule Against Perpetuities. (20 Cal. Law Rev. Com. Reports, p. 2501.) (See 12 *Summary* (10th), *Real Property*, §175 et seq.)

(b) Recommendation Relating to Powers of Attorney. (20 Cal. Law Rev. Com. Reports, p. 2601.)

(c) Recommendation Relating to Debts That Are Contingent, Disputed, or Not Due. (20 Cal. Law Rev. Com. Reports, p. 2707.)

(d) Recommendation Relating to Remedies of Creditor Where Personal Representative Fails To Give Notice. (20 Cal. Law Rev. Com. Reports, p. 2719.)

(e) Recommendation Relating to Repeal of *Civil Code Section 704* (Passage of Ownership of U.S. Bonds on Death). (20 Cal. Law Rev. Com. Reports, p. 2729.)

(f) Recommendation Relating to Disposition of Small Estate Without Probate. (20 Cal. Law Rev. Com. Reports, p. 2737.)

(g) Recommendation Relating to Right of Surviving Spouse To Dispose of Community Property. (20 Cal. Law Rev. Com. Reports, p. 2769.)

(h) Recommendation Relating to Litigation Involving Decedents. (20 Cal. Law Rev. Com. Reports, p. 2785.)

(i) Recommendation Relating to Compensation in Guardianship and Conservatorship Proceedings. (20 Cal. Law Rev. Com. Reports, p. 2837.)

(j) Recommendation Relating to Recognition of Trustees' Powers. (20 Cal. Law Rev. Com. Reports, p. 2849.)

(k) Recommendation Relating to Access to Decedent's Safe Deposit Box. (20 Cal. Law Rev. Com. Reports, p. 2859.)

(l) Recommendation Relating to Gifts in View of Impending Death. (20 Cal. Law Rev. Com. Reports, p. 2869.)

(m) Recommendation Relating to TOD [Transfer on Death] Beneficiary Designation for Vehicles and Certain Other State-Registered Property. (20 Cal. Law Rev. Com. Reports, p. 2883.)

(2) *Scope of Enactment*. The 1991 Legislature enacted substantially all of these recommendations of the Law Revision Commission.

(3) *Operative Date*. The revised statutes were generally effective January 1, 1992, although the provisions governing the transfer of property registered in beneficiary form had delayed effective dates. (See *infra*, §312.)

(4) *Law Revision Commission Comments*. In conjunction with the adoption of its recommendations, the Law Revision Commission revised its comments to many provisions of the Probate Code. (See Comments to Other Provisions of 1991 General Probate Bill, 20 Cal. Law Rev. Com. Reports, p. 2907; Comments to 1991 Probate Urgency Clean-Up Bill, 20 Cal. Law Rev. Com. Reports, p. 2909; Report of the California Law Revision Commission on Chapter 82 of the Statutes of 1991 (Senate Bill 896), 21 Cal. Law Rev. Com. Reports, p. 67; Report of the California Law Revision Commission on Chapter 156 of the Statutes of 1991 (Assembly Bill 1577), 21 Cal. Law Rev. Com. Reports, p. 69; Report of the California Law Revision Commission on Chapter 1055 of the Statutes of 1991 (Senate Bill 271), 21 Cal. Law Rev. Com. Reports, p. 71; Report of the California Law Revision Commission on Corrected Probate Code Comments, 21 Cal. Law Rev. Com. Reports, p. 75.)

SUPPLEMENT: [This section is current through the latest supplement]



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11. Revision in 1991.
b. Major Changes.

14 Witkin Sum. Cal. Law Wills § 41

[§ 41] Major Changes.

(1) *Transfer of Registered Property on Death.* Provisions were added authorizing vehicles, vessels, mobilehomes, and other specified property to be registered in beneficiary form and transferred at death without probate. (See *infra*, §312.)

(2) *Access to Decedent's Safe Deposit Box.* A person with the key to a decedent's safe deposit box is now entitled to access to inventory the contents and to remove burial instructions, wills, and trusts. (*Prob.C.* 331, *infra*, §414.)

(3) *Gifts in View of Impending Death.* Provisions governing gifts in view of impending death were added. (*Prob.C.* 5700 *et seq.*; see 13 *Summary* (10th), *Personal Property*, §§134, 153.)

(4) *Rule Against Perpetuities.* The Uniform Statutory Rule Against Perpetuities was enacted as part of the Probate Code. (*Prob.C.* 21200 *et seq.*; see 12 *Summary* (10th), *Real Property*, §175 *et seq.*)

(5) *Contingent, Disputed, and Not-Due Debts.* The statutes governing contingent claims were repealed and replaced by new provisions governing contingent, disputed, and not-due debts. (*Prob.C.* 11460 *et seq.*, *infra*, §654.)

(6) *Liability of Surviving Spouse in Possession of Decedent's Property.* New statutes were added to govern the liability of a surviving spouse in possession of a decedent's community and quasi-community property. (*Prob.C.* 13560 *et seq.*, *infra*, §824.)

(7) *Disposition of Community Securities.* A decedent's surviving spouse is now authorized to deal with community and quasi-community securities. (*Prob.C.* 13545, *infra*, §822.)

(8) *Attorneys' Fees.* The attorneys' fees statutes were revised and renumbered without substantive change. (*Prob.C.* 10810 *et seq.*, *infra*, §528 *et seq.*)

(9) *Statutory Will.* The statutory will with trust was repealed and the statutory will provisions were revised and renumbered accordingly. (*Prob.C.* 6200 *et seq.*, *infra*, §115 *et seq.*)

(10) *Durable Power of Attorney for Health Care.* The automatic expiration after 7 years was repealed. Powers now

last indefinitely unless specifically limited in duration. (See *infra*, §869.)

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a. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 42

[§ 42] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1991:

- (a) Relocation of Powers of Appointment Statute. (21 Cal. Law Rev. Com. Reports, p. 91.)
- (b) Nonprobate Transfers of Community Property. (21 Cal. Law Rev. Com. Reports, p. 163.)
- (c) Notice of Trustees' Fees. (21 Cal. Law Rev. Com. Reports, p. 191.)
- (d) Nonprobate Transfer to Trustee Named in Will. (21 Cal. Law Rev. Com. Reports, p. 201.)
- (e) Preliminary Distribution Without Court Supervision. (21 Cal. Law Rev. Com. Reports, p. 209.)
- (f) Transfer of Conservatorship Property to Trust. (21 Cal. Law Rev. Com. Reports, p. 219.)
- (g) Compensation in Guardianship and Conservatorship Proceedings. (21 Cal. Law Rev. Com. Reports, p. 227.)
- (h) Litigation Involving Decedents. (22 Cal. Law Rev. Com. Reports, p. 895 (Revised Recommendation).)
- (i) Standing To Sue for Wrongful Death. (22 Cal. Law Rev. Com. Reports, p. 955 (Tentative Recommendation).)
- (j) Special Needs Trust for Disabled Minor or Incompetent Person. (22 Cal. Law Rev. Com. Reports, p. 989.)

(2) *Enactment.* The 1992 Legislature enacted substantially all of the Law Revision Commission's recommendations.

(3) *Law Revision Commission Comments.* In conjunction with the adoption of its recommendations, the Commission revised some of its comments to proposed statutes. (See Report of the California Law Revision Commission on Chapter 178 of the Statutes of 1992 (Senate Bill 1496) (Omnibus Probate Bill), 22 Cal. Law Rev. Com. Reports, p. 977; Report of the California Law Revision Commission on Chapters 355 and 572 of the Statutes of 1992 (Assembly Bill 3328 and Senate Bill 1496), 22 Cal. Law Rev. Com. Reports, p. 983; Report of the California Law

Revision Commission on Chapter 51 of the Statutes of 1992 (Assembly Bill 1719), 22 Cal. Law Rev. Com. Reports, p. 995.)

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b. Major Changes.

14 Witkin Sum. Cal. Law Wills § 43

[§ 43] Major Changes.

(1) *Powers of Appointment.* The statutes governing powers of appointment were revised and reenacted as part of the Probate Code. (*Prob.C. 600 et seq., 12 Summary (10th), Real Property, §146.*)

(2) *Nonprobate Transfers.* Statutes setting forth the rights and liabilities of a holder of property subject to a nonprobate transfer were added. (*Prob.C. 5002, 5003, infra, §307.*) The principles governing nonprobate transfers of community property were clarified and codified. (*Prob.C. 5010 et seq., infra, §308 et seq.*) The scope of nonprobate transfers that may pass to the trustee of a testamentary trust without administration was expanded. (*Prob.C. 6320, infra, §360.*)

(3) *Litigation Involving Decedent.* The statutes governing causes of action by and against decedents were revised and consolidated. (See *infra, §516 et seq.*)

(4) *Preliminary Distribution.* Specified preliminary distributions are now authorized after notice under the Independent Administration of Estates Act. (*Prob.C. 10520, infra, §754.*)

(5) *Transfer of Conservatorship Property to Trust.* Conservatorship property unintentionally omitted from a trust created by the conservator or conservatee may now be transferred to the trust. (*Prob.C. 2580, infra, §1026.*)

(6) *Special Needs Trust.* Money from a compromise or judgment in favor of a minor or disabled person may now be transferred to a special needs trust. (*Prob.C. 3604, 3605, infra, §1072.*)

(7) *Compensation of Guardians, Conservators, and Attorneys.* Compensation may now be awarded for services performed before appointment. (*Prob.C. 1470, 1472, 2640, 2641, infra, §§908, 909, 1044, 1045.*)

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a. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 44

[§ 44] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* The Commission made the following recommendations in 1993:

- (a) Deposit of Estate Planning Documents with Attorney. (23 Cal. Law Rev. Com. Reports, p. 965.)
- (b) Parent and Child Relationship for Intestate Succession. (23 Cal. Law Rev. Com. Reports, p. 991.)
- (c) Effect of Joint Tenancy on Marital Property. (23 Cal. Law Rev. Com. Reports, p. 1013.)

(2) *Enactment.* The 1993 Legislature enacted the first two of the Commission's recommendations.

(3) *Law Revision Commission Comments.* In conjunction with the adoption of its recommendations, the Commission revised some of its comments to proposed statutes. (See Report of the California Law Revision Commission on Chapter 519 of the Statutes of 1993 (Assembly Bill 209), 23 Cal. Law Rev. Com. Reports, p. 989; Report of the California Law Revision Commission on Chapter 529 of the Statutes of 1993 (Assembly Bill 1137), 23 Cal. Law Rev. Com. Reports, p. 1009.)

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14 Witkin Sum. Cal. Law Wills § 45

[§ 45] Major Changes.

(1) *Self-Dealing by Fiduciaries.* The 1993 Legislature enacted a variety of provisions limiting donative transfers to trustees, personal representatives, guardians, conservators, and related persons and restricting the compensation of these persons. The most significant changes involve the following:

- (a) Limitations on donative transfers to the drafter of a donative instrument and related persons. (See *infra*, §303.)
- (b) Removal of the drafter of a trust or related persons serving as the sole trustee. (See 13 *Summary* (10th), *Trusts*, §52.)
- (c) Restrictions on compensation of an attorney serving as a personal representative. (See *infra*, §533.)
- (d) Restrictions on compensation of an attorney serving as a guardian or conservator and related persons. (See *infra*, §1046.)
- (e) Restrictions on compensation of an attorney serving as a trustee and related persons. (See 13 *Summary* (10th), *Trusts*, §58.)

(2) *Deposit of Estate Planning Documents.* Statutes were enacted clarifying the rights and responsibilities involved when estate planning documents are deposited with an attorney for safekeeping. (See *Prob.C.* 700 et seq., *supra*, §17 et seq.)

(3) *Parent and Child Relationship for Intestate Succession.* The statute governing the parent and child relationship was repealed and replaced by a series of statutes making some substantive changes. (See *Prob.C.* 6450 et seq., *infra*, §93 et seq.)

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C. Structure of Probate Code.

14 Witkin Sum. Cal. Law Wills § 46

[§ 46] Structure of Probate Code.

The Probate Code has the following divisions and parts, some of which are further divided into chapters and articles.

Division 1. Preliminary Provisions and Definitions

Part 1. Preliminary Provisions (§§1-12)

Part 2. Definitions (§§20-88)

Division 2. General Provisions

Part 1. Effect of Death of Married Person on Community and Quasi-Community Property (§§100-105)

Part 2. Surviving Spouse's Right in California Real Property of Nondomiciliary Decedent (§120)

Part 3. Contractual Arrangements Relating to Rights at Death (§§140-147)

Part 4. Establishing and Reporting Fact of Death (§§200-215)

Part 5. Simultaneous Death (§§220-234)

Part 6. Distribution Among Heirs or Beneficiaries (§§240-249)

Part 7. Effect of Homicide or Abuse of an Elder or Dependent Adult (§§250-259)

Part 8. Disclaimer of Testamentary and Other Interests (§§260-295)

Part 9. Trust Company as Fiduciary (§§300-301)

Part 10. Immediate Steps Concerning Decedent's Tangible Personal Property and Safe Deposit Box (§§330-331)

Part 11. Fiduciaries' Wartime Substitution Law (§§350-388)

Part 12. Probate Referees (§§400-453)

Part 13. Litigation Involving Decedent (§§550-555)

Part 14. Powers of Appointment (§§600-695)

Part 15. Deposit of Estate Planning Documents With Attorney (§§700-735)

Part 16. Jurisdiction (§§800-801)

Part 17. Legal Mental Capacity (§§810-813)

Part 18. Right to Trial (§825)

Part 19. Conveyance or Transfer of Property Claimed to Belong to Decedent or Other Person (§§850-859)

Division 3. General Provisions of a Procedural Nature

Part 1. General Provisions (§§1000-1064)

Part 2. Notices and Citations (§§1200-1265)

Part 3. Appeals (§§1300-1312)

Division 4. Guardianship, Conservatorship, and Other Protective Proceedings

Part 1. Definitions and General Provisions (§§1400-1490)

Part 2. Guardianship (§§1500-1611)

Part 3. Conservatorship (§§1800-1969)

Part 4. Provisions Common to Guardianship and Conservatorship (§§2100-2893)

Part 5. Public Guardian (§§2900-2955)

Part 6. Management or Disposition of Community Property Where Spouse Lacks Legal Capacity (§§3000-3154)

Part 7. Capacity Determinations and Health Care Decisions for Adult Without Conservator (§§3200-3212)

Part 8. Other Protective Proceedings (§§3300-3803)

Part 9. California Uniform Transfers to Minors Act (§§3900-3925)

Division 4.5. Powers of Attorney

Part 1. Definitions and General Provisions (§§4000-4054)

Part 2. Powers of Attorney Generally (§§4100-4310)

Part 3. Uniform Statutory Form Power of Attorney (§§4400-4465)

Part 4. Judicial Proceedings Concerning Powers of Attorney (§§4500-4545)

Division 4.7. Health Care Decisions

Part 1. Definitions and General (§§4600-4665)

Part 2. Uniform Health Care Decisions Act (§§4670-4743)

Part 3. Judicial Proceedings (§§4750-4771)

Part 4. Request to Forgo Resuscitative Measures (§§4780-4786)

Part 5. Advance Health Care Directive Registry (§§4800-4805)

Division 5. Nonprobate Transfers

Part 1. Provisions Relating to Effect of Death (§§5000-5032)

Part 2. Multiple-Party Accounts (§§5100-5407)

Part 3. Uniform TOD Security Registration Act (§§5500-5512)

Part 4. Nonprobate Transfer to Former Spouse (§§5600-5604)

Part 5. Gifts in View of Impending Death (§§5700-5705)

Division 6. Wills and Intestate Succession

Part 1. Wills (§§6100-6390)

Part 2. Intestate Succession (§§6400-6455)

Part 3. Family Protection (§§6500-6615)

Part 4. Escheat of Decedent's Property (§§6800-6806)

Division 7. Administration of Estates of Decedents

Part 1. General Provisions (§§7000-7666)

Part 2. Opening Estate Administration (§§8000-8577)

Part 3. Inventory and Appraisal (§§8800-8980)

Part 4. Creditor Claims (§§9000-9399)

Part 5. Estate Management (§§9600-10382)

Part 6. Independent Administration of Estates (§§10400-10592)

Part 7. Compensation of Personal Representative and Attorney for the Personal Representative (§§10800-10850)

Part 8. Accounts (§§10900-11052)

Part 9. Payment of Debts (§§11400-11467)

Part 10. Distribution of Estate (§§11600-12007)

Part 11. Closing Estate Administration (§§12200-12252)

Part 12. Administration of Estates of Missing Persons Presumed Dead (§§12400-12408)

Part 13. Nondomiciliary Decedents (§§12500-12591)

Division 8. Disposition of Estate Without Administration

Part 1. Collection or Transfer of Small Estate Without Administration (§§13000-13210)

Part 2. Passage of Property to Surviving Spouse Without Administration (§§13500-13660)

Division 9. Trust Law

Part 1. General Provisions (§§15000-15004)

Part 2. Creation, Validity, Modification, and Termination of Trusts (§§15200-15414)

Part 3. Trustees and Beneficiaries (§§15600-15805)

Part 4. Trust Administration (§§16000-16465)

Part 5. Judicial Proceedings Concerning Trusts (§§17000-17457)

Part 6. Rights of Third Persons (§§18000-18201)

Part 7. Uniform Management of Institutional Funds Act (§§18500-18509)

Part 8. Payment of Claims, Debts, and Expenses from Revocable Trust of Deceased Settlor (§§19000-19403)

Division 10. Proration of Taxes (§§20100-20225)

Division 11. Construction of Wills, Trusts, and Other Instruments

Part 1. Rules for Interpretation of Instruments (§§21101-21140)

Part 2. Perpetuities (§§21200-21231)

Part 3. No Contest Clause (§§21300-21322)

Part 3.5. Limitations on Transfers to Drafters and Others (§§21350-21356)

Part 4. Abatement (§§21400-21406)

Part 5. Compliance With Internal Revenue Code (§§21500-21541)

Part 6. Family Protection: Omitted Spouses and Children (§§21600-21630)

Part 7. Contracts Regarding Testamentary or Intestate Succession (§§21700)

SUPPLEMENT: [This section is current through the latest supplement]

Division 4. Guardianship, Conservatorship, and Other Protective Proceedings

Part 3. Part 3 now includes §§1800-1970.

Division 4.7. Health Care Decisions

Part 4. In 2008, Part 4 was renamed Request Regarding Resuscitative Measures.*Division 9. Trust Law**Part 7.* In 2008, the Uniform Management of Institutional Funds Act was replaced with the Uniform Prudent Management of Institutional Funds Act. Part 7, entitled Uniform Prudent Management of Institutional Funds Act, now includes §§18501-18510.

Division 11. Construction of Wills, Trusts, and Other Instruments

Part 3. In 2008, Part 3 was revised. It now includes §§21310-21315.



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D. Construction and Effect of Probate Code.

14 Witkin Sum. Cal. Law Wills § 47

[§ 47] Construction and Effect of Probate Code.

(1) *Continuation of Existing Law.* A provision of the Probate Code, "insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment." (*Prob.C. 2(a).*)

(2) *Provisions Based on Uniform Acts.* A provision of the Probate Code, "insofar as it is the same in substance as a provision of a uniform act, shall be construed as to effectuate the general purpose to make uniform the law in those states which enact that provision." (*Prob.C. 2(b).*) The Law Revision Commission Comment states that *Prob.C. 2* applies to all the uniform acts, not just the Uniform Probate Code. (On uniform acts incorporated in Probate Code, see *supra*, §2.)

(3) *General Rules of Construction.* These include:

- (a) *Prob.C. 4* (headings do not affect scope, meaning, or intent of substantive provisions).
- (b) *Prob.C. 5* (certified mail is equivalent to registered mail).
- (c) *Prob.C. 6* (general provisions and rules of construction govern unless wording or context requires otherwise).
- (d) *Prob.C. 7* (references apply to amendments and additions).
- (e) *Prob.C. 8* (definitions of terms used for subdivisions: "chapter," "article," etc.).
- (f) *Prob.C. 9* (present tense includes past and future; future tense includes present).
- (g) *Prob.C. 10* (singular includes plural and plural includes singular).
- (h) *Prob.C. 11* (severability provision).
- (i) *Prob.C. 12* ("shall" is mandatory and "may" is permissive).

(4) *Transitional Provisions.* *Prob.C. 3* provides transitional rules for the application of the "new law" (changes in the Probate Code by amendment, addition, or repeal). The term "old law" means the law in effect before the operative

date of the new law. (*Prob.C. 3(a)*.) Except as otherwise provided in the new law and subject to the following limitations, the new law applies on its operative date "to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person, commencement of a proceeding, making of an order, or taking of an action." (*Prob.C. 3(b), (c)*.) The following limitations apply:

(a) If a paper or document was filed before the operative date, the content, execution, and notice are governed by the old law; subsequent proceedings after the operative date are governed by the new law. (*Prob.C. 3(d)*.)

(b) If an order was made before the operative date or an action was taken on an order before the operative date, the validity of the order or action is governed by the old law; subsequent proceedings after the operative date to modify an order or alter a course of action are governed by the new law. (*Prob.C. 3(e)*.) (See *Estate of Stoddart (2004) 115 C.A.4th 1118, 1126, 9 C.R.3d 770* [old law governed order made before operative date of statutory amendment even though appeal occurred after operative date].)

(c) No person is liable for proper action taken before the operative date even though the action would be improper if taken after the operative date; no person has any duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences. (*Prob.C. 3(f)*.)

(d) If the new law does not apply to a matter that occurred before the operative date, the old law continues to apply, notwithstanding amendment or repeal. (*Prob.C. 3(g)*.)

(e) If the application of a particular provision of the new law "would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstances that existed before the operative date," the court may apply either the new law or the old law "to the extent reasonably necessary to mitigate the substantial interference." (*Prob.C. 3(h)*.)

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E. Definitions.
1. Scope.

14 Witkin Sum. Cal. Law Wills § 48

[§ 48] Scope.

The Probate Code defines or explains a variety of terms that govern the construction of the Code unless "the provision or context otherwise requires." (*Prob.C. 20.*) The defined terms refer to persons and entities (see *infra*, §49), or legal and financial concepts (see *infra*, §50). Additional terms with more limited scope are defined with respect to particular transactions. The following are illustrative:

- (1) *Guardianships and conservatorships. Prob.C. 1401 et seq.* (See *infra*, §906.)
- (2) *Nondomiciliary decedents. Prob.C. 12500 et seq.* (See *infra*, §65.)
- (3) *Statutory will. Prob.C. 6200 et seq.* (See *infra*, §117.)
- (4) *Disclaimers. Prob.C. 260 et seq.* (See *infra*, §330.)
- (5) *Health Care Decisions Law. Prob.C. 4603 et seq.* (See *infra*, §880.)
- (6) *Power of Attorney Law. Prob.C. 44010 et seq.* (See *infra*, §842.)

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2. Persons and Entities.

Witkin Sum. Cal. Law Wills § 49

[§ 49] Persons and Entities.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Beneficiary*. See *Patton v. Sherwood* (2007) 152 C.A.4th 339, 61 C.R.3d 289, 13 Summary (10th), *Trusts*, Supp., §305 [beneficiary of charitable trust includes settlor who has reserved power to enforce trust].(7) *Fiduciary*. A "professional fiduciary" for purposes of the Probate Code is defined in *B. & P.C. 6501(f)*. Beginning January 1, 2009, only a professional fiduciary licensed under *B. & P.C. 6500* et seq. may hold himself or herself out to the public as a professional fiduciary. (*Prob.C. 60.1*, added in 2006 and amended in 2007.) (On *B. & P.C. 6500* et seq., see Supp., *infra*, §970A.)



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14 Witkin Sum. Cal. Law Wills § 49

[§ 49] Persons and Entities.

(1) *Beneficiary*. A "beneficiary" is "a person to whom a donative transfer of property is made or that person's successor in interest." With respect to intestate succession, the term means an heir. With respect to testate succession, the term means a devisee. With respect to a trust, the term means "a person who has any present or future interest, vested or contingent." With respect to a charitable trust, the term includes any person entitled to enforce the trust. (*Prob.C. 24*, based on *Unif.Prob.C.*, §1-201(2).)

(2) *Child*. A "child" is an individual entitled to take as a child by intestate succession "from the parent whose relationship is involved." (*Prob.C. 26*, based on *Unif.Prob.C.*, §1-201(3).) The Comment points out that a stepchild or foster child may be within the definition. (See *infra*, §95.)

(3) *Conservatee*. The term includes a limited conservatee. (*Prob.C. 29*.)

(4) *Conservator*. The term includes a limited conservator. (*Prob.C. 30*.)

(5) *Devisee*. A "devisee" is a person designated in a will to receive a devise. In the case of a devise to a trust or trustee, the trust or trustee is the devisee, not the beneficiaries of the trust. (*Prob.C. 34*, based on *Unif.Prob.C.*, §1-201(8).)

(6) *Domestic Partner*. A "domestic partner" means one of two persons who have filed a Declaration of Domestic Partnership with the Secretary of State under *Family C. 297* et seq. as long as the partnership has not been terminated under *Family C. 299*. (*Prob.C. 37(a)*.) However, if the partnership is terminated by the death of one of the partners and a Notice of Termination was not filed before death, the surviving partner is entitled to all the rights of a surviving domestic partner under the Probate Code. (*Prob.C. 37(b)*.) (On domestic partner registration, see 11 *Summary* (10th), *Husband and Wife*, §25 et seq.)

(7) *Fiduciary*. A "fiduciary" is a personal representative, trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian under the Uniform Transfers to Minors Act, or "other legal representative." (*Prob.C. 39*.)

(8) *Financial Institution*. (See *Prob.C. 40*, based on *C.C.P. 680.200*.)

(9) *Heirs*. The term means those persons entitled to take property of a decedent by intestate succession. It includes a surviving spouse. (*Prob.C. 44*, based on *Unif.Prob.C., §1-201(17)*.)

(10) *Interested Person*. The meaning of "interested person" as it relates to particular individuals is determined "according to the particular purposes of, and matters involved in, any proceeding." Subject to this proviso, the term includes (a) an "heir, devisee, child, spouse, creditor, beneficiary, and any other person" with a right or claim against a trust or estate which might be affected by the proceeding, (b) a person having priority for appointment as a personal representative, and (c) a fiduciary representing an interested person. (*Prob.C. 48*, based on *Unif.Prob.C., §1-201(20)*.) (See *Estate of Davis (1990) 219 C.A.3d 663, 669, 268 C.R. 384* [administrator's surety was interested party entitled to participate in creditor's contest of final accounting; intervention under *C.C.P. 387* was not required].)

(11) *Issue*. The "issue" of a person means "all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent." (*Prob.C. 50*, based on *Unif.Prob.C., §1-201(21)*.)

(12) *Parent*. A "parent" is an individual entitled to take as a parent by intestate succession "from the child whose relationship is involved." (*Prob.C. 54*, based on *Unif.Prob.C., §1-201(28)*.) The Comment points out that a stepparent or foster parent may be within the definition when the requirements of former *Prob.C. 6408* (now *Prob.C. 6454*; see *infra*, §95) are met.

(13) *Person*. (See *Prob.C. 56*, based on *Unif.Prob.C., §1-201(27), (29)*.)

(14) *Personal Representative*. The term "personal representative" means an executor, administrator, administrator with the will annexed, special administrator, successor personal representative, public administrator acting under *Prob.C. 7660* (*infra*, §§423, 424) or "a person who performs substantially the same function under the law of another jurisdiction governing the person's status." The term "general personal representative" excludes a special administrator unless he or she has the powers, duties, and obligations of a general personal representative under *Prob.C. 8545* (*infra*, §427). (*Prob.C. 58*, based on *Unif.Prob.C., §1-201(30)*.)

(15) *Predeceased Spouse*. (See *Prob.C. 59*; *infra*, §84.)

(16) *State*. (See *Prob.C. 74*, based on *Unif.Prob.C., §1-201(40)*.)

(17) *Subscribing Witness*. The term means a witness who signs a will as provided in *Prob.C. 6110* (*infra*, §144). (*Prob.C. 76*.)

(18) *Surviving Spouse*. *Prob.C. 78*, based on *Unif.Prob.C., §2-802*, is designed in part to deal with the problem of a divorce or annulment that is not recognized in California. It does so by applying an estoppel principle against specified persons, and is consistent with prior case law. (Law Rev. Com. Comment.) The term "surviving spouse" does not include the following:

(a) "A person whose marriage to the decedent has been dissolved or annulled," unless the parties were remarried to each other at the time of the decedent's death. (*Prob.C. 78(a)*.)

(b) A person whose marriage is dissolved or annulled under a decree or judgment that is not recognized as valid in California unless the spouses "subsequently participate in a marriage ceremony purporting to marry each to the other" or "subsequently live together as husband and wife." (*Prob.C. 78(b)*.)

(c) A person who participates in a marriage ceremony with a third person following a decree or judgment of dissolution or annulment obtained by the decedent. (*Prob.C. 78(c)*.)

(d) "A person who is a party to a valid proceeding concluded by an order purporting to terminate all marital

property rights." (*Prob.C. 78(d)*.) (See *Estate of Lahey* (1999) 76 C.A.4th 1056, 1059, 91 C.R.2d 30 [because judgment of legal separation was "order purporting to terminate all marital property rights" under *Prob.C. 78(d)*, decedent's spouse was not surviving spouse for purposes of intestate succession].)

(19) *Transferee*. The term means the beneficiary, donee, or other recipient of an interest transferred by an instrument. (*Prob.C. 81.5*.)

(20) *Transferor*. The term means a testator, settlor, grantor, owner, or other person who executes an instrument. (*Prob.C. 81*.)

(21) *Trust Company*. (See *Prob.C. 83*.)

(22) *Trustee*. A "trustee" includes "an original, additional, or successor trustee, whether or not appointed or confirmed by a court." (*Prob.C. 84*, based on *Unif.Prob.C., §1-201(46)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Beneficiary*. See *Patton v. Sherwood* (2007) 152 C.A.4th 339, 61 C.R.3d 289, 13 Summary (10th), *Trusts*, Supp., §305 [beneficiary of charitable trust includes settlor who has reserved power to enforce trust]. (7) *Fiduciary*. A "professional fiduciary" for purposes of the Probate Code is defined in *B. & P.C. 6501(f)*. Beginning January 1, 2009, only a professional fiduciary licensed under *B. & P.C. 6500* et seq. may hold himself or herself out to the public as a professional fiduciary. (*Prob.C. 60.1*, added in 2006 and amended in 2007.) (On *B. & P.C. 6500* et seq., see Supp., infra, §970A.) (18) *Surviving Spouse*. See *Estate of McDaniel* (2008) 161 C.A.4th 458, 461, 73 C.R.3d 907 [following *Estate of Lahey* (1999) 76 C.A.4th 1056, 91 C.R.2d 30, text, p. 112; under *Prob.C. 78(d)*, decedent's spouse was not surviving spouse for purposes of intestate succession where final judgment dividing community property and waiving support had been entered before death].



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
II. CALIFORNIA PROBATE CODE
E. Definitions.
3. Legal and Financial Terms.

14 Witkin Sum. Cal. Law Wills § 50

[§ 50] Legal and Financial Terms.

(1) *Account*. (See *Prob.C.* 21, based on *Unif.Prob.C.*, §6-101(1).)

(2) *Account in Insured Credit Union*. (See *Prob.C.* 22.)

(3) *Account in Insured Savings and Loan Association*. (See *Prob.C.* 23.)

(4) *Community Property*. (See *Prob.C.* 28; *infra*, §264.)

(5) *Devise*. As a noun, the term means "a disposition of real or personal property by will." As a verb, the term means "to dispose of real or personal property by will." (*Prob.C.* 32, based on *Unif.Prob.C.*, §1-201(7).)

(6) *Dissolution of Marriage*. The term includes divorce. (*Prob.C.* 36.)

(7) *Family Allowance*. The term means the allowance provided by *Prob.C.* 6540 et seq. (*infra*, §775 et seq.). (*Prob.C.* 38.)

(8) *Instrument*. The term means "a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property." (*Prob.C.* 45.)

(9) *Insured Account in a Financial Institution*. (See *Prob.C.* 46.)

(10) *Letters*. With respect to personal representatives, "letters" means letters testamentary, letters of administration, letters of administration with the will annexed, or letters of special administration. With respect to guardians and conservators, "letters" means letters of guardianship or conservatorship or temporary guardianship or conservatorship. (*Prob.C.* 52, based on *Unif.Prob.C.*, §1-201(23).)

(11) *Pay-on-Death or P.O.D. Account*. These terms are defined in *Prob.C.* 5140 (4 *Summary* (10th), *Negotiable Instruments*, §78). (*Prob.C.* 55.)

(12) *Probate Homestead*. The term means a homestead provided by *Prob.C.* 6250 et seq. (*infra*, §768 et seq.). (

Prob.C. 60.)

(13) *Property*. The term means "anything that may be the subject of ownership and includes both real and personal property and any interest therein." (*Prob.C. 62*, based on *Unif.Prob.C., §1-201(33)*.) (See *Hecht v. Superior Court* (1993) 16 C.A.4th 836, 850, 20 C.R.2d 275, *infra*, §352 [decendent's ownership interest in his cryogenically frozen sperm was sufficient to constitute property within the meaning of *Prob.C. 62*].)

(14) *Quasi-Community Property*. (See *Prob.C. 66*; *infra*, §264.)

(15) *Real Property*. The term includes "a leasehold interest in real property." (*Prob.C. 68*.)

(16) *Security*. The term is broadly defined and includes "any interest or instrument commonly known as a security." (*Prob.C. 70*, based on *Unif.Prob.C., §1-201(37)*.)

(17) *Totten Trust Account*. (See *Prob.C. 80*, based on *Unif.Prob.C., §6-101(14)*; 13 *Summary* (10th), *Trusts*, §8 et seq.)

(18) *Trust*. A "trust" includes (a) any express trust, whether private or charitable, whenever and however created, and (b) a trust, created or determined by a judgment or decree, which is to be administered in the manner of an express trust. The term excludes other constructive trusts, resulting trusts, and a variety of fiduciary relationships and financial arrangements listed in the statute. (*Prob.C. 82*; see 13 *Summary* (10th), *Trusts*, §1.)

(19) *Will*. The term includes "codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will." (*Prob.C. 88*, based on *Unif.Prob.C., §1-201(48)*.) (See *Rest.3d, Property (Wills and Other Donative Transfers)* §3.1 [attested will].)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
III. CONFLICT OF LAWS
A. Restatement.

Witkin Sum. Cal. Law Wills § 51

[§ 51] Restatement.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *First Restatement*. See McDougal, American Conflicts Law 5th, §181 et seq.; superseding Leflar 4th, cited in the text.



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Witkin Summary of California Law
III. CONFLICT OF LAWS
A. Restatement.

14 Witkin Sum. Cal. Law Wills § 51

[§ 51] Restatement.

(1) *First Restatement.* The first Restatement of Conflict of Laws laid down two general rules for intestate succession and testamentary disposition: (a) Questions relating to *real property* were determined solely by the law of the *situs*--the state where the property was located. (b) Questions relating to *personal property* were determined by the law of the decedent's *domicile*, under the maxim *mobilia sequuntur personam* ("moveables follow the person"). (See generally Leflar, American Conflicts Law 4th, §194 et seq.; Scoles & Hay, Conflict of Laws 3d, §20.1 et seq.; 16 *Am.Jur.2d* (1998 ed.), *Conflict of Laws* §30 et seq.; 23 *Am.Jur.2d* (2002 ed.), *Descent and Distribution* §§12, 13.)

(2) *Second Restatement.* The Second Restatement retains the "situs" rule where succession to real property is involved (*Rest.2d, Conflict of Laws* §236 et seq.), and the "domicile" rule where succession to personal property is involved (*Rest.2d, Conflict of Laws* §260 et seq.). (See *infra*, §52 et seq.) The rules, however, are restated with these modifications: Succession is determined by "the law that would be applied" (a) by the courts of the situs, where real property is involved, or (b) by the courts of the state where decedent was domiciled at death, where personal property is involved. Usually this will be the "local law" of the situs or decedent's domicile. (*Rest.2d, Conflict of Laws* §§236 et seq., 260 et seq., and Comments.) But there may be circumstances where the courts of the situs or decedent's domicile would look to the law of some other state to determine questions relating to succession; and, in those circumstances, the forum court should do likewise. (See, e.g., *Rest.2d, Conflict of Laws* §236, Comment a; §260, Comment b.) (On general question of when to apply another state's entire law, including its choice-of-law rules, see 1 *Summary* (10th), *Contracts*, §61.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *First Restatement.* See McDougal, American Conflicts Law 5th, §181 et seq.; superseding Leflar 4th, cited in the text.



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Witkin Summary of California Law

III. CONFLICT OF LAWS

B. Succession.

1. Real Property.

14 Witkin Sum. Cal. Law Wills § 52

[§ 52] Real Property.

Intestate succession to interests in real property is determined "by the law that would be applied by the courts of the situs." Usually this will be the local law of the situs. (*Rest.2d, Conflict of Laws* §236; see *Estate of Loyd* (1917) 175 C. 699, 705, 167 P. 157; 20 *Stanf. L. Rev.* 11; 23 *Am.Jur.2d* (2002 ed.), *Descent and Distribution* §12.) This general rule applies to issues such as these:

(1) *Legitimacy*. Whether a person must be legitimate in order to inherit. (*Rest.2d, Conflict of Laws* §237; see *Estate of Loyd*, supra; *Estate of Lund* (1945) 26 C.2d 472, 477, 159 P.2d 643; 20 *Stanf. L. Rev.* 1045; 87 A.L.R.2d 1274 [conflict of laws as to legitimacy as affecting descent and distribution].) (On Uniform Parentage Act, abolishing distinction between legitimate and illegitimate children, see 10 *Summary* (10th), *Parent and Child*, §17 et seq.)

(2) *Adoption*. Whether an adopted child can inherit. (*Rest.2d, Conflict of Laws* §238; see 87 A.L.R.2d 1240 [conflict of laws as to adoption as affecting descent and distribution]; on law applied to determine validity of adoption, see 10 *Summary* (10th), *Parent and Child*, §91.)

(3) *Pretermission*. The rights of a pretermitted heir. (See 99 A.L.R.3d 724 [conflict of law as to pretermitted heir].)

(4) *Escheat*. Escheat of real property to the state in the absence of heirs. Escheat is determined solely by the local law of the situs. (*Rest.2d, Conflict of Laws* §243.) (For California statute on escheat, see infra, §99 et seq.)

(5) *Spousal Rights*. The rights of a surviving spouse. (*Rest.2d, Conflict of Laws*, §§241, 242; see *Estate of Hisey* (1930) 106 C.A. 678, 680, 289 P. 889; 69 A.L.R.3d 1081 [conflict of laws regarding election for or against will].)

In *Estate of Patmore* (1956) 141 C.A.2d 416, 296 P.2d 863, the testator, domiciled in California, left real and personal property in California and Kansas. Administration was commenced in California and ancillary administration in Kansas. The testator's surviving husband filed an election in the Kansas court to take his statutory half of the Kansas land instead of taking under the will. While the Kansas proceeding was pending, the California court ordered distribution in accordance with the will. *Held*, reversed. Kansas law governs the right of election, and his election there will be recognized here. This makes applicable the rule that one who elects to take against the will cannot also claim rights under it. If the California decree were given effect, the husband would be deprived of his Kansas election. Hence,

the California decree of distribution should be postponed until the validity of his election is determined by the *Kansas* court. (141 C.A.2d 419.)

West's Key Number Digest, Descent and Distribution k.4

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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III. CONFLICT OF LAWS

B. Succession.

2. Personal Property.

a. In General.

14 Witkin Sum. Cal. Law Wills § 53

[§ 53] In General.

Intestate succession to personal property is determined by "the law that would be applied by courts of the state where the decedent was domiciled at the time of his death." Usually this will be the local law of the state of domicile. (*Rest.2d, Conflict of Laws* §260, Comments b, c; see C.C. 946 ["If there is no law to the contrary in the place where personal property is situated"]; *Estate of Hebert* (1941) 42 C.A.2d 664, 665, 109 P.2d 729; *Estate of Nolan* (1955) 135 C.A.2d 16, 19, 286 P.2d 899; 22 Cal. L. Rev. 223; 6 So. Cal. L. Rev. 54; 46 Cal. L. Rev. 185; 23 Am.Jur.2d (2002 ed.), *Descent and Distribution* §13.) Hence, the law of the decedent's domicile will ordinarily determine the following:

(1) *Legitimacy*. Whether a person must be legitimate to inherit. (*Rest.2d, Conflict of Laws* §261; see 20 Stanf. L. Rev. 1045; 87 A.L.R.2d 1274 [conflict of laws as to legitimacy as affecting descent and distribution].) (On Uniform Parentage Act abolishing distinction between legitimate and illegitimate children, see 10 *Summary* (10th), *Parent and Child*, §17 et seq.)

(2) *Adoption*. Whether an adopted child can inherit. (See *infra*, §54.)

(3) *Pretermission*. The rights of a pretermitted heir. (See 99 A.L.R.3d 724 [conflict of law as to pretermitted heir].)

(4) *Escheat*. Escheat of personal property to the state in the absence of heirs. "The chattels of an intestate pass to the state in which they are administered" (i.e., generally the state where they are located) when there are no heirs. (*Rest.2d, Conflict of Laws* §266.) (For California statute on escheat, see *infra*, §99 et seq.)

(5) *Spousal Rights*. The rights of a surviving spouse. (*Rest.2d, Conflict of Laws* §265; see *Estate of O'Connor* (1933) 218 C. 518, 526, 23 P.2d 1031; *Estate of Bir* (1948) 83 C.A.2d 256, 262, 188 P.2d 499 [right of two widows of polygamous marriage]; 69 A.L.R.3d 1081 [conflict of laws regarding election for or against will].)

West's Key Number Digest, Descent and Distribution k.5

SUPPLEMENT: [This section is current through the latest supplement]



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III. CONFLICT OF LAWS

B. Succession.

2. Personal Property.

b. Adopted Child.

14 Witkin Sum. Cal. Law Wills § 54

[§ 54] Adopted Child.

In accordance with the domicile rule (see *supra*, §53), whether an adopted child can inherit personal property is determined "by the law that would be applied by courts of the state where the decedent was domiciled at the time of death," usually the local law of the state of domicile. (*Rest.2d, Conflict of Laws* §262.) Thus, a child validly adopted in another state succeeds to property of a decedent domiciled here in accordance with California law. The reason is that status as an adopted child is determined by the law of the state of adoption (see 10 *Summary* (10th), *Parent and Child*, §91), but once this is established, the right of inheritance in California is the same as that of a child adopted here. (See *Estate of Hunsicker* (1923) 65 C.A. 114, 223 P. 411; *Estate of Hebert* (1941) 42 C.A.2d 664, 665, 109 P.2d 729; *Estate of Tibbetts* (1941) 48 C.A.2d 177, 179, 119 P.2d 368; 87 A.L.R.2d 1240 [conflict of laws as to adoption as affecting descent and distribution].)

The converse of the situation in *Hebert* and *Tibbetts* arose in *Estate of Grace* (1948) 88 C.A.2d 956, 200 P.2d 189. G adopted E in Texas in 1894. She then came to California, where E married, had a daughter R, and died. Subsequently, on G's death, R claimed the right to inherit through her mother (E, the adopted child), by right of representation. This theory was rejected on the ground that "adoption" under the Texas law prior to 1907 merely constituted E an heir and did not give her the status of an adopted child; hence, the California rules of inheritance relating to an adopted child could not be applied. (88 C.A.2d 959.) (For alternative theory on which inheritance was allowed, see 1 *Summary* (10th), *Contracts*, §86.) (See *Ehrenclou v. MacDonald* (2004) 117 C.A.4th 364, 12 C.R.3d 411, *infra*, §230 [citing *Tibbetts* and *Grace*; law of state where adoption took place determines status of parties to adoption].)

Estate of Zaepfel (1951) 102 C.A.2d 774, 228 P.2d 600, involved successive adoptions. S was adopted by her stepmother in Connecticut and later by her grandmother in New York. Her stepmother died domiciled in California, leaving all California personal property to charity. *Held*, S was not entitled to inherit. New York law would permit an adopted child to inherit from a natural parent and, presumably, from the prior adoptive parent (the stepmother). But New York law only gave her the status of an adopted child of the second adoptive parent, and her right to inherit from the prior adoptive parent is denied by *California law*. (102 C.A.2d 777.) (See 24 *So. Cal. L. Rev.* 478.)

West's Key Number Digest, Descent and Distribution k.5

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
III. CONFLICT OF LAWS
C. Testamentary Disposition.
1. Validity of Will.

14 Witkin Sum. Cal. Law Wills § 55

[§ 55] Validity of Will.

(1) *Real Property*. The validity and effect of a will, insofar as it disposes of real property, are determined by "the law that would be applied by the courts of the situs," usually the local law of the situs. (*Rest.2d, Conflict of Laws* §239, and Comments a, c, d, e, f [law selected by this rule determines capacity of person to make will or accept devise, formal validity of will, and validity in other respects, such as whether the will violates rule against perpetuities, nature of estate created, and whether land acquired after execution passes under its terms]; see *Estate of Anthony* (1932) 127 C.A. 186, 191, 15 P.2d 531; 72 Harv. L. Rev. 1156.)

(2) *Personal Property*. The validity and effect of a testamentary transfer of personal property are determined by "the law that would be applied by the courts of the state where the testator was domiciled at the time of his death," usually the local law of the state of domicile. (*Rest.2d, Conflict of Laws* §263; see *Estate of Barton* (1925) 196 C. 508, 512, 238 P. 681; *Estate of Layton* (1933) 217 C. 451, 463, 19 P.2d 793; *Estate of O'Connor* (1933) 218 C. 518, 526, 23 P.2d 1031; *Estate of Burnison* (1949) 33 C.2d 638, 640, 204 P.2d 330; *Estate of Brace* (1960) 180 C.A.2d 797, 799, 4 C.R. 683 [California testator; codicil made in Mexico and void there but valid under California law governed disposition of personal property]; *Estate of Moore* (1961) 190 C.A.2d 833, 842, 12 C.R. 436 [Florida testator; holographic will invalid there; California bank accounts did not pass under it]; 46 Cal. L. Rev. 185; 72 Harv. L. Rev. 1162.)

(3) *Choice of Law*. *Prob.C. 6113*, based on *Unif.Prob.C.*, §2-506, provides that a written will is valid if it is executed pursuant to any of the following:

- (a) *Prob.C. 6110* (witnessed wills). (See *infra*, §137 et seq.)
- (b) *Prob.C. 6111* (holographic wills). (See *infra*, §150 et seq.)
- (c) *Prob.C. 6200* et seq. (statutory wills). (See *infra*, §115 et seq.)
- (d) *Prob.C. 6380* et seq. (international wills). (See *infra*, §71 et seq.)
- (e) The law of the place of execution at the time of execution.

(f) The law of the place of the testator's domicile, abode, or nationality at the time of execution or at the time of death.

SUPPLEMENT: [This section is current through the latest supplement]



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III. CONFLICT OF LAWS

C. Testamentary Disposition.

2. Interpretation and Construction of Instrument.

14 Witkin Sum. Cal. Law Wills § 56

[§ 56] Interpretation and Construction of Instrument.

(1) *Choice of Law Specified in Will.* A will, whether it disposes of real or personal property, is to be construed in accordance with the law of the state "designated for this purpose in the will." (*Rest.2d, Conflict of Laws* §§240(1), 264(1); see *Unif.Prob.C.*, §2-602 [meaning and legal effect of will is determined by law of state selected by testator "unless the application of that law is contrary to the public policy of this state"].) The designation may be express, or it "may be apparent from the language of the will or from other circumstances that the testator wished to have the local law of a particular state govern the construction of the will." (*Rest.2d, Conflict of Laws*, §§240, 264, Comment e.)

(2) *Choice of Law Not Specified in Will.* In the absence of any designation, the will is to be construed in accordance with the traditional rules: (a) Insofar as it disposes of real property, "the rules of construction that would be applied by the courts of the situs." (*Rest.2d, Conflict of Laws* §240(2); see 72 *Harv. L. Rev.* 1158.) (b) Insofar as it disposes of personal property, "the rules of construction that would be applied by the courts where the testator was domiciled at the time of his death." (*Rest.2d, Conflict of Laws* §240(2); see 72 *Harv. L. Rev.* 1162; 52 *A.L.R.2d* 490 [what law determined who are "heirs," "issue," etc.].)

(3) *Meaning and Effect of Disposition.* The meaning and legal effect of a disposition in an instrument is determined by the local law of the state selected by the transferor in the instrument, unless the application of that law is contrary to (a) the community and quasi-community property rights of the surviving spouse, (b) California public policy applicable to the disposition, or (c) in the case of a will, *Prob.C.* 6500 et seq. (family protection; see *infra*, §765 et seq.). (*Prob.C.* 21103.)

SUPPLEMENT: [This section is current through the latest supplement]



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III. CONFLICT OF LAWS
C. Testamentary Disposition.
3. Effect of Equitable Conversion.

Witkin Sum. Cal. Law Wills § 57

[§ 57] Effect of Equitable Conversion.

SUPPLEMENT: [This section is current through the latest supplement]
See *27A Am.Jur.2d (2008 ed.), Equitable Conversion §2.*



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CHAPTER XXI - Wills and Probate

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III. CONFLICT OF LAWS

C. Testamentary Disposition.

3. Effect of Equitable Conversion.

14 Witkin Sum. Cal. Law Wills § 57

[§ 57] Effect of Equitable Conversion.

Where a will directs that real property be sold and turned into money, the property is deemed transformed or converted into personal property under the doctrine of equitable conversion. (See 13 *Summary* (10th), *Equity*, §177.) If the property is located in one state and the testator is domiciled in another, application of the doctrine can have an obvious effect on conflict of law questions.

In *McCaughna v. Bilhorn* (1935) 10 C.A.2d 674, 52 P.2d 1025, the testator, a resident of Illinois, made a valid witnessed will in 1907 in favor of her husband, and a holographic will in 1932 (void in Illinois but valid in California) ordering the sale of California land and distribution of the value of 40 acres to plaintiff, her brother. The normal result would have been that the holographic will, though invalid where made, would effectively dispose of the California land under California law. But the will did not devise the real property; the testator ordered it sold and the money given to plaintiff. Under the equitable conversion doctrine, the land would be treated as personalty, and would pass under the law of the decedent's domicile (Illinois) to the husband in accordance with the earlier witnessed will. However, because this would have defeated the clear intention expressed in the later will, it was held that the equitable conversion doctrine should not be applied. (10 C.A.2d 681.) (See 24 Cal. L. Rev. 605; 49 Harv. L. Rev. 994; 17 Stanf. L. Rev. 1118.)

In *Estate of Loyd* (1917) 175 C. 699, 167 P. 157, the testator died in California, leaving some of his estate here to his wife; his will directed the executors to sell land he owned in Iowa, for the benefit of his 12 children. H, an illegitimate child, sued in California and established his right to share in the estate as a pretermitted heir; but the Iowa law recognized no such right. If an equitable conversion took place, the property to be sold would be considered personalty, and would pass in accordance with the law of California. But the devolution of real property is governed by the law of its situs. The children therefore elected to take the property as land. This resulted in a reconversion, and all of the property in Iowa went to them under the law of Iowa. (175 C. 706.) (For criticism of reconversion doctrine used in *Loyd*, see 17 Stanf. L. Rev. 1116.)

The first Restatement of Conflict of Laws took the position that a will disposing of real property should be governed by the law of the situs, regardless of direction to sell. (See 24 Cal. L. Rev. 606.) The Second Restatement provides: "Whether an interest in land is equitably converted by dealings with the land, so that for choice-of-law purposes the interest should be treated in the same way as an interest in a movable, will be determined in the same way as this question would be determined by the courts of the situs." (*Rest.2d, Conflict of Laws* §225, Comment b,

Illustration 2; see 43 A.L.R.2d 569 [conflict of laws as to equitable conversion]; 27A Am.Jur.2d (1996 ed.), *Equitable Conversion* §2; for analysis of equitable conversion doctrine and conflict of laws, see 16 Stanf. L. Rev. 568; 17 Stanf. L. Rev. 1095, 1111.)

SUPPLEMENT: [This section is current through the latest supplement]
See 27A Am.Jur.2d (2008 ed.), *Equitable Conversion* §2.



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C. Testamentary Disposition.

4. Revocation of Will.

14 Witkin Sum. Cal. Law Wills § 58

[§ 58] Revocation of Will.

Revocation is governed by the same rules that govern validity of a will (see *supra*, §55). The effect of an act of revocation is determined by the law that would be applied: (1) By the courts of the situs, insofar as the will disposes of real property. (*Rest.2d, Conflict of Laws* §239, Comment i; see *20 Stanf. L. Rev.* 2.) (2) By the courts of the testator's domicile at the time of his death, insofar as it disposes of personal property. (*Rest.2d, Conflict of Laws* §263, Comment i.) (See *9 A.L.R.2d 1412* [conflicts of laws respecting revocation of will]; *16 Am.Jur.2d (1998 ed.)*, *Conflict of Laws* §68.)

Thus, in the case of a will of personal property, if the testator does an act in one state that would revoke the will, and thereafter changes his domicile and dies in another state where that act would not be a revocation, the governing law is that of the state of domicile at the time of death, and the will is good. (*Estate of Patterson (1923)* 64 C.A. 643, 647, 222 P. 374; see *12 Cal. L. Rev.* 519; cf. *Estate of Barton (1925)* 196 C. 508, 512, 238 P. 681 [applying rule to determination of lapse of legacies].)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Bases for Administration.

Witkin Sum. Cal. Law Wills § 59

[§ 59] Bases for Administration.

SUPPLEMENT: [This section is current through the latest supplement]

See McDougal, American Conflicts Law 5th, §188 et seq.; superseding Leflar 4th, cited in the text.



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a. Bases for Administration.

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[§ 59] Bases for Administration.

Either the state where the decedent was domiciled at the time of death, or a state where the decedent left assets, may probate a will and appoint an executor or administrator. (*Rest.2d, Conflict of Laws* §§314, 315, and Introductory Note, p. 356 et seq.; *Estate of Estrem* (1940) 16 C.2d 563, 567, 107 P.2d 36; see Leflar, *American Conflicts Law* 4th, §202; Scoles and Hay, *Conflict of Laws* 3d, §22.1 et seq.; 31 *Am.Jur.2d* (2002 ed.), *Executors and Administrators* §96 et seq.) But questions may arise as to what state may grant letters to administer an estate on the theory that intangible property is located within its borders.

(1) *Chose in Action*. Where the property consists of an ordinary chose in action or a claim not represented by a negotiable document, the situs is where the debtor is domiciled, for it is there that the debtor can be sued and the claim collected. (See *Estate of Glassford* (1952) 114 C.A.2d 181, 186, 249 P.2d 908.) This rule is applied to a cause of action for wrongful death; the plaintiff may obtain letters of administration to collect the claim (i.e., to bring the action) in any state where the governing statute authorizes the action. (*Estate of Waits* (1944) 23 C.2d 676, 678, 679, 146 P.2d 5; *Rest.2d, Conflict of Laws* §314; see 13 *Stanf. L. Rev.* 744.)

(2) *Negotiable Instruments*. As to bonds and negotiable instruments, where the claim is represented by a document, the modern rule is that administration may be had where the paper is physically located, and payment of a note made to an ancillary administrator in possession of it is a good discharge of the debtor. (*Rest.2d, Conflict of Laws* §314, Comment i, §326(3); see *Estate of Glassford, supra*.)

(3) *Shares of Stock*. The general rule treats shares of stock as assets at the place of incorporation; the place where the certificate is located is of no importance. (See *Murphy v. Crouse* (1901) 135 C. 14, 20, 66 P. 971; but cf. *Union Trust Co. of San Francisco v. Pacific Tel. & Tel. Co.* (1916) 31 C.A. 64, 67, 159 P. 820 [if domiciliary administrator in possession of certificate has shares actually transferred prior to ancillary administration in state of incorporation, transferee will prevail as against subsequently appointed ancillary administrator].) However, under the Uniform Commercial Code (U.C.C. 8301 et seq.), transfer of certificated shares without the certificate is ineffective. It would seem that, in jurisdictions that have adopted the Code, the stock should be regarded as an asset at the place where the certificate is located, rather than at the state of incorporation. (See *Rest.2d, Conflict of Laws* §314, Comment i; §324 [certificate not in lawful possession of foreign administrator may be administered in state where certificate is located].)

SUPPLEMENT: [This section is current through the latest supplement]

See McDougal, American Conflicts Law 5th, §188 et seq.; superseding Leflar 4th, cited in the text.



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b. Ancillary Administration.

14 Witkin Sum. Cal. Law Wills § 60

[§ 60] Ancillary Administration.

Because a decedent, though domiciled in one state, may leave property in one or more other states, there may be more than one proceeding to administer the estate. The state of the decedent's domicile may admit the will to probate, issue letters, and thus provide for original administration. (See *Estate of Reynolds* (1933) 217 C. 557, 560, 20 P.2d 323.)

But if there is property located in another state, that state has jurisdiction to administer it. (*Estate of Glassford* (1952) 114 C.A.2d 181, 188, 249 P.2d 908.) Hence, proceedings are frequently brought for the appointment of an ancillary administrator to take charge of that property. (See *Rest.2d, Conflict of Laws* §§334, 364; *Richards v. Blaisdell* (1909) 12 C.A. 101, 110, 106 P. 732; 31 Am.Jur.2d (2002 ed.), *Executors and Administrators* §1057 et seq.) The ancillary administrator collects the assets within his or her own state, pays local creditors and, pursuant to order of the court, usually transfers the remainder to the domiciliary representative, although in special cases the court of ancillary administration may order distribution to those entitled to the assets. (*Rest.2d, Conflict of Laws* §§364, 365; see *Estate of Lathrop* (1913) 165 C. 243, 249, 131 P. 752; *Bankers Trust Co. v. Patton* (1934) 1 C.2d 172, 178, 33 P.2d 1019; C.E.B., 3 Decedent Estate Practice, §33.1 et seq.) (For California statutory procedure, see *infra*, §65 et seq.)

The principal purpose of ancillary administration is to collect and hold a decedent's local assets for the payment of debts owed in the state. "Local creditors and claimants need not be compelled to present their claims in another forum nor accept unenforceable assurances of payment by foreign executors which may later be repudiated while assets are situated in this state which may properly be applied to satisfy the obligations against the estate." (*Estate of Glassford, supra*, 114 C.A.2d 191.)

Separate administration proceedings are distinct and, even though the same person qualifies both as domiciliary and ancillary representative, the offices are separate and there is no privity. So where a plaintiff gets a judgment against the representative in a foreign state, and sues again at the domicile, the action must be brought on the original claim, not on the judgment. The theory is that each administrator can only be ordered to pay by the court that appointed him or her and out of assets in the administrator's possession. (*Rest.2d, Conflict of Laws* §356(1); *Richards v. Blaisdell, supra*, 12 C.A. 105; see *Riley v. New York Trust Co.* (1942) 315 U.S. 343, 62 S.Ct. 608, 613, 86 L.Ed. 885, 893; for exception to this rule where same person is executor in both states, see *Rest.2d, Conflict of Laws* §356(2).)

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c. Probate of Foreign Will.

14 Witkin Sum. Cal. Law Wills § 61

[§ 61] Probate of Foreign Will.

(1) *Original Probate*. Although it is the usual practice to probate a will first at the testator's domicile, original probate is permissible wherever administration of an intestate estate can be had, i.e., wherever assets are found. (*Rest.2d, Conflict of Laws* §314; *Estate of Estrem* (1940) 16 C.2d 563, 567, 107 P.2d 36; see 20 A.L.R.3d 1033 [probate, in state where assets are found, of will of nonresident not probated in state of domicile].)

(2) *Ancillary Probate*. After a will has been admitted to original probate or has been established or proved in another state or country, if there are assets in California that require administration the will may also be probated here as a foreign will. (See *Rest.2d, Conflict of Laws* §314.) An erroneous finding of domicile by the foreign court is not an obstacle to ancillary probate here; i.e., if a will of a decedent who was a resident of California has been probated in a foreign state, the California court may nevertheless admit it to ancillary probate here as a foreign will. (*Estate of Sankey* (1926) 199 C. 391, 400, 249 P. 517; *Estate of Reynolds* (1933) 217 C. 557, 560, 20 P.2d 323.)

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d. Collection of Foreign Assets.

14 Witkin Sum. Cal. Law Wills § 62

[§ 62] Collection of Foreign Assets.

May the domiciliary representative go to the foreign state and collect assets located there, without ancillary administration? The principal objection is that the state where the property is located has an interest in administration for the purpose of paying local creditors' claims and taxes, and the procedure should protect their rights.

(1) *Real Property*. As to real property, it is clear that the domiciliary representative cannot get title to make a valid transfer; local administration is essential. (*Rest.2d, Conflict of Laws* §334; see *Estate of Strong* (1898) 119 C. 663, 665, 51 P. 1078; *Blair v. Hazzard* (1910) 158 C. 721, 725, 112 P. 298; cf. *Unif.Prob.C.*, §§4-204, 4-205.)

(2) *Tangible Personal Property*. As to tangible personal property, there is some authority for taking possession without administration, in the absence of an ancillary administrator, subject to a duty to account in the domiciliary state. (*Rest.2d, Conflict of Laws* §§321, 322, 323; *Estate of Ortiz* (1890) 86 C. 306, 312, 24 P. 1034; see *Estate of Grivel* (1932) 128 C.A. 186, 190, 17 P.2d 172; *Unif.Prob.C.*, §4-201.)

(3) *Intangible Personal Property*. As to intangibles such as debts owed to the decedent but not evidenced by a negotiable instrument, the main problem is whether the debtor may safely pay the foreign representative. The better rule seems to be that a debtor who pays without knowledge of the appointment of a local ancillary administrator is discharged; and a foreign representative who accepts payment without knowledge of the appointment of a local administrator is not liable to the local administrator. (*Rest.2d, Conflict of Laws* §§328, 329; *Fox v. Tay* (1891) 89 C. 339, 350, 26 P. 897; *Union Trust Co. of San Francisco v. Pacific Tel. & Tel. Co.* (1916) 31 C.A. 64, 67, 159 P. 820; *Estate of Barreiro* (1932) 125 C.A. 752, 765, 14 P.2d 786 [administrator who collects intangibles in foreign state may be held to account for them in state of appointment]; *Unif.Prob.C.*, §§4-201, 4-202.)

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e. Actions by or Against Representative.

14 Witkin Sum. Cal. Law Wills § 63

[§ 63] Actions by or Against Representative.

(1) *Actions by Representative.* Except where permitted by special statute, an executor or administrator cannot sue in a representative capacity, outside the state of appointment, on a claim of the decedent. (*Rest.2d, Conflict of Laws* §354, Comments a, b; *C.C.P. 1913(b)*; see *Estate of Rawitzer* (1917) 175 C. 585, 587, 166 P. 581; *Winbigler v. Shattuck* (1920) 50 C.A. 562, 563, 195 P. 707; 52 A.L.R.2d 1016 [capacity of local or foreign personal representative to maintain action for death under foreign statute providing for action by personal representative]; 52 A.L.R.2d 1048 [capacity of foreign or ancillary personal representative to maintain action for death under forum statute providing for action by personal representative].) The same rule applies to a foreign guardian. (See *Mayer v. Willing* (1961) 196 C.A.2d 379, 381, 16 C.R. 476; *Siegal v. Superior Court* (1962) 203 C.A.2d 22, 25, 21 C.R. 348; 94 A.L.R.2d 162 [capacity of guardian to sue or be sued outside state of appointment].)

It has been held, however, that where the foreign representative does sue and prosecutes the claim to judgment without objection being raised as to capacity, the judgment is res judicata in a subsequent suit in the state of appointment. (*Canfield v. Scripps* (1936) 15 C.A.2d 642, 646, 59 P.2d 1040; see *Rest.2d, Conflict of Laws* §354(1).)

Three main exceptions to the general rule have been recognized:

(a) Where the claim arises out of transactions by the representative, and therefore is in the representative's favor as such, the representative is the proper party to sue anywhere. (*Rest.2d, Conflict of Laws* §355; *Lewis v. Adams* (1886) 70 C. 403, 411, 11 P. 833 [decedent's cause of action was reduced to judgment after death; debt merged in judgment, and new claim belonged to representative]; *Fox v. Tay* (1891) 89 C. 339, 350, 26 P. 897.)

(b) The representative may assign a negotiable instrument, and the assignee may sue in a state where the representative would not be qualified to act. (See *McCully v. Cooper* (1896) 114 C. 258, 261, 46 P. 82.) The Restatement goes further: the representative in possession of a negotiable instrument may bring the action. (*Rest.2d, Conflict of Laws* §354(2).)

(c) A foreign representative may maintain an action to enforce a claim "when maintenance of the suit is in the best interests of the estate and will not prejudice the interests of local creditors." (*Rest.2d, Conflict of Laws* §354(4), and see

Comment e and Illustrations 1, 2.)

(2) *Actions Against Representative*. The traditional rule as to actions against a representative is similar to that governing actions by the representative: A representative cannot ordinarily be sued outside the state of appointment on a claim against the decedent, because the representative is not personally liable for the claim, and only the court that appointed the representative may authorize payment out of the assets of the estate. (See *Philbrook v. Randall* (1924) 195 C. 95, 102, 231 P. 739; *Canfield v. Scripps*, *supra*.) The same rule applies to a foreign guardian. (See *Mayer v. Willing*, *supra*; 94 A.L.R.2d 162 [capacity of guardian to sue or be sued outside state of appointment].) (For different rule applicable to testamentary trustee, see *Estate of Knox* (1942) 52 C.A.2d 338, 344, 126 P.2d 108, 2 Cal. Proc. (4th), *Jurisdiction*, §431; 31 Cal. L. Rev. 199; 13 Summary (10th), *Trusts*, §16.)

The Restatement, however, approves an action against a foreign representative if the law of the forum authorizes it, in three situations:

(a) Where "suit could have been maintained within the state against the decedent during his lifetime because of a basis of jurisdiction other than mere physical presence." (*Rest.2d, Conflict of Laws* §358(a); see *Mitsui Mfrs. Bank v. Tucker* (1984) 152 C.A.3d 428, 430, 199 C.R. 517, 2 Cal. Proc. (4th), *Jurisdiction*, §177.) (On action against foreign representative of nonresident motorist under *Veh.C.* 17450 et seq., see *Kaplan v. Superior Court* (1961) 191 C.A.2d 492, 494, 12 C.R. 781; 3 Cal. Proc. (4th), *Actions*, §946.)

(b) Where the representative has done an act in the state in the representative's official capacity. (*Rest.2d, Conflict of Laws* §358(b).) Thus, a foreign representative who enters an appearance in an action involving the estate will be bound by the judgment. (*Rest.2d, Conflict of Laws* §358, Comment h; see *Canfield v. Scripps*, *supra*.)

(c) A representative may, of course, be sued on the representative's own obligations, or on torts committed after appointment. (*Rest.2d, Conflict of Laws* §359.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Actions Against Representative*. *Knox case*:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §445.

Mitsui Mfrs. Bank case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §185.

Action against foreign representative of nonresident motorist:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §1030.



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2. California Statutes on Nondomiciliary Decedent.

a. Law Revision Commission Recommendation.

14 Witkin Sum. Cal. Law Wills § 64

[§ 64] Law Revision Commission Recommendation.

Former Probate Code provisions established a procedure for the collection of a claim or the removal of personal property by a foreign representative holding letters issued in any state or territory of the United States. (See *Robertson v. United States Nat. Bank* (1965) 235 C.A.2d 63, 67, 44 C.R. 871; 17 U.S.F. L. Rev. 655.)

The Law Revision Commission's 1987 Recommendation Relating to Nondomiciliary Decedents (see 19 Cal. Law Rev. Com. Reports, pp. 995, 997) concluded that the existing procedure was time-consuming and expensive, and recommended changes described as follows:

(1) *Sister State Domiciliaries*. "The proposed law grants automatic recognition to a sister state order admitting a nondomiciliary's will to probate, unless an opponent of the will shows one of the following: (1) that the sister state order is not based on a finding that the decedent was domiciled in the sister state at the time of death, (2) that all interested parties were not given notice and an opportunity for contest in the sister state proceedings, or (3) that the determination in the sister state is not final. This approach comports with the substance of the law governing full faith and credit."

(2) *Foreign Nation Domiciliaries*. "The full faith and credit clause does not apply to judgments of foreign nations, but states have typically recognized such judgments on the same grounds as sister state judgments. This has been the policy of California since 1851. The proposed law retains this aspect of existing law, but also gives the court discretion to deny recognition if the order admitting the will in the foreign nation was made under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. This discretion is drawn from the statute applicable to recognition of money judgments rendered in foreign nations. In the case of a foreign nation order, the burden is on the proponent of the will to show (1) that the decedent was domiciled in the foreign nation, (2) that all interested parties were given notice and an opportunity for contest in the proceedings in the foreign nation, and (3) that the determination in the foreign nation is final."

(3) *Affidavit Procedure for Collection of Small Estates*. "The existing summary procedure for collection of accounts in a financial institution by a foreign personal representative requires publication of notice to creditors and beneficiaries and a 30-day wait for objections before the funds may be released. In the case of a small account (an account of \$ 1,000 or less) the cost of publication is unduly great in relation to the size of the account. In the case of a large account the

30-day wait is unreasonably short when compared with the normal four-month creditor claim period."

"The proposed law abandons these procedures in favor of the affidavit procedure for collection of personal property of small estates without administration. Under this procedure, a sister state personal representative would be able to bring an action to compel the holder of property to pay or deliver it to the sister state personal representative without the need to first petition for ancillary administration. Making this procedure available to the sister state personal representative puts the personal representative on essentially the same footing as a successor under the nondomiciliary decedent's will. The sister state personal representative would not be liable to creditors or other successors, however, if the property collected by affidavit is turned over to the nondomiciliary's estate for administration in the sister state."

"With the exception of this affidavit procedure, the proposed law retains the rule that a sister state or foreign nation personal representative who wants to bring suit in California to collect debts owed the decedent or other property of the decedent must first be appointed as a local personal representative in California ancillary proceedings."

(4) *Informal Collection of Personal Property.* "The proposed law deletes the requirement that the State Controller must consent to removal of the property from California in the case of informal collection of the decedent's personal property. The repeal of the California inheritance tax makes this provision unnecessary."

(5) *Appointment of Local Personal Representative.* "The proposed law gives a sister state personal representative a priority for appointment as a local personal representative. A priority is also given to the nominee of the sister state personal representative. The sister state personal representative or the nominee must still qualify for appointment under relevant provisions."

(6) *Representative Subject to California Jurisdiction.* "The proposed law makes clear that a sister state or foreign nation personal representative who does specified acts in California thereby submits to the jurisdiction of the California courts. This is consistent with general civil practice."

The Commission's recommendations were enacted in 1988 and became effective July 1, 1989. (See *Prob.C. 12500* et seq., *infra*, §65 et seq.)

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b. Definitions and Scope.

14 Witkin Sum. Cal. Law Wills § 65

[§ 65] Definitions and Scope.

(1) *Definitions.* The following terms are defined for the purposes of *Prob.C. 12500* et seq.:

(a) *Ancillary administration* means proceedings in California for administration of the estate of a nondomiciliary decedent. (*Prob.C. 12501.*)

(b) *Foreign nation* means a jurisdiction other than a state of the United States. (*Prob.C. 12502.*)

(c) *Foreign nation personal representative* means a personal representative appointed in a jurisdiction other than a state of the United States. (*Prob.C. 12503.*)

(d) *Local personal representative* means a nondomiciliary decedent's personal representative appointed in California. (*Prob.C. 12504.*)

(e) *Nondomiciliary decedent* means a person who dies domiciled in a sister state or foreign nation. (*Prob.C. 12505.*)

(f) *Sister state* means a state other than California. (*Prob.C. 12506.*)

(g) *Sister state personal representative* means a personal representative appointed in a sister state. (*Prob.C. 12507.*)

(2) *Applicability of Probate Code Provisions.* Except to the extent otherwise provided in *Prob.C. 12500* et seq., ancillary administration of a decedent's estate is subject to all other provisions of the Probate Code concerning the administration of decedents' estates, including, but not limited to, "opening estate administration, inventory and appraisal, creditor claims, estate management, independent administration, compensation, accounts, payment of debts, distribution, and closing estate administration." (*Prob.C. 12530.*) The Law Revision Commission Comment cited an exception: *Prob.C. 12540* (infra, §68).

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c. Ancillary Administration.

14 Witkin Sum. Cal. Law Wills § 66

[§ 66] Ancillary Administration.

(1) *Opening Administration.* "Any interested person, or a sister state or foreign nation personal representative," may commence an ancillary administration proceeding by a petition for probate of the will or appointment of a local personal representative, or both. (*Prob.C. 12510.*) Venue is determined by *Prob.C. 7052* (infra, §353). (*Prob.C. 12511.*) The procedure and notice are the same as in proceedings for probate of a will or appointment of a personal representative of a person who dies domiciled in California, except as provided in *Prob.C. 12520* et seq. (infra, §67). (*Prob.C. 12512.*) The Law Revision Commission Comment to *Prob.C. 12510* observes that "interested person" includes a person named as executor in the will.

(2) *Appointment of Local Representative.* *Prob.C. 12513*, based on *Unif.Prob.C., §3-203*, deals with appointment where the decedent dies while domiciled in a sister state. (a) A personal representative appointed by a court of that state has priority over all other persons, "except where the decedent's will nominates a different person to be the personal representative in this state." (b) The sister state personal representative may nominate another, and the nominee has the same priority. The Law Revision Commission Comment points out that this provision applies only where the decedent was domiciled in a sister state, not in a foreign nation, and deals only with priority; the representative must still qualify for appointment pursuant to *Prob.C. 8400* et seq. (infra, §415).

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2. California Statutes on Nondomiciliary Decedent.

d. Will Previously Admitted to Probate.

Witkin Sum. Cal. Law Wills § 67

[§ 67] Will Previously Admitted to Probate.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Admission of Will Admitted in Foreign Nation.*

(b) *Exceptions.* The Uniform Foreign-Money Judgments Recognition Act was repealed and replaced by the Uniform Foreign-Country Money Judgments Recognition Act (*C.C.P. 1713 et seq.*) in 2007. *C.C.P. 1716(b)(1)* is comparable to former *C.C.P. 1713.4(a)(1)*.



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D. Probate and Administration of Estates.

2. California Statutes on Nondomiciliary Decedent.

d. Will Previously Admitted to Probate.

14 Witkin Sum. Cal. Law Wills § 67

[§ 67] Will Previously Admitted to Probate.

(1) *Applicable Procedure Where Will Is Admitted to Probate in Sister State or Foreign Nation. Prob.C. 12520* provides as follows:

(a) If the will satisfies the requirements of *Prob.C. 12520 et seq.*, probate of the will in an ancillary administration proceeding is governed by *Prob.C. 12520 et seq. (Prob.C. 12520(a).)*

(b) If the will does not satisfy the requirements of *Prob.C. 12520 et seq.*, it may be probated in an ancillary administration proceeding pursuant to *Prob.C. 8000 et seq. (infra, §583 et seq.). (Prob.C. 12520(b).)*

The Law Revision Commission Comment points out that the general provisions on opening administration (*Prob.C. 8000 et seq.*) apply in two situations: where the sister state or foreign nation order is not entitled to recognition, and where admission to probate has not been sought in the sister state or foreign nation.

(2) *Petition for Probate.* A petition for probate under *Prob.C. 12520 et seq.* must include both of the following:

(a) The will or an authenticated copy. (*Prob.C. 12521(a).)*

(b) "An authenticated copy of the order admitting the will to probate in the sister state or foreign nation or other evidence of the establishment or proof of the will in accordance with the law of the sister state or foreign nation." (*Prob.C. 12521(a).)* An "authenticated copy" is a copy that satisfies the requirements of *Ev.C. 1530 et seq.* (authentication of writings in official custody; see *2 Cal. Evidence (4th), Documentary Evidence, §41 et seq.*). (*Prob.C. 12521(b).)*

(3) *Admission of Will Admitted in Sister State.* "If a will of a nondomiciliary decedent was admitted to probate, or established or proved, in accordance with the laws of a sister state," the court must admit the will to probate in California, and may not permit a contest or revocation of probate, unless one or more of the following are shown:

(a) "The determination in the sister state is not based on a finding that at the time of death the decedent was domiciled in the sister state." (*Prob.C. 12522(a).)*

(b) "One or more interested parties were not given notice and an opportunity for contest in the proceedings in the sister state." (*Prob.C. 12522(b)*.)

(c) "The determination in the sister state is not final." (*Prob.C. 12522(c)*.)

The Law Revision Commission Comment points out that *Prob.C. 12522* "presumes a sister state order admitting a will to probate to be valid. The burden is on an opponent of the will to show that the order is not entitled to full faith and credit in this state."

(4) *Admission of Will Admitted in Foreign Nation.* *Prob.C. 12523* provides as follows:

(a) *Conditions.* Except as provided in *Prob.C. 12523(b)*, if a will of a nondomiciliary decedent was admitted to probate, or established or proved, in accordance with the laws of a foreign nation, the court must admit the will to probate in California, and may not permit a contest or revocation of probate, "if it appears from the order admitting the will to probate in the foreign nation, or otherwise appears, that all of the following conditions are satisfied":

(1) "The determination in the foreign nation is based on a finding that at the time of death the decedent was domiciled in the foreign nation." (*Prob.C. 12523(a)(1)*.)

(2) "All interested parties were given notice and an opportunity for contest in the proceedings in the foreign nation." (*Prob.C. 12523(a)(2)*.)

(3) "The determination in the foreign nation is final." (*Prob.C. 12523(a)(3)*.)

(b) *Exceptions.* The court may refuse to admit the will, even though it is shown to satisfy the conditions set forth in *Prob.C. 12523(a)*, "where the order admitting the will was made under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." (*Prob.C. 12523(b)*.)

The Law Revision Commission Comment points out that, under *Prob.C. 12523(a)*, the proponent of the will has the burden of showing that the specified conditions are satisfied, and that the source of *Prob.C. 12523(b)* is the Uniform Foreign-Money Judgments Recognition Act (*C.C.P. 1713.4(a)(1)*); see 8 *Cal. Proc. (4th), Enforcement of Judgment*, §433).

(5) *Effect of Admission.* A nondomiciliary decedent's will admitted to probate under *Prob.C. 12520* et seq. has the same force and effect as the will of a person who dies while domiciled in California that is admitted to probate in California. (*Prob.C. 12524*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Admission of Will Admitted in Foreign Nation.*

(b) *Exceptions.* The Uniform Foreign-Money Judgments Recognition Act was repealed and replaced by the Uniform Foreign-Country Money Judgments Recognition Act (*C.C.P. 1713* et seq.) in 2007. *C.C.P. 1716(b)(1)* is comparable to former *C.C.P. 1713.4(a)(1)*.

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment*, §462 et seq.



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D. Probate and Administration of Estates.

2. California Statutes on Nondomiciliary Decedent.

e. Distribution to Sister State Representative.

14 Witkin Sum. Cal. Law Wills § 68

[§ 68] Distribution to Sister State Representative.

(1) *Conditions for Distribution of Personal Property.* "If a person dies while domiciled in a sister state, the court in an ancillary administration proceeding may make an order for preliminary or final distribution of all or part of the decedent's personal property in this state to the sister state personal representative if distribution is in the best interest of the estate or interested persons." (*Prob.C. 12540(a)*.) The order is made pursuant to *Prob.C. 11600* et seq. (infra, §721 et seq.). (*Prob.C. 12540(b)*.)

The Law Revision Commission makes the following points:

(a) This procedure applies only where the nondomiciliary decedent was domiciled in a sister state, not in a foreign nation.

(b) All of the procedural provisions of *Prob.C. 11600* et seq. apply (e.g., petition, notice of hearing, opposition, time when preliminary or final distribution may be ordered, and conclusiveness of order).

(c) Distribution to the personal representative is dependent on a determination that it is in the best interest of the estate or interested persons; in other cases, distribution is made directly to the beneficiaries.

(2) *Distribution of Real Property Proceeds.* If necessary to make distribution pursuant to *Prob.C. 12540* et seq., "real property in the nondomiciliary decedent's estate may be sold and the court may order the proceeds to be distributed to the sister state personal representative. The sale shall be made in the same manner as other sales of real property of a decedent." (*Prob.C. 12541*.)

The Law Revision Commission points out that this section is an exception to the normal rule where distribution is made to the beneficiaries (see *Prob.C. 12530*, supra, §65), and that it permits the court to order a sale in the course of either preliminary or final distribution. The Comment adds: "This section is not intended to limit authority the sister state personal representative may have under the Independent Administration of Estates Act" (*Prob.C. 10400* et seq., infra, §745 et seq.).

(3) *Insolvent Estate.* "If the nondomiciliary decedent's estate in the sister state where the decedent was domiciled is

insolvent, distribution may be made only to the sister state personal representative and not to the beneficiaries."
(*Prob.C. 12542.*)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Probate and Administration of Estates.

2. California Statutes on Nondomiciliary Decedent.

f. Collection of Personal Property.

14 Witkin Sum. Cal. Law Wills § 69

[§ 69] Collection of Personal Property.

(1) *Affidavit Procedure for Small Estate.* If a nondomiciliary decedent's property in California satisfies the requirements of *Prob.C. 13100* (infra, §797), a sister state personal representative may, without petitioning for ancillary administration, use the affidavit procedure of that section to collect personal property of the decedent. (*Prob.C. 12570*.) The Law Revision Commission notes the following:

(a) *Prob.C. 12570* makes the sister state personal representative a successor in interest for the purpose of *Prob.C. 13051(d)* (infra, §795).

(b) The affidavit procedure for collecting real property (*Prob.C. 13200* et seq., infra, §807 et seq.) is not available to the sister state personal representative, but the beneficiaries may employ the procedure.

(c) "Transfer to the sister state personal representative under this procedure results in a transfer for the purposes of administration, whereas the general affidavit procedure results in transfer to the ultimate beneficiaries."

(d) The procedure under *Prob.C. 12570* is not available to foreign nation personal representatives.

(2) *Effect of Transfer to Representative.* The effect of payment, delivery, or transfer of personal property to the sister state personal representative, and the effect of failure to do so, are governed by *Prob.C. 13100* et seq. (infra, §797 et seq.). (*Prob.C. 12571*.)

(3) *Action To Compel Transfer.* The sister state personal representative may bring an action against a holder of the decedent's property, and may be awarded attorneys' fees, as provided in *Prob.C. 13105(b)* (infra, §801). (*Prob.C. 12572*.) The Law Revision Commission points out that this provision is an exception to the general rule that a sister state personal representative may not bring an action in California (*C.C.P. 1913*), and adds: "Where property has been transferred to a successor by affidavit, the sister state personal representative does not have the power to bring an action under Section 13111(d) unless the sister state personal representative is appointed as the local personal representative in ancillary administration."

(4) *Liability of Representative.* A sister state personal representative who takes property by affidavit under *Prob.C.*

12570 et seq. is not liable as a person to whom payment, delivery, or transfer of the decedent's property is made under *Prob.C. 13109* or *13110* to the extent that the sister state personal representative restores the property to the nondomiciliary decedent's estate in the sister state in compliance with *Prob.C. 13111*. (*Prob.C. 12573*.)

The Law Revision Commission notes that *Prob.C. 12573* provides a special rule governing the liability of a sister state personal representative who takes personal property by an affidavit under *Prob.C. 12570 et seq.* The sister state personal representative is liable to creditors under *Prob.C. 13110* or to heirs or devisees under *Prob.C. 13111* "only if the property collected by affidavit is not put in the estate for purposes of administration in the sister state."

SUPPLEMENT: [This section is current through the latest supplement]



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2. California Statutes on Nondomiciliary Decedent.

g. Jurisdiction Over Foreign Representative.

14 Witkin Sum. Cal. Law Wills § 70

[§ 70] Jurisdiction Over Foreign Representative.

(1) *By Act of Foreign Representative.* Under *Prob.C. 12590*, based on *Unif.Prob.C., §4-301*, a sister state personal representative or foreign nation personal representative submits personally in a representative capacity to the jurisdiction of the courts of California in any proceeding relating to the estate by doing any of the following actions:

(a) Filing a petition for ancillary administration. (*Prob.C. 12590(a).*)

(b) Receiving money or other personal property pursuant to *Prob.C. 12570* (*supra*, §69). Jurisdiction under this provision is limited to the amount of money and the value of personal property received. (*Prob.C. 12590(b).*)

(c) Doing an act in California as a personal representative that would have given California jurisdiction over the personal representative as an individual. (*Prob.C. 12590(c).*)

(2) *By Act of Decedent.* "A sister state personal representative or foreign nation personal representative is subject to the jurisdiction of the courts of this state in a representative capacity to the same extent that the nondomiciliary decedent was subject to jurisdiction at the time of death." (*Prob.C. 12591*, based on *Unif.Prob.C., §4-302.*) The Law Revision Commission Comment points out that this provision is consistent with *C.C.P. 410.10* (see *2 Cal. Proc. (4th), Jurisdiction*, §8), and with *Mitsui Mfrs. Bank v. Tucker (1984) 152 C.A.3d 428, 199 C.R. 517*, but that nothing in the section excuses a creditor from compliance with applicable creditor claim requirements in ancillary administration proceedings.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *By Act of Decedent.*

Cross-Reference: *2 Cal. Proc. (5th), Jurisdiction*, §9.



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III. CONFLICT OF LAWS
E. Uniform International Wills Act.
1. In General.

14 Witkin Sum. Cal. Law Wills § 71

[§ 71] In General.

(1) *Nature and Purpose of Act.* The Uniform International Wills Act (Unif.Prob.C., §2-1001 et seq.) was approved by the National Conference of Commissioners on Uniform State Laws in 1977. (See 8 (Part I) U.L.A. (Master Ed.), p. 243 et seq.) It was adopted in California by the 1979 Legislature as former Prob.C. 60 et seq. (See 11 *Pacific L. J.* 295.) In 1985, the Act was restated without substantive change as Prob.C. 6380 et seq. (See Prob.C. 6390 [references to former law are deemed to be references to new provisions].)

The Act was derived from agreements reached at a Washington Convention held in 1973. In construing it, "regard shall be had to its international origin and to the need for uniformity in its interpretation." (Prob.C. 6387.) Its purpose is to provide testators with a way of making wills that are valid in all countries joining the Convention. "The Convention and the annexed uniform law deal only with the formal validity of wills. Thus, the proposal is entirely neutral in relation to local laws dealing with revocation of wills, or those defining the scope of testamentary power, or regulating the probate, interpretation, and construction of wills, and the administration of decedents' estates. The proposal describes a highly formal mode of will execution; one that is sufficiently protective against imposition and mistake to command international approval as being safe enough. However, failure to meet the requirements of an international will does not necessarily result in invalidity, for the mode of execution described for an international will does not pre-empt or exclude other standards of testamentary validity." (Commissioners' Prefatory Note, 8 (Part I) U.L.A. (Master Ed.), pp. 244, 245.)

(2) *Validity of International Will.* An "international will" is a will executed in conformity with Prob.C. 6381 et seq. The will is valid as to form "irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile, or residence of the testator." (Prob.C. 6381(a).) However, invalidity as an international will does not affect its validity as a will "of another kind," e.g., under common law rules. (Prob.C. 6381(b).) An international will is subject to the ordinary rules of revocation. (Prob.C. 6386.) A joint will cannot be an international will. (Prob.C. 6381(c).)

(3) *Persons Empowered To Supervise Execution ("Authorized Persons").* An "authorized person" is a person who, by Prob.C. 6388 or the laws of the United States (including members of the diplomatic and consular service designated by Foreign Service Regulations), "is empowered to supervise the execution of international wills." (Prob.C. 6380(b).) California attorneys "in good standing as active law practitioners of this state" are authorized persons. (Prob.C. 6388.)

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SUPPLEMENT: [This section is current through the latest supplement]



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III. CONFLICT OF LAWS
E. Uniform International Wills Act.
2. Requisites of Will.

14 Witkin Sum. Cal. Law Wills § 72

[§ 72] Requisites of Will.

(1) *Formalities of Execution.*

(a) The will must be in writing. "It need not be written by the testator himself or herself. It may be written in any language, by hand or by any other means." (*Prob.C. 6382(a).*)

(b) The testator must declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is the testator's will and that the testator knows the contents. The testator need not inform the witnesses, or the authorized person, of the contents of the will. (*Prob.C. 6382(b).*)

(c) The testator must sign the will or acknowledge his or her signature in the presence of the witnesses and the authorized person. (*Prob.C. 6382(c).*)

(d) "If the testator is unable to sign, the absence of the testator's signature does not affect the validity of the international will if the testator indicates the reason for his or her inability to sign and the authorized person makes note thereof on the will. In that case it is permissible for any other person present, including the authorized person or one of the witnesses, at the direction of the testator to sign the testator's name for the testator if the authorized person makes note of this also on the will, but it is not required that any person sign the testator's name for him or her." (*Prob.C. 6382(d).*)

(e) The witnesses and the authorized person must "there and then attest the will by signing in the presence of the testator." (*Prob.C. 6382(e).*)

(f) The signature must be placed at the end of the will. If the will consists of several sheets, each sheet must be signed and numbered. (*Prob.C. 6383(a).*)

(g) The date of the will is the date of its signature by the authorized person. That date must be noted at the end of the will by the authorized person. (*Prob.C. 6383(b).*)

(h) The authorized person must ask the testator whether the testator wishes to make a declaration concerning the safekeeping of the will. If so the place of safekeeping must be mentioned in the certificate provided for in *Prob.C. 6384.*

(*Prob.C. 6383(c).*)

The requirements of *Prob.C. 6383*, though mandatory and perhaps enforceable by sanctions against the authorized person, are not essential; i.e., noncompliance with them does not invalidate the will. (*Prob.C. 6383(d).*)

(2) *Certificate of Authorized Person.* The authorized person must attach to the will a signed certificate establishing that the requirements have been fulfilled. The authorized person keeps a copy and delivers another to the testator. (*Prob.C. 6384.*) A statutory form for the certificate is set forth in *Prob.C. 6384*. The absence or irregularity of a certificate, however, does not affect the formal validity of the will. In the absence of evidence to the contrary, the certificate is conclusive of the formal validity of the instrument as a will under *Prob.C. 6380 et seq.* (*Prob.C. 6385.*)

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E. Uniform International Wills Act.

3. Registry System.

14 Witkin Sum. Cal. Law Wills § 73

[§ 73] Registry System.

An important part of the Uniform International Wills Act is the method provided for safekeeping, search, and discovery of the will and certificate. "The Secretary of State shall establish a registry system by which authorized persons may register in a central information center information regarding the execution of international wills, keeping that information in the strictest confidence until the death of the maker and then making it available to any person desiring information about any will who presents a death certificate or other satisfactory evidence of the testator's death to the center. Information that may be received, preserved in confidence until death, and reported as indicated is limited to the name, social security or other individual identifying number established by law, if any, address, date and place of birth of the testator, and the intended place of deposit or safekeeping of the instrument pending the death of the maker. The Secretary of State, at the request of the authorized person, may cause the information it receives about execution of any international will to be transmitted to the registry system of another jurisdiction as identified by the testator, if that other system adheres to rules protecting the confidentiality of the information similar to those established in this state." (*Prob.C. 6389.*)

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Witkin Summary of California Law IV. INTESTATE SUCCESSION A. In General.

14 Witkin Sum. Cal. Law Wills § 74

[§ 74] In General.

(1) *Definitions and Distinctions.* *Succession* is the acquisition of title to property of a person who dies without disposing of it by will. The decedent is called an intestate, and is said to die intestate. (See generally *Unif.Prob.C.*, §2-101 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §2.1 [intestacy: general principles and definitions]; C.E.B., 3 Decedent Estate Practice, §24.15 et seq.; 97 *Harv. L. Rev.* 1108 [future of law of succession]; 23 *Am.Jur.2d* (2002 ed.), *Descent and Distribution* §1 et seq.)

The *heirs* of a person are those whom the law appoints to succeed at the decedent's death to his or her estate in case of intestacy, by virtue of the statutes of succession. (*Dickey v. Walrond* (1927) 200 C. 335, 339, 253 P. 706; *Estate of Jones* (1934) 3 C.A.2d 395, 397, 39 P.2d 847.) Heirs must be distinguished from next of kin. The words "kin," "kinship," and "next of kin" refer solely to persons related by blood, and do not include those related by affinity. (*Estate of Roberts* (1948) 85 C.A.2d 609, 614, 194 P.2d 28; see *infra*, §263 [same meaning given to phrase "kindred of the testator" in anti-lapse statute].)

(2) *Statutory Framework.* Intestate succession is governed by *Prob.C.* 6400 et seq., effective January 1, 1985, superseding former *Prob.C.* 200 et seq. (On death before effective date, see *Prob.C.* 6414.) The general succession statutes apply to separate property (see *infra*, §77 et seq.). (On surviving spouse's share in community and quasi-community property, see *infra*, §76.)

(3) *General Rule.* "Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in" *Prob.C.* 6400 et seq. (*Prob.C.* 6400, based on *Unif.Prob.C.*, §2-101.)

(4) *Heir Must Survive Decedent.* "A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period." The survival requirement does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state. (*Prob.C.* 6403(a).) Deaths before 1990 are governed by prior law. (*Prob.C.* 6403(b).)

(5) *Dower and Curtesy Abolished.* Except to the extent provided in *Prob.C.* 120, "the estates of dower and curtesy are not recognized." (*Prob.C.* 6412, based on *Unif.Prob.C.*, §2-113; see 11 *Summary* (10th), *Community Property*, §1.)

The Law Revision Commission Comment points out that *Prob.C. 120* "gives the surviving spouse rights in California real property of a nondomiciliary decedent that may be akin to dower or curtesy in the decedent's state of domicile." (See *infra*, §272.)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION
B. Distribution of Shares by Representation.

14 Witkin Sum. Cal. Law Wills § 75

[§ 75] Distribution of Shares by Representation.

(1) *In General.* Succession by right of representation or *per stirpes* takes place when the descendants of a decedent take the same share or right in the estate of another that the decedent would have taken if the decedent had been alive. (See *Lombardi v. Blois* (1964) 230 C.A.2d 191, 198, 40 C.R. 899, *infra*, §223.) Succession *per capita* is the division of the estate in equal shares among a group of persons who are related to the decedent in equal degree. (See C.E.B., 1 Will Drafting 3d, §12.32; *Rest.3d, Property (Wills and Other Donative Transfers)* §2.3 [intestate share of surviving descendants]; 23 *Am.Jur.2d* (2002 ed.), *Descent and Distribution* §89 et seq.)

In *Maud v. Catherwood* (1945) 67 C.A.2d 636, 155 P.2d 111, decedent left property in trust, for himself, his wife, and his children. The trust was to terminate on the death of the last surviving beneficiary, and the property was then to be distributed to the living lineal descendants of the decedent as they would have been entitled to take as heirs at law had the decedent himself been the last survivor. Four grandchildren and two great-grandchildren claimed the estate. A grandchild and a great-grandchild each claimed as the sole living descendant of different children of the testator; of the other beneficiaries, two claimed under a third child and two under a fourth child of the testator. *Held*, because the claimants were not in equal degree they succeeded by right of representation, not *per capita*, even though the result was to give a greater share to the great-grandchild who was the sole living descendant of one child of the testator than to a grandchild who was not the sole living descendant of another child of the testator. (67 C.A.2d 643.) (See 33 *Cal. L. Rev.* 324.)

(2) *Current Statute.* The current statute adopts a modified system of representation in which the primary division of the estate takes place at the first generation of descendants with any living members. (See Law Rev. Com. Comment to *Prob.C.* 240.)

"If a statute calls for property to be distributed or taken in the manner provided in this section, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that issue who leaves issue then living being divided in the same manner among his or her then living issue." (*Prob.C.* 240, based on *Unif.Prob.C.*, §2-106.) *Prob.C.* 240 applies where the death occurs on or after January 1, 1985. Deaths before that date are governed by prior law. (*Prob.C.* 241.)

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IV. INTESTATE SUCCESSION

C. Surviving Spouse's Share in Community and Quasi-Community Property.

14 Witkin Sum. Cal. Law Wills § 76

[§ 76] Surviving Spouse's Share in Community and Quasi-Community Property.

On the death of a married person, one-half of the community and quasi-community property belongs to the surviving spouse and the other half belongs to the decedent. (*Prob.C. 100(a), 101(a)*; *infra*, §265.) However, spouses may agree in writing to divide community and quasi-community property unequally on the basis of (1) aggregate value, or (2) a division of individual assets. (*Prob.C. 100(b), 101(b)*; *infra*, §265.) In the case of intestate succession, the one-half of the community and quasi-community property that belongs to the decedent under *Prob.C. 100(a), 101(a)* passes to the surviving spouse. (*Prob.C. 6401(a), (b)*.) (For definition of "community property," see *Prob.C. 28*, *infra*, §264; for definition of "quasi-community property," see *Prob.C. 66*, *infra*, §264; on surviving spouse's right to compel restoration of property transferred by decedent, see *Prob.C. 102*, *infra*, §267; on disposition of property where married persons die simultaneously, see *Prob.C. 103*, *infra*, §265; on community property held in revocable trust, see *Prob.C. 104*, *infra*, §265; on disposition of estate without administration, see *Prob.C. 13000 et seq.*, *infra*, §793 *et seq.*)

Community property may also be held with right of survivorship. On the death of one of the spouses, the property passes to the survivor subject to the same procedures as property held in joint tenancy. (C.C. 682.1; see *infra*, §266.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Intestate Shares in Separate Property.
1. In General.

14 Witkin Sum. Cal. Law Wills § 77

[§ 77] In General.

If a decedent is married or has a domestic partner at the time of death, part or all of the separate property in the decedent's intestate estate passes to the surviving spouse or domestic partner under *Prob.C. 6401* (infra, §78). The part of the intestate estate not passing to the surviving spouse or domestic partner under *Prob.C. 6401*, or the entire intestate estate if there is no surviving spouse or domestic partner, passes to other heirs under *Prob.C. 6402* (infra, §79 et seq.). However, *Prob.C. 6402* is subject to *Prob.C. 6402.5* (infra, §85), applying special distribution rules to property attributable to a predeceased spouse where there is no surviving spouse or issue of the decedent. (See *46 Hastings L. J. 941* [drafting intestacy provisions for heirs other than surviving spouse]; *Rest.3d, Property (Wills and Other Donative Transfers)* §2.3 [intestate share of surviving descendants], §2.4 [intestate share of surviving ancestors and collateral relatives]; *23 Am.Jur.2d* (2002 ed.), *Descent and Distribution* §77 et seq.)

Prob.C. 6402 sets forth the following order of priority:

- (1) Issue of decedent. (*Prob.C. 6402(a)*, infra, §79.)
- (2) Parent or parents. (*Prob.C. 6402(b)*, infra, §80.)
- (3) Issue of parents. (*Prob.C. 6402(c)*, infra, §80.)
- (4) Grandparents or issue of grandparents. (*Prob.C. 6402(d)*, infra, §81.)
- (5) Issue of predeceased spouse. (*Prob.C. 6402(e)*, infra, §84.)
- (6) Next of kin. (*Prob.C. 6402(f)*, infra, §82.)
- (7) Parents of predeceased spouse or their issue. (*Prob.C. 6402(g)*, infra, §84.)

West's Key Number Digest, Descent and Distribution k.25.1 et seq.

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2. Surviving Spouse or Domestic Partner.

14 Witkin Sum. Cal. Law Wills § 78

[§ 78] Surviving Spouse or Domestic Partner.

(1) *Statutory Share*. The intestate share of the surviving spouse or domestic partner in separate property is as follows:

(a) "The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister." (*Prob.C. 6401(c)(1)*.)

(b) One-half of the intestate estate where the decedent leaves (1) only one child or the issue of a deceased child, or (2) no issue but leaves a parent or parents or their issue or the issue of either of them. (*Prob.C. 6401(c)(2)*.)

(c) One-third of the intestate estate where the decedent leaves (1) more than one child, (2) one child and the issue of one or more deceased children, or (3) issue of two or more deceased children. (*Prob.C. 6401(c)(3)*.) (See *Rest.3d, Property (Wills and Other Donative Transfers) §1.2* [intestate share of surviving spouse].)

(2) *Putative Spouse as Surviving Spouse*. In *Estate of Leslie (1984) 37 C.3d 186, 207 C.R. 561, 689 P.2d 133*, an intestate decedent's putative husband claimed an interest in her separate property under former *Prob.C. 221* (now *Prob.C. 6401*) and sought priority in appointment as administrator of her estate under former *Prob.C. 422* (now *Prob.C. 8461*; see *infra*, §437). *Held*, he was the "surviving spouse" for both purposes.

(a) A putative spouse is entitled to succeed to quasi-marital property. (*37 C.3d 192, 193*, citing *Feig v. Bank of America (1936) 5 C.2d 266, 273, 54 P.2d 3, 11 Summary* (10th), *Community Property*, §260, and *Estate of Krone (1948) 83 C.A.2d 766, 769, 189 P.2d 741, 11 Summary* (10th), *Community Property*, §264.) In other contexts, courts have accorded surviving putative spouses the same rights as surviving legal spouses, including (1) the right to bring an action for wrongful death, and (2) the right to recover public employee death and retirement benefits. (*37 C.3d 195, 196*.)

(b) "The foregoing authority compels but one conclusion: a surviving putative spouse is entitled to succeed to a share of his or her decedent's separate property. This result is inherently fair. ... Further, to deny a putative spouse the status of surviving spouse for the purposes of succeeding to a share of the decedent's separate property would lead to anomalous and unjust results. For example, where the decedent is survived by a putative spouse and children of the putative marriage, such a rule would deny the spouse succession rights to separate property even though the children are

accorded such rights." (37 C.3d 197.)

(c) *Estate of Levie* (1975) 50 C.A.3d 572, 123 C.R. 445, which reached a contrary conclusion, has been severely criticized by commentators. Its reasoning is unpersuasive, and it is disapproved "to the extent that it is inconsistent with this opinion." (37 C.3d 198, 200.)

(d) A putative spouse is also a surviving spouse for purposes of priority in appointment as the administrator of the decedent spouse's estate. "[I]n the absence of clear legislative direction to the contrary, neither logic nor justice supports the conclusion that a putative spouse may inherit an intestate share of the decedent's separate property but may not administer the estate." (37 C.3d 200.)

West's Key Number Digest, Descent and Distribution k.52(1) et seq.

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3. Issue of Decedent.

14 Witkin Sum. Cal. Law Wills § 79

[§ 79] Issue of Decedent.

If there is no surviving spouse or domestic partner (see *supra*, §78), the estate passes to the issue of the decedent. If the issue are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 6402(a)*, based on *Unif.Prob.C., §2-103*.) (On *Prob.C. 240*, distribution of shares by representation, see *supra*, §75.)

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4. Parents or Issue of Parents.

14 Witkin Sum. Cal. Law Wills § 80

[§ 80] Parents or Issue of Parents.

If there is no surviving spouse or domestic partner or surviving issue (see *supra*, §§78, 79), the estate passes to "the decedent's parent or parents equally." (*Prob.C. 6402(b)*, based on *Unif.Prob.C., §2-103.*)

If there is no surviving spouse, surviving issue, or surviving parent, the estate passes "to the issue of the parents or either of them." If the issue are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240. (Prob.C. 6402(c)*, based on *Unif.Prob.C., §2-103.*) (On *Prob.C. 240*, distribution of shares by representation, see *supra*, §75.)

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5. Grandparents or Issue of Grandparents.

14 Witkin Sum. Cal. Law Wills § 81

[§ 81] Grandparents or Issue of Grandparents.

If there is no surviving spouse or domestic partner, surviving issue, surviving parent, or surviving issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, the estate passes "to the grandparent or grandparents equally, or to the issue of those grandparents if there is no surviving grandparent." If the issue are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 6402(d)*, based in part on *Unif.Prob.C., §2-103*.) (On *Prob.C. 240*, distribution of shares by representation, see *supra*, §75.) The Law Revision Commission Comment makes the following points:

(1) Grandchildren or more remote lineal descendants of the grandparents of the deceased take ahead of great-grandparents. Under former law, "great-grandparents (related in the third degree) took ahead of grandchildren of the decedent's grandparents (fourth degree)."

(2) *Prob.C. 6402(d)* is different from *Unif.Prob.C., §2-103*, because under the Uniform Code provision "half of the estate goes to paternal grandparents or to the issue of the paternal grandparents if both are deceased, and the other half goes to maternal grandparents or to the issue of the maternal grandparents if both are deceased."

In *Estate of Hawkins (1987) 194 C.A.3d 102, 239 C.R. 464*, the probate court ordered that the residue of an intestate's estate be distributed one-eighth to each of the intestate's seven surviving first cousins and one-sixteenth to each of two first cousins once removed (the surviving children of a first cousin who predeceased the intestate). *Held*, order affirmed.

(a) The distribution of decedent's estate was governed by *Prob.C. 6402(d)*. (*194 C.A.3d 105, 106*.) *Prob.C. 50* (*supra*, §49) defines a person's "issue" as "all his or her lineal descendants of all generations." Thus, the first cousins once removed were entitled to share in decedent's estate even though they were related to her in a more remote degree than her seven first cousins. (*194 C.A.3d 107*.)

(b) That the first cousins once removed were great-grandchildren of the intestate's grandparents was irrelevant. *Prob.C. 6402(d)* does not provide for tracing through a decedent's great-grandparents, and the first cousins once removed did not do so. "Their claim to a portion of decedent's estate is based upon their lineal descent from decedent's

maternal grandparents. The mere fact that decedent's maternal grandparents are also respondents' maternal great-grandparents does not bar respondents from inheriting a portion of decedent's estate" under *Prob.C. 6402(d)*. (194 C.A.3d 108.)

In *Estate of McCrary* (1997) 54 C.A.4th 100, 103, 62 C.R.2d 504, the estate was properly divided among living maternal first cousins and the issue of deceased paternal first cousins; the maternal and paternal first cousins of the decedent were in the same generation even though descended from different grandparents. (See *Marlow v. Superior Court* (1941) 17 C.2d 393, 110 P.2d 11 [cousins take in preference to children of deceased cousin]; *Estate of Way* (1938) 29 C.A.2d 669, 672, 85 P.2d 563 [aunts take in preference to first cousins]; 19 A.L.R.2d 191 [nieces and nephews]; 54 A.L.R.2d 1009 [cousins]; 55 A.L.R.2d 643 [uncles and aunts].)

West's Key Number Digest, Descent and Distribution k.36

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6. Next of Kin.

14 Witkin Sum. Cal. Law Wills § 82

[§ 82] Next of Kin.

If there is no surviving spouse or domestic partner, surviving issue, surviving parent or issue of a parent, or surviving grandparent or issue of a grandparent, or issue of a predeceased spouse, but the decedent is survived by next of kin, the estate passes "to the next of kin in equal degree, but where there are two or more collateral kindred in equal degree who claim through different ancestors, those who claim through the nearest ancestor are preferred to those claiming through an ancestor more remote." (*Prob.C. 6402(f)*.) (On issue of predeceased spouse, see *Prob.C. 6402(e)*, *infra*, §84.)

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1. Former Law.

14 Witkin Sum. Cal. Law Wills § 83

[§ 83] Former Law.

(1) *Community Property From Previous Marriage*. It frequently happens that two people marry, community property is acquired, one spouse dies, and community property vests in the surviving spouse. Subsequently, the surviving spouse dies, leaving neither spouse nor issue. Under former Prob.C. 228, the property went to the children of the predeceased spouse, or, if none, then one-half to the parents or brothers and sisters of the predeceased spouse, and the other half to the parents or brothers and sisters of the decedent. Thus, the origin or source of acquisition of the property governed its succession, and the purpose was to give some of the former property to the relatives of the predeceased spouse where the decedent was not survived by the obviously preferred beneficiaries--spouse or issue. (On the origin, purpose, and scope of statute, see *Estate of McArthur* (1930) 210 C. 439, 444, 292 P. 469; *Estate of Sweitzer* (1932) 215 C. 489, 11 P.2d 633; *Estate of Abdale* (1946) 28 C.2d 587, 590, 170 P.2d 918; *Estate of Roberts* (1948) 85 C.A.2d 609, 194 P.2d 28 [where predeceased spouse left no children, relatives of that spouse could take no more than one-half]; *California v. Broderson* (1967) 247 C.A.2d 797, 802, 56 C.R. 58 [following *Estate of Roberts*]; *Estate of Ecker* (1968) 264 C.A.2d 119, 125, 70 C.R. 155; 25 Cal. L. Rev. 261; 49 A.L.R.2d 391 [statutes governing descent of property derived from predeceased spouse]; on extension of statute to property acquired from predeceased spouse by gift, devise, survivorship, etc., see *Estate of Rattray* (1939) 13 C.2d 702, 708, 91 P.2d 1042; *Estate of Allie* (1958) 50 C.2d 794, 329 P.2d 903; *Estate of Simmons* (1966) 64 C.2d 217, 49 C.R. 369, 411 P.2d 97; *Estate of Taitmeyer* (1943) 60 C.A.2d 699, 712, 141 P.2d 504.)

Where one-half went to the relatives of the predeceased spouse and there were no known heirs of the decedent to take the remaining half, it could escheat to the state. But in 1969, the statute was amended to eliminate escheat by incorporating a provision of the Uniform Simultaneous Death Act, thereby making the same distribution for spouses dying at different times as for those who died simultaneously. (See *Mannheim v. Superior Court* (1970) 3 C.3d 678, 91 C.R. 585, 478 P.2d 17; *Estate of McDill* (1975) 14 C.3d 831, 122 C.R. 754, 537 P.2d 874; *Estate of Hoegler* (1978) 82 C.A.3d 483, 147 C.R. 289.)

(2) *Separate Property From Predeceased Spouse*. Former Prob.C. 229 dealt with the situation where the property left to the decedent by the predeceased spouse was separate property. Upon death of the decedent intestate, leaving neither spouse nor issue, the separate property went back to the children or descendants, or parents, or brothers and sisters and descendants of the predeceased spouse. (See *Estate of Auclair* (1945) 75 C.A.2d 189, 195, 170 P.2d 29 [statute was inapplicable where decedent died leaving issue of spouse, but not of predeceased spouse from whom the

property came]; on extension of statute to property acquired from predeceased spouse by gift, survivorship, etc., see *Estate of Harris* (1937) 9 C.2d 649, 657, 72 P.2d 873; *Estate of Frary* (1938) 26 C.A.2d 83, 86, 78 P.2d 760; *Estate of Davis* (1948) 88 C.A.2d 704, 707, 199 P.2d 755.)

A 1970 amendment provided that if the decedent left neither spouse nor issue, "that portion of the estate created by gift, descent, devise, or bequest from the separate property of a parent or grandparent" went back to that parent or grandparent; if the parent or grandparent was dead, it went in equal shares to the heirs of the deceased parent or grandparent. The statute was inapplicable where the property did not have its origin in separate property of the predeceased spouse, e.g., where the decedent himself was the original source of title (*Estate of Abdale* (1946) 28 C.2d 587, 170 P.2d 918); where a third person was the original source of title (*Estate of Rudman* (1948) 85 C.A.2d 270, 193 P.2d 39; *Estate of Riley* (1981) 119 C.A.3d 204, 173 C.R. 813); or where a joint tenancy was created prior to the marriage (*Estate of Hobart* (1947) 82 C.A.2d 502, 187 P.2d 105). The statute was also not applicable where the decedent in some way obtained a completely new title that superseded the former title by gift. (*Estate of Putnam* (1933) 219 C. 608, 28 P.2d 27; *Estate of Westerman* (1968) 68 C.2d 267, 274, 66 C.R. 29, 437 P.2d 517; *Estate of Flood* (1942) 55 C.A.2d 410, 130 P.2d 811; *Estate of Bishop* (1962) 209 C.A.2d 48, 59, 25 C.R. 763; *Estate of Blume* (1966) 241 C.A.2d 496, 500, 50 C.R. 622.)

A special problem arose where property was acquired in a noncommunity property state and later was brought into California. Because the California classification of community and separate property had no meaning at the time the property was acquired, how could California statutes be applied? In *Estate of Perkins* (1943) 21 C.2d 561, 134 P.2d 231, the court declared that the only way in which the legislative purpose behind the statutes could be given effect in these cases was to reclassify, for purposes of succession, all personal property brought to California, treating it as separate or community property in the same manner as if it had been acquired in California. (See *Estate of Ball* (1949) 92 C.A.2d 93, 102, 206 P.2d 1111 [following *Perkins*]; *Estate of Krey* (1960) 183 C.A.2d 312, 317, 6 C.R. 804; 31 Cal. L. Rev. 331; 13 Stanf. L. Rev. 733; 53 Cal. L. Rev. 49.)

(3) *Statutory Consolidation.* Former Prob.C. 228 was repealed in 1980 and its provisions were incorporated into a revised Prob.C. 229, controlling the succession of heirs to both the separate and community property of a predeceased spouse where the decedent left no spouse or issue. The portion of the decedent's estate "attributable to the decedent's predeceased spouse" went to the children and descendants of the predeceased spouse. (See *Estate of Riley* (1981) 119 C.A.3d 204, 211, 173 C.R. 813 [decedent's estate derived from separate property of his mother]; *Estate of Nereson* (1987) 194 C.A.3d 865, 870, 239 C.R. 865 [in-law heirs' share in former community property asset had to be adjusted downward to reflect infusions of capital by decedent in years following spouse's death]; *Estate of Luke* (1987) 194 C.A.3d 1006, 1015, 240 C.R. 84 ["community property presumption," not "form-of-the-title presumption," applied where property was acquired by married couple as joint tenants].) (For current statute, see Prob.C. 6402.5, *infra*, §85.)

In *Estate of Newman* (1994) 25 C.A.4th 472, 30 C.R.2d 547, F, while married to J, received a gift of real property as her separate property, which was transmuted into community property during marriage. On F's death, the property passed by will to J. On J's subsequent death intestate, F's nephew claimed the entire property under former Prob.C. 229. The trial judge, relying on the transmutation, awarded half the property to F's nephew and half to J's brother, his intestate heir. *Held*, reversed. Under the "source rule," F's nephew was entitled to the entire property.

(a) *Construction of former Prob.C. 229(b).* The apparently conflicting provisions of former Prob.C. 229(b) (defining "attributable" property) were harmonized as follows (25 C.A.4th 485):

(1) Former Prob.C. 229(b)(1) (now Prob.C. 6402.5(f)(1)) applies where the property was always the community property of the decedent and the predeceased spouse.

(2) Former Prob.C. 229(b)(2) (now Prob.C. 6402.5(f)(2)) applies where the property was originally community property but became the property of the decedent by gift, descent, devise, or bequest from the predeceased spouse.

(3) Former Prob.C. 229(b)(5) (now *Prob.C. 6402.5(f)(4)*) applies where the property was originally the separate property of the predeceased spouse and became the property of the decedent by gift, descent, devise, or bequest from the predeceased spouse.

(b) *Application of "source rule" to transmutation.* The legislative intent behind former Prob.C. 229 and its statutory predecessors is a "theory of distribution in which the source of the property's acquisition is controlling." Thus, once property is acquired as separate property, it retains that character, despite transmutation, for purposes of disposition under the statute. Where the source of property is community property accumulated during marriage, division between the relatives of the decedent and the relatives of the predeceased spouse is fair and reasonable under the source rule, "since both spouses are deemed to have contributed equally." Here, by contrast, J did not contribute to acquisition, and the property should be distributed to F's relatives. (25 *C.A.4th* 486.)

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2. Nature and Scope of Statute.

14 Witkin Sum. Cal. Law Wills § 84

[§ 84] Nature and Scope of Statute.

(1) *In General.* The basic intestate succession scheme is determined by *Prob.C. 6401* (supra, §§76, 78) and *Prob.C. 6402* (supra, §79 et seq.). Part of that scheme provides for succession by relatives of a predeceased spouse if the decedent is not survived by designated relatives of the decedent. (See infra, this section.) In addition, *Prob.C. 6402.5* (infra, §85) sets forth special succession rules that apply to that portion of the decedent's estate "attributable" to the decedent's predeceased spouse.

(2) *Who Is Predeceased Spouse.* A "predeceased spouse" is "a person who died before the decedent while married to the decedent." (*Prob.C. 59.*) The Law Revision Commission Comment points out that it is possible that the decedent may have more than one predeceased spouse. The term does not include any of the following:

(a) "A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife." (*Prob.C. 59(a).*)

(b) "A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony to a third person." (*Prob.C. 59(b).*)

(c) "A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights." (*Prob.C. 59(c).*)

(3) *Succession by Issue of Predeceased Spouse.* If there is no surviving spouse or domestic partner, issue, parent or issue of a parent, or grandparent or issue of a grandparent, but the decedent is survived by the issue of a predeceased spouse, the estate passes to that issue. If the issue are all of the same degree of kinship to the predeceased spouse, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240.* (*Prob.C. 6402(e).*) (On *Prob.C. 240*, distribution of shares by representation, see supra, §75.)

(4) *Succession by Parents or Issue of Parents of Predeceased Spouse.* If there is no surviving spouse or domestic partner, issue, parent or issue of a parent, grandparent or issue of a grandparent, issue of a predeceased spouse, or next

of kin, but the decedent is survived by the parents of a predeceased spouse, or the issue of the parents, the estate passes "to the parent or parents equally, or to the issue of such parents if both are deceased." If the issue are all of the same degree of kinship to the predeceased spouse, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 6402(g)*.) (On *Prob.C. 240*, distribution of shares by representation, see *supra*, §75.)

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3. Apportionment of Property Between Families.

14 Witkin Sum. Cal. Law Wills § 85

[§ 85] Apportionment of Property Between Families.

(1) *In General. Prob.C. 6402.5*, based on former Prob.C. 229, provides special rules for the apportionment of property between the families of an intestate and an intestate's predeceased spouse. The portion of a decedent's estate "attributable" to a predeceased spouse passes to the predeceased spouse's family. (See *16 Pepperdine L. Rev.* 831 [comprehensive note on *Prob.C. 6402.5*].)

(2) *What Is "Attributable" Property.* For purposes of *Prob.C. 6402.5*, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate:

(a) "One-half of the community property in existence at the time of the death of the predeceased spouse." (*Prob.C. 6402.5(f)(1)*.)

(b) "One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise." (*Prob.C. 6402.5(f)(2)*.)

(c) "That portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship." (*Prob.C. 6402.5(f)(3)*.)

(d) "Any separate property of the predeceased spouse which came to the decedent by gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship." (*Prob.C. 6402.5(f)(4)*.)

Quasi-community property is treated the same as community property. (*Prob.C. 6402.5(g)*.)

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

(a) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse. If the issue are all of the same degree of kinship to the predeceased spouse, they take equally, but if of unequal degree

those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 6402.5(a)(1)*.)

(b) "If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally." (*Prob.C. 6402.5(a)(2)*.)

(c) "If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them." If the issue are all of the same degree of kinship to the predeceased spouse, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 6402.5(a)(3)*.)

(d) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in *Prob.C. 6402*. (*Prob.C. 6402.5(a)(4)*.)

(e) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under *Prob.C. 6402*, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse, who takes in the same manner as the next of kin of the decedent takes under *Prob.C. 6402*. (*Prob.C. 6402.5(a)(5)*.) (On *Prob.C. 240*, distribution of shares by representation, see *supra*, §75; on distribution to next of kin under *Prob.C. 6402*, see *supra*, §82.)

(4) *Distribution of Personal Property (5 Years and \$ 10,000)*. For purposes of distributing personal property under *Prob.C. 6402.5*, if the decedent had a predeceased spouse who died not more than 5 years before the decedent, and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

(a) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse. If the issue are all of the same degree of kinship to the predeceased spouse, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 6402.5(b)(1)*.)

(b) "If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally." (*Prob.C. 6402.5(b)(2)*.)

(c) "If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them." If the issue are all of the same degree of kinship to the predeceased spouse, they take equally, but if of unequal degree those of more remote degree take in the manner provided in *Prob.C. 240*. (*Prob.C. 6402.5(b)(3)*.)

(d) If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the next of kin of the decedent in the manner provided in *Prob.C. 6402*. (*Prob.C. 6402.5(b)(4)*.)

(e) If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under *Prob.C. 6402*, the portion of the decedent's estate attributable to the predeceased spouse passes to the next of kin of the predeceased spouse, who takes in the same manner as the next of kin of the decedent takes under *Prob.C. 6402*. (*Prob.C. 6402.5(b)(5)*.) (On *Prob.C. 240*, distribution of shares by representation, see *supra*, §75; on distribution to next of kin under *Prob.C. 6402*, see *supra*, §82.)

For this purpose, "personal property" means "that personal property in which there is a written record of title or ownership and the value of which in the aggregate is ten thousand dollars (\$ 10,000) or more." (*Prob.C. 6402.5(e)*.) And "the claimant heir bears the burden of proof to show the exact personal property to be disposed of to the heir." (*Prob.C. 6402.5(c)*.)

For purposes of notice under any provision of the Probate Code with respect to an estate that may include personal property subject to distribution under *Prob.C. 6402.5(b)*, "if the aggregate fair market value of tangible and intangible personal property with a written record of title or ownership in the estate is believed in good faith by the petitioning party to be less than ten thousand dollars (\$ 10,000), the petitioning party need not give notice to the issue or next of kin of the predeceased spouse. If the personal property is subsequently determined to have an aggregate fair market value in excess of ten thousand dollars (\$ 10,000), notice shall be given to the issue or next of kin of the predeceased spouse as provided by law." (*Prob.C. 6402.5(d)*.)

(5) *Afterborn Heirs*. "Relatives of the predeceased spouse conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent." (*Prob.C. 6402.5(h)(1)*.)

(6) *Persons Related Through Two Lines*. "A person who is related to the predeceased spouse through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share." (*Prob.C. 6402.5(h)(2)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION
F. Relatives of Half Blood.

14 Witkin Sum. Cal. Law Wills § 86

[§ 86] Relatives of Half Blood.

(1) *In General.* Kindred of the "half blood" are those who have one parent in common, but not both, e.g., two sons of the same father, but of different mothers are half brothers. (See 47 A.L.R.4th 561 [kindred of whole and half blood]; 23 Am.Jur.2d (2002 ed.), *Descent and Distribution* §§71, 105.)

(2) *Former Law.* Under the former statute, half-blood relatives of the decedent who were not of the blood of an ancestor of the decedent were excluded from inheriting property of the decedent that had come to the decedent from that ancestor. (See *Estate of Lynch* (1901) 132 C. 214, 216, 64 P. 284; *Estate of Ryan* (1943) 21 C.2d 498, 499, 133 P.2d 626; *Estate of Nidever* (1960) 181 C.A.2d 367, 385, 5 C.R. 343; *Estate of Donovan* (1966) 247 C.A.2d 523, 525, 55 C.R. 758; 29 Cal. L. Rev. 77; 31 Cal. L. Rev. 334, 593.)

(3) *Revised Statute.* Except as provided in Prob.C. 6451, "relatives of the halfblood inherit the same share they would inherit if they were of the whole blood." (Prob.C. 6406, based on Unif.Prob.C., §2-107.) This change "puts halfbloods on the same footing as wholeblood relatives of the decedent." (Law Rev. Com. Comment.) (On Prob.C. 6451, governing effect of adoption on intestate succession, see *infra*, §97.)

West's Key Number Digest, Descent and Distribution k.41

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION
G. Afterborn Heirs.

14 Witkin Sum. Cal. Law Wills § 87

[§ 87] Afterborn Heirs.

"Relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent." (*Prob.C. 6407*, based on *Unif.Prob.C.*, §2-108.) (See *C.C. 43.1* [unborn child as existing person]; 18 *J. Juvenile Law* 84 [rights of posthumously conceived children]; 31 *U.C. Davis L. Rev.* 1 [assisted reproduction and transfer of wealth].)

West's Key Number Digest, Wills k.534(5)

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IV. INTESTATE SUCCESSION
H. Persons Related Through Two Lines.

14 Witkin Sum. Cal. Law Wills § 88

[§ 88] Persons Related Through Two Lines.

"A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share." (*Prob.C. 6413*, based on *Unif.Prob.C.*, §2-114.) The Legislative Committee Comment points out that *Prob.C. 6413* has "potential application, for example, in a case where the natural parents of a child are killed in an accident and the child is adopted by a brother or sister of the natural mother of child, leaving the child as natural and adopted grandchild of the parents of the natural mother."

West's Key Number Digest, Wills k.497(4)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION

I. Special Classes of Children.

1. Original Statutes.

a. Adopted Children.

14 Witkin Sum. Cal. Law Wills § 89

[§ 89] Adopted Children.

Under the original statute (former Prob.C. 257) in effect prior to 1955, adoption effected a complete substitution of only the immediate parental relation. The results of the statute and prior case law were summarized in *Estate of Calhoun* (1955) 44 C.2d 378, 282 P.2d 880, as follows: "(1) The adopted child inherits from his adopting parents and they inherit from him; (2) upon adoption he ceases to inherit from his natural parents, and they cease to inherit from him; (3) the adopted child's status with regard to other natural relatives is not changed, and his right to inherit from them is not cut off by the adoption; and (4) by the adoption the child does not gain the right to inherit from collateral relatives of the adopting parents." (44 C.2d 384.)

In *Estate of Calhoun*, decedent G was an adopted child, and D was a natural child, of the Calhoun family. On G's death, his brothers and sisters were his heirs. But because adoption affected only the parental relation, D did not become his sister for purposes of succession; i.e., there was no right of inheritance between an adopted child and his foster brothers or sisters. Hence, the estate went to P, decedent's natural blood brother, and D was not entitled to letters of administration. A strong dissenting opinion urged rejection of this rule on policy grounds. The majority agreed that the better policy might be "to substitute the relationship of the adoptive family for that of the blood relatives." (44 C.2d 387.) (See 7 *Hastings L. J.* 86; 29 *So. Cal. L. Rev.* 126; 2 *U.C.L.A. L. Rev.* 269.)

Former Prob.C. 257, as amended in 1955, carried the substitution of parental relationship one step further than the prior law. The relationship to the natural parent and blood relatives was fully cut off, and the relationship to the adopting parent and his or her relatives was fully created. For purposes of succession, therefore, an adopted child lost all relationship to his or her original family and became as much a part of the adopting family as any natural child. The statute had the following effects:

(1) *Inheritance by adopted child from adopting parent.* The right of the adopted child to succeed to the estate of his or her adopting parent was unchanged. (See *Estate of Mercer* (1928) 205 C. 506, 507, 271 P. 1067.)

(2) *Inheritance by adopted child from grandparents.* Contrary to the former law, the adopted child no longer succeeded to the estate of his or her original grandparent, but succeeded to the estate of the grandparent of the adoptive family. (See *Estate of Dillehunt* (1959) 175 C.A.2d 464, 467, 346 P.2d 245 [natural grandson of decedent, adopted by

stranger, cannot be pretermitted heir]; *Estate of Garey* (1963) 214 C.A.2d 39, 41, 29 C.R. 98 [adoption effected complete substitution of family relationships, precluding any inheritance by adopted child from original grandparent, even though parent died before adoption].)

(3) *Inheritance by adopted child from collateral relatives.* (a) Under the former law, an adopted child inherited from the collateral relatives of his or her natural parent. (See *Estate of Darling* (1916) 173 C. 221, 226, 159 P. 606.) This was changed and inheritance was not allowed. (b) Under the former law, an adopted child did not inherit from collateral relatives of the adopting parents. (See *Estate of Pence* (1931) 117 C.A. 323, 333, 4 P.2d 202; *Estate of Jones* (1934) 3 C.A.2d 395, 398, 39 P.2d 847; *Estate of Stewart* (1939) 30 C.A.2d 594, 596, 86 P.2d 1071; *Estate of Kruse* (1953) 120 C.A.2d 254, 256, 260 P.2d 969; 20 Cal. L. Rev. 327; 43 A.L.R.2d 1183.) This was changed and inheritance was allowed.

(4) *Inheritance from adopted child: Parents.* The established rule remained that the adopting parents inherited from the adopted child, and the natural parents did not.

(5) *Inheritance from adopted child: Grandparents.* Pursuant to the same theory, natural grandparents no longer inherited from the adopted child, and the "new" grandparents (of the adoptive family) did so.

(6) *Inheritance from adopted child: Collateral relatives.* Collateral relatives inherited; i.e., the rule of *Estate of Calhoun*, was nullified by the amendment.

Adoption gives rise to several additional problems in connection with intestate succession, rights under a will, and taxation. The following should be noted:

(1) The children of an adopted child were "issue" of the adoptive parent for purposes of taking the child's share from the adoptive parent by right of representation. (*Estate of Hebert* (1941) 42 C.A.2d 664, 666, 109 P.2d 729; *Estate of Smith* (1946) 73 C.A.2d 291, 293, 166 P.2d 74.)

(2) Where there were successive adoptions, the second adoption nullified the first, and cut off the adopted child's right to succeed to the estate of the former adoptive parents. (*Estate of Zaepfel* (1951) 102 C.A.2d 774, 778, 228 P.2d 600, *supra*, §54; see 24 So. Cal. L. Rev. 478.)

SUPPLEMENT: [This section is current through the latest supplement]
See 48 Santa Clara L. Rev. 765 [open adoption and inheritance rights].



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IV. INTESTATE SUCCESSION

I. Special Classes of Children.

1. Original Statutes.

b. Out of Wedlock Children.

14 Witkin Sum. Cal. Law Wills § 90

[§ 90] Out of Wedlock Children.

(1) *In General.* The common law rule that illegitimates have "no inheritable blood" was abolished by modern statutes. (See *Estate of Paterson* (1939) 34 C.A.2d 305, 309, 93 P.2d 825; 29 Cal. L. Rev. 185; 38 Cal. L. Rev. 322; 6 U.C. Davis L. Rev. 217.)

(2) *Inheritance From Mother.* Under the express terms of former Prob.C. 255, the illegitimate child succeeded from his or her mother without any requirement of legitimation or acknowledgment.

(3) *Inheritance From Father.* In order to inherit from his or her father, the illegitimate child had to either be legitimated (by subsequent marriage of the parents, or reception into the family of the father), or acknowledged for inheritance. (Former Prob.C. 255; see former C.C. 215 [subsequent marriage]; former C.C. 230 [reception into family]; 10 Summary (10th), *Parent and Child*, §13; *De Sylva v. Ballentine* (1956) 351 U.S. 570, 76 S.Ct. 974, 980, 100 L.Ed. 1415, 1428; *Blythe v. Ayres* (1892) 96 C. 532, 582, 31 P. 915 [no particular form required for acknowledgment]; *Estate of Flood* (1933) 217 C. 763, 767, 21 P.2d 579 [reception into family]; *Estate of Ginocchio* (1974) 43 C.A.3d 412, 418, 117 C.R. 565, 8 Summary (10th), *Constitutional Law*, §784 [rejecting petitioner's theory that judicial declaration of paternity, obtained by mother against decedent during latter's lifetime, was equivalent of acknowledgment]; 33 A.L.R.2d 705 [what amounts to recognition]; on validity of statute precluding inheritance by illegitimate acknowledged by father but not legitimated, see *Labine v. Vincent* (1971) 401 U.S. 532, 91 S.Ct. 1017, 1019, 28 L.Ed.2d 288, 292, 8 Summary (10th), *Constitutional Law*, §784.)

(4) *Inheritance From Relatives.* The right of an illegitimate to inherit from lineal and collateral relatives of his or her father was sharply limited by the requirement of former Prob.C. 255, that even if acknowledged, the child did not represent his or her father unless legitimated. Former Prob.C. 255 apparently required both subsequent marriage and acknowledgment or reception into the family, and thus denied representation where the child had merely been received into the family. This was inconsistent with the language of former C.C. 230, under which the child received into the family was "deemed for all purposes legitimate from the time of its birth." In *Wolf v. Gall* (1916) 32 C.A. 286, 297, 163 P. 346, 350, the double requirement was suggested. But in *Estate of Garcia* (1949) 34 C.2d 419, 422, 210 P.2d 841, the dictum was disapproved and the double requirement rejected. Hence, an illegitimate child, legitimated under former C.C. 230 by reception into the family, represented his father for the purpose of inheriting from collateral relatives,

notwithstanding the fact that his father and mother never married. (See 38 Cal. L. Rev. 322.)

(5) *Succession From Illegitimate Child.* Under Former Prob.C. 256, inheritance from the illegitimate roughly followed the same pattern as inheritance by him or her. (See *Estate of Paterson* (1939) 34 C.A.2d 305, 309, 93 P.2d 825; 29 Cal. L. Rev. 185, 191.) Hence, though the child was not legitimated, his or her mother inherited, but the father and the father's relatives did not. In *Estate of Paterson*, the claimants were collateral relatives of the decedent, but had to trace their relationship through decedent's illegitimate grandmother. *Held*, this was proper; the illegitimate grandmother could have inherited from the decedent, and therefore she could be used as a "conduit" for the collateral relatives. (34 C.A.2d 312.) (See 29 Cal. L. Rev. 185, 192.)

(6) *Succession Between Illegitimate Children.* Where there are two illegitimate children of the same mother, may one illegitimate inherit from the other? Under former Prob.C. 255, dealing with inheritance *by* illegitimates, the child could not represent either parent by inheriting from his kindred, so the surviving illegitimate could not inherit. But under former Prob.C. 256, dealing with inheritance *from* illegitimates, the deceased child's estate went to his or her mother or her heirs, and the surviving illegitimate could inherit. A 1943 amendment to former Prob.C. 255 cleared up any conflict and established the rule that the illegitimate could represent his or her mother. But where the illegitimates were merely children of the same father, there was no representation and presumably there would be no inheritance by one from the other.

(7) *Effect of Uniform Parentage Act.* In 1975, the Uniform Parentage Act abolished the distinction between legitimate and illegitimate children. (See *Family C. 7600* et seq.; 10 *Summary* (10th), *Parent and Child*, §17 et seq.) In conformity with the new approach, former Prob.C. 255 was repealed and a new section with the same number eliminated all reference to illegitimacy and acknowledgment; it applied where a parent and child relationship was (a) presumed and not rebutted, or (b) was established, under the Uniform Act. (See 10 *Summary* (10th), *Parent and Child*, §20 et seq.) (On illegitimate children, see *Trimble v. Gordon* (1977) 430 U.S. 762, 97 S.Ct. 1459, 1462, 52 L.Ed.2d 31, 36, 8 *Summary* (10th), *Constitutional Law*, §784 [state's intestate succession laws that allowed illegitimate children to inherit from their mothers only, whereas legitimate children were allowed to inherit from both their mothers and their fathers, violated the Equal Protection Clause]; *Reed v. Campbell* (1986) 476 U.S. 852, 106 S.Ct. 2234, 2237, 90 L.Ed.2d 858, 863 [*Trimble* was controlling in case where intestate died before decision and illegitimate child filed claim after decision].)

West's Key Number Digest, Wills k.497(6)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 48 *Santa Clara L. Rev.* 857 [nonmarital posthumous children and inheritance rights].



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IV. INTESTATE SUCCESSION

I. Special Classes of Children.

1. Original Statutes.

c. Stepchildren.

14 Witkin Sum. Cal. Law Wills § 91

[§ 91] Stepchildren.

The former intestacy statute provided that if a decedent left no surviving spouse, but left "issue," the whole estate went to the "issue." For this purpose, unadopted stepchildren were not "issue" entitled to take. (*Estate of Lima* (1964) 225 C.A.2d 396, 398, 37 C.R. 404; *Estate of Davis* (1980) 107 C.A.3d 93, 95, 165 C.R. 543.)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION
I. Special Classes of Children.
2. 1983 Revision.

14 Witkin Sum. Cal. Law Wills § 92

[§ 92] 1983 Revision.

(1) *Enactment.* Former Prob.C. 6408 and 6408.5, governing intestate succession by or from adopted persons, persons born out of wedlock, stepchildren, and foster children, were adopted in 1983.

(2) *Parent and Child Relationship.* Former Prob.C. 6408, based on Unif.Prob.C., §2-109 and superseding former Prob.C. 255 and 257 (see supra, §89, 90), set forth the conditions for establishing a parent and child relationship for purposes of intestate succession:

(a) The relationship of parent and child existed between a child and the child's natural parents, regardless of the marital status of the natural parents. Generally, a natural parent and child relationship was established where that relationship was presumed and not rebutted pursuant to the Uniform Parentage Act.

(b) The relationship of parent and child existed between an adopted child and the child's adopting parent or parents.

(c) The relationship of parent and child existed between a child and the child's foster parent or stepparent if (1) the relationship began during the child's minority and continued throughout the parties' joint lifetimes, and (2) it was established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

(3) *Exclusion of Natural Relatives.* Former Prob.C. 6408.5 delineated circumstances in which natural relatives could not inherit from or through an adopted child or a child born out of wedlock, even though the child could inherit from the natural relatives:

(a) Generally, adoption cut off the rights of the natural parents unless (1) the natural parent and adopted person lived together at any time as parent and child or the natural parent was married to or was cohabitating with the other natural parent at the time the child was conceived and died before the birth of the child, and (2) the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(b) If a child was born out of wedlock, ordinarily a parent or a relative did not inherit from or through the child unless the parent or relative acknowledged the child and contributed to the child's support or care.

(4) *Repeal.* Former Prob.C. 6408.5 was repealed in 1990 and its provisions were incorporated into former Prob.C. 6408. Former Prob.C. 6408 was repealed in 1993 and replaced by *Prob.C. 6450 et seq.* (See *infra*, §93 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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I. Special Classes of Children.

3. 1993 Revision.

a. In General.

14 Witkin Sum. Cal. Law Wills § 93

[§ 93] In General.

(1) *Recommendation and Enactment.* In 1993, the California Law Revision Commission recommended the enactment of statutes revising and restating the law governing the parent and child relationship for purposes of intestate succession. (See Parent and Child Relationship for Intestate Succession, 23 Cal. Law Rev. Com. Reports, p. 991; Report of the California Law Revision Commission on Chapter 529 of the Statutes of 1993 (Assembly Bill 1137), 23 Cal. Law Rev. Com. Reports, p. 1009.) The Commission's recommendation, with minor changes, was adopted in 1993 by the repeal of *Prob.C. 6408* and the enactment of *Prob.C. 6450 et seq.* (See 25 *Pacific L. J.* 391.) (On parent and child relationship, see *infra*, §94; on intestate succession by and through foster and stepchildren, see *infra*, §95; on intestate succession by and through out of wedlock children, see *infra*, §96; on intestate succession by and through adopted children, see *infra*, §97.)

(2) *Construction of Class Gifts.* *Prob.C. 21115* provides rules for construing wills, trusts, deeds, and other instruments under the Probate Code that make class gifts, which may include half bloods, and adopted, step-, foster, and out of wedlock children. (See *infra*, §228 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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I. Special Classes of Children.

3. 1993 Revision.

b. Parent and Child Relationship.

Witkin Sum. Cal. Law Wills § 94

[§ 94] Parent and Child Relationship.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Establishing Natural Parentage*. See *Estate of Burden (2007)* 146 C.A.4th 1021, 1029, 1030, 53 C.R.3d 390 [decedent's oral and written acknowledgement of paternity on number of occasions, to out-of-wedlock child, child's mother, and decedent's relatives, was "clear and convincing evidence" for purposes of intestate succession under *Prob.C. 6453(b)(2)*, even though decedent only grudgingly admitted paternity and did not want to become involved in child's life].



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I. Special Classes of Children.

3. 1993 Revision.

b. Parent and Child Relationship.

14 Witkin Sum. Cal. Law Wills § 94

[§ 94] Parent and Child Relationship.

(1) *When Parent and Child Relationship Exists.* Subject to *Prob.C. 6450* et seq., a parent and child relationship exists for purposes of intestate succession (a) between a person and the person's natural parents, regardless of their marital status, and (b) between an adopted person and the person's adopting parent or parents. (*Prob.C. 6450.*) (See *Rest.3d, Property (Wills and Other Donative Transfers) §2.5* [parent and child relationship]; Cal. Transactions Forms, 1 Estate Planning §6:11 et seq.)

(2) *Establishing Natural Parentage.* A natural parent and child relationship is established for purposes of intestate succession when the relationship is presumed and not rebutted under the Uniform Parentage Act (*Family C. 7600* et seq.; see 10 *Summary* (10th), *Parent and Child*, §17 et seq.). (*Prob.C. 6453(a).*)

The relationship may be established under any provision of the Act, but to establish the relationship by an action under *Family C. 7630(c)* (no presumed father or presumed father deceased; see 10 *Summary* (10th), *Parent and Child*, §48), one of the following conditions must exist:

(a) An order declaring paternity must be entered during the father's lifetime. (*Prob.C. 6453(b)(1).*)

(b) Paternity must be established by clear and convincing evidence that the father openly held out the child as his own. (*Prob.C. 6453(b)(2).*)

(c) Paternity must be established by clear and convincing evidence and it must have been impossible for the father to hold out the child as his own. (*Prob.C. 6453(b)(3).*) (See *Cheyanna M. v. A.C. Nielsen Co. (1998) 66 C.A.4th 855, 875, 78 C.R.2d 335, 6 Summary* (10th), *Torts*, §1393 [law of intestate succession determines standing of afterborn child to bring action for wrongful death of parent; for purposes of *Prob.C. 6453(b)(3)*, it is impossible for father to hold out unborn child as his own, and thus holding out is not required to show paternity].)

In *Weir v. Ferreira (1997) 59 C.A.4th 1509, 70 C.R.2d 33*, decedent was the beneficiary of a trust. On his death, his issue was entitled to his share. Plaintiff, the trustee, petitioned to ascertain the beneficiaries. Defendant, who was raised in decedent's family, claimed an interest in his share as one of decedent's children, based on a decree of dissolution

declaring that defendant was the daughter of decedent and his former wife. *Held*, defendant was entitled to a share. Lacking contrary evidence in the trust, "issue" means those entitled to take by intestate succession. (59 C.A.4th 1514.) The judgment of dissolution established a parent and child relationship during decedent's lifetime. It was sufficient for determining intestate succession under *Prob.C. 6453(b)(1)* and was binding on those claiming through decedent, even though it was not denominated as an action under the Uniform Parentage Act and all procedural requirements of the Act may not have been followed. (59 C.A.4th 1519.)

The relationship may also be established under *Prob.C. 249.5* (posthumous conception; 10 *Summary* (10th), *Parent and Child*, §40). (*Prob.C. 6453(c)*.)

(3) *DNA Testing for Paternity Is Not Authorized*. In *Estate of Sanders* (1992) 2 C.A.4th 462, 3 C.R.2d 536, decedent's putative daughter sought a share of the estate as a pretermitted heir and requested DNA testing to verify paternity. *Held*, DNA testing was properly denied.

(a) *Exclusive basis for paternity in intestacy proceedings*. Under former *Prob.C. 6408(c)* (now *Prob.C. 6453*), a natural parent-child relationship exists for purposes of intestate succession only if (a) a presumption of paternity under the Uniform Parentage Act has not been rebutted, (b) a paternity decree was entered while the father was alive, or (c) there is clear and convincing evidence that the father openly and notoriously held out the child as his own. The statute does not authorize alternative means of establishing paternity. (2 C.A.4th 471.) The restrictive language of the statute was substituted for the original language recommended by the California Law Revision Commission in 1983, and in three amendments since that time the substantive meaning has not been changed. "Clearly, it has continued to be the intent of the Legislature to discourage dubious paternity claims made after a father's death for the sole purpose of inheritance." (2 C.A.4th 474.)

(b) *Scientific basis for interpretation*. The contention that scientific advances in genetic testing have rendered this construction of the statute obsolete by removing the uncertainty of proof that justified the restrictive nature of the statute is more appropriately addressed to the *Legislature*. (2 C.A.4th 476.)

(c) *Equal protection*. The constitutional doctrine of equal protection does not require that the statute be struck down. In *Lalli v. Lalli* (1978) 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503, the Court upheld a New York statute allowing an illegitimate child to inherit from his intestate father only if a paternity order had been entered during the father's lifetime. The Court held that the statutory requirement was substantially related to the state's interest in providing an orderly disposition of a decedent's property in cases involving paternity claims. (2 C.A.4th 476.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Establishing Natural Parentage*. See *Estate of Burden* (2007) 146 C.A.4th 1021, 1029, 1030, 53 C.R.3d 390 [decedent's oral and written acknowledgement of paternity on number of occasions, to out-of-wedlock child, child's mother, and decedent's relatives, was "clear and convincing evidence" for purposes of intestate succession under *Prob.C. 6453(b)(2)*, even though decedent only grudgingly admitted paternity and did not want to become involved in child's life].



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CHAPTER XXI - Wills and Probate

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IV. INTESTATE SUCCESSION

I. Special Classes of Children.

3. 1993 Revision.

c. Foster or Stepchildren.

14 Witkin Sum. Cal. Law Wills § 95

[§ 95] Foster or Stepchildren.

For purposes of intestate succession by a person or the person's issue from or through a foster parent or stepparent, the parent and child relationship exists if (1) the relationship began during the child's minority and continued throughout the joint lifetimes of the child and the foster parent or stepparent, and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the child "but for a legal barrier." (*Prob.C. 6454.*) The Law Revision Commission Comment notes that the natural parent of the child may inherit from the child but the foster parent or stepparent may not. The child, however, may inherit from both the natural parent and the foster parent or stepparent. (See *Estate of Claffey* (1989) 209 C.A.3d 254, 257, 259, 257 C.R. 197 [former statute; existence of "legal barrier" to adoption was clear, but there was no "clear and convincing evidence" that decedent would have adopted "but for" that barrier]; 47 *Hastings L. J.* 1 [intestate succession for stepchildren]; 22 *U.C. Davis L. Rev.* 917 [stepchildren]; 23 *Am.Jur.2d* (2002 ed.), *Descent and Distribution* §§78, 81; 63 *A.L.R.2d* 303 [inheritance from and through stepchild].)

The statutory requirements have been the subject of conflicting decisions in the Courts of Appeal. In *Estate of Stevenson* (1992) 11 C.A.4th 852, 14 C.R.2d 250, James had two sons while married to Coreatha. The couple separated when the boys were infants, and James and the boys began living with Helen. The relationship between James and Helen continued, with interruptions, until James' death, and the boys for many years believed Helen to be their natural mother. At one point when the boys were teenagers, Coreatha refused to consent to their adoption by Helen. When Helen died intestate, the boys petitioned to share in her estate as stepchildren. Defendants, her natural child and grandchild, contended that the requirements of former Prob.C. 6408(e) (now *Prob.C. 6454*) were not satisfied. *Held*, plaintiffs were entitled to share in the estate.

(a) *Nature of relationship.* The statute requires that the parent and child relationship continue throughout the parties' joint lifetimes, but does not expressly require continuity in living arrangements. "Given the frequency of separation and divorce, it makes sense to recognize that relationships between stepparent and child may continue to flourish even though the relationship between the stepparent and natural parent does not." (11 C.A.4th 860.) A continuous relationship may include something less than a continuous living arrangement, and the relationship between stepparent and child does not automatically cease because the natural parent and the stepparent separate. Here, the totality of the circumstances, including a 35-year relationship and the belief that Helen was plaintiffs' natural mother, demonstrate the

kind of family relationship contemplated by the statute, despite a 6-year interruption in the relationship between *James and Helen*. (11 C.A.4th 862.)

(b) *Intent to adopt*. The statute requires clear and convincing evidence that the stepparent would have adopted the child but for a legal barrier. As suggested in *Estate of Lind* (1989) 209 C.A.3d 1424, 257 C.R. 853, *infra*, §553, a legal barrier must exist when adoption is attempted, not at all times until the stepparent dies. The Law Revision Commission Comment points out that the legal barrier is usually the natural parent's refusal to consent. To require that barrier to exist for life would mean that the statute would not apply to adult stepchildren, because there would be no barrier to the adoption of an adult. That the Legislature intended such a result is doubtful. Here, there was substantial evidence, from the testimony of those with whom Helen discussed adoption, to support a finding of the requisite intent. (11 C.A.4th 866.)

Estate of Cleveland (1993) 17 C.A.4th 1700, 22 C.R.2d 590, rejected the reasoning of *Estate of Stevenson*, and reached a contrary result. James and Esther lived together for 12 years. Plaintiff, Esther's son Andre, lived with them from age 12 to 24, received some support from James, and was claimed as a dependent on James' tax return. At one time, James asked to adopt plaintiff, but Esther refused, fearing that the adoption would damage her relationship with her son. When plaintiff was 35, James died intestate and plaintiff sought a share of the estate under former Prob.C. 6408(e) (now Prob.C. 6454) by petitioning for an order directing the trustee of the decedent's trust to convey property to the personal representative. Defendant trustee contended that plaintiff was not entitled to a share of the estate under the statute and, therefore, lacked standing to file the petition. *Held*, summary judgment for defendant affirmed.

(a) The issue here is whether the statutory element of a legal barrier preventing adoption must exist only at the time of the attempted adoption or must continue to the time of the death of the decedent. (17 C.A.4th 1707.) The holding in *Stevenson*, that the legal barrier must exist only at the time adoption is attempted, ignores the plain meaning of the statute. The term "but for" is plain and unequivocal. "Under the statute, the failure to adopt an individual may be attributed to a legal impediment only if the legal impediment is the actual cause or the cause in fact of the failure to adopt." (17 C.A.4th 1709.)

(b) Lack of the consent of a minor's natural parent to adoption cannot constitute the actual cause of a decedent's failure to adopt the minor, where the decedent fails to adopt the minor for many years after the minor reaches the age of majority. There may be many reasons for failure to adopt, including a change in the "nature or quality" of their relationship. Where a decedent neither adopts an individual nor writes a will to provide for him, "it is fair to conclude that when many years pass without an adoption after the legal impediment ceases to exist, the decedent had other reasons for not effectuating the adoption." (17 C.A.4th 1710.)

(c) Nothing in the statutory language or the legislative history indicates that the statute is not applicable to adults. An adult stepchild or foster child "should be entitled to claim where the decedent dies shortly after the claimant reaches the age of majority and an adoption could not reasonably have been accomplished during the interim." (17 C.A.4th 1711.) Once adoption is possible, the decedent should be given "a reasonable time within which to contemplate the ramifications of the adoption and to initiate the proceedings." (17 C.A.4th 1712.)

(d) Here, there is no evidence of any legal impediment to adoption for the 16 years after plaintiff reached the age of majority, and there can be no argument that decedent did not have a reasonable time to adopt during that period. Thus, the decedent's failure to adopt plaintiff was not caused by the legal impediment of lack of consent during plaintiff's minority, and as a matter of law, plaintiff is not entitled to share in the decedent's estate under the statute. (17 C.A.4th 1713.)

The Supreme Court addressed the statutory requirements in *Estate of Joseph* (1998) 17 C.4th 203, 70 C.R.2d 619, 949 P.2d 472, following *Estate of Cleveland* and disapproving *Estate of Stevenson*. Kim was Louis' foster child beginning at 3 years of age. Her natural parents refused to allow adoption at various times during her minority, and Louis did not pursue adult adoption. On Louis' death, Kim's claim to his estate by intestate succession was opposed by

his brother. *Held*, the legal barrier to adoption required by *Prob.C. 6454* must continue throughout the joint lifetimes of the parent and child. This interpretation of the statute is consistent with the statutory language requiring adoption "but for a legal barrier." It also serves the likely intent of an intestate stepparent or foster parent, and makes intestate succession efficient and expeditious. (17 C.4th 212, 213.) One justice issued a strong dissent. (17 C.4th 218.)

In *Estate of Furia* (2002) 103 C.A.4th 1, 126 C.R.2d 384, decedent's will left property to her children with a gift over, in the event of a predeceased child, to "the surviving issue of the deceased devisee." The question was whether her deceased son's stepdaughter was entitled to a share of the devise as his "surviving issue." *Held*, she was not entitled to inherit.

(a) Under *Prob.C. 50*, "issue" means lineal descendants of all generations, with the parent and child relationship determined by the definitions of "parent" and "child." Under *Prob.C. 26*, "child" means a person entitled to take from the parent by intestate succession. Thus, to take a share under decedent's will, the stepdaughter must have been one of her stepfather's intestate heirs. (103 C.A.4th 4.)

(b) The stepdaughter was not entitled to inherit under *Prob.C. 6454*. As required by *Estate of Joseph*, a legal barrier to adoption must persist until death. Here, there was no barrier to adoption once the stepdaughter became an adult. (103 C.A.4th 4.)

(c) The stepdaughter was not entitled to inherit under *Prob.C. 6455*, the equitable adoption statute (*infra*, §97; see 10 *Summary* (10th), *Parent and Child*, §75). While there is no legal barrier requirement under the doctrine of equitable adoption, the doctrine does not change the adoptee's status as an heir. The right of an equitable adoptee to recover property from the parent is a contractual right, not a right of inheritance under the Probate Code. It allows inheritance from the parent but does not extend to the property of others. (103 C.A.4th 5, 6.)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION

I. Special Classes of Children.

3. 1993 Revision.

d. Out of Wedlock Children.

14 Witkin Sum. Cal. Law Wills § 96

[§ 96] Out of Wedlock Children.

If a child is born out of wedlock, a natural parent or other relative of the natural parent inherits from or through the child only if the parent or relative acknowledged the child and contributed to the child's support. (*Prob.C. 6452*.) An exception for a sibling of the child or the issue of a sibling was repealed in 1996. (See *Estate of Corcoran* (1992) 7 C.A.4th 1099, 1102, 9 C.R.2d 475 [inheritance by siblings in absence of acknowledgement and support under former exception]; 48 A.L.R.2d 759 [inheritance from illegitimate child]; 60 A.L.R.2d 1182 [inheritance by illegitimate child from mother's legitimate children]; 97 A.L.R.2d 1101 [inheritance by illegitimate child from or through mother's ancestors or collateral relatives]; 7 A.L.R.3d 677 [inheritance by illegitimate child from mother's other illegitimate children].)

The Law Revision Commission Comment makes the following points:

(1) The issue of an out of wedlock child inherit from or through the child on the basis of the parent and child relationship between themselves and that child, not on the basis of the relationship between that child and that child's parents.

(2) If an out of wedlock child is adopted, inheritance may be precluded under *Prob.C. 6451* (infra, §97) even if the requirements of *Prob.C. 6452* are met.

(3) Although a sibling may not inherit from a deceased out of wedlock child through a parent who has failed to acknowledge or contribute to the support of the deceased child, the sibling may inherit through the other parent, if that parent is not disqualified.

The acknowledgement required by *Prob.C. 6452* need not be in a witnessed writing and need not be made after the child is born. (*Lozano v. Scalier* (1996) 51 C.A.4th 843, 848, 59 C.R.2d 346 [father of out of wedlock child who acknowledged him in writing in medical policy and orally to family and friends, and contributed to his support, was person "entitled to property of the decedent by intestate succession" for purposes of wrongful death statute when child was killed in automobile accident].)

In *Estate of Griswold* (2001) 25 C.4th 904, 108 C.R.2d 165, 24 P.3d 1191, decedent was born out of wedlock and died intestate without issue. His half siblings claimed half of his separate property through his deceased natural father under *Prob.C. 6402(c)* (supra, §80). (The other half of the separate property belonged to decedent's surviving spouse under *Prob.C. 6401(c)* (supra, §78).) *Held*, the half siblings were entitled to share in the estate.

(a) In order for relatives of a natural parent to inherit from an out of wedlock child through the natural parent, *Prob.C. 6452* requires that the parent acknowledge the child and contribute to the child's support. Here, decedent's natural father confessed to paternity in an out-of-state proceeding and paid child support until decedent was 18 years old, and the issue is whether that confession of paternity amounts to acknowledgement for purposes of the statute. (25 C.4th 910.)

(b) Although the word "acknowledge" is not defined in the Probate Code, the common meaning of the term is to admit to be true or to confess. Here, decedent's natural father appeared in the paternity proceeding and confessed that the paternity allegation was true. There is no evidence that he did not do so knowingly and voluntarily or that he later denied paternity. (25 C.4th 911.) This conduct constitutes acknowledgement for purposes of *Prob.C. 6452*. It is not necessary that the natural father establish an ongoing parental relationship with the child or acknowledge the child's existence to his subsequent wife and children. (25 C.4th 916.)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION

I. Special Classes of Children.

3. 1993 Revision.

e. Adopted Children.

14 Witkin Sum. Cal. Law Wills § 97

[§ 97] Adopted Children.

(1) *When Relationship With Natural Parent Is Severed.* Adoption severs the relationship between the adopted person and the natural parent unless (a) the parent and child "lived together at any time as parent and child," or the parent was married to or cohabited with the other natural parent when the child was conceived and died before the child was born, and (b) the adoption was by the spouse of either of the natural parents or occurred after the death of either of the natural parents. (*Prob.C. 6451(a)*.) (See *2 Am.Jur.2d (2004 ed.)*, *Adoption* §§175, 186, 190; *37 A.L.R.2d 333* [inheritance from or through adopted child's natural parent or natural kindred]; *60 A.L.R.3d 631* [inheritance by adopted child from natural grandparent].)

In *Estate of Dye (2001) 92 C.A.4th 966, 112 C.R.2d 362*, decedent had two natural sons, who were adopted by their mother's new husband after their parents were divorced, and an adopted son, who was the child of decedent's second wife. Decedent's will devised all his property to the second wife, she predeceased decedent, the devise was not saved by the anti-lapse statute, and decedent thus died intestate. *Held*, under *Prob.C. 6451(a)*, adopted-out children may inherit from their natural parent when the adoption is by a stepparent. Thus, under *Prob.C. 6402(a)* (*supra*, §79), the estate was shared equally among the adopted son, the surviving natural son, and the issue of the deceased natural son. (*92 C.A.4th 972*.)

(2) *Succession by and Through Adopted Person.* A wholeblood sibling of an adopted person or the sibling's issue inherit from or through the adopted person on the basis of a parent and child relationship that satisfies *Prob.C. 6451(a)*. A natural parent or other relative of the natural parent inherits from or through the adopted person on the basis of that relationship only if the adoption is by the spouse or surviving spouse of that parent. (*Prob.C. 6451(b)*.) (See *43 A.L.R.2d 1183* [inheritance by adopted child from kindred of adoptive parent]; *94 A.L.R.2d 1200* [inheritance by adopted child's issue from adopting parents].) The Law Revision Commission Comment notes the following:

(a) Relatives of the natural parent do not inherit from the adopted child, even though the child may inherit from the relatives under *Prob.C. 6450(a)* (*supra*, §94).

(b) For wholeblood siblings to inherit from or through an adopted person, the requirements of *Prob.C. 6451(a)* must be satisfied.

(c) The issue of an adopted child inherit from or through the adopted child on the basis of the parent and child relationship between themselves and that child, not on the basis of the relationship between that child and that child's parents.

(3) *Successive Adoptions*. For purposes of *Prob.C. 6451*, a prior adoptive parent and child relationship is treated as a natural parent and child relationship. (*Prob.C. 6451(c)*.) The Law Revision Commission Comment makes the following points:

(a) If a person adopted by one set of parents is later adopted by another set, the second adoption terminates the relationship between the person and the first adoptive parents unless *Prob.C. 6451(a)* is satisfied, substituting "adoptive" for "natural" in that provision.

(b) *Prob.C. 6451(c)* broadens the term "wholeblood" in *Prob.C. 6451(b)* to include adoptive siblings in a proper case.

(4) *Equitable Adoption*. Nothing in *Prob.C. 6450* et seq. limits the application of the judicial doctrine of equitable adoption for the benefit of the child or the child's issue. (*Prob.C. 6455*.) (On equitable adoption, see 10 *Summary* (10th), *Parent and Child*, §75.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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IV. INTESTATE SUCCESSION
J. Escheat of Decedent's Property.
1. Former Law.

14 Witkin Sum. Cal. Law Wills § 98

[§ 98] Former Law.

(1) *In General.* If a decedent, whether or not domiciled in this state, left no one to take the estate or any portion of it by testate succession, and no one other than a government or governmental subdivision or agency to take the estate or a portion of it by intestate succession, under the laws of this state or of any other jurisdiction, the property escheated at the time of death. However, escheat did not take place if there were any relatives; the property went to the "next of kin of the decedent." (Former Prob.C. 228, 229, 230, 231; see *Estate of Michaud* (1942) 53 C.A.2d 835, 836, 128 P.2d 595; *Estate of Roberts* (1948) 85 C.A.2d 609, 612, 616, 194 P.2d 28 [partial escheat; relatives of predeceased spouse were not "next of kin" of decedent for escheat purposes even though they were entitled by statute to share of estate].)

(2) *Decedent Domiciled Elsewhere.* California formerly followed the rule that personal property left in this state by a decedent domiciled elsewhere could not escheat to this state. (See *Estate of Nolan* (1955) 135 C.A.2d 16, 19, 286 P.2d 899.) Other jurisdictions took a different view, holding that property physically located in a state could escheat to that state, regardless of the foreign domicile of the decedent. The United States Supreme Court, in *Texas v. New Jersey* (1965) 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596, 7 Summary (10th), *Constitutional Law*, §636, established several possible bases for escheat of unclaimed property, and the statutes on this subject were broadened to permit escheat, under certain circumstances, of property of a nondomiciled decedent. (Former Prob.C. 232 et seq.)

West's Key Number Digest, Escheat k.1 et seq.

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J. Escheat of Decedent's Property.
2. Nature and Scope of Statute.

14 *Witkin Sum. Cal. Law Wills* § 99

[§ 99] Nature and Scope of Statute.

If there is no taker of the intestate estate under *Prob.C. 6400* et seq. (supra, §74 et seq.), *Prob.C. 6800* et seq. govern the escheat of the decedent's property. (*Prob.C. 6404*.) (On application of Simultaneous Death Act, see *infra*, §289 et seq.)

"If a decedent, whether or not the decedent was domiciled in this state, leaves no one to take the decedent's estate or any portion thereof by testate succession, and no one other than a government or governmental subdivision or agency to take the estate or a portion thereof by intestate succession, under the laws of this state or of any other jurisdiction, the same escheats at the time of the decedent's death in accordance with" *Prob.C. 6800* et seq. (*Prob.C. 6800(a)*.)

Escheated property is subject to "the same charges and trusts to which it would have been subject if it had passed by succession." The property is also subject to *C.C.P. 1300* et seq. (unclaimed property; see 13 *Summary* (10th), *Personal Property*, §36 et seq.). (*Prob.C. 6800(b)*.) (On escheat proceedings in decedents' estates, see *C.C.P. 1420* et seq.)

Escheat is not automatic; the Attorney General must bring an action to vest title in the state, and any rightful parties have 5 years after judgment to assert their claims. (*C.C.P. 1420* et seq.; see *Estate of Lindquist* (1944) 25 *C.2d* 697, 711, 154 *P.2d* 879; *Estate of Griswold* (1935) 11 *C.A.2d* 89, 91, 53 *P.2d* 192; *Estate of Williams* (1940) 37 *C.A.2d* 181, 187, 99 *P.2d* 349.)

In *Ebert v. California* (1949) 33 *C.2d* 502, 202 *P.2d* 1022, decedent died intestate, no heirs appeared, and a decree ordering distribution to the state was made in May 1940. The property, consisting of cash, was kept by the County Treasurer and not delivered to the State Treasurer until January 1946. In February of that year, heirs of the decedent claimed it. *Held*, they were barred by the 5-year statute of limitations, which runs from the date of the decree of distribution, despite the fact that the property was not delivered to the State Treasurer as required. (33 *C.2d* 505.)

In *Mundt v. California* (1976) 54 *C.A.3d* 940, 943, 127 *C.R. 20*, the trial court entered an order for distribution to the state. Plaintiffs, first cousins of decedent, filed a timely petition, and the court ordered the state to return the escheated property to them. The state appealed on the ground that the record showed that decedent had two brothers who would have taken the entire estate if alive and that plaintiffs had failed to prove that they were dead. The trial court

ordered distribution to plaintiffs, contending that the failure of the brothers to appear within the required 5-year period entitled plaintiffs, as next entitled persons, to the estate. *Held*, affirmed. "We find nothing in the escheat statutes which requires one set of claiming heirs to prove that other heirs are dead or otherwise incapacitated. Respondents need only prove to the satisfaction of the trial court that the prior heirs were never married and have no descendants, and that respondents do not know the whereabouts of the prior heirs." (See *Estate of Supeck* (1990) 225 C.A.3d 360, 368, 274 C.R. 706 [following *Mundt*; decedent's brother and nephew were entitled to escheated property despite existence of daughter, who was foreclosed from claiming escheated property by failing to file timely petition].)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION
J. Escheat of Decedent's Property.
3. Real and Tangible Personal Property.

14 Witkin Sum. Cal. Law Wills § 100

[§ 100] Real and Tangible Personal Property.

(1) *Real Property in This State*. Unclaimed real property in California escheats to this state. (*Prob.C. 6801.*)

(2) *Tangible Personal Property Customarily Kept in This State*. Unclaimed tangible personal property owned by the decedent, wherever located at the decedent's death, that was customarily kept in California prior to the decedent's death escheats to this state. (*Prob.C. 6802.*)

(3) *Tangible Personal Property Subject to Control of Superior Court*. Unclaimed tangible personal property owned by the decedent that is subject to the control of the superior court for purposes of administration and disposition under *Prob.C. 7000* et seq. (infra, §404 et seq.) generally escheats to this state. (*Prob.C. 6803(a).*) However, property claimed by another jurisdiction goes to that jurisdiction if (a) the other jurisdiction is entitled to the property under its law, (b) the decedent customarily kept the property in that jurisdiction prior to death, and (c) the other jurisdiction would recognize California's claim to property here under similar circumstances. (*Prob.C. 6803(b).*)

West's Key Number Digest, Escheat k.3; Wills k.1, 2

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J. Escheat of Decedent's Property.
4. Intangible Property.

14 Witkin Sum. Cal. Law Wills § 101

[§ 101] Intangible Property.

(1) *Intangible Personal Property of Decedent Domiciled in This State.* Unclaimed intangible personal property owned by a decedent domiciled in California at death escheats to this state. (*Prob.C. 6804.*)

(2) *Intangible Personal Property Subject to Control of Superior Court.* Unclaimed intangible personal property owned by the decedent that is subject to the control of the superior court for purposes of administration and disposition under *Prob.C. 7000* et seq. (*infra*, §404 et seq.) generally escheats to this state whether or not the decedent was domiciled in this state at death. (*Prob.C. 6805(a).*) However, property claimed by another jurisdiction goes to that jurisdiction if (a) the other jurisdiction is entitled to the property under its law, (b) the decedent was domiciled in that jurisdiction at death, and (c) the other jurisdiction would recognize California's claim to property of a California domiciliary under similar circumstances. (*Prob.C. 6805(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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IV. INTESTATE SUCCESSION
J. Escheat of Decedent's Property.
5. Benefits Distributable From Certain Trusts.

14 Witkin Sum. Cal. Law Wills § 102

[§ 102] Benefits Distributable From Certain Trusts.

"Notwithstanding any other provision of law, a benefit consisting of money or other property distributable from a trust established under a plan providing health and welfare, pension, vacation, severance, retirement benefit, death benefit, unemployment insurance or similar benefits does not pass to or escheat to the state" under *Prob.C. 6800* et seq., but goes to the trust or fund from which it is distributable, subject to *C.C.P. 1521* (escheat of employee benefit plan distributions, see 13 *Summary* (10th), *Personal Property*, §40). However, if the plan has terminated and the trust or fund has been distributed to the beneficiaries, the benefit passes and escheats to the state. (*Prob.C. 6806.*)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
V. MAKING OF WILLS

A. Nature and Types of Wills.

1. Nature of Will.

a. Testamentary Disposition of Property.

14 Witkin Sum. Cal. Law Wills § 103

[§ 103] Testamentary Disposition of Property.

(1) *Will Is Ineffective Until Death.* Testamentary disposition is the transfer of property by a will. A will is an instrument in or by virtue of which a qualified person legally and intentionally directs the disposition of his or her property, to become effective only following his or her death. It is *ambulatory*, i.e., ineffective during the testator's life. (See *Tennant v. John Tennant Memorial Home* (1914) 167 C. 570, 577, 140 P. 242, *infra*, §105; on corresponding rule of construction, see *infra*, §208; and see 79 *Am.Jur.2d* (2002 *ed.*), *Wills* §4 *et seq.*; Cal. Transactions Forms, 4 Estate Planning §19:1 *et seq.*; Cal. Civil Practice, 1 Probate and Trust Proceedings, §3:1 *et seq.*)

(2) *Gift of Body Part.* Ordinarily, the subject of a testamentary disposition must be property, and a dead body is not property. (See 13 *Summary* (10th), *Personal Property*, §5.) However, the Uniform Anatomical Gift Act (*Health & Saf.C. 7150 et seq.*) authorizes an individual to make a gift of all or any part of his or her body, the gift to take effect on or after death. Other persons, designated by the statute in a specified order of priority, are authorized to make the gift, unless the proposed donor knows of a refusal or "contrary indications" by the decedent or knows of an objection by a member of the donor's class or a higher class of priority. An anatomical gift may be made by a signed document of gift or other specified communication; the validity of the gift is not affected by the absence or presence of a will, the validity of a will, or whether a will is probated. Law enforcement officers and hospitals must, in specified cases, make a "reasonable search" for a document of gift or other information identifying the bearer as a donor or as an individual who has refused to make an anatomical gift. (See 13 *Summary* (10th), *Personal Property*, §6 *et seq.*)

(3) *Property Subject to Disposition.* A will may dispose of the testator's separate property, the community property that belongs to the testator under *Prob.C. 100*, and the quasi-community property that belongs to the testator under *Prob.C. 101*. (*Prob.C. 6101*.) Generally, on the death of a married person, one-half of the community and one-half of the quasi-community property belongs to the decedent. (*Prob.C. 100(a)* [community]; *Prob.C. 101(a)* [quasi-community].) However, spouses may agree in writing to divide community and quasi-community property "on the basis of a non pro rata division of the aggregate value" or "on the basis of a division of each individual item or asset" or partly on each basis. (*Prob.C. 100(b)* [community]; *Prob.C. 101(b)* [quasi-community].) (On *Prob.C. 100* and *101*, see *infra*, §265.) In addition, C.C. 682.1 authorizes community property to be held with right of survivorship. (See *infra*, §266.)

(4) *Testator's Death Before 1985*. Except as otherwise specifically provided, the statutes governing wills (*Prob.C. 6100 et seq.*) apply to cases where the testator died on or after January 1, 1985; prior law applies where the testator died before January 1, 1985. (*Prob.C. 6103.*)

West's Key Number Digest, Wills k.1, 2

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1. Nature of Will.

b. Valid Will Without Disposition.

14 Witkin Sum. Cal. Law Wills § 104

[§ 104] Valid Will Without Disposition.

The supposed rule that an instrument is not a will if it does not dispose of any property is not strictly correct; this is true only of an instrument that does not attempt or purport to dispose of property. A proceeding to "probate" or prove a will is one that seeks to establish its validity as a testamentary instrument. If the instrument is one that purports to make a revocable disposition of property, and meets the tests of capacity and formalities of execution, it is entitled to probate regardless of whether the persons named under it take any property by the will.

This distinction was clearly set forth in *Estate of Philippi (1945) 71 C.A.2d 127, 161 P.2d 1006*, *infra*, §§280, 559. Decedent made (a) an April will leaving all property to his attorney in trust and disinheriting his children, his sole heirs; (b) an August will leaving all property to his friend M, but failing to mention his children. Petitions for probate of both wills were filed. The attorney objected to admission of the August will on the ground that under it the children would take the entire estate as pretermitted heirs independently of the will, and therefore the instrument did not dispose of any property and was not a will. *Held*, the August will was properly admitted to probate. It was an instrument testamentary in form and properly executed, and its interpretation and effect were matters for future determination. (*71 C.A.2d 134.*)

In *Estate of Fries (1965) 238 C.A.2d 558, 47 C.R. 888*, the testator filled out a printed form (witnessed) with good testamentary language and appointment of her husband as executor. It provided that "I give, devise," etc., all property, but no beneficiary was named. *Held*, it was a will, because it named an executor, but the probate court properly ordered distribution in accordance with the law of intestate succession. The surviving husband's contention that the testator meant "beneficiary" when she wrote "executor" was a proper subject of extrinsic evidence, but the judge's conclusion that it was not her intent was supported by sufficient evidence. (*238 C.A.2d 564.*) (See *Estate of Selditch (1949) 91 C.A.2d 62, 67, 204 P.2d 364.*)

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2. Will Distinguished From Other Instruments.

a. Deed.

14 Witkin Sum. Cal. Law Wills § 105

[§ 105] Deed.

A will must be executed in accordance with certain formalities (*infra*, §§137 et seq., 150 et seq.) and an attempted testamentary disposition by a mere deed is invalid. It therefore becomes important at times to determine whether an instrument is intended as a deed or a will. (See 31 *A.L.R.2d* 532 [effect on validity and character of instrument in form of deed of provisions indicating intent to postpone or limit rights of grantee until after death of grantor].)

In *Tennant v. John Tennant Memorial Home* (1914) 167 C. 570, 140 P. 242, the grantor executed a deed of certain real property to defendant, subject to a reservation of a life estate in the property, and to a right of revocation. The grantor died without exercising the power to revoke, and her heirs and administrator claimed the property, chiefly on the ground that the instrument was a will and was void as an attempted testamentary disposition without the formalities required for its execution. *Held*, it was a valid deed. (a) A testamentary instrument is ambulatory; by its execution the maker parts with no rights, and none are vested in any other person. (b) A deed must make a present transfer, although the enjoyment of the property by the grantee may be made to commence in the future. The reservation of the power to revoke does not affect the present conveyance of a vested future interest, but merely affords the means whereby that vested future estate can be defeated before it ripens into an estate in possession. If the instrument passes, at the time of its execution, an interest in the property, even though the interest is in a future estate and is subject to a defeasance, it is a present conveyance and not a will. (167 C. 577.) (See *Nichols v. Emery* (1895) 109 C. 323, 329, 41 P. 1089; *Cohn v. Klein* (1930) 209 C. 421, 425, 287 P. 459.)

Conversely, an instrument clearly in the form of a will, and invalid for lack of proper execution, cannot be converted into a valid deed by a construction omitting all testamentary language. (*Schroeder v. Wilson* (1948) 89 C.A.2d 63, 66, 200 P.2d 173.)

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b. Contract.

1. Obligation Terminable on Death.

14 Witkin Sum. Cal. Law Wills § 106

[§ 106] Obligation Terminable on Death.

Occasionally an instrument contains the statement that an obligation shall terminate on the death of the creditor, and a question arises whether this is invalid as an attempted testamentary disposition. The answer depends upon the circumstances:

(1) *Absolute Obligation.* If an absolute obligation is created by contract, and later the creditor alone writes on the instrument a statement that the obligation shall cease at the creditor's death, this is ineffective as a gift, for lack of delivery, and ineffective as a will, for lack of proper execution. (*Estate of McEuen (1936) 18 C.A.2d 180, 181, 63 P.2d 332* [installment contract for sale of real property].)

(2) *Qualified Obligation.* If by the terms of the contract the original obligation is itself qualified, the parties having agreed that it shall cease on the death of the creditor, the instrument is a valid contract and not an invalid will. There is no attempt by the creditor to dispose of property after death, because, by agreement of the parties, no obligation will remain at that time. (*Bergman v. Ornbaun (1939) 33 C.A.2d 680, 682, 92 P.2d 654* [promissory note for installment payments on sale of real property; provision for cancellation of future payments on payee's death].) (See *Prob.C. 5000(b)(2)*, *infra*, §108, codifying rule of *Bergman v. Ornbaun*; *11 A.L.R.3d 1427* [validity and effect of agreement that debt or obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee].)

In *Symmonds v. Pacific Homes (1964) 224 C.A.2d 507, 36 C.R. 725*, decedent was a member of defendant charitable corporation providing homes for retired persons on a life-care plan. He entered into an agreement, evidenced by a letter signed by both parties, to deposit his funds with defendant in an "open account subject to withdrawals" on his order, defendant agreeing to pay "a dividend of 4% per annum payable quarterly," and in the event of his death the balance to be paid to the Endowment Fund of defendant. Decedent received the quarterly "dividends" but made no withdrawals. On his death, his executor sued to recover the accumulated deposits (\$ 1,500). *Held*, reversing the trial judge, no recovery. This was not an invalid attempt at testamentary disposition, but a valid contractual provision discharging a debtor on the creditor's death. (*224 C.A.2d 511.*)

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2. Promise Performable on Death.

14 Witkin Sum. Cal. Law Wills § 107

[§ 107] Promise Performable on Death.

Another type of instrument, calling for a distinction between an invalid will and a valid contract to be partly performed after death, was involved in *Estate of Howe (1948) 31 C.2d 395, 189 P.2d 5*. Decedent, the owner of a business, contracted with N to manage it for a salary and bonus. It was further agreed that should decedent predecease N, N should receive the business "as additional compensation for his said services, rendered prior to the death." Decedent's widow contended that the provision for giving N the business was an invalid testamentary gift, because (a) adequate consideration for N's services was already provided for; (b) decedent could terminate the agreement by its terms on giving 90 days' notice; (c) in the event of N's death, his heirs were not to receive the property; and (d) decedent left a will in which the business was bequeathed to N "in the event such contract should be questioned." *Held*, the agreement was valid and enforceable by N. The consideration--N's services--supported the entire agreement, which could not be "dismembered" by severing the provision relating to the business. And none of the other factors was significant in view of the clear intent of the parties to create a present contractual obligation on the part of the promisor (decedent), for a valuable consideration (its adequacy being immaterial). Because there was a valid contractual obligation created during decedent's lifetime, the fact that it was in part performable after death, and on the condition or contingency of prior death of the promisor, did not bring it into conflict with the statute of wills. (*31 C.2d 400.*) (See *Estate of Turner (1959) 171 C.A.2d 591, 596, 341 P.2d 376* [veteran, in consideration of medical treatment in Veterans' hospital, agreed that his property should go to United States as trustee for Veterans' fund, on his death leaving no will or heirs]; *79 Am.Jur.2d (2002 ed.), Wills §36; 1 A.L.R.2d 1178* [provision for post-mortem payment or performance as affecting character and validity of instrument as contract].)

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3. Pay-on-Death Provisions.

14 Witkin Sum. Cal. Law Wills § 108

[§ 108] Pay-on-Death Provisions.

(1) *Instruments and Provisions.* Under *Prob.C. 5000*, based on *Unif.Prob.C., §6-201*, specified nonprobate transfers are valid even though not in compliance with the requirements for the execution of wills. These include "a nonprobate transfer 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." (*Prob.C. 5000(a)*.) (See *Rest.3d, Property (Wills and Other Donative Transfers) §7.1* [definition and validity of "will substitute"]; *50 A.L.R.4th 272* [pay-on-death account as will]; *infra*, §306.) The statute also includes the following:

(a) A written provision that money or other benefits due, controlled, or owned by the decedent be paid after death to a person designated by the decedent in the instrument or in a separate writing (including a will) executed before or after the designating instrument. (*Prob.C. 5000(b)(1)*.)

(b) A written provision that money due or to become due under the instrument will cease to be payable in the event of the death of the promisor or promisee before payment or demand. (*Prob.C. 5000(b)(2)*.)

(c) A written provision that property controlled or owned by the decedent that is the subject of the instrument will pass to a person designated by the decedent in the instrument or in a separate writing (including a will) executed before or after the designating instrument. (*Prob.C. 5000(b)(3)*.)

(2) *Multiple-Party Accounts.* The California Multiple-Party Accounts Law governs multiple-party accounts on deposit with financial institutions such as banks, savings associations, credit unions, and industrial loan companies. (*Prob.C. 5100 et seq.*; see 4 *Summary* (10th), *Negotiable Instruments*, §77 *et seq.*) The law provides that a provision designating a beneficiary in an account may not be changed by will (*Prob.C. 5302(e)*), and that an account is not a testamentary disposition and need not satisfy the requisites for a valid testamentary disposition (*Prob.C. 5304*). Under *Prob.C. 6600(b)(2)*, multiple-party accounts are excluded in determining the estate of a decedent or its value to the extent that the account belongs to the account beneficiary on the death of the decedent. (See *15 Pacific L. J. 446*.)

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4. Contract To Make Will.

14 Witkin Sum. Cal. Law Wills § 109

[§ 109] Contract To Make Will.

A contract may be made (usually between husband and wife) to govern the parties in their future testamentary dispositions. But (a) the contract, though enforceable by the remedy of "quasi-specific performance," is not a will; and (b) the will executed pursuant to it, in the absence of contractual terms, is not enforceable as a contract. (See *Unif.Prob.C.*, §2-701; 79 *Am.Jur.2d* (2002 ed.), *Wills* §312 et seq.; C.E.B., 1 *Will Drafting* 3d, §1.8 et seq.; 44 *Cal. L. Rev.* 968; 13 *Summary* (10th), *Equity*, §31; *infra*, §§112, 113.)

A valid will in contractual form must be distinguished. In *Halldin v. Usher* (1958) 49 *C.2d* 749, 321 *P.2d* 746, a husband and wife signed a writing declaring that they "herewith agree" that the survivor should receive their property, and that on their death it should go to their children in a specified manner. The husband died, and plaintiff son, in an action for declaratory relief, contended that he was a third-party beneficiary of this contract. *Held*, parol evidence, properly received to construe the ambiguous instrument, supported the trial court's determination that the instrument was to take effect only on the death of one of the spouses, and was therefore a will and not a contract. (49 *C.2d* 751.)

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c. Gift or Living Trust.

14 Witkin Sum. Cal. Law Wills § 110

[§ 110] Gift or Living Trust.

(1) *Gift in View of Impending Death.* A gift in view of impending death (*gift causa mortis*) differs from a will in that (a) it can be made orally, (b) it must be made in contemplation of impending death, and (c) delivery is required. (See *Prob.C. 5700 et seq.*, 13 *Summary* (10th), *Personal Property*, §§134, 153.) Because they evade the law of testamentary disposition, it is sometimes said that such gifts are not viewed favorably and must be clearly established. (See 13 *Summary* (10th), *Personal Property*, §135.)

(2) *Living Trust.* It might be argued that a trust can sometimes be successfully attacked on the ground that its provisions are testamentary in effect and call for the formalities of execution of a will. But practical exceptions to the statute of wills are recognized in the tentative or Totten trust in a bank account (see 13 *Summary* (10th), *Trusts*, §8 et seq.), and in the unfunded insurance trust (see 13 *Summary* (10th), *Trusts*, §31). In addition, an ordinary living trust involves the transfer of property to the trustee during life, not at death.

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3. Types of Wills.

a. Witnessed and Holographic Wills.

14 Witkin Sum. Cal. Law Wills § 111

[§ 111] Witnessed and Holographic Wills.

With respect to the manner in which they are made, wills are of two types:

(1) *Witnessed*. A witnessed will requires the formalities of execution specified in *Prob.C. 6110*. (See *infra*, §137 et seq.)

(2) *Holographic*. A holographic will does not require formalities, but the signature and material provisions must be in the handwriting of the testator. (*Prob.C. 6111*.) (See *infra*, §150 et seq.)

Former statutes recognized a *nuncupative* or "soldier's will," requiring neither writing nor formalities, but only an oral testamentary disposition by (a) a person in actual military service in the field, or doing duty on shipboard at sea, in actual contemplation, fear, or peril of death; or (b) any person in expectation of immediate death from any injury received the same day. However, the will could dispose only of personal property of a value not exceeding \$ 1,000, the words had to be reduced to writing within 30 days and probate had to be sought within 6 months, and the will had to be proved by two witnesses. Following a recommendation of the California Law Revision Commission, noting that the restrictions and procedural requirements made the use of these wills impractical, the statutes were repealed in 1982. (See 16 Cal. Law Rev. Com. Reports, p. 309; *14 Pacific L. J.* 370.)

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b. Joint and Mutual Wills.

1. Joint Will Without Contract.

14 Witkin Sum. Cal. Law Wills § 112

[§ 112] Joint Will Without Contract.

There are three forms of disposition loosely referred to as *joint* or *mutual* wills:

(1) *Joint Will*. This is "a single testamentary instrument constituting or containing the wills of two or more persons, and jointly executed by them as their respective wills. It is not necessarily either mutual or reciprocal. It is, in legal effect, the separate will of each of the persons executing it. The fact that it is executed by both or all of such persons does not affect its validity or effect as the will of any one of them." (*Daniels v. Bridges* (1954) 123 C.A.2d 585, 588, 267 P.2d 343; see *Estate of Lane* (1975) 47 C.A.3d 52, 57, 120 C.R. 499; 79 Am.Jur.2d (2002 ed.), *Wills* §659 et seq.; C.E.B., 1 Will Drafting 3d, §1.17.)

(2) *Mutual Wills*. These are "the separate wills of two or more persons which are reciprocal in their provisions." (*Daniels v. Bridges*, *supra*.)

(3) *Joint and Mutual Will*. This is "one instrument executed jointly by two or more persons, the provisions of which are reciprocal." (*Daniels v. Bridges*, *supra*; see *Chase v. Leiter* (1950) 96 C.A.2d 439, 448, 215 P.2d 756; *Van Houten v. Whitaker* (1959) 169 C.A.2d 510, 514, 337 P.2d 900; *Thompson v. Boyd* (1963) 217 C.A.2d 365, 375, 32 C.R. 513.)

None of these arrangements accomplishes an irrevocable disposition of property. Under *Prob.C. 21700(b)*, the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke. (See *Rolls v. Allen* (1928) 204 C. 604, 607, 269 P. 450; *Daniels v. Bridges*, *supra*; *Thompson v. Boyd*, *supra*, 217 C.A.2d 380; 61 Harv. L. Rev. 681.) (On joint will with contract, see *infra*, §113.)

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2. Joint Will With Contract.

14 Witkin Sum. Cal. Law Wills § 113

[§ 113] Joint Will With Contract.

In order to secure the effect of an irrevocable arrangement, it is necessary to make a binding agreement, either in the will or in a separate written instrument. (See *Chase v. Leiter* (1950) 96 C.A.2d 439, 448, 215 P.2d 756 [joint and mutual will was also contract]; *Van Houten v. Whitaker* (1959) 169 C.A.2d 510, 515, 337 P.2d 900 [same]; *Estate of Stuart* (1950) 97 C.A.2d 218, 220, 217 P.2d 723 [joint will was in part a contract; contract part was voidable for mutual mistake]; *Daniels v. Bridges* (1954) 123 C.A.2d 585, 588, 267 P.2d 343; *Brewer v. Simpson* (1960) 53 C.2d 567, 578, 2 C.R. 609, 349 P.2d 289; *Mitchell v. Marklund* (1965) 238 C.A.2d 398, 405, 47 C.R. 756; *Estate of Cates* (1971) 16 C.A.3d 1, 11, 93 C.R. 696; Cal. Transactions Forms, 2 Estate Planning §11:10 et seq.; 79 Am.Jur.2d (2002 ed.), Wills §671 et seq.; 48 Cal. L. Rev. 858; 18 Hastings L. J. 423; 2 Stanf. L. Rev. 431; 85 A.L.R.3d 8 [right of party to joint will to dispose of property during life]; 17 A.L.R.4th 167 [establishment and effect, after death of one of the makers of joint will, of agreement not to revoke will].) (On requisites of contract, see *infra*, §326.)

Even where there is a contract, the testator may still revoke, and the probate court may distribute the estate in accordance with the subsequent directions of the testator; but a suit in equity will lie to enforce the terms of the contract. (See *Estate of Rolls* (1924) 193 C. 594, 602, 226 P. 608; *Wolf v. Donahue* (1929) 206 C. 213, 220, 273 P. 547; *Staples v. Hawthorne* (1929) 208 C. 578, 582, 283 P. 67; *Van Houten v. Whitaker*, *supra*; 13 Cal. L. Rev. 179; 61 Harv. L. Rev. 683; on equitable enforcement, see 13 Summary (10th), Equity, §31 et seq.; on lack of contractual intent to benefit third party, see *Kalmanovitz v. Bitting* (1996) 43 C.A.4th 311, 50 C.R.2d 332, 13 Summary (10th), Equity, §33.)

However, a contract will not be inferred from the joint form alone. "The mere fact that a joint will contains reciprocal, or similar or identical, provisions is not of itself sufficient evidence of a contract, nor is it enough to establish a legal obligation to forbear revocation in the absence of a valid contract." (*Daniels v. Bridges*, *supra*, 123 C.A.2d 589; *Thompson v. Boyd* (1963) 217 C.A.2d 365, 376, 32 C.R. 513; see 61 Harv. L. Rev. 677.)

The practical lesson taught by these cases is that the contract is the important element:

(1) If, under proper advice, a written contract is made, the statute of frauds is satisfied (see 1 Summary (10th), Contracts, §371; *infra*, §326), and the contract is enforceable in an action for quasi-specific performance, by the

imposition of a constructive trust against persons who take the property (see 13 *Summary* (10th), *Equity*, §31).

(2) If, as is often the case, the contract is not in writing, the statute of frauds is a bar to quasi-specific performance unless the circumstances give rise to an estoppel to set up the bar (see 1 *Summary* (10th), *Contracts*, §409).

(3) If no contract is proved, the joint and mutual will is ineffectual to carry out the intended dispositions when either party chooses to disregard them.

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c. Conditional Will.

14 Witkin Sum. Cal. Law Wills § 114

[§ 114] Conditional Will.

A will may by its terms be made conditional upon the happening of an event, e.g., death from a particular disease or operation. The will is ineffective if the condition precedent does not happen. (*Prob.C. 6105*; see *Estate of Cook* (1916) 173 C. 465, 468, 160 P. 553.) And "a subsequent desire that a will once conditional should become absolute is ineffective without reexecution or republication of the will." (*Estate of Taylor* (1953) 119 C.A.2d 574, 582, 259 P.2d 1014.) (See 79 *Am.Jur.2d* (2002 ed.), *Wills* §650 et seq.; 1 *A.L.R.3d* 1048 [determination whether will is absolute or conditional].)

But language that superficially appears conditional may, to uphold the will, be construed as "mere matter of inducement." The test is: "Did the testator intend, by the language used, to make the happening of the possibility referred to a condition precedent to the operation of the will, in which case the instrument is not entitled to probate if the condition is not fulfilled; or did he state the possibility of the happening merely as the motive or reason which led to the making of the instrument and which was carelessly stated in language suggestive of a condition, in which case the will becomes operative on the testator's death even if the event, the possibility of which appears to have induced the will, has not taken place?" (*Estate of Taylor, supra*, 119 C.A.2d 580; see *Estate of Moulton* (1959) 176 C.A.2d 87, 90, 1 C.R. 407; *Estate of Desmond* (1963) 223 C.A.2d 211, 214, 35 C.R. 737 [extrinsic evidence was admissible to show intent]; *Estate of Stephenson* (1965) 235 C.A.2d 326, 329, 45 C.R. 121.)

In *Estate of Taylor, supra*, T, in the Navy, wrote L saying that "in case Davie Jones gets me out in the South Pacific ocean in other words lost at Sea" he wanted his bonds, cash, and wages to go to B, an old friend in whose family he lived. T also told B that "in the event anything would happen to him" he was sending a paper to L and that B should contact L. After his Navy service terminated, T lived in B's family for some years, mentioning the paper and repeating his direction to contact L. On his death, L filed the paper as a will with the county clerk, and an aunt contested it. *Held*, the will was absolute and B was entitled to the estate. Stressing the preferred construction to uphold an informal will of a decedent in the armed services, the court thought the following facts supported the conclusion of inducement rather than condition: (a) The document was delivered to a third person; (b) the decedent directed its preservation, and it was preserved with his knowledge, after the apparent condition had failed; (c) no will was subsequently executed, and this document was not revoked. (119 C.A.2d 582.)

In *Estate of Del Val* (1958) 159 C.A.2d 600, 323 P.2d 1011, decedent, the day before he went to the hospital for treatment of a heart condition, wrote a brief holographic will stating that "if there is anything happen to me to night" he left his property to Mr. and Mrs. D. He delivered the paper to Mrs. D, saying, "This is my will. Take care of it." He returned from the hospital and stayed with them for several months until his death from a heart attack, without further discussion of the will. *Held*, it was absolute. The court followed the approach of *Estate of Taylor*, applying the rule of liberal construction of the will of an unskilled layman (*infra*, §190), and noting particularly that (a) he did not limit his directions for preservation of the document to any particular time; (b) he did not ask for its return; and (c) he did not execute another will or revoke this one. (159 C.A.2d 606.)

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A. Nature and Types of Wills.

4. California Statutory Will.

a. Nature and Purpose of Statute.

14 Witkin Sum. Cal. Law Wills § 115

[§ 115] Nature and Purpose of Statute.

(1) *Statutory Development.* The 1982 Legislature added provisions to the Probate Code authorizing "California Statutory Wills." The statutes provided two detailed forms of wills, one with a trust and one without. The statutes incorporated by reference the text of mandatory clauses, definitions, and rules of construction. They were designed to offer persons an opportunity to devise property in an expedient and inexpensive fashion. (See Cal. Transactions Forms, 4 Estate Planning §19:42 et seq.; 14 *Pacific L. J.* 370; 19 *Western State L. Rev.* 77 [A Criticism of the California Statutory Will].) The statutory form with a trust was repealed in 1991. The form without a trust remains in effect. (See *Prob.C.* 6200 et seq.)

(2) *General Law Applicable.* Except as specifically provided in *Prob.C.* 6200 et seq., "the general law of California applies to a California statutory will." (*Prob.C.* 6243.) The enacting statute (Stats. 1982, Chap. 1401, §2) states that "[e]xcept as specifically provided, nothing in this bill is intended to change the substantive law of California."

(3) *Validity and Construction of Wills Executed Under Former Law.* *Prob.C.* 6242 governs statutory wills executed under former law as follows:

(a) Except as specifically provided in *Prob.C.* 6200 et seq., a statutory will includes only the texts of the property disposition clauses and the mandatory clauses as they exist on the day the will is executed. (*Prob.C.* 6242(a).)

(b) *Prob.C.* 6205 (definition of "descendants"; *infra*, §117), *Prob.C.* 6206 (reference to Uniform Transfer to Minors Act; *infra*, §117), and *Prob.C.* 6227 (effect of dissolution or annulment; *infra*, §119) apply to every statutory will. *Prob.C.* 6211 (120-hour survival requirement; *infra*, §117) applies to statutory wills executed after January 1, 1991. (*Prob.C.* 6242(b).)

(c) Notwithstanding *Prob.C.* 6222, and except as provided by *Prob.C.* 6242(b), a will executed on a form prepared for use under prior law that satisfies the requirements of prior law is governed by the law before January 1, 1992. (*Prob.C.* 6242(c).) (See *Prob.C.* 6223(c) [statutory will executed on form allowed under prior law is governed by law applicable before January 1, 1992].)

(d) A statutory will does not fail to meet the requirements of *Prob.C. 6242(a)* merely because it is executed on a form that incorporates mandatory clauses of *Prob.C. 6241* that refer to former *Prob.C. 1120.2*; in such a will the trustee has the powers listed in *Prob.C. 16220* et seq. (see 13 *Summary* (10th), *Trusts*, §100 et seq.). (*Prob.C. 6242(d)*.)

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b. Statutory Form.

14 Witkin Sum. Cal. Law Wills § 116

[§ 116] Statutory Form.

(1) *Single Form Only.* There is now only one form for a California statutory will. (*Prob.C. 6223(a).*) The statutory will with trust was repealed in 1991.

(2) *Content of Will.* The statutory will consists of the form set forth in *Prob.C. 6240*, excluding the questions and answers at the beginning. (*Prob.C. 6223(b)(1).*) By reference, the will includes the full text of the definitions and rules of construction set forth in *Prob.C. 6200* et seq. (*infra*, §117), the property disposition clause adopted by the testator, and the mandatory clauses set forth in *Prob.C. 6241* (*infra*, this section). (*Prob.C. 6223(b)(2).*)

(3) *Format of Statutory Form.* The statutory form in *Prob.C. 6240* begins with (a) 21 questions and answers about the form and its use, and (b) instructions about reading the document, filling in the blanks, and executing and witnessing it. The will sets forth and explains various choices and provides boxes for the testator to complete. It includes the following:

- (a) Name and declaration.
- (b) Specific gift of personal residence.
- (c) Specific gift of automobile, household and personal effects.
- (d) Specific gifts of cash to persons or charities.
- (e) Disposition of residue.
- (f) Guardian of person of minor child.
- (g) Provision for property of persons under age 25.
- (h) Executor and bond.

(i) Execution and attestation.

(4) *Mandatory Clauses Incorporated by Reference.* *Prob.C. 6241* sets forth the following mandatory provisions, which are incorporated by reference into the statutory form pursuant to *Prob.C. 6223(b)(2)(C)*:

(a) *Intestate Disposition.* If the testator has not made an effective residuary disposition, the executor distributes the residuary estate to the heirs at law, their identities and respective shares to be determined according to the intestate succession law governing property not acquired from a predeceased spouse in effect on the date of the testator's death. (*Prob.C. 6241(a).*)

(b) *Powers of Executor.* The executor has those powers conferred by law and specified powers (1) to sell, lease, or invest estate assets, (2) to distribute assets to a minor's guardian or custodian, and (3) to distribute assets in cash or in kind. (*Prob.C. 6241(b).*)

(c) *Powers of Guardian.* A guardian of the person has the same authority as a parent with legal custody. A guardian of the property has all powers conferred by law. These powers may be exercised without court authorization. (*Prob.C. 6241(c).*)

(5) *Construction of Clauses.* Only the text of the property disposition clauses and the mandatory clauses are considered in determining their meaning. Titles are disregarded. (*Prob.C. 6225.*)

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c. Definitions and Rules of Construction.

14 Witkin Sum. Cal. Law Wills § 117

[§ 117] Definitions and Rules of Construction.

The Probate Code contains a number of definitions and rules of construction governing statutory wills (*Prob.C. 6200*).

(1) *General Definitions and Rules of Construction.* The usual definitions of "testator," "executor," "trustee," and "person" are set forth. (*Prob.C. 6201, 6203, 6204, 6210.*) The same is true of the usual rules governing masculine pronouns, plural and singular words, "shall" and "may." (*Prob.C. 6207, 6208.*)

(2) *Descendants.* "Descendants" means "children, grandchildren, and their lineal descendants of all generations," with the relationship of parent and child at each generation being determined as provided in *Prob.C. 21115* (*infra*, §228 et seq.). A reference to "descendants" includes a single descendant "where the context so requires." (*Prob.C. 6205.*)

(3) *Distribution to Descendants.* When distribution under a statutory will is to be made to a person's descendants, "the property shall be divided into as many equal shares as there are then living descendants of the nearest degree of living descendants and deceased descendants of that same degree who leave descendants then living; and each living descendant of the nearest degree shall receive one share and the share of each deceased descendant of that same degree shall be divided among his or her descendants in the same manner." (*Prob.C. 6209.*)

(4) *Transfers to Minors.* A reference in a statutory will to the "Uniform Gifts to Minors Act of any state" or the "Uniform Transfers to Minors Act of any state" includes both acts. A reference to "custodian" means the person designated as custodian in the statutory will or any other person acting as custodian under either Uniform Act at any time. (*Prob.C. 6206.*) (On Uniform Act, see 13 *Summary* (10th), *Personal Property*, §140 et seq.)

(5) *120-hour Survival Requirement.* "Reference to a person 'if living' or who 'survives me' means a person who survives the decedent by 120 hours. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of the California statutory will, and the beneficiaries are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be a beneficiary has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period." The survival requirement does not apply if the application of the requirement would result in the escheat of property to the state. (*Prob.C. 6211.*) *Prob.C. 6211* applies to statutory wills executed after January 1, 1991. (*Prob.C.*

6242(b).)

(6) *Improper Disposition*. If more than one property disposition clause appearing in paragraph 2 or 3 of the statutory will form are selected, no gift is made. If more than one property disposition clause in paragraph 5 is selected, or if none is selected, the residuary estate of the testator is distributed to the testator's heirs as if the testator did not make a will. (*Prob.C. 6224*.) If no property disposition clause is adopted, *Prob.C. 6224* applies. (*Prob.C. 6223(b)(2)(B)*.)

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d. Execution.

14 Witkin Sum. Cal. Law Wills § 118

[§ 118] Execution.

(1) *Formal Requirements.* A statutory will may be executed by any person over the age of 18 who is of sound mind. (*Prob.C. 6220.*) The testator must fill in the blanks and sign the will. (*Prob.C. 6221(a).*)

"Each witness shall observe the testator's signing and each witness shall sign his or her name in the presence of the testator." (*Prob.C. 6221(b).*) The execution of the attestation clause in the statutory will form by two or more witnesses satisfies *Prob.C. 8220* (proof of will; *infra*, §545). (*Prob.C. 6222.*)

Notwithstanding *Prob.C. 6110* (witnessed wills; *infra*, §137 et seq.), a document executed on a statutory will form is valid as a will if the following requirements are shown by clear and convincing evidence: (a) The form is signed by the testator, (b) the court is satisfied that the testator knew and approved the contents of the will and intended it to have testamentary effect, and (c) the testamentary intent reflected in the document is clear. (*Prob.C. 6226(c).*)

In *Estate of Perry* (1996) 51 C.A.4th 440, 58 C.R.2d 797, the decedent's will was executed on a statutory will form. Various blanks were not personally completed by the decedent, as required by *Prob.C. 6221(a)*, but the will was signed and witnessed, as required by *Prob.C. 6110*. *Held*, summary judgment for contestants reversed. Whether the will was properly executed was a triable issue. No statutory language suggests a legislative intent to make *Prob.C. 6110* inapplicable simply because a testator uses a statutory will form but fails to meet all the requirements of *Prob.C. 6221*. Under *Prob.C. 6226(c)*, an unwitnessed will on a statutory form may be admitted to probate even though the requirements of *Prob.C. 6221(b)* are not fully met. "We see no reason to infer that the Legislature intended to deny probate when the will was properly signed and witnessed, but the testator did not personally complete the form's blanks." (51 C.A.4th 446.)

(2) *Additions and Deletions.* "Any additions to or deletions from the California statutory will on the face of the California statutory will form, other than in accordance with the instructions, shall be given effect only where clear and convincing evidence shows they would effectuate the clear intent of the testator. In the absence of such a showing, the court either may determine that the addition or deletion is ineffective and shall be disregarded, or may determine that all or a portion of the California statutory will is invalid, whichever is more likely to be consistent with the intent of the testator." (*Prob.C. 6226(b).*)

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e. Amendment and Revocation.

14 Witkin Sum. Cal. Law Wills § 119

[§ 119] Amendment and Revocation.

(1) *In General.* A statutory will may be amended or revoked by codicil "in the same manner as other wills." (*Prob.C. 6226(a).*) (On revocation, see *infra*, §173 et seq.; on codicils, see *infra*, §159 et seq.)

(2) *Effect of Dissolution or Annulment of Testator's Marriage.* *Prob.C. 6227* makes the general rule on revocation by dissolution or annulment (see *infra*, §177) applicable to statutory wills as follows:

(a) *Revocation and Revival.* If, after executing a statutory will, the testator's marriage is dissolved or annulled, the dissolution or annulment revokes any disposition of property to the former spouse and any nomination of the former spouse as executor, trustee, guardian, or custodian. A disposition or nomination revoked solely by this provision is revived by the testator's remarriage to the former spouse. (*Prob.C. 6227(a).*) (On dissolution or annulment before January 1, 1985, see *Prob.C. 6227(d).*)

(b) *Interpretation of Will Provisions.* Property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator. Provisions nominating the former spouse as executor, trustee, guardian, or custodian are to be interpreted as if the former spouse failed to survive. (*Prob.C. 6227(b).*)

(c) *Legal Separation Distinguished.* For purposes of *Prob.C. 6227*, dissolution or annulment means any dissolution or annulment that would exclude the spouse as a surviving spouse within the meaning of *Prob.C. 78* (*supra*, §49). A decree of legal separation that does not terminate the status of husband and wife is not a dissolution or annulment for this purpose. (*Prob.C. 6227(c).*)

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1. In General.

14 Witkin Sum. Cal. Law Wills § 120

[§ 120] In General.

(1) *Basic Requirement.* "An individual 18 or more years of age who is of sound mind may make a will." (*Prob.C. 6100(a).*) (See *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi* (1996) 51 C.A.4th 1302, 1308, 59 C.R.2d 647 [because a minor lacks capacity to make a will, he or she dies intestate and estate passes equally to minor's parents, in absence of surviving spouse or issue; thus, minor lacked ability to assign his future interest in settlement proceeds to his mother]; *Unif.Prob.C. §2-501; Rest.3d, Property (Wills and Other Donative Transfers) §8.1* [mental capacity to make or revoke donative transfer], §8.2 [minor lacks capacity to make will or gift]; 79 *Am.Jur.2d* (2002 ed.), *Wills* §62 et seq.; C.E.B., 1 Will Drafting 3d, §2.8 et seq.; C.E.B., 3 Decedent Estate Practice, §22.24 et seq.; Cal. Transactions Forms, 4 Estate Planning §19:32 et seq.)

(2) *Particular Factors.* Illiteracy is not a disqualifying factor. (*Estate of Shay* (1925) 196 C. 355, 360, 237 P. 1079; see 37 A.L.R.3d 889 [testator's illiteracy or lack of knowledge of language in which will is written as affecting its validity].) Nor is old age, illness, or physical weakness. (*Estate of Casarotti* (1920) 184 C. 73, 80, 192 P. 1085; *Estate of Sexton* (1926) 199 C. 759, 764, 251 P. 778 [paralytic strokes]; cf. *Estate of Doolittle* (1908) 153 C. 29, 31, 94 P. 240 [feeble condition of dying man was relevant on issue of mental capacity]; *Estate of Goddard* (1958) 164 C.A.2d 152, 157, 330 P.2d 399.) Mental incompetency, however, is a ground for the contest of a will. (*Prob.C. 6100.5*, *infra*, §121 et seq.)

(3) *Capacity of Conservator and Conservatee.* A conservator may make a will on behalf of a conservatee if authorized to do so by court order under *Prob.C. 2580* (*infra*, §1027). (*Prob.C. 6100(b)*, *6100.5(c).*) However, the authority to do so does not "impair the right of a conservatee who is mentally competent to make a will from revoking or amending a will made by a conservator or making a new and inconsistent will." (*Prob.C. 6100(b).*) (On right of conservatee to make will, see *Prob.C. 1871*, *infra*, §953.)

West's Key Number Digest, Wills k.21 et seq.

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B. Competency and Capacity.

2. Mental Incompetency.

a. Test.

14 Witkin Sum. Cal. Law Wills § 121

[§ 121] Test.

(1) *In General.* "[I]t is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act." (*Estate of Chevallier* (1911) 159 C. 161, 168, 113 P. 130.) The test of competency is whether the testator had sufficient mental capacity to be able (a) to understand the nature of his or her act; (b) to understand and recollect the nature and situation of his or her property; and (c) to remember and understand his or her relations to the persons who have claims on his or her bounty, and whose interests are affected by the will. (*Estate of Smith* (1926) 200 C. 152, 158, 252 P. 325; *Estate of Powell* (1931) 113 C.A. 670, 673, 299 P. 108; *Estate of Sandman* (1932) 121 C.A. 9, 12, 8 P.2d 499; see *Rest.3d, Property (Wills and Other Donative Transfers)* §8.1 [test of capacity]; 79 *Am.Jur.2d* (2002 ed.), *Wills* §62 et seq.; 11 Proof of Facts 159 [testamentary capacity]; 17 Proof of Facts 3d 219 [lack of testamentary capacity from Alzheimer's disease or dementia]; 19 Proof of Facts 3d 335 [lack of testamentary capacity from AIDS dementia]; 38 Proof of Facts 3d 227 [proof of testamentary incapacity of mentally retarded person]; 62 Proof of Facts 3d 197 [proof of incompetency]; 66 *Harv. L. Rev.* 1116; 24 *San Diego L. Rev.* 1043; 47 *A.L.R.5th* 523 [Alzheimer's disease as affecting testamentary capacity].)

(2) *Statutory Criteria.* An individual is not mentally competent to make a will if either of the following is true at the time of execution:

(a) "The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will." (*Prob.C. 6100.5(a)(1).*)

(b) "The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done." (*Prob.C. 6100.5(a)(2).*)

Nothing in *Prob.C. 6100.5* supersedes existing law "relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders." (*Prob.C. 6100.5(b).*)

Prob.C. 6100.5(a)(2) codifies the standards for determining testamentary capacity set forth in *Estate of Perkins* (1925) 195 C. 699, 235 P. 45, and later decisions. Whether or not delusions and hallucinations are characterized as "insane," the proper test is whether delusions and hallucinations result in a devise the testator would otherwise not have made. (*Goodman v. Zimmerman* (1994) 25 C.A.4th 1667, 1677, 32 C.R.2d 419.)

(3) *Capacity Statute*. A comprehensive statute governing legal capacity for a variety of acts, including the capacity to execute wills and trusts, was adopted in 1995. (See *Prob.C. 810* et seq., supra, §8 et seq.)

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2. Mental Incompetency.

b. Showing Required.

14 Witkin Sum. Cal. Law Wills § 122

[§ 122] Showing Required.

A contestant must show either (1) mental incompetence generally, or (2) a delusion that directly influenced the testamentary act. The point at issue is the testator's mental condition at the time of the execution of the will; evidence of the testator's condition at other times is only of significance insofar as it aids in determining condition at the time of execution. (See *Estate of Perkins* (1925) 195 C. 699, 703, 235 P. 45; *Estate of Ivey* (1928) 94 C.A. 576, 585, 271 P. 559; *Estate of Clark* (1929) 100 C.A. 357, 361, 280 P. 204; *Estate of Finkler* (1935) 3 C.2d 584, 595, 46 P.2d 149; *Estate of Powers* (1947) 81 C.A.2d 480, 482, 184 P.2d 319; *Estate of Fosselman* (1957) 48 C.2d 179, 185, 308 P.2d 336; *Estate of Clegg* (1978) 87 C.A.3d 594, 600, 151 C.R. 158; 79 Am.Jur.2d (2002 ed.), Wills §90 et seq.; 6 Stanf. L. Rev. 93; 24 San Diego L. Rev. 1043.)

On the issue of mental capacity, opinion evidence may be given by the subscribing witness or an intimate acquaintance. (Ev.C. 870; see 1 Cal. Evidence (4th), Opinion Evidence, §7.) Expert psychiatric evidence is also admissible. (See 1 Cal. Evidence (4th), Opinion Evidence, §56.) (See Prob.C. 6100.5(b), supra, §121; 66 Harv. L. Rev. 1116 [psychiatric evidence]; 18 Stanf. L. Rev. 1119 [psychiatric evaluation]; 89 A.L.R.2d 177 [admissibility of previously executed wills on issue of mental capacity].)

The issue of competency is one of fact on which the determination of the jury is almost invariably upheld. (See 9 Cal. Proc. (4th), Appeal, §359 et seq.; for reversals of jury determinations of incompetency, see *Estate of Lingenfelter* (1952) 38 C.2d 571, 580, 241 P.2d 990; *Estate of Fritschi* (1963) 60 C.2d 367, 372, 33 C.R. 264, 384 P.2d 656 [evidence amounted only to speculation about possible effects of drugs]; on difficulties of appellate review in competency cases, see 9 Cal. Proc. (4th), Appeal, §368; and see 6 Stanf. L. Rev. 91.)

SUPPLEMENT: [This section is current through the latest supplement]
Competency is factual determination:

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §365 et seq.

Appellate review in competency cases:

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §374.



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c. Burden of Proof.

14 Witkin Sum. Cal. Law Wills § 123

[§ 123] Burden of Proof.

Prior to adoption of the Evidence Code, the case law had recognized a general presumption of sanity and competency, thus placing the burden on the contestant to prove incompetency. (See *Estate of Rich* (1947) 79 C.A.2d 22, 28, 179 P.2d 373; *Estate of Powers* (1947) 81 C.A.2d 480, 482, 184 P.2d 319; *Estate of Lingenfelter* (1952) 38 C.2d 571, 580, 241 P.2d 990; *Estate of White* (1954) 128 C.A.2d 659, 665, 276 P.2d 11; *Camperi v. Chiechi* (1955) 134 C.A.2d 485, 499, 286 P.2d 399; *Estate of Goddard* (1958) 164 C.A.2d 152, 157, 330 P.2d 399; *Estate of Wynne* (1966) 239 C.A.2d 369, 373, 48 C.R. 656.)

During this period, a presumption was regarded as evidence, and the presumption of sanity could prevail against the testimony of subscribing witnesses. Thus, in *Estate of Wright* (1936) 7 C.2d 348, 60 P.2d 434, the draftsman of the will (a notary), both subscribing witnesses, and others testified that in their opinion the testator was of unsound mind. The lower court denied admission of the will to probate. On appeal the court reviewed this evidence, found it concerned with trivialities, and reversed the order, declaring that "testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act." (7 C.2d 356.) The court added: "If it could be said that the testimony of the three persons who participated in the creation of the will and who by their solemn acts gave the stamp of approval and verity to its due execution, and afterwards attempted to repudiate all they had done, had any convincing force or any substantial factual basis, their testimony would nevertheless be subject to the scrutiny and suspicion which courts rightfully exercise in considering the testimony of persons who out of their own mouths admit their guilt of self-stultification. It has been said that such testimony is 'simply worthless.' " (7 C.2d 350.)

The Evidence Code abolished the rule that a presumption is evidence (Ev.C. 600(a); see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §52), and also eliminated the presumption of sanity. But the burden of proof is still on the party asserting insanity. (Ev.C. 522; see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §27.) An examination of the cases discloses comparatively few in which the attack on the ground of incompetency was successful. (See *infra*, §125 et seq.) (See C.E.B., 1 Will Drafting 3d, §2.13.)

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d. Proof Sufficient.

14 *Witkin Sum. Cal. Law Wills* § 124

[§ 124] Proof Sufficient.

(1) *General Insanity*. Only a few cases furnish illustrations of general insanity. (See *Estate of Wasserman* (1915) 170 C. 101, 103, 148 P. 931 [miscellaneous hallucinations and irrational beliefs, insanity in family]; *Estate of Hansen* (1940) 38 C.A.2d 99, 113, 100 P.2d 776; *Estate of Halbert* (1947) 80 C.A.2d 666, 672, 182 P.2d 266 [obvious insanity coupled with delusion that testator's wife had wrongfully disposed of personal property against his wishes; testimony of attorney, doctors, and laymen supported verdict]; *Estate of Fosselman* (1957) 48 C.2d 179, 185, 308 P.2d 336 [senile dementia in advanced stage]; *Estate of Wolf* (1959) 174 C.A.2d 144, 148, 344 P.2d 37 [decedent was adjudicated incompetent less than 1 month after execution; evidence that mental condition did not materially change in interval; denial of probate affirmed]; 11 Proof of Facts 159 [testamentary capacity].)

(2) *Insane Delusions*. Most of the decisions denying probate on grounds of incompetency involve delusions. A mere unfounded belief or prejudice does not establish incompetency, but a belief so irrational that no normal person could have it may amount to an insane delusion sufficient to destroy testamentary capacity. (See *Estate of Russell* (1922) 189 C. 759, 770, 210 P. 249 [belief that child was illegitimate]; *Estate of McDonald* (1923) 191 C. 161, 164, 215 P. 545 [belief that brother was robbing and harassing him]; *Estate of Sandman* (1932) 121 C.A. 9, 12, 8 P.2d 499 [testator, obeying supposed communication from deceased wife, left property to brother instead of to only child]; *Estate of Bishop* (1934) 2 C.2d 132, 133, 39 P.2d 201 [testator converted to spiritualism and was induced by spirit messages to commit suicide and leave property to church]; *Estate of Mickelson* (1940) 37 C.A.2d 450, 454, 99 P.2d 687 [testator's groundless belief that wife was unfaithful and that child was illegitimate]; *Estate of Fosselman, supra*, 48 C.2d 187 [delusion that recently employed nurse, named legatee and devisee, was old friend]; *Estate of Collin* (1957) 150 C.A.2d 702, 711, 310 P.2d 663 [paranoid beliefs, delusions, and hallucinations bearing directly on creation and terms of later wills; judge properly inferred that, but for these delusions, testator would not have attempted to alter first will]; *Estate of Turpin* (1963) 222 C.A.2d 57, 60, 34 C.R. 812, quoting the text; 40 Proof of Facts 2d 339.)

(3) *Illness*. The incompetency may be the result of a serious illness. (See *Estate of Bourquin* (1958) 161 C.A.2d 289, 298, 326 P.2d 604 [testator, hospitalized with heart disease, had extreme difficulty with breathing and speech]; *Estate of Wochos* (1972) 23 C.A.3d 47, 54, 99 C.R. 782 [adjudication of incompetency in guardianship proceeding, coupled with arteriosclerosis, impaired gait, filthy habits, and loss of memory].)

West's Key Number Digest, Wills k.55(1) et seq.

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e. Matters Insufficient or Inconclusive.

1. Mental or Physical Conditions.

14 Witkin Sum. Cal. Law Wills § 125

[§ 125] Mental or Physical Conditions.

The following alone are not regarded as sufficient to establish incompetency:

- (1) Lapses or loss of memory. (*Estate of Nolan* (1938) 25 C.A.2d 738, 743, 78 P.2d 456.)
- (2) Inability to transact business. (*Estate of Sexton* (1926) 199 C. 759, 768, 251 P. 778 ["Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity"].)
- (3) Idiosyncrasies and peculiarities of behavior. (*Estate of Collins* (1917) 174 C. 663, 670, 164 P. 1110; *Estate of Finkler* (1935) 3 C.2d 584, 597, 46 P.2d 149; *Estate of Wright* (1936) 7 C.2d 348, 356, 60 P.2d 434.)
- (4) Acute alcoholism or habitual indulgence in intoxicating liquors. (*Estate of Arnold* (1940) 16 C.2d 573, 582, 107 P.2d 25; *Estate of Garvey* (1940) 38 C.A.2d 449, 456, 101 P.2d 551.)
- (5) Cruelty, rages, or unfriendly acts toward family. (*Estate of Peterkin* (1937) 23 C.A.2d 597, 606, 73 P.2d 897.)
- (6) Prejudices or false beliefs concerning relatives. (*Estate of Hess* (1920) 183 C. 589, 596, 192 P. 35; *Estate of Perkins* (1925) 195 C. 699, 708, 235 P. 45.)
- (7) The fact that the testator committed suicide. (*Estate of Rich* (1947) 79 C.A.2d 22, 30, 179 P.2d 373 [suicide is relevant, but cannot alone establish incapacity]; cf. *Estate of Collin* (1957) 150 C.A.2d 702, 711, 310 P.2d 663 [factor supporting determination of incapacity mainly on other grounds].)

Estate of Selb (1948) 84 C.A.2d 46, 190 P.2d 277, is illustrative: "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity." (84 C.A.2d 46 49.) (See *Estate of Llewellyn* (1948) 83 C.A.2d 534, 553, 189 P.2d 822; *Estate of Ridgway* (1949) 92 C.A.2d 325, 329, 206 P.2d 892; *Estate of Leonard* (1949) 92 C.A.2d 420, 427, 207 P.2d 66; *Estate of Greenhill* (1950) 99 C.A.2d 155, 166, 221 P.2d 310; *Estate of Dobrzensky* (1951) 105 C.A.2d 134, 139,

232 P.2d 886; *Estate of Teed* (1952) 112 C.A.2d 638, 645, 247 P.2d 54; *Estate of Fritschi* (1963) 60 C.2d 367, 372, 33 C.R. 264, 384 P.2d 656 [decendent in hospital with fatal cancer; physically weak, disturbed, under heavy dosage of drugs; but witnesses testified to rational behavior]; *Estate of Mann* (1986) 184 C.A.3d 593, 603, 229 C.R. 225.)

West's Key Number Digest, Wills k.31

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2. Unrelated Delusions.

14 Witkin Sum. Cal. Law Wills § 126

[§ 126] Unrelated Delusions.

Delusions or hallucinations not related to the testamentary act do not show incompetency. (*Estate of Perkins* (1925) 195 C. 699, 704, 235 P. 45.) And if the belief formed by the testator is founded on any facts, however unsubstantial they may appear, and however unfounded the resulting inference, the belief is not an insane delusion. (*Estate of Alegria* (1948) 87 C.A.2d 645, 658, 197 P.2d 571.) (See *Estate of Selb* (1948) 84 C.A.2d 46, 54, 190 P.2d 277; *Estate of Hart* (1951) 107 C.A.2d 60, 66, 236 P.2d 884 [approving instruction].)

West's Key Number Digest, Wills k.34

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3. Unnatural Will.

14 Witkin Sum. Cal. Law Wills § 127

[§ 127] Unnatural Will.

An unnatural or eccentric will, which disregards the normal objects of the testator's bounty, such as the immediate family, is an inconclusive factor. (See *Estate of Powell* (1931) 113 C.A. 670, 674, 299 P. 108; *Estate of Nolan* (1938) 25 C.A.2d 738, 741, 78 P.2d 456 [testator preferred cousin to nieces and nephews; no evidence of mental incapacity; preference is relevant only where undue influence or delusion is charged]; *Estate of McGivern* (1946) 74 C.A.2d 150, 154, 168 P.2d 232; *Estate of White* (1954) 128 C.A.2d 659, 667, 276 P.2d 11.)

West's Key Number Digest, Wills k.52(2)

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4. Prior Adjudication of Incompetency.

14 Witkin Sum. Cal. Law Wills § 128

[§ 128] Prior Adjudication of Incompetency.

What is the effect of a prior adjudication of insanity or incompetency in another proceeding, where the testator was placed in an institution or under guardianship or conservatorship? It is settled in California that the adjudication, though admissible in evidence, is not conclusive on the issue of testamentary capacity, and is probably not even prima facie proof of incompetency. The reason is that a guardian or conservator may be appointed for one who is unable to manage his or her property or business, although the person may have sufficient capacity to make a will. (See *Estate of Loveland* (1912) 162 C. 595, 599, 123 P. 801; *Estate of Worrall* (1942) 53 C.A.2d 243, 245, 127 P.2d 593; *Estate of Powers* (1947) 81 C.A.2d 480, 483, 184 P.2d 319; 16 So. Cal. L. Rev. 355; 89 A.L.R.2d 1120 [effect of guardianship of adult on testamentary capacity].)

The adjudication only affords an inference of lack of capacity on its date; it cannot by itself support a finding of incapacity where the will was made at a later date. (See *Estate of Nelson* (1964) 227 C.A.2d 42, 55, 38 C.R. 459 [commitment in October, will at end of December; summary judgment for proponent affirmed].)

West's Key Number Digest, Wills k.52(3)

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C. Fraud and Undue Influence.
1. Fraud.

14 Witkin Sum. Cal. Law Wills § 129

[§ 129] Fraud.

"The execution or revocation of a will or a part of a will is ineffective to the extent the execution was procured by duress, menace, fraud, or undue influence." (*Prob.C. 6104.*) (See *Rest.3d, Property (Wills and Other Donative Transfers)* §8.3.)

Although fraud and undue influence are frequently lumped together by a contestant on the theory that the misrepresentations were part of the pressure constituting undue influence, fraud is itself a distinct ground of contest. (See *Estate of Newhall* (1923) 190 C. 709, 718, 214 P. 231 [false charges against character of contestant, daughter of testator, as a result of which contestant was practically disinherited]; *Estate of Benton* (1901) 131 C. 472, 477, 63 P. 775; *Estate of Ricks* (1911) 160 C. 467, 480, 117 P. 539; *Estate of Nutt* (1919) 181 C. 522, 529, 185 P. 393; *Estate of Carson* (1920) 184 C. 437, 442, 194 P. 5 [beneficiary, already married, concealed that fact and entered into void marriage with testator, who left him bulk of her estate]; C.E.B., 1 Will Drafting 3d, §§2.22, 2.23; C.E.B., 3 Decedent Estate Practice, §22.55; 79 *Am.Jur.2d* (2002 ed.), *Wills* §394 et seq.) (On types and elements of fraud, see 1 *Summary* (10th), *Contracts*, §285 et seq.; 5 *Summary* (10th), *Torts*, §767 et seq.)

Where the fraud is only on the part of one beneficiary, the result will be to vitiate the portion of the will dealing with the gift to that beneficiary, leaving the gifts to others valid and unimpaired. (*Estate of Carson*, supra, 184 C. 441.)

The truth or falsity of religious beliefs is not a proper subject for judicial inquiry (see 7 *Summary* (10th), *Constitutional Law*, §514), and a charge that religious institutions, which were estate beneficiaries, were guilty of fraud in teaching that gifts to the church would benefit the testator in the hereafter, presents no justiciable issue. (*Estate of Supple* (1966) 247 C.A.2d 410, 414, 55 C.R. 542.)

West's Key Number Digest, Wills k.153

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2. Undue Influence.

a. Nature and Effect.

14 Witkin Sum. Cal. Law Wills § 130

[§ 130] Nature and Effect.

"The execution or revocation of a will or a part of a will is ineffective to the extent the execution was procured by duress, menace, fraud, or undue influence." (*Prob.C. 6104.*) (See *Rest.3d, Property (Wills and Other Donative Transfers) §8.3*; Cal. Transactions Forms, 1 Estate Planning §2:22 et seq.)

"Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment." (*Estate of Ricks* (1911) 160 C. 467, 480, 117 P. 539.) "It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person taken in response to the pressure does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another." (*Estate of Anderson* (1921) 185 C. 700, 707, 198 P. 407.) (See *Estate of Morcel* (1912) 162 C. 188, 194, 121 P. 733; *Estate of Bixler* (1924) 194 C. 585, 590, 229 P. 704 [sufficiency of pleading]; *Estate of Easton* (1934) 140 C.A. 367, 370, 35 P.2d 614; *Estate of Franco* (1975) 50 C.A.3d 374, 382, 123 C.R. 458; *Estate of Baker* (1982) 131 C.A.3d 471, 480, 182 C.R. 550; *Estate of Auen* (1994) 30 C.A.4th 300, 313, 35 C.R.2d 557 [entire will was revoked where attorney's undue influence permeated will]; *Hagen v. Hickenbottom* (1995) 41 C.A.4th 168, 179, 48 C.R.2d 197 [because even true statements about decedent's heirs could support claim of undue influence, summary judgment against heirs was improper]; 79 *Am.Jur.2d* (2002 ed.), *Wills* §371 et seq.; C.E.B., 1 Will Drafting 3d, §2.16 et seq.; C.E.B., 3 Decedent Estate Practice, §22.43 et seq.; 36 Proof of Facts 2d 109 [undue influence in execution of will].)

It is frequently said that a strong showing is necessary, or that the proof must be by clear and convincing evidence. (See *Estate of Anderson*, supra; *Estate of Hopkins* (1934) 136 C.A. 590, 602, 29 P.2d 249; *Estate of Ventura* (1963) 217 C.A.2d 50, 58, 31 C.R. 490, quoting the text.) In *Estate of Fritsch* (1963) 60 C.2d 367, 33 C.R. 264, 384 P.2d 656, reversing an order denying probate, the court referred to judicial "vigilance" in protecting the testator's freedom to dispose of his or her property, and observed that "a legion of decisions strike down attempts of juries to invalidate wills upon the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their properties." (60 C.2d 373.)

But the issue, like that of competency, is one of fact, and the jury's determination for or against the will is upheld in nearly all cases. (See *Estate of Teel* (1944) 25 C.2d 520, 526, 154 P.2d 384, *infra*, §135; 6 *Stanf. L. Rev.* 91; 9 *Cal. Proc.* (4th), *Appeal*, §359 *et seq.*; 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §38; for illustrations of reversals, see *Estate of Lingenfelter* (1952) 38 C.2d 571, 585, 241 P.2d 990, *infra*, §133 [jury's finding of undue influence rejected]; *Estate of Welch* (1954) 43 C.2d 173, 178, 272 P.2d 512 [same]; *cf.* *Estate of Gagliasso* (1957) 150 C.A.2d 65, 68, 309 P.2d 513 [nonsuit against contestant reversed].)

As in the case of fraud (*supra*, §129), it may be shown that only part of the will was the result of undue influence, and the other part may then be upheld. (*Prob.C.* 6104; *Estate of Webster* (1941) 43 C.A.2d 6, 15, 110 P.2d 81, 111 P.2d 355; *Estate of Stauffer* (1956) 142 C.A.2d 35, 41, 297 P.2d 1029; *Estate of Molera* (1972) 23 C.A.3d 993, 1001, 100 C.R. 696.)

West's Key Number Digest, Wills k.155

SUPPLEMENT: [This section is current through the latest supplement]

Undue influence is factual determination:

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §365 *et seq.*



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2. Undue Influence.

b. Influence by Person Not Benefited.

14 Witkin Sum. Cal. Law Wills § 131

[§ 131] Influence by Person Not Benefited.

Usually the pressure is exercised by a beneficiary of the will, and the fact that the person charged with undue influence did not actually benefit by the will tends to refute the charge. (See *13 A.L.R.3d 381* [presumption or inference of undue influence from testamentary gift to relative, friend, or associate of person preparing will or procuring execution].) In *Estate of Muller (1936) 14 C.A.2d 129, 57 P.2d 994*, the testator, a woman of 21 years, was intimately associated with a married man twice her age and an ex-convict. He handled much of her business and dominated her activities. They disappeared, leaving suicide notes. Her will left the property to the son of her companion. *Held*, judgment denying probate reversed; the father gained nothing personally. (*14 C.A.2d 132*.) It would seem, however, that benefit to his child might be treated as equivalent to benefit to the person charged.

Estate of Trefren (1948) 86 C.A.2d 139, 194 P.2d 574, seems clearly contrary in principle to *Estate of Muller*. T, the testator, friendly with her husband, had declared that he should receive their accumulated property on her death. During the period of her last illness, S, the wife of T's son by a prior marriage, had a will prepared by S's own lawyer leaving the permitted one-half of the community property to the son, and excluding T's husband, and had it signed by T, with only S and a nurse as witnesses and without the knowledge of T's husband. *Held*, the verdict finding undue influence was supported by the evidence, the court pointing out that "where a wife is active in obtaining the preparation and execution of a will making her husband the sole beneficiary, the activity of the wife is imputed to the husband." (*86 C.A.2d 148*.) (See *Estate of Bixler (1924) 194 C. 585, 595, 229 P. 704* [not necessary to allege that person charged with undue influence actually profited by the will]; cf. *Estate of Ventura (1963) 217 C.A.2d 50, 59, 31 C.R. 490*, quoting the text [*Trefren* and *Bixler* distinguished; proof was insufficient in view of absence of personal benefit].)

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c. Circumstances Probative of Undue Influence.

1. Combination of Factors Is Necessary.

Witkin Sum. Cal. Law Wills § 132

[§ 132] Combination of Factors Is Necessary.

SUPPLEMENT: [This section is current through the latest supplement]

See *David v. Hermann* (2005) 129 C.A.4th 672, 684, 28 C.R.3d 622, citing the text [although evidence of active participation in preparation or execution of testamentary instrument is "highly probative" of undue influence, proof of procurement of instrument is not essential for finding of undue influence unless court relies on presumption of undue influence (text, §135) to shift burden of proof to proponent; factors other than procurement may satisfy general standard of proof of undue influence].



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c. Circumstances Probative of Undue Influence.

1. Combination of Factors Is Necessary.

14 Witkin Sum. Cal. Law Wills § 132

[§ 132] Combination of Factors Is Necessary.

The proof of undue influence by circumstantial evidence usually requires a showing of a number of factors that, in combination, justify the inference, but which, taken individually and alone, are not sufficient. This approach is illustrated in *Estate of Graves* (1927) 202 C. 258, 259 P. 935: "Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of the decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination." (202 C. 262.)

In *Estate of Yale* (1931) 214 C. 115, 122, 4 P.2d 153, the court listed the following indicia of undue influence in the case: "(1) The provisions of the will were unnatural; ... (2) the dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution; (3) the relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act; (4) the decedent's mental and physical condition was such as to permit a subversion of his freedom of will; and (5) the chief beneficiaries under the will were active in procuring the instrument to be executed." (See *Estate of Webster* (1941) 43 C.A.2d 6, 14, 110 P.2d 81; *Estate of Williams* (1950) 99 C.A.2d 302, 310, 221 P.2d 714; *Estate of Hannam* (1951) 106 C.A.2d 782, 786, 236 P.2d 208; *Estate of Jamison* (1953) 41 C.2d 1, 7, 256 P.2d 984; *Estate of Gagliasso* (1957) 150 C.A.2d 65, 68, 309 P.2d 513; *Estate of Franco* (1975) 50 C.A.3d 374, 382, 384, 123 C.R. 458.)

An important indication of undue influence is that the will is "unnatural" in the sense that it prefers strangers in blood to the natural objects of the testator's bounty. But this factor has no probative force by itself, because the testator may make any disposition he or she chooses; it is therefore to be considered only where other factors are present. (*Estate of Shay* (1925) 196 C. 355, 364, 237 P. 1079; *Estate of Smith* (1926) 200 C. 152, 160, 252 P. 325; *Estate of White* (1954) 128 C.A.2d 659, 667, 276 P.2d 11; for similar rule on competency, see supra, §127.) The fact that the

testator fails to provide for collateral heirs, such as nephews, or even brothers or sisters, does not support the contention that the will is unnatural. (*Estate of Jacobs* (1938) 24 C.A.2d 649, 651, 76 P.2d 128 [nephews]; *Estate of Nolan* (1938) 25 C.A.2d 738, 742, 78 P.2d 456; *Estate of Ventura* (1963) 217 C.A.2d 50, 59, 60, 31 C.R. 490, quoting the text [preference of charity over half brother].)

Estate of Sarabia (1990) 221 C.A.3d 599, 270 C.R. 560, examined the concept of *undue profit* as an element of undue influence. Decedent's brother, his closest living relative, contested the will, alleging undue influence by the sole beneficiary, decedent's business manager and companion. Two of the three elements of the presumption of undue influence (see *infra*, §135), a confidential relationship with the decedent and activity in procuring the will, were established. On the third element, undue profit, the jury was instructed that the term "unduly" referred to something "unwarranted, excessive, inappropriate, unjustifiable or improper." The contestant objected, contending that the concept of undue profit is purely *quantitative*. *Held*, judgment that beneficiary had not unduly profited affirmed; the concept of undue profit has a *qualitative* aspect.

(a) The implicit premise of a purely quantitative view "is that the omitted heir has some entitlement to the decedent's bounty that is superior to the beneficiary designated by the testator." Such a premise "is contrary to the fundamental principle of testamentary independence." (221 C.A.3d 607.)

(b) "For the trier of fact to decide what influence was 'undue' clearly entails a qualitative assessment of the relationship between the decedent and the beneficiary; to know what influence was 'undue' requires knowledge of what influence, if any, would qualify for a more benign interpretation. ... To determine if the beneficiary's profit is 'undue' the trier must necessarily decide what profit would be 'due.' These determinations cannot be made in an evidentiary vacuum. The trier of fact derives from the evidence introduced an apprehension of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition." (221 C.A.3d 607.)

(c) The contestant's desire to limit the trier of fact's inquiry to the terms of the will itself would make the law of intestate succession the litmus test for undue profit and would "invariably work to the advantage of relatives." This test would "impinge on the testator's right and freedom to devise property to persons or entities with whom the testator has no genetic or legal relationship." (221 C.A.3d 608.)

(d) Here, there was ample evidence that the contestant was not the natural object of decedent's testamentary disposition, including evidence that the decedent spent his entire adult life living and working abroad with the beneficiary and often expressed his desire to leave his property to the beneficiary. (221 C.A.3d 608.)

SUPPLEMENT: [This section is current through the latest supplement]

See *David v. Hermann* (2005) 129 C.A.4th 672, 684, 28 C.R.3d 622, citing the text [although evidence of active participation in preparation or execution of testamentary instrument is "highly probative" of undue influence, proof of procurement of instrument is not essential for finding of undue influence unless court relies on presumption of undue influence (text, §135) to shift burden of proof to proponent; factors other than procurement may satisfy general standard of proof of undue influence].



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2. Undue Influence.

c. Circumstances Probative of Undue Influence.

2. Opportunity To Influence Testator.

14 Witkin Sum. Cal. Law Wills § 133

[§ 133] Opportunity To Influence Testator.

Obviously mere opportunity to exercise influence, even when coupled with interest and motive, does not give rise to any inference that it was in fact exercised. Hence, this is the weakest of the factors, and standing alone it carries no weight. (*Estate of Kilborn* (1912) 162 C. 4, 11, 120 P. 762; *Estate of Holloway* (1925) 195 C. 711, 724, 235 P. 1012; *Estate of Knight* (1935) 9 C.A.2d 454, 456, 50 P.2d 475; *Estate of Muller* (1936) 14 C.A.2d 129, 132, 57 P.2d 994; *Estate of McGivern* (1946) 74 C.A.2d 150, 156, 168 P.2d 232; *Estate of Llewellyn* (1948) 83 C.A.2d 534, 556, 189 P.2d 822; *Estate of Williams* (1950) 99 C.A.2d 302, 315, 221 P.2d 714; *Estate of Welch* (1954) 43 C.2d 173, 180, 272 P.2d 512; *Estate of Lombardi* (1954) 128 C.A.2d 606, 611, 276 P.2d 67; *Estate of Bould* (1955) 135 C.A.2d 260, 269, 287 P.2d 8; *Estate of Robbins* (1959) 172 C.A.2d 549, 554, 342 P.2d 933 [no invalidation unless proof that will was procured by influence].)

In *Estate of Lingenfelter* (1952) 38 C.2d 571, 241 P.2d 990, the court, reversing an order denying probate, said: "Conceding that the provisions of Vivian's will were unnatural, that its dispositions were at variance with Vivian's preexisting testamentary intentions, that Madge had an opportunity to subvert Vivian's will and that Vivian's condition was such as to permit a subversion of her freedom of will, and that Madge and her husband benefited by the provisions of the will, there still is no proof of undue influence. Evidence of activity by Madge in procuring execution of the will is entirely lacking." (38 C.2d 585.) (Cf. *Estate of Jamison* (1953) 41 C.2d 1, 10, 256 P.2d 984 [following approach of *Estate of Teel* (1944) 25 C.2d 520, 154 P.2d 384, *infra*, §135; see dissent, relying on *Estate of Lingenfelter*].)

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c. Circumstances Probative of Undue Influence.

3. Decedent's Susceptible Condition and Beneficiary's Activity.

14 Witkin Sum. Cal. Law Wills § 134

[§ 134] Decedent's Susceptible Condition and Beneficiary's Activity.

With the exception of the confidential relationship cases (*infra*, §135), decisions upsetting a will for undue influence almost invariably deal with a testator in a weakened physical or mental state. Without a showing of weakness, it is difficult to draw the inference that there was activity and pressure that actually succeeded in overpowering the will of the testator, as distinguished from persuasive advice or entreaty. (See *Estate of Anderson* (1921) 185 C. 700, 707, 198 P. 407.)

However, where a showing is made, and it is coupled with activity and undue profit by the beneficiary, a case against the will may be established. (See *Estate of Snowball* (1910) 157 C. 301, 306, 107 P. 598; *Estate of Little* (1923) 64 C.A. 695, 703, 223 P. 416; *Estate of Yale* (1931) 214 C. 115, 122, 4 P.2d 153; *Estate of Hettermann* (1941) 48 C.A.2d 263, 271, 119 P.2d 788; *Estate of Garibaldi* (1961) 57 C.2d 108, 113, 17 C.R. 623, 367 P.2d 39 [confidential relationship, fraud, unnatural will, and activity]; *Estate of Ventura* (1963) 217 C.A.2d 50, 61, 31 C.R. 490, citing the text; 48 A.L.R.3d 961 [solicitation of testator to make will or specified bequest as undue influence].)

An unusual situation, in which the beneficiary was in a distant place, was presented in *Estate of Pohlmann* (1949) 89 C.A.2d 563, 201 P.2d 446. The testator was living in Nazi Germany. Her son, who had escaped to America, informed her by letter that he would make no attempt to bring her here unless she executed a will, prepared by him in California, which left all her estate to him and expressly disinherited her only other heir, his sister. She executed the will. *Held*, probate was properly denied. In answer to the objection that "activity" could not be charged in view of the distance separating the parties, the court said: "It may well be that no will was ever before executed under such circumstances as are shown by this record and that never has such an opportunity been presented for the overpowering of an elderly person's volition. ... In order to exert undue influence it is not necessary that the beneficiary of that influence be in the presence of the testator if the circumstances are such that pressure may be exerted by means other than oral persuasion." (89 C.A.2d 578.)

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2. Undue Influence.

c. Circumstances Probative of Undue Influence.

4. Confidential Relationship.

14 Witkin Sum. Cal. Law Wills § 135

[§ 135] Confidential Relationship.

(1) *In General.* Where the beneficiary is in a confidential relationship with the testator, actively participates in procuring the execution of the will, and unduly profits by it (i.e., obtains substantial benefits though not a normal object of the testator's bounty), a presumption of undue influence arises and places the burden on the beneficiary to show that the will was freely made. (See *Estate of Nutt* (1919) 181 C. 522, 526, 185 P. 393; *Estate of Graves* (1927) 202 C. 258, 262, 259 P. 935 [business adviser of elderly, sick woman]; *Estate of Erickson* (1934) 140 C.A. 520, 525, 35 P.2d 628 [will drawn by attorney-beneficiary]; *Estate of Hampton* (1940) 39 C.A.2d 488, 497, 103 P.2d 611; *Estate of Schlyen* (1951) 105 C.A.2d 648, 660, 234 P.2d 211; *Estate of Rugani* (1952) 108 C.A.2d 624, 629, 239 P.2d 500 [elderly, ailing, illiterate testator and legal secretary companion who lived in his home]; *Estate of Bourquin* (1958) 161 C.A.2d 289, 299, 326 P.2d 604 [religious counselors attended testator in hospital and called attorney member of church to draw will in its favor]; *Estate of Garibaldi* (1961) 57 C.2d 108, 113, 17 C.R. 623, 367 P.2d 39; *Estate of Clegg* (1978) 87 C.A.3d 594, 602, 151 C.R. 158; 76 A.L.R.3d 743 [illicit or unlawful relation between testator and beneficiary as evidence of undue influence].) (On concept of undue profit, see *Estate of Sarabia* (1990) 221 C.A.3d 599, 270 C.R. 560, *supra*, §132.)

Of course, where the beneficiary is a natural object of the testator's bounty, the will is not unnatural and no presumption arises. (See *Estate of Morcel* (1912) 162 C. 188, 196, 121 P. 733 [testator disinherited adult daughter, with whom she was on unfriendly terms, in favor of man with whom she had lived as if married for over 30 years].)

(2) *Burden.* Once the presumption of undue influence is established, the burden of persuasion shifts to the proponent to prove that the will was not induced by his or her undue influence. (*Estate of Gelonese* (1974) 36 C.A.3d 854, 863, 111 C.R. 833; but see *Estate of Erickson*, *supra*, decided prior to adoption of Evidence Code [only burden of going forward shifts]; on burden of proof and presumptions generally, see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §1 et seq.)

(3) *What Constitutes Confidential Relationship.* Confidential relations are of various kinds, and the existence of the relationship is usually a question of fact. In *Estate of Llewellyn* (1948) 83 C.A.2d 534, 562, 189 P.2d 822, a brother of the testator, beneficiary of the will, with whom the testator was not in fact intimate or friendly, and who did not handle any of his affairs, was held not to be in a confidential relationship. *Estate of Spaulding* (1947) 83 C.A.2d 15, 187 P.2d

889, held that a young man with whom the testator had homosexual relations was not in a confidential relationship. The court, quoting from an earlier case, said: "The question is as to the effect of the influence upon the testator's mind, not as to its moral character or its source, although in some cases the character of the person exerting the influence may be an important factor in determining its effect." (83 C.A.2d 19.)

(4) *Attorney-Client Relationship*. When an attorney-client relationship exists between the testator and a beneficiary, a showing of *undue profit* by the beneficiary is not necessary to establish a presumption of undue influence. The presumption of undue influence arises from proof that the person alleged to have exerted undue influence (a) had an attorney-client relationship with the testator at the time the will was prepared, (b) actively participated in preparation or execution of the will, and (c) benefited by the will. (See *Estate of Auen* (1994) 30 C.A.4th 300, 308, 35 C.R.2d 557 [finding sufficient evidence of undue benefit to warrant revocation of will where decedent left most of large estate to her attorney]; 19 A.L.R.3d 575 [undue influence in gift to testator's attorney].)

(5) *Combination of Factors Is Required*. While confidential relationship is a strong factor, it is not sufficient in itself to raise the presumption. The two additional factors must be shown: undue profit by the beneficiary, and activity in procurement, the latter element being the one most frequently lacking in the proof. (See *Estate of Baird* (1917) 176 C. 381, 384, 168 P. 561; *Estate of Holloway* (1925) 195 C. 711, 723, 235 P. 1012; *Estate of Shay* (1925) 196 C. 355, 363, 237 P. 1079; *Estate of Presho* (1925) 196 C. 639, 651, 238 P. 944; *Estate of Easton* (1934) 140 C.A. 367, 376, 35 P.2d 614; *Estate of Hull* (1944) 63 C.A.2d 135, 140, 146 P.2d 242; *Estate of Watkins* (1947) 81 C.A.2d 465, 474, 184 P.2d 192; *Estate of Doty* (1949) 89 C.A.2d 747, 756, 201 P.2d 823; *Estate of Kerr* (1954) 127 C.A.2d 521, 526, 274 P.2d 234; *Camperi v. Chiechi* (1955) 134 C.A.2d 485, 502, 286 P.2d 399; *Estate of Bould* (1955) 135 C.A.2d 260, 274, 287 P.2d 8; *Estate of Burlew* (1956) 146 C.A.2d 642, 648, 304 P.2d 233; *Estate of Fritschi* (1963) 60 C.2d 367, 374, 33 C.R. 264, 384 P.2d 656, citing the text [no evidence of activity in procurement]; *Estate of Mann* (1986) 184 C.A.3d 593, 606, 229 C.R. 225; cf. *Estate of Abert* (1949) 91 C.A.2d 50, 52, 204 P.2d 347 [verdict of undue influence upheld on weak showing consisting of inferences from circumstantial evidence].)

In *Estate of Straisinger* (1967) 247 C.A.2d 574, 55 C.R. 750, Mr. and Mrs. S made mutual wills with the estate to go ultimately to E, a charity. After Mr. S's death, Mrs. S made a holographic will leaving everything to the Cunninghams, close friends who had cared for her and to whom she had previously deeded valuable property. The only proof of execution came from the Cunninghams, who testified that they did not participate in or influence the making of the will. E, contesting, offered evidence that its representatives had called on Mrs. S to persuade her to draw a will in favor of the charity, that the Cunninghams represented that she had done so, and that, relying on this false information, they had abandoned their endeavor. *Held*, this evidence did not establish an estoppel (no duty to speak, no showing that Mrs. S could have been persuaded); and further, equitable estoppel is not a ground of contest. (247 C.A.2d 582.) Thus, though the confidential relationship was clear, the will was not unnatural and there was no affirmative evidence of participation. (247 C.A.2d 585.)

A departure from the settled rules in this field occurred in *Estate of Teel* (1944) 25 C.2d 520, 154 P.2d 384. The testator committed suicide, leaving all property to her second husband, and disinheriting her adult daughter. Although her husband accompanied her to her attorney's office, she consulted the attorney alone, and he testified that she was of sound mind, that he attempted to dissuade her from making the provision, and that there was no evidence of influence. Some witnesses gave opinions as to her mental peculiarities. Probate was denied in accordance with a jury's verdict, and the order was affirmed on the ground of undue influence. The court held that evidence of abnormal conduct, disinheritance of the daughter and profit to the husband, were sufficient to support the verdict, and that, on appeal, all contrary evidence should be disregarded. (25 C.2d 527.) It would seem, however, that as a matter of law there was no undue influence, because evidence of activity by the husband was entirely lacking. (See 6 *Stanf. L. Rev.* 91; 9 *Cal. Proc.* (4th), *Appeal*, §§360, 361; *supra*, §133.)

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SUPPLEMENT: [This section is current through the latest supplement]

(5) *Combination of Factors Is Required.* Evidence of undue influence:

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §§366, 367.



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D. Execution of Witnessed Will.

1. In General.

a. Former Statute and Case Law.

14 Witkin Sum. Cal. Law Wills § 136

[§ 136] Former Statute and Case Law.

The requisites of a formal or witnessed will were set forth in former Prob.C. 50: (1) writing; (2) subscription by testator; (3) acknowledgment and publication by testator; (4) attestation by witnesses.

Early cases, and an occasional later decision, tended to insist on strict compliance with the formalities of execution. (See, e.g., *Estate of Seaman* (1905) 146 C. 455, 462, 80 P. 700; *Estate of Moore* (1949) 92 C.A.2d 120, 124, 206 P.2d 413; *Estate of Howell* (1958) 50 C.2d 211, 215, 324 P.2d 578; *Estate of Mangeri* (1976) 55 C.A.3d 76, 82, 127 C.R. 438.)

Most of the later case law departed from this theory. The liberalizing process took two typical forms: (1) Upholding the will where there was substantial, though not strict, compliance with the statutory requirements; (2) invoking the presumption of due execution to overcome testimony of actual disregard of the statutory requirements. (See 88 *Harv. L. Rev.* 489 [arguing that doctrine is outmoded and urging functional rule of substantial compliance]; 6 *Pepperdine L. Rev.* 331 [Formalities and Formalism: A Critical Look at the Execution of Wills]; *infra*, §147.)

The general principle that a will must show a present testamentary intent is chiefly invoked where an informal document is offered as a holographic will, and the language simply discloses an intention to make a will of a certain kind in the future. (See *infra*, §157.) The court may take a different view of a witnessed instrument. In *Estate of Gerst* (1957) 153 C.A.2d 528, 315 P.2d 49, the deceased left a brief writing signed and witnessed, and naming beneficiaries and executors, but commencing with the words: "Being of sound mind I wish my mother to write my last will and testament." *Held*, distinguishing holographic will cases (e.g., *Estate of Pagel* (1942) 52 C.A.2d 38, 125 P.2d 853, *infra*, §157, and *Estate of Beebee* (1953) 118 C.A.2d 851, 258 P.2d 1101, *infra*, §158), the trial court properly admitted the instrument to probate. The quoted words were interpreted "as merely explaining the fact that the document is in the mother's handwriting and not that of the testatrix, who was ill, or at least had a 'shaking' hand." (153 C.A.2d 540.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Execution of Witnessed Will.

1. In General.

b. Revised Statute.

14 Witkin Sum. Cal. Law Wills § 137

[§ 137] Revised Statute.

(1) *In General.* Except as otherwise provided in *Prob.C. 6100* et seq., a will must satisfy the requirements of *Prob.C. 6110*. (*Prob.C. 6110(a)*.) (See *Unif.Prob.C.*, §2-502 and Comment; *Cal. Transactions Forms*, 4 Estate Planning §§19:36 et seq., 19:103 et seq., 19:152 et seq.; *C.E.B.*, 3 Will Drafting 3d, §36.1 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §3.1 [execution of attested will]; §3.3 [harmless errors in execution]; §3.9 [testamentary disposition by unattested writing]; *79 Am.Jur.2d (2002 ed.)*, *Wills* §170 et seq.)

(2) *Writing.* A will must be in writing. (*Prob.C. 6110(a)*.) (See *infra*, §138.)

(3) *Signature.* A will must be signed in one of the ways provided by *Prob.C. 6110(b)*. (See *infra*, §139.)

(4) *Witnesses.* A will must be witnessed by being signed "by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will." (*Prob.C. 6110(c)*.) (See *infra*, §143 et seq.)

(5) *Omitted Requirements.* The revised statute relaxes the requisites for execution of a witnessed will under former *Prob.C. 50* by eliminating the requirements: (1) that the testator's signature be "at the end" of the will, (2) that the testator "declare" to the witnesses that the instrument is his or her will, (3) that the witnesses' signatures be "at the end" of the will, (4) that the testator "request" the witness to sign the will, and (5) that the witnesses sign the will in the testator's presence. Further, the witnesses need not sign in the presence of each other. (Legislative Com. Comment--Senate.)

(6) *Will Valid in Other Jurisdiction.* *Prob.C. 6113*, based on *Unif.Prob.C.*, §2-506, provides that a written will is valid if its execution complies with the statutes of this state, of the law of the place of execution at the time it is executed, or the law of the place where, at the time of execution or death, the testator is domiciled, has a place of abode, or is a national. (See *supra*, §55.)

(7) *Extrinsic Evidence.* Extrinsic evidence is admissible to determine whether a document constitutes a will pursuant to *Prob.C. 6110* or to determine the meaning of a will or a portion of a will that is unclear. (*Prob.C. 6111.5*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Witnesses*. *Prob.C. 6110(c)* was amended and subdivided in 2008. The provision quoted in the text is now in *Prob.C. 6110(c)(1)*. It was amended to require the will to be signed by the witnesses during the testator's lifetime, but also to recognize an exception to that requirement, in *Prob.C. 6110(c)(2)* (Supp., infra, §144).



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2. Writing.

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[§ 138] Writing.

SUPPLEMENT: [This section is current through the latest supplement]

See 20A Am.Jur. Legal Forms 2d (2008 ed.), Wills §266:37 et seq.; 20B Am.Jur. Legal Forms 2d (2008 ed.), Wills §266:186 et seq.



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2. Writing.

14 Witkin Sum. Cal. Law Wills § 138

[§ 138] Writing.

A will must be in writing. (*Prob.C. 6110(a)*.) A will may consist of several papers bound together. (*Estate of Moro* (1920) 183 C. 29, 31, 190 P. 168; see 38 A.L.R.2d 477 [validity of will written on disconnected sheets].)

A will may be written on both sides of a paper, in which case it should appear either by direct reference or by other circumstances that the testator intended the whole to constitute the will. In *Estate of Ballesio* (1927) 201 C. 357, 359, 256 P. 1101, it was held that a writing on the back, nontestamentary in character, and not directly referred to in the testamentary writing on the face, could nevertheless be construed as part of the will. (See 1 So. Cal. L. Rev. 88; 16 Cal. L. Rev. 154.)

Practice suggestions on drafting wills and particular provisions are available in a number of works and articles. (See Cal. Transactions Forms, 4 Estate Planning §19:1 et seq.; C.E.B., California Will Drafting 3d; *Rest.3d, Property (Wills and Other Donative Transfers)* §3.5 [integration of multiple pages or writings into single will]; 20A Am.Jur. Legal Forms 2d (2000 ed.), Wills §266:38 et seq.; 20B Am.Jur. Legal Forms 2d (2000 ed.), Wills §266:174 et seq.; 18 *Hastings L. J.* 347 [coordination of facts and wills]; on malpractice liability of a lawyer who drafts imprecise contract or will, see 24 U.C.L.A. L. Rev. 422; on joint and mutual wills, see *supra*, §§112, 113.)

SUPPLEMENT: [This section is current through the latest supplement]

See 20A Am.Jur. Legal Forms 2d (2008 ed.), Wills §266:37 et seq.; 20B Am.Jur. Legal Forms 2d (2008 ed.), Wills §266:186 et seq.



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D. Execution of Witnessed Will.

3. Signature of Testator.

a. In General.

14 Witkin Sum. Cal. Law Wills § 139

[§ 139] In General.

(1) *Former Statute and Case Law.* The signature shows the testator's intention to authenticate the will, and former Prob.C. 50 required that the will "be subscribed at the end thereof." This requirement was designed to prevent the subsequent addition of dispositive provisions without complying with the formalities of execution. If there were disposing clauses after the signature, or there was an unreasonably large blank space between the body and the signature, the will was invalid. (*Estate of Seaman* (1905) 146 C. 455, 461, 80 P. 700; *Estate of Jordan* (1947) 81 C.A.2d 419, 421, 184 P.2d 165; see 44 A.L.R.3d 701 [when is will signed at "end" or "foot" as required by statute].)

A few cases gave this requirement a liberal and practical interpretation. In *Estate of Chase* (1942) 51 C.A.2d 353, 124 P.2d 895, the testator commenced with a printed form, wrote dispositive provisions on its front and three accompanying blank pages, then turned to the back of the first page to use the printed attestation clause and other such material, filling in blanks and signing there. *Held*, this was a valid subscription, for an intelligent reading of the papers showed that the back of the first page was the end of the will. (51 C.A.2d 362.)

In *Estate of Morey* (1946) 75 C.A.2d 628, 171 P.2d 131, the testator used a printed form, and placed his written signature at the end, not in the proper blank space provided for it, but below, in the space provided for the testator's name in the attestation clause. *Held*, this was a sufficient subscription. The court had little difficulty in concluding that the name was placed at the end, for the blank in the attestation clause was only 1 1/2 inches below the proper blank and allowed no room for insertion of other provisions. On the more difficult question whether the written name was actually a signature or subscription of the will, rather than a mere completion of the attestation clause, the court drew a favorable inference from the circumstance of his calling the witnesses and indicating his intention to execute the will: "The fact that the signature was not placed where it was supposed to be means nothing if its position indicates that Mr. Morey believed that it belonged where he put it." (75 C.A.2d 632.) (See *Estate of Tonneson* (1947) 81 C.A.2d 703, 706, 185 P.2d 78 [reaching same conclusion on substantially similar facts, without mentioning prior decision].)

But the departures in *Estate of Howell* (1958) 50 C.2d 211, 214, 324 P.2d 578, proved too substantial to allow the will to be saved. The testator, using a printed single-page form, signed and had the witnesses sign after the attestation clause. Then she added two typewritten pages, signing the last page 7 1/2 inches below the last disposition. *Held*, even if the testator's signature on page 3 was sufficiently close, there were no signatures of witnesses there; i.e., the only true

execution took place on page 1. (50 C.2d 215.)

(2) *Revised Statute. Prob.C. 6110(b)* eliminated the requirement of a signature at the end of the will. A will must be signed in one of the following ways:

(a) By the testator. (*Prob.C. 6110(b)(1).*)

(b) "In the testator's name by some other person in the testator's presence and by the testator's direction." (*Prob.C. 6110(b)(2).*) (See *infra*, §141.)

(c) By a conservator pursuant to a court order to make a will under *Prob.C. 2580* (substituted judgment; *infra*, §1025 et seq.). (*Prob.C. 6110(b)(3).*)

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3. Signature of Testator.

b. Signature by Mark.

14 Witkin Sum. Cal. Law Wills § 140

[§ 140] Signature by Mark.

Prob.C. 6110(b) does not mention signature by mark, but former *Prob.C. 50*, read in connection with *C.C.P. 17*, was held to authorize this form of signature. (See *Estate of Dombrowski* (1912) 163 C. 290, 293, 125 P. 233; *Estate of Simmons* (1944) 65 C.A.2d 533, 535, 151 P.2d 8; *Estate of Cecala* (1949) 92 C.A.2d 834, 842, 208 P.2d 436; 79 *Am.Jur.2d* (2002 ed.), *Wills* §208 et seq.; 98 *A.L.R.2d* 841 [validity of will signed by mark, stamp, symbol, or partial or abbreviated signature].)

Under *C.C.P. 17*, "signature or subscription includes mark, when the person cannot write," the name being written near the mark by a person who writes his or her own name as a witness. However, a signature by mark, "in order that the same may be acknowledged or may serve as the signature to any sworn statement," must be witnessed by two persons "who must subscribe their own names as witness thereto."

In *Estate of Edwardson* (1960) 186 C.A.2d 122, 127, 8 C.R. 889, a signature by mark was held invalid where the name of the testator was not written down near the mark or elsewhere on the document.

Estate of Gooch (1962) 211 C.A.2d 1, 26 C.R. 835, took a less strict approach. The language of the statute would suggest that the testator should make his or her mark, and the witness should then write the testator's name near it and add his or her own name as a witness. Here, the attorney brought the document with the testator's name already typed in along with the typed word "mark." *Held*, the statute contained no express requirement about the order of entering mark and name, and none should be implied. (211 C.A.2d 3.)

In *Estate of Mangeri* (1976) 55 C.A.3d 76, 127 C.R. 438, the statutory language was strictly construed to invalidate the will. Decedent was in the hospital. His stepdaughter L and sister V engaged attorney P to prepare a will according to decedent's specific instructions. P did so, but was unable to go to the hospital to supervise the execution, and instructed L and V as to the procedure. At the hospital, decedent stated that his hands were "too shaky" to write his name and he put an "X" on the signature line above his typed name. Two other persons then signed as attesting witnesses. *Held*, probate was properly denied.

(a) Attorney P, who prepared the will and had decedent's name typewritten below the signature line, was not

present when decedent made his mark, did not witness it, and did not sign his own name as a witness. (55 C.A.3d 81.) *Estate of Gooch, supra*, holds only that the order of entering the mark and name is immaterial; the attorney in that case was present and signed his name as a witness to the mark. (55 C.A.3d 81, 82.)

(b) The trend toward liberality is largely confined to holographic wills. "Even rules of liberal construction do not permit us to ignore clear and explicit statutory requirements. There may be procedures other than those prescribed by the Legislature which would equally assure the authenticity of wills subscribed by mark. The question whether a will was executed in conformity with statutory requirements must be determined by reference to what the statutes themselves require. It is not enough to say that the procedures actually followed, while not in accordance with those requirements, were arguably as good." (55 C.A.3d 83.)

In *Estate of McCabe* (1990) 224 C.A.3d 330, 274 C.R. 43, the testator signed by mark directly above his typewritten name. The mark was witnessed separately by an independent witness who signed her own name and the date, but did not write the testator's name. *Held*, the will substantially complied with C.C.P. 17. "We can perceive no sound purpose or policy to be served by invalidating the will because the witness to the mark did not write decedent's name again. Where, as here, the mark was witnessed separately by someone other than the attesting witnesses, the opportunity for fraud is minimal. Thus, strict compliance with the statutory requirements in order to remove that opportunity was unnecessary." (224 C.A.3d 334.)

West's Key Number Digest, Wills k.111(3)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Execution of Witnessed Will.

3. Signature of Testator.

c. Signature by Another.

14 Witkin Sum. Cal. Law Wills § 141

[§ 141] Signature by Another.

Prob.C. 6110(b) authorizes signing "in the testator's name by some other person in the testator's presence and by the testator's direction." (See *Estate of Holloway* (1925) 195 C. 711, 719, 235 P. 1012 ["The fact that another person did the writing or guided the testator's hand because he was physically weak ... raises no presumption against the due execution of the will"]; 79 *Am.Jur.2d* (2002 ed.), *Wills* §213 et seq.; 98 *A.L.R.2d* 824 [validity of will signed by testator with assistance of another].)

Former *Prob.C. 50(1)* added that the person signing for the testator "should write his own name as a witness to the will, but a failure to do so will not affect the validity of the will." This requirement does not appear in *Prob.C. 6110(b)*.

West's Key Number Digest, Wills k.111(3)

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D. Execution of Witnessed Will.

3. Signature of Testator.

d. Typewritten Signature.

14 Witkin Sum. Cal. Law Wills § 142

[§ 142] Typewritten Signature.

Although *C.C.P. 17* contains the general rule of construction that "writing includes printing and typewriting," and typewritten, printed, or rubber-stamped signatures are sufficient to satisfy the requirements of the Statute of Frauds (see 1 *Summary* (10th), *Contracts*, §362), the codes do not clearly indicate whether a typewritten signature, typed by the testator or by a third person at the testator's direction, may be sufficient for a witnessed will.

The problem was considered in *Estate of Moore* (1949) 92 C.A.2d 120, 206 P.2d 413. The testator procured three witnesses to sign a typewritten will with a typewritten signature, declaring at the time that it was his will. He then wrote his name at the beginning, after the date. *Held*, the execution was defective. (a) The written name at the beginning was not a compliance with the requirement of subscription (at the end). (b) The typewritten name at the end did not meet the statutory requirements of a proper substitute method of signing, for there was no proof that decedent himself typed it, nor any evidence as to how or by whom it was typed; nor was there any showing that decedent acknowledged the typed name as his signature. The court, after briefly referring to Statute of Frauds cases, said: "We think that in the case of a will the statute requires a handwritten signature, or, at the very least, that if typewritten it must be shown that the name of the testator was typed by the testator himself or by some one person in his presence and by his direction who then subscribed his name thereto. To hold that the mere typed name of a testator is sufficient to satisfy the requirements of section 50 ... would open the door to an easy form of fraud, when the purported signer was dead." (92 C.A.2d 123.)

The opinion stressed the older rule of strict compliance, by quoting at length from *Estate of Seaman* (1905) 146 C. 455, 462, 80 P. 700, and is not entirely consistent with later cases. The implication that direct evidence was necessary would seem to be unwarranted; the circumstantial evidence afforded an irresistible inference that the testator either typed the signature himself, or had someone type it by his direction. And the declaration that the instrument was his will, together with the addition of his actual written signature in a different place, clearly showed his intention to authenticate. (Cf. *Estate of Morey* (1946) 75 C.A.2d 628, 171 P.2d 131, *supra*, §139 [circumstantial evidence was relied on to authenticate signature in wrong place]; but see *Estate of Howell* (1958) 50 C.2d 211, 214, 324 P.2d 578, *supra*, §139 [citing *Seaman* and *Moore* with approval of strict rule].)

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D. Execution of Witnessed Will.

4. Signatures of Two Witnesses.

a. Former Statute and Case Law.

14 Witkin Sum. Cal. Law Wills § 143

[§ 143] Former Statute and Case Law.

(1) *Acknowledgment and Publication.* Former Prob.C. 50, codifying the rule of *Estate of Emart* (1917) 175 C. 238, 243, 165 P. 707, provided that the testator must, in the presence of both of two attesting witnesses, (a) declare to them that the instrument is his or her will, and (b) sign or acknowledge his or her subscription to them. Both witnesses had to be present when the subscription or acknowledgment was made. If one witness did not know that the instrument was intended to be a will, or if the testator neither signed in the presence of the witnesses nor informed them that he or she had signed, the execution was defective. (See *Estate of Krause* (1941) 18 C.2d 623, 625, 117 P.2d 1; *Estate of Norswing* (1941) 47 C.A.2d 730, 733, 118 P.2d 858; *Estate of Lynch* (1945) 70 C.A.2d 392, 396, 161 P.2d 24 [testator discussed will with first witness, who signed; second witness, present but unaware of what was involved, signed with no prior explanation or knowledge that this was decedent's will]; *Estate of Emden* (1948) 87 C.A.2d 115, 121, 196 P.2d 627 [testator merely asked witnesses to sign "a document"]; 79 Am.Jur.2d (2002 ed.), Wills §240 et seq.; 60 A.L.R.2d 124 [sufficiency of publication]; 7 A.L.R.3d 317 [sufficiency of testator's acknowledgment of signature from conduct and surrounding circumstances]; 71 A.L.R.3d 877 [necessity that attesting witness realize that instrument was intended as will].)

On the other hand, it was not necessary that the testator make an express statement; it was sufficient if conduct indicated to the witnesses that the instrument was the testator's will and was signed by the testator. (*Estate of Silva* (1915) 169 C. 116, 120, 145 P. 1015.) This rule, that the "declaration" or "publication" and the "acknowledgment" may be "implied," was given an extremely liberal application in *Estate of Gray* (1946) 75 C.A.2d 386, 390, 171 P.2d 113. The testator did not expressly state that the instrument was her will, but had called the witnesses on the telephone to ask them to come and witness her will. And she did not sign in the presence of the witnesses; she had already signed when they arrived, and she then asked them to "sign it." *Held*, nevertheless, the will should be admitted to probate. "[I]t is not necessary that the testator should have spoken words declaring the document to be his will." Both the declaration and the acknowledgment may appear from the decedent's conduct and the surrounding circumstances. The prior request on the telephone, coupled with the other circumstances, satisfied the requirements. "The law does not require useless formalities, and any oral declaration by her could not have expressed her intentions more unmistakably than they were expressed by her actions." (75 C.A.2d 392.) (See *Estate of Gray* (1948) 89 C.A.2d 478, 484, 201 P.2d 392 [opinion on appeal after retrial].)

Estate of McKague (1962) 204 C.A.2d 370, 22 C.R. 363, held the statute satisfied on the following evidence: The testator, in a hospital for major surgery, dictated his will to H, who signed. B, an orderly attending a patient in the next bed, heard the dictation, realized that it concerned a will, and was asked by the testator, "Will you sign my Will?" (204 C.A.2d 371.)

(2) *Attestation*. Former Prob.C. 50 provided: "There must be at least two attesting witnesses, each of whom must sign the instrument as a witness, at the end of the will, at the testator's request and in his presence. The witnesses should give their places of residence, but a failure to do so will not affect the validity of the will."

The attestation requirement received an extremely liberal interpretation:

(a) As with the requirement of acknowledgment and publication, the request to the witnesses need not have been a direct statement by the testator, but could be made by the attorney, with the testator's acquiescence. (*Estate of Holloway* (1925) 195 C. 711, 720, 235 P. 1012.) Nor is it essential that an express request use the term "witness." (*Estate of La Mont* (1952) 39 C.2d 566, 569, 248 P.2d 1, *infra*, §146.)

(b) Although the testator was required to sign first, the failure to do so was apparently not fatal where all the signatures were affixed as part of a single transaction. (*Estate of Silva* (1915) 169 C. 116, 122, 145 P. 1015; see 91 A.L.R.2d 737 [validity of will as affected by fact that witnesses signed before testator].)

(c) The witnesses had to sign in the presence of the testator, but they need not have done so in the presence of each other. (*Estate of Dow* (1919) 181 C. 106, 107, 183 P. 794; *Estate of Armstrong* (1937) 8 C.2d 204, 209, 64 P.2d 1093; see 8 Cal. L. Rev. 124.)

(d) The witnesses had to sign at the end of the will, but this requirement was held to be substantially complied with where the attestation clause and signatures were on a separate third sheet, even though there was space enough on the second sheet. (*Estate of Moro* (1920) 183 C. 29, 31, 190 P. 168; see 8 Cal. L. Rev. 451; 45 A.L.R.2d 1365 ["attestation" or "witnessing" of will as including witnesses' subscription]; 17 A.L.R.3d 705 [place of signature of attesting witness]; *Estate of Chase* (1942) 51 C.A.2d 353, 356, 124 P.2d 895, *supra*, §139 [subscription and attestation on back of first page which was clearly the end of the will]; but see *Estate of Howell* (1958) 50 C.2d 211, 215, 324 P.2d 578, *supra*, §139 [attestation on face of first page of three-page will was insufficient].)

(e) The signature of a witness was sufficient even though mistakenly intended as a more formal authentication. Thus, in *Estate of Montgomery* (1949) 89 C.A.2d 664, 201 P.2d 569, the testator wanted the will "notarized," and a notary public, at her insistence, signed and attached a notarial certificate. *Held*, the signature, disregarding the surplusage, was a sufficient attestation. (89 C.A.2d 668.) (See *Estate of Lee* (1964) 225 C.A.2d 578, 580, 37 C.R. 572.)

(f) In a joint will, each testator could be a witness to the other's will, because it is in effect the separate will of each (see *supra*, §112). (*Estate of Lee, supra* [husband and wife wrote out joint will which they signed and notarized; notary was one witness, and each testator was the other witness, despite fact that neither believed he was acting in dual capacity].)

(3) *Conscious Presence Rule*. "The courts have adopted what is known as the 'conscious presence rule' which means that the testator need not actually view the act of signing by the witnesses, but that these elements must be present: (1) the witnesses must sign within the testator's hearing, (2) the testator must know what is being done, and (3) the signing by the witnesses and the testator must constitute one continuous transaction." (*Estate of Tracy* (1947) 80 C.A.2d 782, 783, 182 P.2d 336 [no convenient place in testator's bedroom so witnesses at her direction signed in adjoining room, 20 feet away; held sufficient]; *Estate of Hoffman* (1955) 137 C.A.2d 555, 560, 290 P.2d 669 [one witness just outside partly closed door a few feet away; court observes that "one transaction" and "conscious presence" tests have been applied with "salutary and practical results"]; see 22 So. Cal. L. Rev. 93 [suggesting that requirement of "within the testator's hearing," though more liberal than "seeing test," is still too restrictive]; 79 Am.Jur.2d (2002 ed.), Wills §306 et seq.; 75 A.L.R.2d 318 [what constitutes presence of testator in witnessing of will].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Signatures of Two Witnesses.

b. Nature and Scope of Requirements.

Witkin Sum. Cal. Law Wills § 144

[§ 144] Nature and Scope of Requirements.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Signature of Witness After Testator's Death.* In *Estate of Saueressig* (2006) 38 C.4th 1045, 44 C.R.3d 672, 136 P.3d 201, the Supreme Court resolved the conflict in the Courts of Appeal, holding that the witnesses must sign before the testator's death. The testator had prepared his own typewritten will and had it notarized. A third party was present at the notarization and was willing to sign as the second witness after the testator's death. *Held*, probate of the will was properly denied.

(a) Before 1985, a formal will required the attestation of two witnesses in the presence of the testator. This requirement clearly foreclosed the possibility of postdeath attestation. The Probate Code revision that was effective January 1, 1985, omitted this and other formal requirements of execution. (38 C.4th 1048, 1049.) The current statute, *Prob.C. 6110(c)*, does not contain an express temporal limitation on when the witnesses must sign. Thus, whether the statute permits postdeath attestation is ambiguous. (38 C.4th 1050.)

(b) Decisions of the Courts of Appeal are in conflict on the validity of postdeath attestation, but *Crook v. Contreras* (2002) 95 C.A.4th 1194, 116 C.R.2d 319, text, p. 212, and cases from other states following a similar rule, are more persuasive. Their view invalidating postdeath attestation is consistent with the "critical principle" that a will is operative at death, not at some later time when purported witnesses comply with the statutory requirements. (38 C.4th 1052.)

(c) Nothing in the language or legislative history of *Prob.C. 6110(c)* indicates that, in modifying the execution requirements, the Legislature intended to permit postdeath attestation. "Such a dramatic change would logically have merited mention." (38 C.4th 1053.) The requirement that the testator be alive when the witnesses sign is not in the same category as the inconsequential "ritual requirements" that were eliminated in the statutory revision. (38 C.4th 1053.)

(d) This interpretation of the statute is also consistent with sound public policy. The opportunity for fraud is greater once the testator is deceased. "A rule allowing postdeath attestation would essentially substitute oral testimony for the Legislature's requirement of a witnessed signature. It would encourage will contests and put witnesses, not the testator, in control of the disposition of an estate." (38 C.4th 1055, 1056.)

One justice issued a strong dissent. (38 C.4th 1057.)



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D. Execution of Witnessed Will.

4. Signatures of Two Witnesses.

b. Nature and Scope of Requirements.

14 Witkin Sum. Cal. Law Wills § 144

[§ 144] Nature and Scope of Requirements.

(1) *Statutory Requirements.* "The will shall be witnessed by being signed by at least two persons each of whom (1) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (2) understand that the instrument they sign is the testator's will." (*Prob.C. 6110(c).*)

(2) *Effect.* The Legislative Committee Comment explains the effect of this language as follows:

(a) *Prob.C. 6110(c)* continues the following requirements of former Prob.C. 50: (1) that the will be signed or the testator acknowledge the signature in the presence of two witnesses who are present at the same time, and (2) that the witnesses sign the will.

(b) *Prob.C. 6110(c)* eliminates the following requirements of former Prob.C. 50: (1) that the testator "declare" to the witnesses that the instrument is his or her will, (2) that the witnesses' signatures be "at the end" of the will, (3) that the testator "request" the witnesses to sign the will, and (4) that the witnesses sign the will in the testator's presence.

(c) *Prob.C. 6110(c)* requires that the signing or acknowledgment take place in the presence of the witnesses, present at the same time, but does not require that the witnesses sign in the presence of each other. This is consistent with prior law. (See, e.g., *Estate of Armstrong (1937) 8 C.2d 204, 209, 64 P.2d 1093.*)

(d) The requirement of *Prob.C. 6110(c)(2)* that the witness understand that the instrument is a will replaces the former requirement that the testator declare to the witnesses that the instrument is his or her will. The statute codifies California case law "which did not apply the former declaration requirement literally and held the requirement satisfied if it is apparent from the testator's conduct and the surrounding circumstances that the instrument is a will." (See *supra*, §143.) "The witness may obtain the necessary understanding by any means. For example, the witness may know that the instrument is a will by examining the instrument itself or from the circumstances surrounding the execution of the will." However, nothing in the statute requires that the testator disclose the contents of the will.

(3) *Necessity for Attestation Clause.* It is customary and desirable to include a formal attestation clause reciting the formalities of execution. (See C.E.B., 1 Decedent Estate Practice, §7.62 et seq.; C.E.B., 3 Will Drafting 3d, §36.4;

Judicial Council Form No. DE-131 [proof of subscribing witness]; *infra*, §545 et seq.) But this is not essential; it is sufficient that the will be witnessed. (*Estate of Pitcairn* (1936) 6 C.2d 730, 732, 59 P.2d 90, *infra*, §147.)

(4) *Signature of Witness After Testator's Death.* Decisions of the Courts of Appeal are inconsistent regarding whether a witness may sign after the testator's death.

In *Crook v. Contreras* (2002) 95 C.A.4th 1194, 116 C.R.2d 319, a married couple executed a revocable living trust that, by its terms, was divided into two irrevocable trusts on the death of the first spouse to die. The surviving spouse had the power to make unlimited withdrawals from one of the trusts and was authorized to exercise a power of appointment over the remainder of that trust by will. The first spouse died 3 years later. Seven years after that, the survivor executed two notarized instruments purporting to be amendments to the trust authorizing the survivor to exercise the power by any written instrument and exercising the power. After the survivor's death, two witnesses (one of them the decedent's notarizing attorney) signed attestations that the decedent executed each instrument as "her testamentary instrument" and the attorney signed a proof of subscribing witness form declaring that the decedent acknowledged the instruments to the witnesses as codicils. *Held*, the instruments were not valid codicils. The codicils were not properly witnessed under *Prob.C. 6110*. Although a 1983 amendment to the statute eliminated the requirement that the witnesses sign in the presence of the testator, there is no support for the view that they need not sign during the testator's lifetime. Subscription by two witnesses must occur before death. (95 C.A.4th 1204, 1205.) (For holding that instruments were not valid amendments to trust, see 13 *Summary* (10th), *Trusts*, §195.)

Estate of Eugene (2002) 104 C.A.4th 907, 128 C.R.2d 622, reached a contrary conclusion, holding that the testator's will should have been admitted to probate even though one of the qualifying witnesses signed the will after the testator's death, where there was "not the slightest hint of fraud or any wrongdoing by anyone involved at the time the wills were executed or at any time thereafter." (104 C.A.4th 912.) "Formal attestation rules exist to prevent fraud, not to encourage it by penalizing candor about the condition of a will when it is examined after the testator's death. For this reason, we conclude that, in the absence of legislative direction to the contrary, judicial inquiry should focus on a rule that best accommodates all circumstances surrounding the actual witnessing of a testator's unquestioned intent concerning the disposition of her estate. We therefore disagree with the absolute rule articulated in *Crook v. Contreras*." (104 C.A.4th 914.) (See *Estate of Rabinowitz* (2003) 114 C.A.4th 635, 640, 7 C.R.3d 722 [applying reasoning of *Estate of Eugene* to power of attorney signed by witnesses after death of principal].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Requirements.* *Prob.C. 6110(c)* was amended and subdivided in 2008. The provision quoted in the text is now in *Prob.C. 6110(c)(1)*. It was amended to require the will to be signed by the witnesses during the testator's lifetime, but also to recognize an exception to that requirement, in *Prob.C. 6110(c)(2)* (*infra*, this section). (4) *Signature of Witness After Testator's Death.* In *Estate of Saueressig* (2006) 38 C.4th 1045, 44 C.R.3d 672, 136 P.3d 201, the Supreme Court resolved the conflict in the Courts of Appeal, holding that the witnesses must sign before the testator's death. The testator had prepared his own typewritten will and had it notarized. A third party was present at the notarization and was willing to sign as the second witness after the testator's death. *Held*, probate of the will was properly denied.

(a) Before 1985, a formal will required the attestation of two witnesses in the presence of the testator. This requirement clearly foreclosed the possibility of postdeath attestation. The Probate Code revision that was effective January 1, 1985, omitted this and other formal requirements of execution. (38 C.4th 1048, 1049.) The current statute, *Prob.C. 6110(c)*, does not contain an express temporal limitation on when the witnesses must sign. Thus, whether the statute permits postdeath attestation is ambiguous. (38 C.4th 1050.)

(b) Decisions of the Courts of Appeal are in conflict on the validity of postdeath attestation, but *Crook v. Contreras* (2002) 95 C.A.4th 1194, 116 C.R.2d 319, text, p. 212, and cases from other states following a similar rule, are more persuasive. Their view invalidating postdeath attestation is consistent with the "critical principle" that a will is operative at death, not at some later time when purported witnesses comply with the statutory requirements. (38 C.4th 1052.)

(c) Nothing in the language or legislative history of *Prob.C. 6110(c)* indicates that, in modifying the execution requirements, the Legislature intended to permit postdeath attestation. "Such a dramatic change would logically have merited mention." (38 C.4th 1053.) The requirement that the testator be alive when the witnesses sign is not in the same category as the inconsequential "ritual requirements" that were eliminated in the statutory revision. (38 C.4th 1053.)

(d) This interpretation of the statute is also consistent with sound public policy. The opportunity for fraud is greater once the testator is deceased. "A rule allowing postdeath attestation would essentially substitute oral testimony for the Legislature's requirement of a witnessed signature. It would encourage will contests and put witnesses, not the testator, in control of the disposition of an estate." (38 C.4th 1055, 1056.)

One justice issued a strong dissent. (38 C.4th 1057.) (See 39 *McGeorge L. Rev.* 359 [post-death subscription and protective function of witnessing requirements].)

Prob.C. 6110(c)(2), added in 2008, provides an exception to the requirement that the witnesses must sign during the testator's lifetime: A will not executed in compliance with *Prob.C. 6110(c)(1)* must be treated as though it were executed in compliance with that provision if the proponent establishes by "clear and convincing evidence" that the testator intended the will to constitute his or her will at the time the testator signed it.



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c. Devise to Interested Witness.

14 Witkin Sum. Cal. Law Wills § 145

[§ 145] Devise to Interested Witness.

Under former law, a devise to an interested witness was void to the extent that it exceeded the witness' intestate share. (See *infra*, §345.) *Prob.C. 6112* deals with this problem as follows:

(1) "Any person generally competent to be a witness may act as a witness to a will." (*Prob.C. 6112(a).*)

(2) A will or any provision of it is not invalid, even though the will is signed by an interested witness. (*Prob.C. 6112(b).*)

(3) Unless there are at least two other disinterested subscribing witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. The presumption is a presumption affecting the burden of proof, but does not apply where the witness is a person to whom the devise is made solely in a fiduciary capacity. (*Prob.C. 6112(c).*)

(4) If a devise to an interested witness fails because the presumption applies and the witness fails to rebut the presumption, the interested witness "shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established." Nothing in this provision "affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence." (*Prob.C. 6112(d).*)

The Legislative Committee Comment explains the statute as follows: "Under Section 6112, a witness may take under the will if the witness satisfies the burden of proving that the devise was not procured by duress, menace, fraud, or undue influence. The presumption ... only applies to the devise to the subscribing witness. If the witness fails to meet the burden of overcoming that presumption and the devise to that witness is not inconsistent with, and can be separated from, the remainder of the will, only the devise to the witness fails and not the entire will."

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d. Signing With Different Intention.

14 Witkin Sum. Cal. Law Wills § 146

[§ 146] Signing With Different Intention.

In *Estate of La Mont* (1952) 39 C.2d 566, 248 P.2d 1, the court, stressing the purpose rather than the language of former Prob.C. 50, held that the signature of a witness was sufficient even though the signer may not have intended to sign in the capacity of a witness. Decedent left her estate to her sister Bella, and stated that her sister and her nephew Fred "whose signatures appear below are to jointly administer the estate." Below, in the left column, were the signatures of Bella and Fred; in the right column, each preceded by the word "Witness," were the signatures of Klari and Helen. Helen was a good witness. Klari did not sign at the time and was not. Bella was the beneficiary, so her signature was not sufficient if she was to take the whole estate. Hence, Fred's signature was necessary. The lower court denied probate on the grounds that (1) the will expressly described Fred as an executor (or administrator), and (2) it described the witnesses as witnesses, and did not so describe Fred. The Supreme Court reversed on the theory of substantial compliance.

(a) "In the present case the events surrounding execution of the will include every formal protection intended to be provided by the statute and show that its purposes have been accomplished. The testator told Fred that the instrument was a will and requested him to sign it, and Fred saw the testator sign and affixed his own signature in the testator's presence. All of this took place in the presence of Helen Smith. Fred can testify to the authenticity of the document and to the circumstances surrounding its execution, and his signature serves to identify it. In view of these facts it is immaterial that Fred may have thought he was signing in the capacity of executor. There is nothing in the statute which requires proof of a specific intent to act solely as a witness, and, in our opinion, no such intent is necessary where the person who is relied on as a witness observed all of the events to which he is required to attest and signed the instrument." (39 C.2d 569.)

(b) "Likewise it is immaterial that the testator may have failed to use the word 'witness' in requesting Fred's signature or may have been under a mistaken belief that a person who is named as executor must sign the will. ... Fred was asked to sign the instrument as part of its formal execution, and it was not necessary for proponents to prove that the testator had any specific intent with regard to the particular capacity in which Fred signed. Any other interpretation of the statute might make it a trap rather than a safeguard." (39 C.2d 569.)

West's Key Number Digest, Wills k.119

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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D. Execution of Witnessed Will.
5. Presumption of Due Execution.

14 Witkin Sum. Cal. Law Wills § 147

[§ 147] Presumption of Due Execution.

California recognizes a nonstatutory presumption of due execution of a signed instrument, principally applied to sustain a witnessed will "where witnesses are dead, unavailable or unable to testify or recollect, or are adverse or corrupt." (*Estate of Pitcairn* (1936) 6 C.2d 730, 732, 59 P.2d 90.) In *Estate of Pitcairn*, the will was offered for probate, and the signatures of the testator and two subscribing witnesses were proved genuine, but there was no formal attestation clause reciting compliance with the steps in execution. The subscribing witnesses testified that one was absent when the testator signed and that another was not told it was the testator's will. There was some confusion in the testimony of one witness, and the lower court admitted the will to probate. *Held*, judgment affirmed. While a regular and complete attestation clause makes out a prima facie case of due execution, the presumption is not based upon the recitals in the clause, but arises from the proof of the genuineness of the signatures. (6 C.2d 732.)

"This presumption ... is one of the most beneficent and useful known to the law, and since the testamentary disposition of property is favored and protected ... , it should be applied wherever it is reasonable to do so, in order that technical rules of law may not be allowed to defeat the expressed wishes of those who make wills." (*Estate of Gray* (1946) 75 C.A.2d 386, 392, 171 P.2d 113.) (Cf. Unif.Prob.C., §§3-303(c) [informal probate], 3-406(b) ["self-proving" will]; see 40 A.L.R.2d 1223 [presumption or inference of due execution of will]; *infra*, §546.) (See *Estate of Gray* (1948) 89 C.A.2d 478, 485, 201 P.2d 392 [neither absence of attestation clause, nor failure of witness to read such a clause, destroys the presumption]; *Estate of Braue* (1941) 45 C.A.2d 502, 505, 114 P.2d 386 [same result reached where full attestation clause, and one witness testified falsely]; *Estate of Gerst* (1957) 153 C.A.2d 528, 534, 315 P.2d 49 [no attestation clause; one witness dead, other had no recollection]; *Estate of Browne* (1958) 159 C.A.2d 99, 102, 323 P.2d 827 [attestation clause; one witness forgetful].)

In *Estate of Cecala* (1949) 92 C.A.2d 834, 838, 208 P.2d 436, the presumption was applied where the genuineness of the witnesses' signatures was established, even though the testator's signature was by mark, and the witnesses testified that they did not know or recall the circumstances of the supposed attestation.

It should be noted, however, that the presumption is ordinarily invoked to support a jury verdict in favor of the will; it will seldom be sufficient to overturn a verdict for the contestant. Thus, in *Estate of Jackson* (1958) 157 C.A.2d 198, 320 P.2d 563, one witness stated that all formalities were followed, but the other testified that the testator did not declare that the instrument was his will. *Held*, the jury's verdict for the contestant, and against the will, was supported

by this evidence, despite some showing that the adverse witness had quarrelled with the testator. (157 C.A.2d 201.)

The same result was reached in *Estate of Fletcher* (1958) 50 C.2d 317, 325 P.2d 103, where the issue was tried by the court. One witness was dead; the other testified without impeachment that the recitals in the attestation clause were false, and that the decedent was in a coma and knew nothing of what was happening. *Held*, judgment denying probate affirmed. (50 C.2d 320.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law

V. MAKING OF WILLS

E. Execution of Holographic Will.

1. Writing.

a. In General.

14 Witkin Sum. Cal. Law Wills § 148

[§ 148] In General.

(1) *Nature of Handwriting Requirement.* Former Prob.C. 53 required a holographic will to be "entirely written, dated and signed by the hand of the testator himself." Despite the rule of construction that the term "writing" includes printing and typewriting, a holographic will was held invalid unless actually written by the hand of the testator. (*Estate of Dreyfus* (1917) 175 C. 417, 419, 165 P. 941.)

The instrument could be prepared in duplicate, and either document, if wholly written by the testator, could be given effect despite its designation as a copy. (*Estate of Janes* (1941) 18 C.2d 512, 516, 116 P.2d 438.) Corrections of penmanship errors, and cancellations or interlineations, including changes in dispositive provisions, whether made at the time of signing or later, were all valid if in the handwriting of the testator. (See *Estate of Finkler* (1935) 3 C.2d 584, 600, 46 P.2d 149; *Estate of Clark* (1942) 55 C.A.2d 85, 88, 129 P.2d 969; *Estate of Archer* (1987) 193 C.A.3d 238, 244, 239 C.R. 137.)

(2) *Separate Writings Construed Together.* The same principles that permitted several writings to be construed together as a witnessed will (supra, §138) were applicable to a holographic will. (*Estate of Swendsen* (1941) 43 C.A.2d 551, 554, 111 P.2d 408; *Estate of Dumas* (1949) 34 C.2d 406, 414, 210 P.2d 697, *infra*, §163; *Estate of McCarty* (1962) 211 C.A.2d 23, 27, 27 C.R. 94, *infra*, §163; see 38 A.L.R.2d 477 [validity of will written on disconnected sheets]; *infra*, §162.) However, a number of cases held that where a holographic will was defective in any particular, the defect could not be cured by writing appearing on an envelope enclosing the instrument. (See *Estate of Manchester* (1917) 174 C. 417, 420, 163 P. 358 [signature]; *Estate of Francis* (1923) 191 C. 600, 601, 217 P. 746 [date]; cf. *Estate of Maguire* (1936) 14 C.A.2d 388, 390, 58 P.2d 209 [date; whether writing on envelope was part of will or merely descriptive of contents of envelope was question of fact, which might have been determined either way].)

(3) *Addition of Another's Handwriting.* In *Estate of McNamara* (1953) 119 C.A.2d 744, 260 P.2d 182, decedent wrote out a good, dated holographic will. However, instead of signing, he asked the beneficiary to copy it because he couldn't spell very well. At the bottom of the copy decedent wrote "I have read the above statement," signed it, and dated it. *Held*, there was no valid will; neither the integration nor incorporation by reference doctrines (*infra*, §§162, 165) could save this defectively executed instrument. (119 C.A.2d 747.) (See *Estate of Towle* (1939) 14 C.2d 261, 267, 93 P.2d 555, *infra*, §171 [changes in another's handwriting invalidate will].) These decisions followed the approach that

objectionable matter *actually incorporated* invalidated the will. But another's writing did not have that effect if not made a part of the will. This distinction was illustrated by the hybrid instrument--a holographic will with attesting witnesses. Where the part in the testator's writing was complete and sufficient, the added signatures of witnesses or even a notary's statement were disregarded as surplusage, and the instrument was upheld as a holographic will. (*Estate of Tanner* (1939) 33 C.A.2d 186, 189, 91 P.2d 170; *Estate of Kaminski* (1941) 45 C.A.2d 779, 781, 115 P.2d 21; *Estate of Clark* (1942) 55 C.A.2d 85, 89, 129 P.2d 969; *Estate of Spies* (1948) 86 C.A.2d 87, 90, 194 P.2d 83; see *Estate of Heuler* (1929) 207 C. 391, 392, 278 P. 1031 ["Marriage Contract" in handwriting of decedent construed as his will, despite presence of other party's signature].)

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V. MAKING OF WILLS

E. Execution of Holographic Will.

1. Writing.

b. Printed Matter.

14 Witkin Sum. Cal. Law Wills § 149

[§ 149] Printed Matter.

(1) *Printed Matter Incorporated.* If any material part of the will was printed, or if immaterial printed matter was incorporated in the instrument, it was invalid. Thus, the use of a filled-in printed form was fatal. (*Estate of Bower* (1938) 11 C.2d 180, 183, 78 P.2d 1012; *Estate of Goldsworthy* (1942) 54 C.A.2d 666, 669, 129 P.2d 949.) The same was true where printed surplusage was actually incorporated in a document otherwise entirely written. (See *Estate of Thorn* (1920) 183 C. 512, 514, 192 P. 19 [decendent's use of rubber stamp to incorporate name of the property devised invalidated will, even though rest of the instrument sufficiently described the property]; *Estate of Bernard* (1925) 197 C. 36, 41, 239 P. 404 [will was invalid where testator incorporated words "Long Beach, California" into first sentence, even though place was immaterial and printing was consequently mere surplusage].)

(2) *Printed Matter Not Incorporated.* An important distinction was made in *Estate of De Caccia* (1928) 205 C. 719, 273 P. 552, where the will was written on stationery on which were embossed the words "Oakland, California." The court concluded from an examination of the document that the testator did not intend to make the printed words a part of his will, and held it valid. (205 C. 724.) (See *Estate of Whitney* (1930) 103 C.A. 577, 582, 284 P. 1067; 12 Cal. L. Rev. 53; 17 Cal. L. Rev. 297; 3 So. Cal. L. Rev. 67.)

This theory was greatly extended in *Estate of Durlwanger* (1940) 41 C.A.2d 750, 107 P.2d 477. Decedent wrote a holographic will on hotel stationery on which was printed "Stockton, Calif. ____ 19____". He filled in the blank spaces with "May 3" and "38". The lower court denied probate, but the appellate court sustained the will, holding that the printed figure need not be deemed incorporated, and declaring that the *Thorn* and *Bernard* cases, *supra*, were "of little weight" since the decision in the *De Caccia* case. (41 C.A.2d 756.) (See *Estate of Williams* (1961) 198 C.A.2d 238, 240, 17 C.R. 716; 29 Cal. L. Rev. 552 [suggesting that *Durlwanger* case was wrong, though result was desirable].)

Estate of Baker (1963) 59 C.2d 680, 31 C.R. 33, 381 P.2d 913, went further than any prior decision, ignoring printed surplusage, which the testator seemingly intended to incorporate, and overruling contrary implications in *Estate of Bower*, *supra*. Decedent had an earlier witnessed will containing the words "Modesto, California." The holographic will was on a hotel letterhead; he crossed out some printed words but left in the printed words "Modesto, California," and put the date on the same line. The evidence of striking out some printed words and leaving others intact supported an inference of intention to incorporate the latter; and this inference was strengthened by the form of his first will,

indicating a belief that the place of making was an essential part. Nevertheless, the probate court's order denying probate was reversed by the Supreme Court. The opinion stressed the fact that the words "Modesto, California," though on the same line as the written material, were outside and not within it. More important, however, was the holding as to the testator's belief, evidenced by the earlier will and other deletions in this one, that the designation of locality was necessary. "It would unreasonably advance form over substance to hold that such a mistaken belief, if it existed, would defeat the testator's clearly, and otherwise validly, expressed testamentary intent." (59 C.2d 685.) (See 36 So. Cal. L. Rev. 626.)

Estate of Lando (1970) 7 C.A.3d 8, 86 C.R. 443, followed *Baker*. The will was written on letterhead of the testator, giving his name, address, and occupation (optometrist), with inked additions of zone and corrected telephone number. All of this was above the title of the will and not incorporated. *Held*, the letterhead was surplusage and the will was good. (7 C.A.3d 12.)

Nevertheless, the artificial rule remained, and the difficulty of distinguishing between matter incorporated and matter not incorporated was again illustrated in *Estate of Helmar* (1973) 33 C.A.3d 109, 109 C.R. 6. This instrument commenced with typewritten introductory matter consisting of the caption, the decedent's address, and an introductory clause reciting her capacity and declaring the instrument to be her "LAST WILL AND TESTAMENT." A comma connected this typewritten matter with the handwritten balance of the instrument, which commenced with the words "as follows" and made appropriate dispositions. *Held*, order denying probate affirmed. Both the majority and dissenting opinions stressed the liberal policy declared in *Baker*, but applied it differently: (a) The majority opinion stated that the typewritten matter "was tied into the balance of the document" by the handwritten words "as follows." (33 C.A.3d 113.) And the *Baker* rule "appears to have been applied only in situations where the purported wills were written on paper, usually hotel stationery, upon which there was 'printed' a letterhead or other advertising material which was not in fact incorporated into the document by the writer himself." (33 C.A.3d 113.) (b) The dissenting justice argued that *Baker* was controlling, in that the typewritten portion was unnecessary to the validity of the will, and that the written words "as follows" merely connected, but did not incorporate, the preceding typewritten matter. (33 C.A.3d 115.)

Estate of Black (1982) 30 C.3d 880, 181 C.R. 222, 641 P.2d 754, approved the approach of *Estate of Baker*. The testator used three copies of a stationer's form designed to be used for a one-page will. She dated the instrument in her own hand at the top of the first page, and in blank spaces in the exordium clause at the top of each page she inserted her signature and place of her domicile. She struck out or ignored other printed language relating to residuary gifts, appointment of executor, attesting witnesses and a testimonium clause, but at the bottom of the third page she inserted in the appropriate spaces the name and gender of her executor. She also used blanks at the end of the third page to insert the date of the instrument and the city and state of execution. Using nearly all of the remaining space she made a detailed disposition of her estate. Thus, all essential elements of a holographic will were in her own handwriting, and no handwriting of anyone else appeared on the instrument, but probate was denied because of the incorporation of the printed matter. *Held*, reversed.

(a) *Estate of Baker* approved the policy of liberality in accepting holographic wills, and held that substantial compliance with the statute was all that was required. (30 C.3d 883, 884.) The *Baker* analysis involved several separate inquiries: "Was the particular provision relevant to the substance of the will? Was it essential to the will's validity? Did the testator intend to incorporate the provision? Would invalidation of the holograph defeat the testator's intent?" (30 C.3d 885.)

(b) Here, as in *Baker*, the testator was mistaken as to the necessity of using the printed language to make an effective will. (1) The printed preamble was superfluous to her identification of the document as a will and herself as its maker; both were accomplished in words written by her. (2) Her use of the closing testimonial clause was also unnecessary, because she had already dated the instrument and because designation of the locality was not required. (3) Her use of the printed clause referring to a personal representative was irrelevant to the substance (dispositive provisions) of the will; in the absence of such a designation the court will name an administrator with the will annexed. (30 C.3d 885.)

(c) *Estate of Christian* (1976) 60 C.A.3d 975, 131 C.R. 841, interpreted the term "substance" as used in *Baker* to include all provisions material to the decedent's testamentary intent with respect to the probate of his will--including appointment of a personal representative. The *Christian* court relied on *Estate of Helmar*, *supra*, recognizing, however, that *Helmar* came close to reaffirming the implications of *Estate of Bower*, which the *Baker* court disapproved. (30 C.3d 886, 887.) "Having already rejected *Bower's* reasoning in *Baker*, and expressly reaffirming the latter's principles and rationale, we disapprove both *Estate of Christian* and *Estate of Helmar* ... insofar as they are inconsistent with this opinion." (30 C.3d 887.)

(d) No sound purpose or policy is served by invalidating a holograph "where every statutorily required element of the will is concededly expressed in the testatrix' own handwriting and where the testamentary intent is clearly revealed in the words as she wrote them." (30 C.3d 888.)

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V. MAKING OF WILLS

E. Execution of Holographic Will.

1. Writing.

c. Revised Statute.

14 Witkin Sum. Cal. Law Wills § 150

[§ 150] Revised Statute.

(1) *Recommendation and Enactment.* In response to a 1981 Law Revision Commission Recommendation that only the signature and material provisions of a holographic will be in the testator's handwriting (see 16 Cal. Law Rev. Com. Reports, pp. 307, 308), the 1982 Legislature repealed former Prob.C. 53. (See *14 Pacific L. J.* 369.)

Under *Prob.C. 6111(a)*, a will that does not comply with *Prob.C. 6110* is valid as a holographic will, whether or not witnessed, "if the signature and the material provisions are in the handwriting of the testator." (See *Unif.Prob.C.*, §2-503; *Estate of Archer* (1987) 193 C.A.3d 238, 243, 239 C.R. 137; *Estate of Brenner* (1999) 76 C.A.4th 1298, 1301, 91 C.R.2d 149 [photocopies of testator's handwritten dispositions of property constituted valid holographic will under *Prob.C. 6111*]; Cal. Transactions Forms, 4 Estate Planning §19:40 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §3.2 [execution of holographic will]; *Rest.3d, Property (Wills and Other Donative Transfers)* §3.3 [harmless errors in execution]; 79 *Am.Jur.2d* (2002 ed.), *Wills* §612 et seq.; 20 Cal. Western L. Rev. 258; 32 Hastings L. Rev. 605; 37 *A.L.R.4th* 528 [requirement that holographic will, or material provisions, be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting]; 42 *A.L.R.4th* 176 [electronic tape recording as holographic will].)

(2) *Statement of Testamentary Intent.* "Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will." (*Prob.C. 6111(c)*.)

(3) *Printed Matter Incorporated.* In *Estate of Sola* (1990) 225 C.A.3d 241, 275 C.R. 98, the purported will was actually an altered copy of the formal will, and the court, distinguishing *Estate of Black* (1982) 30 C.3d 880, 181 C.R. 222, 641 P.2d 754, supra, §149, said: "The printed words on the page cannot be viewed as surplusage to a complete testamentary ... reference to the words of the formal, attested will on which the handwritten words appear. The words used, along with the arrows pointing to the printed clause and the signature of the testator, evidence the intent of the decedent that the words not be read apart from the handwritten and typewritten words on the rest of the page." (225 C.A.3d 247.)

(4) *Proof.* A holographic will may be proved in the same manner as other writings. (*Prob.C. 8222*, infra, §547.) Extrinsic evidence is admissible to determine whether a document constitutes a will pursuant to *Prob.C. 6111* or to

determine the meaning of a will or a portion of a will that is unclear. (*Prob.C. 6111.5.*)

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E. Execution of Holographic Will.
2. Date.

14 Witkin Sum. Cal. Law Wills § 151

[§ 151] Date.

(1) *Former Law.* The technical date requirement of former Prob.C. 53 constituted a serious problem for the uninformed testator. The word "entirely" was applied inconsistently to dates and signatures: A signature was valid though partly in initials or even where the true name was not used (see *infra*, §152), but the date had to be complete; i.e., whether in words or figures, it had to include the day, month, and year. Thus, "4-14-07" was valid (*Estate of Chevallier* (1911) 159 C. 161, 170, 113 P. 130), but "22nd day of March, in the year of our Lord one thousand" was not (*Estate of Vance* (1916) 174 C. 122, 123, 162 P. 103). (See 22 A.L.R.3d 866 [use of figures to express date of holographic will as affecting sufficiency].) However, if the date was complete, it was sufficient even though wrong. Thus, "1859" was construed to mean "1889." (*Estate of Fay* (1904) 145 C. 82, 83, 78 P. 340; see *Estate of Wilkinson* (1931) 113 C.A. 645, 649, 298 P. 1037.)

In *Estate of Schiffmann* (1936) 16 C.A.2d 650, 61 P.2d 331, at the top of the instrument were the words "Tues., Aug. 20," and in the body, "The 1935 La Salle which I now drive." *Held*, recourse could not be had to the date in the body, which was not intended to serve as the date of the instrument. (16 C.A.2d 651.) (See *Estate of Maguire* (1936) 14 C.A.2d 388, 389, 58 P.2d 209 [no date in will, partial date in codicil, complete date on enclosing envelope, will held invalid]; *Estate of Wunderle* (1947) 30 C.2d 274, 280, 181 P.2d 874, *infra*, §164 [observing that tendency toward greater liberality in accepting holographic wills does not justify excusing substantial compliance with requirement of date; and recourse cannot be had to body where date mentioned was obviously not intended by testator to serve as date of instrument]; *Estate of Fritz* (1951) 102 C.A.2d 385, 394, 227 P.2d 539 ["December, 1946"; not saved by letter to executors and beneficiary in same box dated "12-24-1947"]; *Estate of Carson* (1959) 174 C.A.2d 291, 292, 344 P.2d 612 ["May 1958"; invalid]; *Estate of Hazelwood* (1967) 249 C.A.2d 263, 267, 57 C.R. 332 [extrinsic evidence inadmissible to make "1965" (incomplete date) read "1-9-65"].)

"Although some decisions contain language which if read out of context require inscription of the month, the day, and the year ... each California case finding dating insufficient involves a situation where reference could be to more than one day." (*Estate of Rudolph* (1980) 112 C.A.3d 81, 83, 169 C.R. 126.) In this case, the will was dated "Monday 26, 1978." In 1978, the 26th day of the month only occurred on one Monday--in June. *Held*, judicial notice should be taken of this fact, and thus the date was rendered complete without resort to extrinsic evidence. (112 C.A.3d 83.)

The date did not have to be written at the same time or on the same day as the will was written or signed. And the

position of the date was immaterial. It could be at the beginning or the foot, in the margin or the body; and it did not have to precede the signature. (*Estate of Moody* (1953) 118 C.A.2d 300, 308, 257 P.2d 709.)

(2) *Revised Statute. Prob.C. 6111* eliminated the date requirement and provides (a) a rule for resolving doubts resulting from inconsistent provisions of undated wills, and (b) a requirement of testamentary capacity at the time of execution. (See 16 Cal. Law Rev. Com. Reports, p. 308.)

(a) *Inconsistent Instruments.* If a holographic will is undated and there is doubt whether its provisions or the inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of the inconsistency "unless the time of its execution is established to be after the date of execution of the other will." (*Prob.C. 6111(b)(1)*.)

The Law Revision Commission Comment explains that *Prob.C. 6111(b)(1)* "is a clarifying provision designed to deal with the situation where the holographic will and another will have inconsistent provisions as to the same property or otherwise have inconsistent provisions. To deal specifically with this situation, paragraph (1) requires either that the holographic will be dated or that the time of its execution be shown to be after the date of execution of the other will. If the date of execution of the holographic will cannot be established by a date in the will or by other evidence to be after the date of execution of the other will, the holographic will is invalid to the extent that the date of its execution is material in resolving the issue of whether it or the other inconsistent will is to be given effect. Where the conflict between the holographic will and the other will is to only a portion of the property governed by the holographic will, the invalidity of the holographic will as to the property governed by the other will does not affect the validity of the holographic will as to other property. Paragraph (1) also covers the situation where both wills are holographic and undated and have inconsistent provisions on a particular matter; in such a case, Section 6111 applies to both wills. If it cannot be established that one of the holographic wills was executed after the other, neither will is valid insofar as the two wills are inconsistent; but, in such case, the validity of the consistent provisions of the two wills is not affected by the failure to establish time of execution."

(b) *Testamentary Capacity.* If a holographic will is undated and the testator lacked testamentary capacity "at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity." (*Prob.C. 6111(b)(2)*.)

The Law Revision Commission Comment explains: *Prob.C. 6111(b)(2)* "applies to the situation where the testator lacked testamentary capacity at any time during which the holographic will might have been executed. Thus, if the testator lacks testamentary capacity at the time of his or her death and the holographic will is found with the testator's personal effects, the will is invalid unless it is established that the will was executed at a time when the testator did have testamentary capacity. This could be established, for example, by evidence of a person who saw the testator make the holographic will and can testify that the testator had testamentary capacity at that time. Likewise, where a testator lacked testamentary capacity for a period prior to death and the undated holographic will is found in the testator's safe deposit box, it could be established that the will was executed at a time when the testator did have testamentary capacity if it were shown that the testator did not have access to the safe deposit box at any time after the testator lost the capacity to execute a will. Paragraph (2) does not invalidate a holographic will if it could not have been executed at a time when the testator lacked testamentary capacity. For example, if the testator becomes ill and requires hospitalization, loses his or her testamentary capacity and dies during the hospitalization period, and the testator's holographic will is found at the testator's home, the will must have been executed before the testator's hospitalization and therefore at a time when the testator had testamentary capacity."

Estate of MacLeod (1988) 206 C.A.3d 1235, 254 C.R. 156, upheld the validity of an undated holographic will. It was drafted at a time when the former statute required a date, but the revised statute did not contain that requirement at the time of the testator's death. The court observed that statutes dispensing with formalities may be applied retrospectively where the effect is to validate previously executed wills of testators who were alive when the statutes were adopted. "[T]his practice is not based on arcane rules relating to the ambulatory nature of wills but rather to the strong policy of the law to uphold, when possible, the validity of wills." (206 C.A.3d 1244.)

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E. Execution of Holographic Will.
3. Signature.

Witkin Sum. Cal. Law Wills § 152

[§ 152] Signature.

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Williams (2007) 155 C.A.4th 197, 208, 210, 66 C.R.3d 34* [decedent's name written in block letters at top of document was sufficient for holographic will; holographic signature need not be legal signature of decedent and need not be at end of document].



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3. Signature.

14 Witkin Sum. Cal. Law Wills § 152

[§ 152] Signature.

Prob.C. 6111(a) requires that the signature be "in the handwriting of the testator." It is not necessary that the legal or true name be signed. (*Estate of Button* (1930) 209 C. 325, 328, 287 P. 964 [letter concluded with words "Love from 'Muddy' "; held equivalent to "Mother" and sufficient].)

The bulk of the case law deals with the signature out of its usual place. Under the statute, the testator must sign, but need not subscribe; i.e., the signature may appear either at the beginning or end, or in the body of the instrument, if it appears to be intended as a token of execution. (*Estate of Morgan* (1927) 200 C. 400, 401, 253 P. 702; *Estate of Brooks* (1931) 214 C. 138, 140, 4 P.2d 148; *Estate of Sullivan* (1928) 94 C.A. 674, 676, 271 P. 753; *Estate of Bauman* (1931) 114 C.A. 551, 555, 300 P. 62; *Estate of Hout* (1954) 126 C.A.2d 721, 724, 273 P.2d 45 [signature in two places--at beginning of will and again in an entirely written attestation clause]; *Estate of Rowe* (1964) 230 C.A.2d 442, 445, 448, 41 C.R. 52 [at end of dispositions, less than inch from bottom edge, "Signed this day" but no signature; name in exordium was sufficient]; see 19 A.L.R.2d 926 [place of signature of holographic will]; 75 A.L.R.2d 895 [sufficiency of signature on holographic will].)

In determining this issue, the court considers the language, form, and relative position of the parts of the will. The intention must appear from the document itself; "parol evidence is not admissible to show that a signature found elsewhere than at the end is a signature of execution." (*Estate of Bloch* (1952) 39 C.2d 570, 573, 248 P.2d 21.)

The older cases were strict. In *Estate of Manchester* (1917) 174 C. 417, 163 P. 358, the instrument commenced with the words "I, Matilda Manchester" and then proceeded to dispose of her property. It concluded with the words "I hereby set my hand this 14th day of Jan. 1914" but no signature followed. *Held*, the will was invalid, because it appeared from the instrument that she did not consider the introductory statement as a signature. (174 C. 419.) (See 17 Cal. L. Rev. 297; 5 Cal. L. Rev. 354.)

Later cases took the more liberal view that completeness of the testamentary terms would justify the inference that the name in the exordium or body was intended as a signature. Thus, in *Estate of Kinney* (1940) 16 C.2d 50, 104 P.2d 782, the testator commenced with her name, then listed various gifts, and stopped. *Held*, the writing appeared to be a complete statement of her desires, and was properly admitted to probate. The court rejected the contention that there must be some expression by the testator affirmatively adopting the name as a signature. "Completeness alone has been

held sufficient evidence of the adoption of the name so placed as the authenticating signature of the testator." (16 C.2d 55.) (See *Estate of Gardener* (1948) 84 C.A.2d 394, 396, 190 P.2d 629; *Estate of Wallace* (1950) 100 C.A.2d 237, 238, 223 P.2d 284 [same].)

Estate of Bloch, *supra*, is even more liberal. The testator wrote an obviously testamentary document on two sides of an envelope. In the body it read, "Bonds belonging solely to Helene I. Bloch," listing them and making dispositions. *Held*, the name was a signature of the testator. The document was a complete testamentary disposition, and the fact that the testator used her name for a dual purpose--to describe property as well as authenticate the will--was immaterial. (39 C.2d 575.) (See *Estate of MacLeod* (1988) 206 C.A.3d 1235, 1242, 254 C.R. 156 [following *Bloch*].)

Where there is no signature, the writing, though clearly intended to be a will or codicil, is invalid. In *Estate of Twohig* (1986) 178 C.A.3d 555, 223 C.R. 352, the testator executed a formal will, leaving his estate to his second wife. When she died, he prepared a handwritten document entitled "Codicil to This Will Dated August 5, 1973," in which he referred to her death, cancelled the disposition to her, and made a new disposition to his children. The document concluded with the words "signed January 14, 1983 at Carmel Valley California." It was found folded inside the formal will in an envelope with the word "Will" printed on it, and typed underneath the words "of Thomas Joseph Twohig." But the codicil was never signed. *Held*, admission of the codicil to probate was improper.

(a) The unsigned codicil's reference to the formal will could not incorporate by reference the signature of the formal will because the codicil was not itself a complete testamentary instrument. (178 C.A.3d 560.)

(b) There was no integration of the formal will and the codicil, for there were no holographic markings on the formal will to indicate the testator's intention to adopt his signature as execution of an existing holographic codicil; the documents were prepared at different times. (178 C.A.3d 561.)

(c) The court concluded that "whether the integration or incorporation doctrines are used, it is clear that the final document, either physically or chronologically, must bear a signature." (178 C.A.3d 561.)

In *Estate of Archer* (1987) 193 C.A.3d 238, 239 C.R. 137, the court held that the testator's later handwritten additions on the back of his signed and dated holographic codicil adopted the date and signature on the front, whether or not the doctrines of integration and incorporation by reference were applicable. (193 C.A.3d 244.)

West's Key Number Digest, Wills k.130

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Williams* (2007) 155 C.A.4th 197, 208, 210, 66 C.R.3d 34 [decendent's name written in block letters at top of document was sufficient for holographic will; holographic signature need not be legal signature of decedent and need not be at end of document].



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4. Testamentary Intent Shown.
a. In General.

Witkin Sum. Cal. Law Wills § 153

[§ 153] In General.

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Williams (2007)* 155 C.A.4th 197, 211, 66 C.R.3d 34 [holographic document that clearly showed testamen- tary intent with respect to some property was holographic will even though it did not entirely dispose of decedent's property and even though it included instructions (regarding power of attorney and wishes during illness) that would normally be effective during life].



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E. Execution of Holographic Will.

4. Testamentary Intent Shown.

a. In General.

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[§ 153] In General.

No particular words are necessary for a holographic will. Thus, a letter or other informal document will be sufficient if it discloses the necessary testamentary intent, i.e., if it appears that the decedent intended to direct the final disposition of property after death. The surrounding circumstances may be considered in reaching a conclusion on this issue. (*Estate of Spitzer* (1925) 196 C. 301, 306, 237 P. 739; *Estate of Beffa* (1921) 54 C.A. 186, 188, 201 P. 616 [decedent wrote: "I sign and transfer all my right and title" in certain property]; *Estate of Button* (1930) 209 C. 325, 330, 287 P. 964; *Estate of Taylor* (1953) 119 C.A.2d 574, 579, 259 P.2d 1014 [letter by seaman to friend: "in case Davie Jones gets me out in the South Pacific ocean in other words lost at Sea" B to have his property]; *Estate of Heuler* (1929) 207 C. 391, 392, 278 P. 1031 ["Marriage Contract" between decedent and prospective wife, setting forth manner in which property should be distributed on death of either]; *Halldin v. Usher* (1958) 49 C.2d 749, 751, 321 P.2d 746, supra, §109; *Estate of Stephenson* (1965) 235 C.A.2d 326, 328, 45 C.R. 121, quoting the text [serviceman's writing on flyleaf of prayer book]; see 14 Cal. L. Rev. 245; 7 Cal. L. Rev. 204; 1 So. Cal. L. Rev. 88; 2 U.S.F. L. Rev. 367; 40 A.L.R.2d 698 [letter as will or codicil].) (On admissibility of testator's declarations of intent, see 1 Cal. Evidence (4th), Hearsay, §221 et seq.)

A letter otherwise sufficient in form is not rendered ineffectual by being labeled "Copy," where no original is mentioned or found. (*Estate of Schultz* (1960) 54 C.2d 513, 517, 6 C.R. 281, 353 P.2d 921 [following *Estate of Janes* (1941) 18 C.2d 512, 516, 116 P.2d 438, supra, §148]; see 81 A.L.R.2d 1112 [designation of identification of instrument as copy as affecting validity as will].) Although the added signature of a witness can be disregarded as surplusage (supra, §148), the fact of the witnessing may indicate testamentary intent. (See *Estate of Spies* (1948) 86 C.A.2d 87, 90, 194 P.2d 83.)

It is likewise immaterial that the decedent expected to make a later formal will to supersede the holograph. (*Estate of Kuttler* (1958) 160 C.A.2d 332, 339, 325 P.2d 624, infra, §156; see 46 A.L.R.3d 938 [effect on testamentary nature of document of expression of intent to make more formal will, further disposition of property, or the like].)

Estate of Smilie (1950) 99 C.A.2d 794, 222 P.2d 692, illustrates the length to which a court may go in upholding a finding of testamentary intent. Decedent, long having quarrelled with his wife and stepdaughter, wrote an illiterate letter to his close friend describing a recent altercation, stating that he didn't want the stepdaughter to get anything, and "

I want you to have all of my after my bill are." The Probate Court's admission of this as a holographic will and revocation of a former witnessed will in favor of the wife were upheld. The theory was that the italicized part of the sentence showed testamentary intent, and the rest could be disregarded as surplusage. (99 C.A.2d 796.) (See *Estate of Crick* (1964) 230 C.A.2d 513, 517, 41 C.R. 120 [illiterate letter containing sentence: "As soon as things are settled so I can will make a real will the way I want it this is just in case"; held that "real" meant formal witnessed will, and interim will just as good]; *Estate of Wolfe* (1968) 260 C.A.2d 587, 593, 67 C.R. 297 [letter, barely legible, and containing much nontestamentary material, nevertheless found sufficient]; *Estate of Geffene* (1969) 1 C.A.3d 506, 513, 81 C.R. 833 ["The following statement I have preferred not to announce: The stock certificates owned by me I transfer to Marian T. Rowans--That these stocks remain secure for her. ... The request is not to be changed, revised or contested but left intacked. Respected due to my wishes"]; *Estate of MacLeod* (1988) 206 C.A.3d 1235, 1241, 254 C.R. 156 ["While the document may not reflect Margaret's usual care with important legal documents, and while it may have been changed from time to time, even with the intent perhaps at some future time to formalize the will, we do not believe this detracts from the conclusion Margaret intended the document, at any given time, to be her will"].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Williams* (2007) 155 C.A.4th 197, 211, 66 C.R.3d 34 [holographic document that clearly showed testamentary intent with respect to some property was holographic will even though it did not entirely dispose of decedent's property and even though it included instructions (regarding power of attorney and wishes during illness) that would normally be effective during life].



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4. Testamentary Intent Shown.

b. Instrument With Dual Purpose.

14 Witkin Sum. Cal. Law Wills § 154

[§ 154] Instrument With Dual Purpose.

In *Estate of Gutierrez (1961) 189 C.A.2d 165, 11 C.R. 51*, the document read in part: "For Maurice Gutierrez. In case that I should have an illness, or my death, I want my husband (Maurice A. Gutierrez) to have some ready money--so am enclosing two cheques ... am also enclosing book--in this letter for \$ 35,000. ... He is to have his share of my estate, which is taken care of by the United States Trust Company of New York ... and the rest to different charities." *Held*, reversing the probate judge, this was a valid testamentary instrument. It was not necessary to use the word "will," it was immaterial that the letter had the dual purpose of providing ready money and also for disposition of the estate, and the identity of the charities and other issues of interpretation did not arise on a petition for probate. (*189 C.A.2d 169.*)

The fact that a letter is mainly devoted to other subjects, and does not even mention the word "will," does not prevent a determination that it is a testamentary instrument. (*Estate of Button (1930) 209 C. 325, 330, 287 P. 964* [letter over 700 words, 24 relied on as testamentary].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Testamentary Intent Shown.

c. Language of Inter Vivos Gift.

14 Witkin Sum. Cal. Law Wills § 155

[§ 155] Language of Inter Vivos Gift.

Estate of Kane (1965) 236 C.A.2d 51, 45 C.R. 742, gave testamentary effect to language of a present gift, used by a testator familiar with both deeds and wills. The document read: "This is to certify that I give" Mr. and Mrs. A the testator's home (described) "with the understanding that I live here." The testator had made two prior holographic wills, clearly testamentary in form, disposing of items of property and naming an executor. The contestants therefore contended that his use of language of an inter vivos transfer was an attempt to make a deed with reserved life estate, ineffective for lack of delivery. But the probate court's order admitting the document to probate was affirmed on the following extrinsic evidence: The parties were intimate friends, and the testator's relatives were not close; decedent retained custody of the document and, before his final illness, directed Mr. and Mrs. A to look in his bureau drawer (where it was kept) "if something happens"; and decedent lacked knowledge of real estate transactions. (236 C.A.2d 52.) (See *Estate of Lampkin (1962) 203 C.A.2d 374, 376, 21 C.R. 513* [illiterate decedent, instrument reciting "I here by do give," i.e., indicating present gift rather than testamentary disposition; held reversible error to exclude extrinsic evidence of declaration that it was "a will"]; *Estate of French (1964) 225 C.A.2d 9, 17, 36 C.R. 908* [language suggesting present disposition was overcome by extrinsic evidence of testamentary intent, and admission to probate affirmed].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Testamentary Intent Shown.

d. Instrument Not Making Disposition.

14 Witkin Sum. Cal. Law Wills § 156

[§ 156] Instrument Not Making Disposition.

It is not necessary that the decedent understand the import or effect of the testamentary provisions. In *Estate of Kuttler* (1958) 160 C.A.2d 332, 325 P.2d 624, the testator desired to disinherit her grandchildren and to leave nothing to her daughters-in-law, but was undecided as to how to dispose of her property. After consultations with her attorney she prepared a dated and signed paper stating that "If at any time I should pass on before I have a recorded Will," she did not want anything to go to them, and added, "Notify" H (her fiancé) "or my sister," "for them to dispose of my belongings as they see fit." The lower court denied probate, in part on the ground that there was no direct disposition of property. But testimony of the attorney and H as to her declarations indicated that she regarded the writing as a will. *Held*, order reversed. The extrinsic evidence supported the internal evidence of testamentary intent; and, regardless of whether she was aware of the principle, the language created a power of appointment, thereby satisfying the requirement of disposition of the estate. (160 C.A.2d 337.)

In *Estate of Karkeet* (1961) 56 C.2d 277, 14 C.R. 664, 363 P.2d 896, the testator, without known relatives, left an envelope addressed to her close friend Leah Selix with the statement "In case of my death--Peggy." In it was a written, dated and signed paper addressed "To Whom It May Concern," and reading: "This is my authorization to Miss Leah Selix ... to act as executrix of all and any property and personal effects (and bank accounts) to act without bond or order of Court." *Held*, though in form only an appointment of an executor, the instrument could, in light of extrinsic evidence, be interpreted as a disposition of property. "[I]t is reasonable to conclude that the decedent did not intend to make her will, provide for an executrix in the technical sense, and at the same time allow the *whole* of her estate to escheat to the state ... ; that having prepared the will herself and not being familiar with the more modern technical meaning of the term 'executrix' the decedent designated her close friend as such intending that she be the residuary legatee; that in providing that Leah was 'to act without bond or order of the Court' the decedent intended that no one else have any interest in the estate." (56 C.2d 283.)

The *Karkeet* case is unusual in that the instrument was concededly a will, whether it disposed of property or not (see *supra*, §104). The problem was therefore one of interpretation of a testamentary instrument. The probate judge rejected extrinsic evidence offered by Leah to resolve the ambiguity in the term "executrix," but nevertheless held her entitled as a matter of law. The Supreme Court, reversing the judgment, held that the will did not compel this conclusion as a matter of law, and that the extrinsic evidence should have been admitted, subject, of course, to rebuttal

by the state seeking to escheat the property. (56 C.2d 283.)

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E. Execution of Holographic Will.

5. Testamentary Intent Not Shown.

a. In General.

14 Witkin Sum. Cal. Law Wills § 157

[§ 157] In General.

If the informal document fails to disclose testamentary intent, and merely expresses a desire or future intention, or refers to a past act or instrument of testamentary disposition, it cannot be given effect as a will. In other words, it must appear that the decedent intended to make a testamentary disposition by that particular paper, and if this cannot be shown it is immaterial that his testamentary intentions were in conformity with it.

In *Estate of Pagel* (1942) 52 C.A.2d 38, 125 P.2d 853, decedent wrote a letter to a hospital stating his intention to leave property to it, and adding that he hoped soon to make such a will. *Held*, "testamentary intent is never retroactive. It must concur with the writing." (52 C.A.2d 44.)

In *Estate of Moore* (1951) 102 C.A.2d 672, 228 P.2d 66, a sheet of tissue was found wrapped around decedent's ring with the statement: "I leave this and all that is mine," but adding "I'll leave a Will." The order admitting the sheet to probate was reversed. The note negated the idea that it was a will and clearly showed that some other writing to be made would be a will (there was one, but it was ineffective because undated). (102 C.A.2d 673.)

In *Estate of Golder* (1948) 31 C.2d 848, 193 P.2d 465, decedent, in the armed forces, wrote a letter to his mother dealing with various matters, but containing a postscript referring to "a surprise coming for you," and adding that if he should not come back, "I want my savings & stocks to go to you." *Held*, probate was properly denied (a) because of lack of clear testamentary intent in the letter, and (b) because to give the savings and stocks to his mother would practically leave his wife and child unprovided for, though they were on friendly terms at the time the letter was written. (31 C.2d 850.)

In *Estate of Brown* (1985) 171 C.A.3d 1064, 218 C.R. 108, a formal will was inadmissible in probate because of the false declarations made by each of its purported witnesses, and the court held that it could not be given effect by treating it as if the testator had intended it to be a holographic instrument. From the face of the will, it was clear that the testator anticipated that there would be further formalities before the will became effective, a fact recognized by the testator's sister when she had the will attested. (171 C.A.3d 1068.)

Many other cases are to the same effect. (See *Estate of Branick* (1916) 172 C. 482, 484, 157 P. 238 [one of many

letters written to brother, discussing property transactions, and closing with casual statement that all property was to go to brothers]; *Estate of Kelleher* (1927) 202 C. 124, 126, 259 P. 437 [statement of intention to make will]; *Estate of Major* (1928) 89 C.A. 238, 242, 264 P. 542 [assurance that will existed and would not be changed]; *Estate of Dotta* (1937) 18 C.A.2d 763, 764, 64 P.2d 741 [decendent wrote letters stating that on death "all I possess is yours"; held, on consideration of surrounding circumstances not set forth in opinion, he did not intend these to constitute his will]; *Estate of Logan* (1938) 29 C.A.2d 60, 65, 84 P.2d 245 [expression of desire]; *Estate of Kenyon* (1941) 42 C.A.2d 423, 426, 109 P.2d 38 [gossipy letter with casual reference to preferred relatives]; *Estate of Wong* (1995) 40 C.A.4th 1198, 1208, 47 C.R.2d 707, citing the text [eight-word document with names, date, initials, and arrow, but lacking subject, verb, and object, was too ambiguous to devise property or show testamentary intent]; *Estate of Southworth* (1996) 51 C.A.4th 564, 569, 59 C.R.2d 272 [charity donor card with printed language reading "I am not taking action now, but my intention is" and handwritten addition reading "My entire estate is to be left to North Shore Animal League" showed intention to make will in future, not present testamentary intent].)

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SUPPLEMENT: [This section is current through the latest supplement]



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5. Testamentary Intent Not Shown.

b. Existing Unrevoked Will.

14 Witkin Sum. Cal. Law Wills § 158

[§ 158] Existing Unrevoked Will.

"[W]here there exists a previously made and unrevoked will of the testator, the later holographic instrument claimed to be a will should be so phrased that there can be no doubt from its language that the intention of the testator was thus to make further testamentary provisions." (*Estate of Beebee* (1953) 118 C.A.2d 851, 859, 258 P.2d 1101.) In *Estate of Beebee*, an elderly woman, having a formal will and codicil at a bank, had previously declared that she would not make a will without an attorney's advice. She wrote a letter to an officer of the bank in the following form: (a) It commenced with enough to constitute a will: "I wish to revoke all former wills ... as conditions no longer ... exist I wish to leave my entire Estate to my Son Ralph." (b) Then she said that she was 89, growing blind, not able to get downtown to the bank, "So please do what is necessary under the circumstances, whether by codicil or a new will." *Held*, the instrument was not testamentary. The second part showed that at most it was a letter to the bank telling how she wished to change her will but intending that the preparation of a codicil or a new will was necessary before this intent could be effected. (118 C.A.2d 858.) (See 43 Cal. L. Rev. 157.)

In *Estate of Spencer* (1948) 87 C.A.2d 591, 197 P.2d 351, decedent wrote a letter to a friend in which she said: "However the building & lot will be turned over to you one day--for I haven't any relations that would be bothered with them--as they all have all they want or need so please accept them." *Held*, probate was properly denied, considering the following factors: (a) the letter dealt mainly with other matters, contained no farewell message or apprehension of approaching death, and in fact decedent did not die for 5 years; (b) there was in existence a prior unrevoked formal will of decedent; (c) the language was susceptible of nontestamentary meaning. (87 C.A.2d 593.)

West's Key Number Digest, Wills k.134

SUPPLEMENT: [This section is current through the latest supplement]



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F. Codicil.
1. Nature and Purpose.

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[§ 159] Nature and Purpose.

SUPPLEMENT: [This section is current through the latest supplement]

On certain gifts of tangible personal property authorized by writing executed after the will, see *Prob.C. 6132* (Supp., infra, §168A).



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F. Codicil.

1. Nature and Purpose.

14 Witkin Sum. Cal. Law Wills § 159

[§ 159] Nature and Purpose.

A codicil is a later testamentary instrument or entry on an original testamentary instrument that supplements or otherwise affects its validity or terms. (See *Estate of Plumel* (1907) 151 C. 77, 80, 90 P. 192; *Estate of Cazaurang* (1941) 42 C.A.2d 796, 798, 110 P.2d 138; *Estate of Duraind* (1942) 51 C.A.2d 206, 210, 124 P.2d 330; *Estate of Cuneo* (1963) 60 C.2d 196, 202, 32 C.R. 409, 384 P.2d 1, *infra*, §173; 79 *Am.Jur.2d* (2002 *ed.*), *Wills* §589 *et seq.*; C.E.B., 1 *Will Drafting* 3d, §6.1 *et seq.*) The term "will" includes "codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will." (*Prob.C.* 88.)

A codicil may be used to accomplish one or more of the following purposes:

(a) Addition of supplementary provisions to a will, which may give rise to questions of interpretation about the effect of the codicil on the prior provisions (*infra*, §§199, 200).

(b) Revocation or partial revocation of a will (*infra*, §§175, 176).

(c) Revival of a revoked will (*infra*, §182).

(d) Validation of an invalid will (*infra*, §165).

(e) Republication or redating of a valid and subsisting will (*infra*, §161).

West's Key Number Digest, *Wills* k.125

SUPPLEMENT: [This section is current through the latest supplement]

On certain gifts of tangible personal property authorized by writing executed after the will, see *Prob.C.* 6132 (*Supp.*, *infra*, §168A).



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F. Codicil.
2. Form of Codicil.

Witkin Sum. Cal. Law Wills § 160

[§ 160] Form of Codicil.

SUPPLEMENT: [This section is current through the latest supplement]
See 20B Am.Jur. Legal Forms 2d (2008 ed.), Wills §266:95 et seq.



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14 Witkin Sum. Cal. Law Wills § 160

[§ 160] Form of Codicil.

A codicil may be in any form so long as it complies with the statutory formalities. Hence, a holographic codicil may be made to a witnessed will. (See *Estate of Atkinson* (1930) 110 C.A. 499, 502, 294 P. 425; *In re Soher* (1889) 78 C. 477, 479, 21 P. 8; *Estate of McCarty* (1962) 211 C.A.2d 23, 27, 27 C.R. 94, *infra*, §163; 40 A.L.R.2d 698 [letter as will or codicil]; Cal. Transactions Forms, 4 Estate Planning §22:1 et seq.; C.E.B., 1 Will Drafting 3d, §6.3; 20B Am.Jur. Legal Forms 2d (2000 ed.), Wills §266:88 et seq.)

It may be on a separate paper or on the same instrument. (*Estate of Atkinson*, *supra* [testator wrote across the lines of a part of his witnessed will, with date and signature, "John Atkinson children are to get John's share"]; *Estate of Plumel* (1907) 151 C. 77, 80, 90 P. 192 [reverse side]; *Estate of Cazaurang* (1941) 42 C.A.2d 796, 798, 110 P.2d 138 [same]; *Estate of Carr* (1949) 93 C.A.2d 750, 754, 209 P.2d 956 [same instrument]; *Estate of Nielson* (1980) 105 C.A.3d 796, 802, 165 C.R. 319, *infra*, §165 [written on face of witnessed will].)

It is not necessary that the writing be labeled "codicil," provided the intention that it become a part of the will is sufficiently shown by language in it referring to the will or by the placement of the words. (See *Estate of Cazaurang*, *supra*; *Estate of Plumel*, *supra*; *Estate of Carr*, *supra*.)

In *Estate of Darms* (1966) 247 C.A.2d 254, 55 C.R. 463, a testator's letter of instructions, disregarded or overlooked by the executor bank, was held to be a valid holographic codicil. Decedent executed a formal will March 14, 1957, with a Utah bank named as executor and trustee. On November 21, 1961, he wrote a letter to the bank's trust officer, which went into the will file and was not disclosed--for unexplained reasons--until the time of preliminary distribution. The letter was entirely in decedent's handwriting, dated, and signed, and therefore in compliance with the formalities of a holographic instrument. It referred to a \$ 3,000 gift to L, and then read: "Wish you would change that to read \$ 15,000 instead of \$ 3,000. Thanking you in advance." Appellant, the residuary legatee, contended that the testator obviously expected some action to be taken by the bank and did not intend to make the change by the letter itself. But the court said: "[T]he Bank did precisely what the testator desired it to do. It filed the handwritten codicil with the formal will. By so doing the Bank effectuated the change which the testator made completely clear in the letter itself." (247 C.A.2d 259.) As to the argument that the bank would have filed the letter even if it lacked the requisites of a codicil: "It is a fair assumption, too, that if the Bank had been confronted with the factual situation posed, it would have caused a new will to be drafted for the precise reason that decedent's testamentary intent was defectively conveyed. In the situation at

bench, the Bank properly concluded it was required to do nothing except file the codicil with the will." (247 C.A.2d 260.) (See 2 U.S.F. L. Rev. 367.)

However, a subsequent writing that merely refers to the will, but shows no dispositive intent, is not a codicil. (*Estate of Loud* (1945) 70 C.A.2d 399, 402, 161 P.2d 49.) In *Estate of Sack* (1948) 88 C.A.2d 791, 199 P.2d 420, the testator made a holographic will, in proper form, leaving nearly all his estate to his sister, "without any reservation." The sister and other relatives sought to probate, as a codicil, a writing addressed to the sister, described by him as "a letter of instructions which I will ask you to follow in regard to the disposition of my estate which, according to the will which is to be probated, is left almost in its entirety to you, for obvious reasons." The letter then indicated certain payments which he desired that the sister make to the other relatives, particularly his daughter. *Held*, the writing was not a codicil for it clearly indicated an intent to allow the unequivocal will to stand as drafted. "The case thus presents the frequent one in which a testator leaves the estate to a devisee without restrictions but later 'requests' the devisee to make other disposition of part of the devise." (88 C.A.2d 794.) The effect of the decision was that the daughter, not mentioned in the will but only in the unprobated letter, would take the entire estate as a pretermitted child (see *infra*, §280 et seq.).

SUPPLEMENT: [This section is current through the latest supplement]
See 20B Am.Jur. Legal Forms 2d (2008 ed.), Wills §266:95 et seq.



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F. Codicil.

3. Republication of Valid Will.

14 Witkin Sum. Cal. Law Wills § 161

[§ 161] Republication of Valid Will.

(1) *Nature of Doctrine.* Normally the codicil "republishes" the will, i.e., the will is considered as if executed at the later date of the codicil. (See *Estate of Cutting* (1916) 172 C. 191, 194, 155 P. 1002; *Estate of Cazaurang* (1941) 42 C.A.2d 796, 798, 110 P.2d 138; *Estate of Matthews* (1917) 176 C. 576, 577, 169 P. 233; *Simon v. Grayson* (1940) 15 C.2d 531, 533, 102 P.2d 1081, *infra*, §166; 79 Am.Jur.2d (2002 ed.), Wills §606 et seq.) And where there is a will, an intermediate codicil or codicils, and a final codicil that mentions the will but not the earlier codicils, the will is republished together with the intermediate codicils. (*Estate of Dubois* (1949) 94 C.A.2d 838, 841, 211 P.2d 895; *Estate of Wochos* (1972) 23 C.A.3d 47, 52, 99 C.R. 782; see 23 So. Cal. L. Rev. 427; Rest.3d, Property (Wills and Other Donative Transfers) §3.4 [republishing by codicil].)

But the doctrine of republication is only a rule of construction designed to carry out the testator's probable intention, and it will not be applied where the result would be so inequitable as to appear contrary to that intention. (See *Estate of McCauley* (1903) 138 C. 432, 436, 71 P. 512; *Estate of Ryder* (1964) 227 C.A.2d 820, 828, 39 C.R. 178.)

(2) *Effect on Marriage and Survival.* Where the testator makes a will before marriage, and is survived by a spouse who is not provided for, the omitted spouse receives a share in the estate. (See Prob.C. 21610, *infra*, §274.) But if a codicil made after marriage republishes the will there is no subsequent marriage and the will is saved. (See *Estate of Cutting* (1916) 172 C. 191, 194, 155 P. 1002; *Estate of Riddel* (1951) 104 C.A.2d 162, 163, 230 P.2d 863.)

The court treats the doctrine of republication as flexible enough to permit a different result if this appears best calculated to carry out the purpose of the marriage and survival statute. In *Estate of Challman* (1954) 127 C.A.2d 736, 274 P.2d 439, the testator made a will, which contained a specific bequest of \$ 250 to Helen Dollinger, and then married her. This provision was sufficient mention (see *infra*, §278). However, he later made a written deletion of this bequest, and a written insertion of "Hellen M. Challman, Wife," in the residuary clause after the name of his adopted son as residuary legatee. The will was admitted to probate with the valid cancellation, but excluding the invalid interlineation (*infra*, §171). Thus, so far as the will itself was concerned, the wife was nowhere mentioned. But he also made a codicil acknowledging his indebtedness to his wife in the sum of \$ 619.40. This was not a sufficient mention or provision for her under the marriage and survival statute (see *infra*, §277), but it would normally overcome the statute by republishing the will. The court held, however, that it did not.

"From all the provisions, changes and attempted changes, in the original will and the fact that the codicil was written by testator upon his premarital will as changed, it appears that testator's republication of his original will was intended to be conditioned upon the effectiveness of the changes attempted to be made by him. The court order deciding that the interlineations were ineffective for the purpose of providing for respondent widow had become final and is not subject to review in the instant proceeding. But, there was before the court in this proceeding no evidence of any kind tending to prove that testator intended the codicil to republish, as of its date after his marriage, and to thus validate his old will giving effect to his deletion of his wife's name as a specific legatee and denying effect to his interlineation of her name as a residuary legatee. Looking at the two documents together we think it is manifest that the testator did not intend to leave his wife unprovided for." (127 C.A.2d 741.) (See 44 Cal. L. Rev. 171 [suggesting, by analogy to dependent relative revocation (infra, §179), theory of dependent relative republication].)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Integration and Reference.

1. Integration.

a. Nature of Doctrine.

14 Witkin Sum. Cal. Law Wills § 162

[§ 162] Nature of Doctrine.

In the law of wills, *integration* occurs where, in accordance with the testator's intention, two or more separate writings are admitted to probate as a single testamentary document. This intention must be shown either by physical connection, such as fastening or folding together, or sequence or continuity of thought in the language of the several papers. (See *Estate of Wunderle* (1947) 30 C.2d 274, 281, 181 P.2d 874 [integration not established]; *Estate of Dumas* (1949) 34 C.2d 406, 414, 210 P.2d 697 [integration established]; *Estate of Morrison* (1950) 98 C.A.2d 380, 383, 220 P.2d 413 [established]; *Estate of Fritz* (1951) 102 C.A.2d 385, 391, 227 P.2d 539 [not established]; *Estate of Moody* (1953) 118 C.A.2d 300, 311, 257 P.2d 709 [established]; *Estate of Blain* (1956) 140 C.A.2d 917, 924, 295 P.2d 898 [not established]; *Estate of Plumer* (1957) 147 C.A.2d 760, 763, 306 P.2d 110 [established]; *Estate of Twohig* (1986) 178 C.A.3d 555, 561, 223 C.R. 352 [not established]; 79 Am.Jur.2d (2002 ed.), *Wills* §177 et seq.; 38 A.L.R.2d 477 [validity of will written on disconnected sheets]; *infra*, §§163, 164.) (On distinguishable doctrine of incorporation by reference, see *infra*, §165.)

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SUPPLEMENT: [This section is current through the latest supplement]



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G. Integration and Reference.

1. Integration.

b. Integration Established.

14 Witkin Sum. Cal. Law Wills § 163

[§ 163] Integration Established.

In *Estate of Dumas (1949)* 34 C.2d 406, 210 P.2d 697, the testator left three papers, folded but not bound, and enclosed in an envelope. All were in her own handwriting. The first was dated, signed, and entitled "The Last Will and Testament of Nellie Dumas." However, though it named executors and recited that "the following bequests" were to be made, no dispositions were made. The second, written 9 years later, contained bequests, but no date or signature. The third, also written 9 years later, contained further bequests and a signature, but no date. *Held*, the papers constituted one integrated document admissible as a will. The second sheet merely continued the first, and the signature on the third was an adoption of the date on the first. "While it may be true that, legally speaking, the first sheet constituted a complete will ... it was obviously not intended as her complete testamentary act for she therein did not dispose of any of her property, the primary function of a will. ... Thus we clearly have an intent that all the papers were to be considered together as one continuous and complete document. That continuity is not destroyed by the time interval between the execution of the first and second and third sheets." (34 C.2d 414.) (See *Estate of Moody (1953)* 118 C.A.2d 300, 311, 257 P.2d 709 [two sides of sheet, text congruous and continuous; integration, though parts written at different dates and with different ink].)

In *Estate of McCarty (1962)* 211 C.A.2d 23, 27 C.R. 94, the testator left two documents in an envelope labeled "Eunice L. McCarty Last Will." One was a properly executed witnessed will dated April 16, 1957. The other, in the testator's handwriting, was dated July 23, 1959, and entitled "This is my (Last) (Will)"; it made typical testamentary dispositions and changed a \$ 10,000 gift to a \$ 1 provision but it had no signature. *Held*, reversing the probate court, the handwritten document should have been admitted to probate as a part of the witnessed will.

(a) The two documents were in the same envelope. The witnessed will contained notations in the handwriting of the testator and was signed: "This will has been changed May 26, 1958," and "Have changed this will July 23--1959 my own handwritten will adtechet." Although it appeared from the color of the inks that the signature was written in May, 1958, it also appeared to have been underlined in July, 1959. The written, dated, and signed notations on the witnessed will, which made no dispositions, did not create a testamentary instrument; hence, there was no incorporation by reference of the holographic codicil. (211 C.A.2d 26.)

(b) But there was physical connection (folded in one envelope) and also continuous sequence of thought (notations

on witnessed will expressly referred to handwritten codicil of same date already in existence). "Under such circumstances, we do not doubt that the testatrix intended to adopt her 1958 signature for the purpose of executing the handwritten codicil. The intent that the two writings be integrated and construed as one instrument is manifest." (211 C.A.2d 29.)

In *Estate of Callahan* (1965) 237 C.A.2d 818, 47 C.R. 220, decedent left an envelope labeled "The Will of Augusta C. Callahan" in a locked metal box. Enclosed were three strips of paper (sheets A, B and C), fixed together by adhesive tape, which contained the elements of a holographic will--written, dated, signed by the testator, and dispositive in form. It appeared, however, that sheets A and C had formerly been parts of an original writing, from which something had been cut out to substitute B, with its dispositions. The contestants argued that there was no indication that decedent herself had taped the pieces, and that someone could have cut parts of another document and stuck them together in his own interest. The court, upholding the papers as a will, answered that fraud is not presumed, and that whether substitution occurred was a matter for proof. (237 C.A.2d 827.)

In *Estate of Phippen* (1965) 238 C.A.2d 241, 47 C.R. 648, decedent left 17 handwritten notebook and binder sheets, together but not folded or fastened. They contained a complete itemization of every bit of property, real or personal, that she owned, with specific gifts to each of her beneficiaries. *Held*, reversing the probate court, the sheets constituted a valid holographic will. Though they were written at various times, and some were not by themselves sufficient to meet the statutory requirements, there was continuity of content, so as to permit them to be construed as an integrated document; and the notebook sheets had her signature, the binder sheets had a date, and all were in her handwriting. (238 C.A.2d 248.)

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1. Integration.
c. Integration Not Established.

14 Witkin Sum. Cal. Law Wills § 164

[§ 164] Integration Not Established.

The difficult problems of proof, particularly where the papers are informal and holographic, are illustrated in several cases.

In *Estate of Wunderle* (1947) 30 C.2d 274, 181 P.2d 874, decedent (a) made a valid witnessed will in 1939; (b) made an invalid formal will in favor of his sister in 1943; (c) wrote a letter to his sister, enclosing the 1943 will, referring to it as "my Testament the way I promised"; (d) left an undated memorandum declaring the will of 1939 void "as a will was made on April 22, 1943," and declaring that his sister "is the sole heiress of all my possessions." *Held*, the 1939 will should be admitted, and the undated memorandum denied probate. The memorandum would have been sufficient as a holographic will if it had been dated; and the date could have been supplied in a proper case from the other documents under the doctrines of integration or incorporation by reference. However, there was no evidence, such as physical attachment of the papers, or the testator's language, to show that the writings were to be construed together as one testamentary instrument (integration) or that one was intended to make another a part of it (incorporation by reference). "[T]he omission of a testamentary intent or of a date from an otherwise valid holographic will is not supplied by a separate document or letter, where there is nothing to indicate that the second document is to be read or construed as part of the holographic will." (30 C.2d 282.)

In *Estate of Fritz* (1951) 102 C.A.2d 385, 227 P.2d 539, the testator left a holographic instrument captioned "Last Will and Testament" in an envelope on which was written "This is my last will enclosed." But the date was "December, 1946" (incomplete; see *supra*, §151). In the same box in which it was kept, there was a fully dated "letter to Cathrin" (his niece named as executor and beneficiary) suggesting that she keep certain securities in the estate because of their good returns, and giving other good advice on how to use the property, on marriage, etc. *Held*, order denying probate affirmed. Each instrument was complete in itself; the second (the letter) was nontestamentary; it did not make any changes in the will but merely gave suggestions and advice to the niece; and there was no continuity in the two writings. "Now if the letter to Catherine did not incorporate the will by reference, and it did not; if it did not dispose of property ... or appoint an executor or name a guardian ... and it did neither; if it was not intended to be integrated with the will, and we have shown that it could not have been; if it merely expressed desires of the decedent, as it discloses ... then the trial court properly rejected it as a testamentary instrument." (102 C.A.2d 393.)

In *Estate of Blain* (1956) 140 C.A.2d 917, 295 P.2d 898, the testator left the following in a safe deposit box: (a) Seven separate sheets, each sufficient in form for a holographic will, enclosed in a sealed envelope labeled in his handwriting "Last Will F. B."; (b) a small piece of paper wrapped around a dinner ring worth \$ 120 and enclosed in a small ring box, with the words "to Sonia Lambert Frank Blain." Sonia was his granddaughter and sole heir. *Held*, she took the entire estate as a pretermitted heir. The legatees and devisees of the estate of more than \$ 115,000 tried to save the will by arguing that the ring paper mentioning her was an integral part of the will. The court pointed out, however, that there was neither proximity of the papers (separate ring box) nor internal reference, hence, no integration. (140 C.A.2d 924.)

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Witkin Sum. Cal. Law Wills § 165

[§ 165] In General.

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C.* 6132 (Supp., infra, §168A).



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G. Integration and Reference.

2. Incorporation by Reference.

a. In General.

14 Witkin Sum. Cal. Law Wills § 165

[§ 165] In General.

(1) *Nature of Doctrine.* A will may incorporate by reference any extrinsic documents or papers in existence at the time of execution of the will and clearly identified in the reference. The extrinsic papers may be of any character, testamentary or nontestamentary, written by the testator or by a third person, formal instruments such as a deed or deed of trust, or informal papers such as a list of property holdings or a book of account. (See *Estate of Willey* (1900) 128 C. 1, 7, 60 P. 471 [deed of trust]; *Estate of Plumel* (1907) 151 C. 77, 80, 90 P. 192 [prior defective will]; *Simon v. Grayson* (1940) 15 C.2d 531, 533, 102 P.2d 1081, *infra*, §166 [letter]; 16 Cal. L. Rev. 154; 29 Cal. L. Rev. 94; 7 Hastings L. J. 225; 79 Am.Jur.2d (2002 ed.), *Wills* §186 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §3.6 [incorporation by reference].) (On incorporation by reference of statutory provisions designed to conform instrument to federal tax law, see *Prob.C.* 21500 et seq., *infra*, §209.)

The doctrine is codified in *Prob.C.* 6130, based on *Unif.Prob.C.*, §2-510: "A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification."

The distinction between integration and incorporation by reference is obvious: The several papers integrated must be testamentary in character and, at the time of execution, the testator must have intended them to constitute a single will. (See *supra*, §162.)

(2) *Validation of Invalid Will.* A valid will may be republished by a later instrument. (See *supra*, §161.) A valid codicil may also validate a will invalid for defective execution or even undue influence. One view is that the codicil republishes the will so that it speaks from the new date; and, if on that date the testator was not acting under undue influence, the entire testamentary instrument is good. (See *Estate of Baird* (1917) 176 C. 381, 383, 168 P. 561; *Estate of Horton* (1932) 128 C.A. 249, 253, 17 P.2d 184.) But "republishing" of an instrument that never was valid is theoretically unsound, and it seems better to reach the same result by applying the doctrine of incorporation by reference. Because any nontestamentary paper may be incorporated, the invalidity of the prior will is not an objection. (See *Estate of Plumel*, *supra*, 151 C. 79; *Estate of Dobzensky* (1951) 105 C.A.2d 134, 141, 232 P.2d 886; 21 A.L.R.2d 821 [codicil as validating will or codicil that was invalid or inoperative at time of execution].)

(3) *Holographic Will or Codicil*. A theoretical difficulty arises where a holographic will or codicil incorporates by reference an unexecuted or invalid typewritten will. Some courts refuse to give effect to incorporation on the ground that the resulting instrument is not in the testator's handwriting. But the better view is that, while integration would be precluded by this objection, incorporation by reference is not. The papers incorporated by reference are used to construe and apply the will, and do not become part of the will in the same sense as those integrated. Hence, the holographic will may be regarded as in the testator's handwriting. (See *Estate of Caruch* (1956) 139 C.A.2d 178, 189, 293 P.2d 514; 7 *Hastings L. J.* 225.)

In *Estate of Foxworth* (1966) 240 C.A.2d 784, 50 C.R. 237, a husband and wife had a joint and mutual will, with property to go to the survivor and then to the four named children. The wife sued for divorce. The husband then executed a holographic will, reciting that fact, and stating that "I wish to change the Will" to leave all property to his mother, with a recommendation that she leave it to son Michael, "the only son that has shown me any kindness." *Held*, quoting the text, this was a sufficient incorporation by reference (240 C.A.2d 788), as well as a sufficient mention of the disinherited children (*infra*, §284). The court added that these facts illustrate one reason for permitting this kind of incorporation: The only two copies of the witnessed will were in the hands of the attorney and the wife. (240 C.A.2d 789.)

In *Estate of Nielson* (1980) 105 C.A.3d 796, 165 C.R. 319, cancelling lines and interlineations, presumably in the testator's handwriting, were written on the face of a validly executed, typewritten, witnessed will. In the margin and at the top and bottom of the instrument were the date and signature of the testator. *Held*, "the handwriting when viewed as a whole authorizes an inference of an intent to incorporate by reference those portions of the typewritten will not modified or revoked by the holographic codicil" and to republish the typewritten will as modified. (105 C.A.3d 804, citing the text.)

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SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C.* 6132 (Supp., *infra*, §168A).



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[§ 166] Existence of Document.

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C.* 6132 (Supp., infra, §168A).



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[§ 166] Existence of Document.

The extrinsic paper must be in existence at the time the will makes reference to it. Any attempt to incorporate a document to be prepared in the future is ineffective, because this would permit the testator to make a later testamentary disposition of property without complying with the formalities governing execution of wills. (See *Simon v. Grayson* (1940) 15 C.2d 531, 533, 102 P.2d 1081; *Estate of Bauer* (1942) 51 C.A.2d 636, 637, 124 P.2d 630; 3 A.L.R.2d 682 [incorporation in will of extrinsic document not in existence at date of will]; *Prob.C. 6130*, supra, §165.)

The supposed additional requirement that the will must refer to the document as existing was rejected without discussion in *Simon v. Grayson*. The will, dated March 25, 1932, provided for payment of money "as shall be directed by me in a letter that will be found in my effects ... and will be dated March 25." A codicil was executed November 25, 1933. The only letter found was dated July 3, 1933. *Held*, the letter was properly incorporated. The will alone did not do so, for at the time the document was not in existence; but the codicil republished the will, and then the will could incorporate it. (15 C.2d 533.) Thus, the decision impliedly holds that, if the document is actually in existence at the time the will is published, it is immaterial that the will refers to it as a future document. (See 29 Cal. L. Rev. 94.)

West's Key Number Digest, Wills k.98

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C. 6132* (Supp., infra, §168A).



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[§ 167] Identification of Document.

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C.* 6132 (Supp., infra, §168A).



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[§ 167] Identification of Document.

The will must identify the paper by a sufficiently certain description. But reasonable certainty is enough, and extrinsic evidence is admissible as an aid to identification. (See *Prob.C.* 6130, *supra*, §165; *Estate of Plumel* (1907) 151 C. 77, 82, 90 P. 192; *Simon v. Grayson* (1940) 15 C.2d 531, 534, 102 P.2d 1081, *supra*, §166 [letter was identified despite discrepancy in dates]; *Estate of Miller* (1932) 128 C.A. 176, 181, 17 P.2d 181; *Estate of Martin* (1939) 31 C.A.2d 501, 505, 88 P.2d 234 [reference to will left by testator's wife was sufficient even though two wills were left by wife; parol evidence was admitted to show which was the last and effective will]; 29 Cal. L. Rev. 94.)

The identification may be made by writing on the document to be incorporated. (See *Estate of Smith* (1948) 31 C.2d 563, 567, 191 P.2d 413 [statement revoking "this will," written across the face of an unexecuted carbon copy of a valid witnessed will].)

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C.* 6132 (Supp., *infra*, §168A).



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G. Integration and Reference.
2. Incorporation by Reference.
d. Intention To Incorporate.

Witkin Sum. Cal. Law Wills § 168

[§ 168] Intention To Incorporate.

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C.* 6132 (Supp., infra, §168A).



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14 Witkin Sum. Cal. Law Wills § 168

[§ 168] Intention To Incorporate.

Mere reference to an extrinsic document is not enough; it must appear that the testator intended to incorporate it for purposes of carrying out his or her testamentary desires. (*Prob.C. 6130*, supra, §165.)

The same is true of physical connection without express reference. In *Estate of Selditch* (1949) 91 C.A.2d 62, 204 P.2d 364, two valid holographic instruments, referring to executors "of my will" but making no disposition of property, were found in a safe deposit box clipped to a typewritten will, which was invalid for lack of a second witness. Observing that "considerable caution should be exercised" in applying the doctrine, the court said that the testator's intent "should be reasonably apparent either from direct reference thereto in the will or from some rather unequivocal surrounding circumstances." (91 C.A.2d 66.) Here, there was nothing to show an intent to incorporate the typewritten will other than its placement. (91 C.A.2d 66.)

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing incorporation by reference for certain gifts of tangible personal property, see *Prob.C. 6132* (Supp., infra, §168A).



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2. Incorporation by Reference.

e. (New) Disposition of Personal Property by Document Outside Will.

14 Witkin Sum. Cal. Law Wills § 168A

[§ 168A] (New) Disposition of Personal Property by Document Outside Will.

The general rules governing incorporation by reference and acts of independent significance have been relaxed for certain gifts of tangible personal property. *Prob.C. 6132*, added in 2006, provides as follows:

(1) *In General.* "Notwithstanding any other provision, a will may refer to a writing that directs disposition of tangible personal property." (*Prob.C. 6132(a)*.) The writing is effective if the following conditions are satisfied:

(a) The will is not revoked and refers to the writing. (*Prob.C. 6132(a)(1)*.)

(b) The writing is dated and is either in the testator's handwriting or signed by the testator. (*Prob.C. 6132(a)(2)*.) However, the failure of the writing to conform to these conditions "does not preclude the introduction of evidence of the existence of the testator's intent" regarding the disposition of property as authorized by *Prob.C. 6132*. (*Prob.C. 6132(b)*.)

(c) The writing describes the items and the recipients of the property with "reasonable certainty." (*Prob.C. 6132(a)(3)*.)

(2) *Requirements for Incorporation by Reference and Acts of Independent Significance Are Not Applicable.* "The writing may be written or signed before or after the execution of the will and need not have significance apart from its effect upon the disposition of property made by the will." The writing is given effect as though it were contained in the will itself. (*Prob.C. 6132(c)*.)

(3) *Death of Devisee Before Testator.* If a designated recipient of property predeceases the testator, the property passes as further directed in the writing. In the absence of further directions, the disposition lapses. (*Prob.C. 6132(c)*.)

(4) *Inconsistent Provisions.* The testator may make subsequent handwritten or signed changes to a writing. In the event of inconsistent dispositions as between writings, the most recent writing controls. (*Prob.C. 6132(d)*.) However, if the omission of the date from a writing raises a doubt about which of two inconsistent writings is controlling, the undated writing is invalid "to the extent of the inconsistency" unless the time of execution is established to be later. (*Prob.C. 6132(e)(1)*.)

(5) *Lack of Capacity*. If a writing omits the date of execution and "it is established that the testator lacked testamentary capacity at any time during which the writing may have been executed, the writing is invalid unless it is established that it was executed at a time when the testator had testamentary capacity." (*Prob.C. 6132(e)(2)*.)

(6) *Included Property*. *Prob.C. 6132* applies to "tangible personal property not otherwise specifically disposed of" by the testator's will. (*Prob.C. 6132(a)*.) (See *Prob.C. 6132(h)(1)* [term "tangible personal property" includes "articles of personal or household use or ornament," including, e.g., furniture, furnishings, automobiles, boats, jewelry, and precious metals in tangible form]; *Prob.C. 6132(h)(2)* [statute applies to coins or currency kept for historical, artistic, collectible, or investment value apart from normal use as legal tender].)

(7) *Excluded Property*. *Prob.C. 6132* does not apply to property used primarily in a trade or business or money that is "common coin or currency." (*Prob.C. 6132(a)*.) (See *Prob.C. 6132(h)(2)* [term "common coin or currency" means coins or currency normally used as legal tender]; *Prob.C. 6132(h)(1)* [statute does not apply to real property, mobilehomes, intangible property, evidences of indebtedness, monetary deposits, documents of title, and securities].)

(8) *Limitations on Value*. The total value of tangible personal property identified and disposed of in the writing may not exceed \$ 25,000. If the value of an item of tangible personal property described in the writing exceeds \$ 5,000, that item is not subject to *Prob.C. 6132* and is disposed of under the remainder clause of the will. However, the value of that item is not counted for purposes of the \$ 25,000 limitation. (*Prob.C. 6132(g)*.)

(9) *Filing in Probate Proceeding*. The writing must be filed with the inventory and appraisal. However, if it is not available or has not been found at that time, it must be filed no later than 60 days before the petition for final distribution is filed. (*Prob.C. 6132(f)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Reference to Acts of Independent Significance.

a. In General.

Witkin Sum. Cal. Law Wills § 169

[§ 169] In General.

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing acts of independent significance for certain gifts of tangible personal property, see *Prob.C. 6132* (Supp., supra, §168A).*Correction:* Page 242, fourth line of section, cross-reference should be "(supra, §166)".



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a. In General.

14 Witkin Sum. Cal. Law Wills § 169

[§ 169] In General.

A doctrine has been developed to cover a situation that goes beyond incorporation by reference. The testator cannot, under the incorporation rule, affect the will by writings to be made in the future; only documents in existence may be incorporated (*supra*, §115). However, the testator may make a valid testamentary disposition to such persons as may be employed by the testator at death, or to the person the testator may marry, or to the residuary legatees or devisees of a third person's will. In each instance the effect of the will depends on future acts of the testator or the third person. But these acts have a purpose or significance distinct from their effect on the will, and the testamentary dispositions are given effect under the doctrine of reference to nontestamentary acts of independent significance.

The doctrine is codified in *Prob.C. 6131*, based on *Unif.Prob.C.*, §2-512: "A will may dispose of property by reference to acts and events that have significance apart from their effect upon the disposition made by the will, whether the acts and events occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will by another person is such an event."

The principal application of the doctrine is in furnishing theoretical support for the testamentary gift to a living trust ("pourover trust"). A will, e.g., makes a gift to a living trust, so that, on the testator's death, additional property is "poured over" into the trust. If the trust instrument is subject to amendment, the gift could be held void as a bad incorporation by reference of a future document. It seems more reasonable, however, to uphold it on the theory that the trust instrument has an independent existence and significance. (See *Rest.3d, Trusts* §§17, 19; *Rest.3d, Property (Wills and Other Donative Transfers)* §3.7 [independent significance].) (For general discussion, see 47 *Cal. L. Rev.* 267; 69 *Harv. L. Rev.* 1147.) A Uniform Act authorizes this useful and desirable "pourover" provision. (See *infra*, §170.)

West's Key Number Digest, Wills k.98

SUPPLEMENT: [This section is current through the latest supplement]

On relaxation of rules governing acts of independent significance for certain gifts of tangible personal property, see *Prob.C. 6132* (Supp., *supra*, §168A). *Correction:* Page 242, fourth line of section, cross-reference should be "(*supra*, §166)".



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b. Uniform Testamentary Additions to Trusts Act.

14 Witkin Sum. Cal. Law Wills § 170

[§ 170] Uniform Testamentary Additions to Trusts Act.

(1) *Statutory Development.* The first Uniform Testamentary Additions to Trusts Act was approved in 1960. A revised act was approved in 1991. (For the 1991 Act, see 8B U.L.A. (Master Ed.), p. 355; for the 1960 Act, see 8B U.L.A. (Master Ed.), p. 367.) The Act was adopted in California in 1965 as former Prob.C. 170 et seq. (now *Prob.C. 6300* et seq.). (See 6 Santa Clara Lawyer 91; 39 So. Cal. L. Rev. 163; 12 U.C.L.A. L. Rev. 213; 15 U.C.L.A. L. Rev. 217; 12 A.L.R.3d 56 [pourover provisions from will to living trust]; C.E.B., 1 Will Drafting 3d, §8.3.) *Prob.C. 6300* et seq. may be cited as the Uniform Testamentary Additions to Trusts Act. (*Prob.C. 6303*.)

(2) *Authorization of Pourover Trust.* "A devise, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts)." (*Prob.C. 6300*.) (See *Rest.3d, Property (Wills and Other Donative Transfers)* §3.8 [pourover devise].)

(3) *Requirements for Validity.* A pourover devise is valid "if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the trust property)." Validity is not affected by the fact that the trust is amendable or revocable or that the trust is amended after execution of the will or after the testator's death. However, "[u]nless otherwise provided in the will, a revocation or termination of the trust before the death of the testator causes the devise to lapse." (*Prob.C. 6300*.)

The Law Revision Commission Comment points out that under former law with respect to testamentary assets the trust could not be amended after the testator's death unless the testator's will so provided. Under *Prob.C. 6300*, testamentary assets are subject to postdeath amendments of the trust, the same as inter vivos assets, unless the testator's will provides to the contrary.

(4) *Effect.* Unless the will provides otherwise, "the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any

amendments thereto made before or after the death of the testator (regardless of whether made before or after the execution of the testator's will)." (*Prob.C. 6300.*)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law V. MAKING OF WILLS H. Interlineation.

14 Witkin Sum. Cal. Law Wills § 171

[§ 171] Interlineation.

(1) *Invalidity in General.* Because a codicil may be placed anywhere on the instrument, a provision inserted between or across lines of the will might be valid if executed with the proper formalities of a holographic or witnessed codicil. (See *supra*, §160.) But an interlineation made after execution of the will and without the requisite formalities is wholly invalid. Cancellation, which results in revocation, requires no formalities (*infra*, §174), but interlineation, which results in new testamentary provisions, is void unless the formalities of execution are observed. (See *Estate of Cumming* (1979) 96 C.A.3d 867, 871, 158 C.R. 263; 24 A.L.R.2d 514 [effect of testator's attempted physical alteration of will after execution]; 34 A.L.R.2d 619 [interlineations and changes appearing on face of will].)

In *Estate of Martens* (1937) 10 C.2d 395, 74 P.2d 238, the will named S as executor. The testator directed T to draw a line through this provision and substitute the names of his daughter and son. A memorandum of the change was entered at the bottom of the will, and testator signed, with T as a witness. *Held*, the cancellation of the old executor provision was effective, but the substitution, not in decedent's handwriting and with only one witness, was not. Hence, letters of administration with the will annexed were issued. (10 C.2d 398.)

(2) *Validity in Holographic Will.* A peculiar, and perhaps questionable, exception to the interlineation rule was declared in *Estate of Finkler* (1935) 3 C.2d 584, 46 P.2d 149, where the testator made written interlineations in a holographic will. The court held that because the entire will including his changes was in his own handwriting, the original date and signature were sufficient. (3 C.2d 599.) Thus it appears that, although a new holographic will or codicil would be fatally defective if lacking in date or signature, extensive changes or even a completely new testamentary plan can be made by cancellations and interlineations in the old will, without a new date or signature. (See *Estate of Cuneo* (1963) 60 C.2d 196, 201, 32 C.R. 409, 384 P.2d 1.)

However, the changes must all be made by the testator. In *Estate of Towle* (1939) 14 C.2d 261, 93 P.2d 555, decedent and her business adviser discussed the revision of her holographic will and preparation of a witnessed will, and at the conference both made cancellations, interlineations, and notes on the holographic will. Her adviser then gave it to an attorney with instructions to prepare a new will, but decedent died before executing it. *Held*, the holographic will was void, being no longer entirely in the handwriting of decedent. The proponent argued that the changes in decedent's writing were valid under the rule of *Estate of Finkler*, *supra*, and that cancellations or interlineations by another constituted spoliation, and could not be effective either to modify or to revoke the will. The court conceded that this argument would be proper if the changes had been made by a stranger, but here they were made with decedent's

authority, under her direction. (14 C.2d 267.) (See 28 Cal. L. Rev. 413.) (Cf. *Estate of Kelly* (1960) 178 C.A.2d 24, 30, 2 C.R. 634 [where valid witnessed will is used as basis for discussion of proposed new will, and only defacement is by pencilled notations made by attorney in the margin, will is not revoked].)

West's Key Number Digest, Wills k.107

SUPPLEMENT: [This section is current through the latest supplement]



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I. Funeral Instructions.

14 Witkin Sum. Cal. Law Wills § 172

[§ 172] Funeral Instructions.

Health & Saf.C. 7100.1 governs written directions for funeral "goods and services" and the disposition of remains.

Under *Health & Saf.C. 7100.1(a)*, a decedent may, before death, execute a writing specifying funeral goods and services and directing the disposition of remains. If the following conditions are satisfied, the decedent's directions "may not be altered, changed, or otherwise amended in any material way" and must be "faithfully carried out" unless a statement to the contrary is signed and dated by the decedent:

(1) The directions set forth "clearly and completely" the decedent's final wishes "in sufficient detail so as to preclude any material ambiguity."

(2) Arrangements for payment have been made (through trusts, insurance, "commitments by others, or any other effective and binding means"), so as to preclude payment by survivors who might otherwise retain the right to control the disposition of remains.

If arrangements are made for either the cost of the funeral or the cost of interment, but not both, the decedent's wishes must be carried out "only to the extent that the decedent has sufficient assets to do so," unless those who otherwise have the right to control the disposition of remains and arrange the funeral agree to assume the cost. (*Health & Saf.C. 7100.1(b)*.)

Directions contained in a will must be carried out "regardless of the validity of the will in other respects or the fact that the will may not be offered for or admitted to probate until a later date." (*Health & Saf.C. 7100.1(c)*.)

In the absence of directions under *Health & Saf.C. 7100.1*, the right to control the disposition of remains and arrange the funeral, and the liability for cost, are governed by *Health & Saf.C. 7100*. (See 13 *Summary* (10th), *Personal Property*, §5.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 173

[§ 173] In General.

(1) *Statutory Methods.* Several methods of revocation are provided by statute. (See *79 Am.Jur.2d (2002 ed.)*, *Wills* §467 et seq.; C.E.B., 1 *Will Drafting* 3d, §9.1 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §4.1 [revocation of wills]; on revocation of joint and mutual wills, see *supra*, §§112, 113.) A will or part of a will is revoked by the following:

- (a) A subsequent will that revokes the prior will or part of it expressly or by inconsistency. (See *Prob.C. 6120(a)*, *infra*, §§175, 176.)
- (b) Mutilation or destruction with intent to revoke. (See *Prob.C. 6120(b)*, *infra*, §174.)
- (c) Dissolution or annulment of the testator's marriage (see *Prob.C. 6122*, *infra*, §177) or termination of the testator's domestic partnership (see *Prob.C. 6122.1*, *infra*, §178).

Although revocation of a will ordinarily revokes its codicils, a complete testamentary writing originally intended as a codicil may survive the revocation if this is the testator's intent. (See *Estate of Cuneo (1963)* 60 *C.2d* 196, 202, 32 *C.R. 409*, 384 *P.2d* 1; 7 *A.L.R.3d* 1143 [revocation of will as affecting codicil and vice versa].)

(2) *Effective Revocation by Operation of Law.* Some jurisdictions, by statute or case law, allow certain changes in the testator's circumstances or condition to work a revocation by operation of law, although the term "revocation" may not be used. The following are illustrative:

- (a) Election of surviving spouse to take against the will. (See *infra*, §268 et seq.)
- (b) Statutory share of omitted spouse or child. (See *infra*, §273 et seq.)
- (c) Ademption. (See *infra*, §251 et seq.)
- (d) Restrictions on inheritance by designated persons, e.g., decedent's killer or abuser. (See *infra*, §293 et seq.)

West's Key Number Digest, Wills k.167

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 174

[§ 174] Mutilation or Destruction.

(1) *Statutory Rule.* A will or part of a will is revoked by "[b]eing burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction." (*Prob.C. 6120(b)*, based on *Unif.Prob.C.*, §2-507.) (See *Estate of Olmsted* (1898) 122 C. 224, 229, 54 P. 745 [cancellation: all signatures of testator crossed out, and lines drawn through many clauses]; 79 *Am.Jur.2d* (2002 ed.), *Wills* §507 et seq.; 24 *A.L.R.2d* 514 [effect of testator's attempted physical alteration of will after execution]; 61 *A.L.R.3d* 958 [testator's failure to make new will, following loss of original by fire, theft, or similar casualty].) (On presumption of destruction with intent to revoke, see *Prob.C. 6124*, *infra*, §552.)

(2) *Partial Revocation by Cancellation.* The effect of cancellation, by drawing lines through or across provisions of the will, is clear. If the testator cancels the whole of a witnessed or holographic will, it is revoked; cancellation is equivalent to mutilation or destruction. If the testator cancels a part of either a witnessed or holographic will, this operates as a partial revocation; i.e., the particular provisions cancelled are eliminated from the will. (*Estate of Wikman* (1906) 148 C. 642, 643, 84 P. 212; *Estate of Martens* (1937) 10 C.2d 395, 397, 74 P.2d 238 [cancellation performed by another at testator's direction and in his presence]; *Estate of Atkinson* (1930) 110 C.A. 499, 501, 294 P. 425 [testator drew ink lines through second and third clauses, writing across the lines the words "I cut out this part of will"]; *Estate of Neubauer* (1958) 49 C.2d 740, 742, 321 P.2d 741; *Estate of Uhl* (1969) 1 C.A.3d 138, 143, 81 C.R. 436.)

(3) *Destruction of Duplicate.* A will executed in duplicate may be revoked by defacing or destroying one of the duplicates. (*Prob.C. 6121*; see *Estate of Janes* (1941) 18 C.2d 512, 517, 116 P.2d 438 [recognizing rule but holding it inapplicable]; 17 *A.L.R.2d* 805 [destruction or cancellation of one copy of will executed in duplicate as revocation of other copy].)

(4) *Intent Not Carried Out.* The mere intent to revoke, not accompanied by an act of destruction or cancellation, is insufficient. In *Estate of Silva* (1915) 169 C. 116, 145 P. 1015, the testator asked his wife to destroy the will, and she burned an envelope, falsely declaring to him that the will was inside. *Held*, it was not revoked. (169 C. 121.) In accordance with the court's suggestion, the heirs successfully sought relief in equity, by having the wife declared a constructive trustee for their benefit. (See *Brazil v. Silva* (1919) 181 C. 490, 493, 185 P. 174; 3 *Cal. L. Rev.* 350; 13 *Summary* (10th), *Trusts*, §320.)

(5) *Destruction by Third Person*. Mutilation or destruction by a third person not directed by the testator is of course ineffective, and the fraudulently destroyed instrument may be proved as a lost will. (See *Estate of Thompson (1941)* 44 C.A.2d 774, 778, 112 P.2d 937; *Estate of Arbuckle (1950)* 98 C.A.2d 562, 567, 220 P.2d 950.) (On probate of lost will, see *infra*, §550.)

(6) *Proof*. A difficult problem of proof is presented when a mutilated will is found and no direct evidence is available about what happened. In *Estate of Holmes (1948)* 88 C.A.2d 360, 198 P.2d 708, the testator made several statements, just prior to her death, unequivocally recognizing the continued existence of her will and mentioning its location. After her death it was found, where she had indicated, in her chest of drawers, torn into pieces; but all of the pieces had been replaced in the envelope in which the will had been kept. It was shown that during a 6-day period prior to her death the testator was in the hospital without access to the instrument, and that during this period and for several months before other persons, including one disinherited daughter, could have obtained it. *Held*, order denying probate reversed. The court emphasized (a) the lack of any evidence that the testator did tear up the will; (b) the improbability that a testator would open a sealed envelope, tear up his will, and replace the pieces in the envelope; (c) the expressed belief of the testator that her will was in the drawer; and (d) the "policy" in favor of testacy (*infra*, §201). (88 C.A.2d 364.)

Although the *Holmes* opinion seems to reach the correct result, its theory of appellate review is contrary to *Estate of Bristol (1943)* 23 C.2d 221, 223, 143 P.2d 689, on which it purports to rely. In *Bristol*, the order of the probate court, based on an extremely weak showing, was *upheld*, while here the order, though sustainable on the inferences from the circumstances shown, was *reversed*. (On rule of conflicting inferences, see 9 Cal. Proc. (4th), *Appeal*, §370.)

West's Key Number Digest, Wills k.171

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Proof*. Rule of conflicting inferences:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §376 et seq.



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VI. REVOCATION OF WILLS

A. Methods of Revocation.

3. Execution of Subsequent Instrument.

a. Express Revocation Clause.

14 Witkin Sum. Cal. Law Wills § 175

[§ 175] Express Revocation Clause.

A will or part of a will is revoked by a subsequent will that revokes the prior will or part of it "expressly or by inconsistency." (*Prob.C. 6120(a)*, based on *Unif.Prob.C.*, §2-507.) (See *Estate of Rose (1928)* 95 C.A. 580, 583, 273 P. 92; 79 *Am.Jur.2d* (2002 ed.), *Wills* §479 et seq.)

The subsequent instrument may be holographic. (See *Estate of Smith (1948)* 31 C.2d 563, 567, 191 P.2d 413 [holographic instrument consisting solely of revocation clause]; 49 *A.L.R.3d* 1223 [revocation of witnessed will by holographic will].) However, in *Estate of Grobe (1950)* 96 C.A.2d 70, 214 P.2d 535, the decedent, having a witnessed will, wrote his attorney a letter, dated and signed, stating that "I wish to annul the Will you made for me," and "I wish to have you draw up another Will" specifying the new beneficiary, and adding that he wanted to meet soon if convenient. *Held*, the witnessed will was properly admitted; the testator did not intend to revoke by this letter (he lived several years without pressing the matter). (96 C.A.2d 71.) (See *Estate of Beebe (1953)* 118 C.A.2d 851, 860, 258 P.2d 1101, *supra*, §158 [letter to custodian of will showing intent to prepare codicil was not testamentary]; 22 *A.L.R.3d* 1346 [revocation of will by nontestamentary writing]; 43 *Cal. L. Rev.* 157.)

West's Key Number Digest, Wills k.181

SUPPLEMENT: [This section is current through the latest supplement]



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A. Methods of Revocation.

3. Execution of Subsequent Instrument.

b. Inconsistent Provisions.

14 *Witkin Sum. Cal. Law Wills* § 176

[§ 176] Inconsistent Provisions.

(1) *In General.* Where there is no express revoking clause, the later instrument will, if possible, be construed together with the earlier, and will not be deemed to revoke it unless its provisions are wholly inconsistent. (See *Estate of Dargie* (1932) 216 C. 667, 671, 15 P.2d 849; *Estate of Mallon* (1938) 28 C.A.2d 106, 110, 81 P.2d 992; *Estate of Johnson* (1979) 91 C.A.3d 800, 807, 154 C.R. 586; 79 Am.Jur.2d (2002 ed.), *Wills* §487 et seq.; 59 A.L.R.2d 11 [implied revocation of will by later will or codicil].)

If an executor is named in the prior will, and a subsequent will is wholly inconsistent in its other provisions but names no executor, whether the appointment of the executor is to be given effect is left to the court. (See *Estate of Iburg* (1925) 196 C. 333, 334, 238 P. 74 [court refused to give effect to appointment of executor].)

(2) *Complete Disposition by Later Will.* It has frequently been declared that where the second will makes a complete disposition of the testator's property, it revokes the earlier will. Thus, in *Estate of Mallon, supra*, the first will gave all the property in trust for the testator's sister, and the second will gave it to her directly. *Held*, there was a revocation. (See *Estate of Iburg, supra* [first will left estate to friend, naming him executor; second left property to sister, without appointment of executor]; *Estate of Benson* (1944) 62 C.A.2d 866, 871, 145 P.2d 668 [second instrument revoked first, though it recited that it was "codicil"]; *Estate of Brodersen* (1951) 102 C.A.2d 896, 903, 229 P.2d 38; *Estate of Salmonski* (1951) 38 C.2d 199, 209, 238 P.2d 966.)

Other decisions point out that the fact of complete disposition is not absolutely controlling; it is possible to treat the later instrument as a codicil where the inconsistency is not too great. Ordinarily there would be no reason to do so; the later will must be given effect wherever inconsistent, and the resulting disposition of the property will be the same whether one or both are admitted to probate. A special situation arises, however, where two wills are made, and the second is intentionally destroyed, or not being found is presumed to have been destroyed with intent to revoke. The conventional approach is to treat the second will as a revocation of the first, and after revocation of the second is established the testator is considered as having died intestate. To avoid this result, the courts try to find a means of reconciling the two, so that the destruction of the second instrument may be treated merely as the revocation of a codicil, and the first instrument may be admitted to probate as the unrevoked will. In *Estate of Shute* (1942) 55 C.A.2d 573, 131 P.2d 54, three-fourths of the estate was similarly treated in both wills, and minor inconsistencies were held

insufficient to cause a revocation. "It is not a question of whether the act of revoking the second will served to revive or restore the first one, but of whether the act of executing the second will in and of itself had the effect of revoking the first will." (55 C.A.2d 577.) (See *Estate of Schnoor* (1935) 4 C.2d 590, 591, 51 P.2d 424 [despite minor differences, wills were identical in disposition of residue of estate].)

West's Key Number Digest, Wills k.184(3)

SUPPLEMENT: [This section is current through the latest supplement]



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VI. REVOCATION OF WILLS

A. Methods of Revocation.

4. Dissolution or Annulment of Marriage.

Witkin Sum. Cal. Law Wills § 177

[§ 177] Dissolution or Annulment of Marriage.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule of Revocation.* In *Estate of Coleman (2005) 129 C.A.4th 380, 28 C.R.3d 282*, the decedent's pourover will devised his entire estate to a revocable living trust of which he and his wife were the settlors, with an alternate devise, if the devise to the living trust failed, to a testamentary trust with the same terms and provisions. The decedent's marriage was later dissolved. *Held*, the decedent's children were entitled to the estate. (a) The living trust was effectively revoked as part of a marital settlement agreement in which the parties conveyed their entire interest in the trust property to each other as individuals. (*129 C.A.4th 388.*) (b) The revocation of the living trust triggered the alternate devise to the testamentary trust with identical terms. (*129 C.A.4th 388.*) (c) The terms of the testamentary trust are subject to the restrictions of *Prob.C. 6122*, which revokes provisions in favor of the former wife and requires the trust to be administered as though she predeceased the decedent. (*129 C.A.4th 389.*)



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A. Methods of Revocation.

4. Dissolution or Annulment of Marriage.

14 Witkin Sum. Cal. Law Wills § 177

[§ 177] Dissolution or Annulment of Marriage.

(1) *General Rule of Revocation.* Unless a will expressly provides otherwise, dissolution or annulment of a testator's marriage revokes (a) a disposition or appointment of property to the former spouse, (b) a provision conferring a power of appointment on the former spouse, and (c) a nomination of the former spouse as executor, trustee, custodian, or guardian. (*Prob.C. 6122(a)*, based on *Unif.Prob.C.*, §2-508.) (See *Estate of Reeves (1991)* 233 C.A.3d 651, 656, 284 C.R. 650 [*Prob.C. 6122* applied to revoke holographic will naming as beneficiary woman whom testator later married and then divorced]; *Estate of Hermon (1995)* 39 C.A.4th 1525, 46 C.R.2d 577, *infra*, §221 [class gift in will executed before dissolution construed to exclude issue of former spouse]; *Estate of Jones (2004)* 122 C.A.4th 326, 335, 18 C.R.3d 637, citing the text [following *Estate of Hermon*]; *Rest.3d, Property (Wills and Other Donative Transfers)* §4.1 [revocation of will]; 79 *Am.Jur.2d* (2002 ed.), *Wills* §550 et seq.; 40 *So. Cal. L. Rev.* 708 [divorce]; 71 *A.L.R.3d* 1297 [divorce or annulment as affecting previous will].) *Prob.C. 6227*, on statutory wills, is similar. (See *supra*, §119.)

(2) *Meaning of Dissolution or Annulment.* For purposes of *Prob.C. 6122*, "dissolution or annulment means any dissolution or annulment which would exclude the spouse as a surviving spouse" pursuant to *Prob.C. 78* ("surviving spouse" defined; see *supra*, §49), but does not include a "decree of legal separation which does not terminate the status of husband and wife." (*Prob.C. 6122(d)*.)

(3) *Effect of Revocation.* Property prevented from passing to the former spouse passes as though the former spouse failed to survive the testator, and a provision conferring some other power or office on the former spouse is interpreted as though the former spouse failed to survive. (*Prob.C. 6122(c)*.)

(4) *Revival by Remarriage.* A disposition or provision revoked by *Prob.C. 6122* is revived by remarriage to the former spouse. (*Prob.C. 6122(b)*.)

(5) *Statute Is Exclusive.* Except as provided in *Prob.C. 6122.1* (revocation by termination of the testator's domestic partnership; *infra*, §178), "[n]o change of circumstances other than as described in this section revokes a will." (*Prob.C. 6122(e)*.) (On effective revocation by operation of law, see *supra*, §173.)

(6) *Notice to Parties in Proceeding for Dissolution or Annulment.* *Family C. 2024* sets forth statutory notices required to be included in petitions and judgments for dissolution, nullity, or legal separation. (See 11 *Summary* (10th),

Husband and Wife, §83.) Each notice includes a statement that dissolution or annulment may automatically cancel each spouse's rights under the other's will, trust, retirement plan, pay-on-death bank account, power of attorney, survivorship rights in joint tenancy property, etc. (See 99 A.L.R.5th 637 [divorce or settlement agreement as affecting rights under former spouse's individual retirement account].)

West's Key Number Digest, Wills k.193

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule of Revocation*. In *Estate of Coleman* (2005) 129 C.A.4th 380, 28 C.R.3d 282, the decedent's pourover will devised his entire estate to a revocable living trust of which he and his wife were the settlors, with an alternate devise, if the devise to the living trust failed, to a testamentary trust with the same terms and provisions. The decedent's marriage was later dissolved. *Held*, the decedent's children were entitled to the estate. (a) The living trust was effectively revoked as part of a marital settlement agreement in which the parties conveyed their entire interest in the trust property to each other as individuals. (129 C.A.4th 388.) (b) The revocation of the living trust triggered the alternate devise to the testamentary trust with identical terms. (129 C.A.4th 388.) (c) The terms of the testamentary trust are subject to the restrictions of *Prob.C.* 6122, which revokes provisions in favor of the former wife and requires the trust to be administered as though she predeceased the decedent. (129 C.A.4th 389.)



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A. Methods of Revocation.
5. Termination of Domestic Partnership.

14 Witkin Sum. Cal. Law Wills § 178

[§ 178] Termination of Domestic Partnership.

(1) *General Rule of Revocation.* *Prob.C. 6122.1* extends the rule of revocation by dissolution or annulment (*supra*, §177) to termination of a domestic partnership. Unless the will expressly provides otherwise, the termination of the testator's domestic partnership revokes (a) a disposition or appointment of property to the former domestic partner, (b) a provision conferring a power of appointment on the former domestic partner, and (c) a nomination of the former domestic partner as executor, trustee, conservator, or guardian. (*Prob.C. 6122.1(a).*)

(2) *Effect of Revocation.* Property prevented from passing to the former domestic partner passes as though the former domestic partner failed to survive the testator, and a provision conferring a power or office on the former domestic partner is interpreted as though the former domestic partner failed to survive the testator. (*Prob.C. 6122.1(c).*)

(3) *Revival by Subsequent Partnership.* A disposition or provision revoked by *Prob.C. 6122.1* is revived if the testator establishes another domestic partnership with the same domestic partner. (*Prob.C. 6122.1(b).*)

(4) *Effective Date.* *Prob.C. 6122.1* applies to wills executed on or after January 1, 2002. (*Prob.C. 6122.1(d).*)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Dependent Relative Revocation.
1. Nature of Doctrine.

14 Witkin Sum. Cal. Law Wills § 179

[§ 179] Nature of Doctrine.

A testator doubtless has power to make an expressly conditional revocation. The cases, however, go further and hold that if the testator revokes under some mistake, the condition may be implied or presumed. With respect to certain situations, this has become crystallized into the doctrine of dependent relative revocation. Thus, if the testator destroys a first will in the mistaken belief that a second will is valid, the law presumes that the testator intended to revoke only if the second were valid; i.e., the revocation is not absolute, but is relative, and dependent upon the validity of the second will. Similarly, if the testator, in a new will or codicil, revokes gifts to certain relatives, stating that they are dead, the doctrine may be applied to nullify the revocation if the belief turns out to be untrue. (See *Estate of Kaufman* (1945) 25 C.2d 854, 860, 155 P.2d 831, *infra*, §180; *Estate of Kahan* (1946) 76 C.A.2d 766, 768, 174 P.2d 15; *Estate of Cuneo* (1963) 60 C.2d 196, 202, 32 C.R. 409, 384 P.2d 1; 79 Am.Jur.2d (2002 ed.), Wills §529 et seq; Rest.3d, Property (Wills and Other Donative Transfers) §4.3 [ineffective revocation]; 33 Cal. L. Rev. 159; 64 Harv. L. Rev. 686; 16 U.S.F. L. Rev. 631 [Dependent Relative Revocation and the Probate of Lost or Destroyed Wills in California]; 24 A.L.R.2d 514 [effect of testator's attempted physical alteration of will after execution]; 75 A.L.R.3d 877 [revival, under doctrine of dependent relative revocation, of charitable bequest in will expressly revoked in will containing same bequest].)

Some courts refuse to apply the doctrine unless the mistaken belief appears in the instrument; i.e., extrinsic evidence of the mistake will not be considered. (See 64 Harv. L. Rev. 686.) This restrictive view received approval in *Estate of Salmonski* (1951) 38 C.2d 199, 238 P.2d 966, where appellants argued that the revocation of a formal will in favor of decedent's brother and sister, by a holographic codicil made 5 days later, was conditioned on the decedent's mistaken belief that the beneficiaries were dead. "If he arrived at the mistaken belief that they were dead, he failed to state that fact either directly or by implication, and without such expression somewhere in the testamentary documents the court is without power to supply it." (38 C.2d 213.) More recent cases are to the contrary. (See *Estate of Robertson* (1968) 266 C.A.2d 866, 867, 72 C.R. 396, *infra*, §180; *Estate of Anderson* (1997) 56 C.A.4th 235, 65 C.R.2d 307, *infra*, §180.)

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B. Dependent Relative Revocation.
2. Doctrine Applied.

14 Witkin Sum. Cal. Law Wills § 180

[§ 180] Doctrine Applied.

In *Estate of Kaufman (1945) 25 C.2d 854, 155 P.2d 831*, the testator made a will in New York leaving the bulk of his estate to charity, then moved to California and executed a new will, with a revoking clause, changing the executor but making substantially the same dispositions. His attorney had suggested a codicil rather than a new will, advising him that the charitable gift would be void if death occurred within 30 days (under the former law restricting charitable gifts), but he had rejected the suggestion. He died within 30 days. *Held*, both wills should be admitted to probate. "When a testator repeats the same dispositive plan in a new will, revocation of the old one by the new is deemed inseparably related to and dependent upon the legal effectiveness of the new. ... If the new will fails to give effect to the twice declared purpose of the testator, its revocatory clause falls, for a testator who repeats his purpose intends to confirm and not revoke it, and does not intend to have the new will operate as a revocation independently of its operation as a will." (25 C.2d 860.) The opinion adopts a most advanced form of the doctrine of dependent relative revocation, applying it where the second will expressly revokes the first. (See 33 Cal. L. Rev. 159; 28 A.L.R.2d 526 [revocation of will as affected by invalidity of dispositive provision of later will].)

In *Estate of Robertson (1968) 266 C.A.2d 866, 72 C.R. 396*, the testator made a will in 1953 leaving her entire estate to respondents (niece and nephew) in equal shares. She made a codicil in 1963 referring to the new residence of one respondent and replacing her executor, but otherwise making no changes. In 1965, while in a convalescent home, aged 83 and with greatly impaired vision, she signed a new will drawn by her attorney, which left furniture and personal effects to a friend, but made no provision at all for the residue--the bulk of her estate. It also revoked all prior wills. The 1965 will was admitted to probate, and under it appellants, heirs at law of the testator's predeceased spouse, would take half of the property (which was community property of the testator and her predeceased husband). To avoid this, respondents offered the 1953 will and codicil for probate, and the judge admitted them as part of the will. *Held*, affirmed. The evidence clearly showed that she intended to revoke her earlier will only if the new one left all of the real value in her estate to respondents.

(a) *Internal evidence of will*. The 1965 will made several references to the residue (liquidate, pay taxes, etc.), and recited the relationship to respondents, and the testator expressly declared that "I have other relatives to whom I purposely leave nothing" (clearly covering appellants). Thus the will contained within itself a strong indication of intent to dispose of the entire estate. (266 C.A.2d 868.)

(b) *Extrinsic evidence.* The attorney who drew the 1965 will testified that he was instructed only to change the executor; that he suggested the minor change of leaving furniture, etc., to a local friend, rather than to ship it to Canada where respondents lived; that he drafted the will as directed, in longhand, leaving the residue to respondents, but his secretary omitted this paragraph from the typed will; that he did not review it before taking it to the testator; that he was frustrated in his attempts to read it to her by nurses attending the other occupant of the two-bed ward; that he summarized its contents, including the provision for leaving everything but the furniture to respondents, and that she agreed and executed it. (266 C.A.2d 868.)

In *Estate of Anderson* (1997) 56 C.A.4th 235, 65 C.R.2d 307, the testator's 1982 will exercised a testamentary power of appointment over a portion of a trust in favor of her daughter. Her 1993 will expressly revoked prior wills, but inadvertently failed to exercise the power. The executor petitioned for probate of the 1993 will and that portion of the 1982 will exercising the power. A beneficiary of the trust, whose beneficial interest would increase if the power of appointment were not exercised, contested probate of the 1982 will. *Held*, under the doctrine of dependent relative revocation, the 1982 will was properly admitted and the power was exercised.

(a) The exercise of a power of appointment by will, like any other provision, is not operative until death, and may be revoked. Thus, the 1993 revocation, even though it did not specifically mention the power of appointment, was sufficient to revoke the exercise of the power unless the doctrine of dependent relative revocation applies. (56 C.A.4th 242.)

(b) Under the doctrine, a conditional revocation may be implied in the event of mistake. (56 C.A.4th 243, quoting the text, and citing *Estate of Robertson*.) Thus, the testator is presumed to have intended the prior will to stand to the extent that the subsequent will proves ineffective. A will may be ineffective if, as a result of a mistake, it "fails in a material way to distribute the estate in accordance with the testator's intent." (56 C.A.4th 245.) Here, the testator's intent is clearly to benefit her daughter, not the beneficiaries of the trust, her stepgrandchildren. An additional requirement of total or partial intestacy under the subsequent will would frustrate the testator's intent, and is not required for the doctrine to operate. (56 C.A.4th 246.)

(c) The subsequent will need not show on its face that the revocation of the prior will was conditioned on the effectiveness of the subsequent will. Extrinsic evidence may be considered. (56 C.A.4th 248, citing *Estate of Kaufman*.) Here, the documents raise serious questions about the interpretation of the subsequent will, and testimony by the attorney who supervised its preparation was appropriate to show that the testator intended to exercise the power and failed to do so through a drafting error. (56 C.A.4th 250.)

SUPPLEMENT: [This section is current through the latest supplement]



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 B. Dependent Relative Revocation.
 3. Doctrine Held Inapplicable.

14 Witkin Sum. Cal. Law Wills § 181

[§ 181] Doctrine Held Inapplicable.

In *Estate of Strickman* (1966) 247 C.A.2d 469, 55 C.R. 606, the testator executed a three-page typewritten will prepared by attorney N. Pages 1 and 2 contained all dispositive provisions. Page 3 appointed N executor and B alternate, requested that pets be placed in suitable homes, and contained signature and attestation clauses, properly signed. Then the testator decided to substitute B for N as executor, and to have her pets put to death. Accordingly, she had B's wife type a new Page 3; she substituted it for the old Page 3, had witnesses sign it, and put a paper clip on the pages, but never signed it herself. The old Page 3 was never found. In a contest by a sister and nieces, the judge admitted the entire original will to probate, on the testimony of two witnesses as to execution and their identification of a true copy of the old Page 3. *Held*, this was error.

(a) When a will was in the testator's possession and cannot be found after death, there is a presumption that it was destroyed by the testator with intent to revoke (see *infra*, §552). No evidence was offered to rebut it; hence, on this record, the old Page 3 was revoked. And it could not be proved as a lost will because there was no evidence that it was in existence at the time of the testator's death. (247 C.A.2d 471, 472.)

(b) The doctrine of dependent relative revocation could have been applied by regarding the minor changes in the old Page 3 as dependent on the validity of the new Page 3, if the old Page 3 could be found or proved to have been in existence at the death of the testator; failing this, the old Page 3 could not be revived. (247 C.A.2d 474.)

(c) The court reached the conclusion that Pages 1 and 2 should be admitted to probate as the will, despite the fact that the only signatures were on Page 3. (247 C.A.2d 474.)

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14 Witkin Sum. Cal. Law Wills § 182

[§ 182] Revival of Revoked Will.

Except where the doctrine of dependent relative revocation applies (*supra*, §179), revocation is a final act, which completely destroys the legal effect of the will. If a will is once effectively revoked, either by physical destruction or by a subsequent instrument (see *supra*, §173 et seq.), it entirely loses its testamentary character.

Where the revocation is by a subsequent instrument, in some jurisdictions a previously revoked (first) will may be revived if the revoking (second) will is destroyed with intent to revoke. The theory is that the revoking second will is ambulatory until death, and, if revoked by destruction, it never had the effect of revoking the first will. (See *28 Cal. L. Rev.* 265; *79 Am.Jur.2d* (2002 ed.), *Wills* §601 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §4.2 [revival of revoked will].)

Other states take the opposite view, by enacting "anti-revival" statutes. (See *Estate of Hering* (1980) *108 C.A.3d* 88, 93, 99, *166 C.R.* 298; *25 Cal. L. Rev.* 265; *33 Hastings L. J.* 357.) *Prob.C.* 6123, based on *Unif.Prob.C.*, §2-509, provides as follows:

(a) "If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 6120 or 6121, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed." (*Prob.C.* 6123(a).)

(b) "If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect." (*Prob.C.* 6123(b).)

Of course the writing itself may subsequently be made the basis of a new will by re-execution, or may be incorporated by reference in a later will or codicil. (See *Estate of Cazaurang* (1941) *42 C.A.2d* 796, *110 P.2d* 138; *33 A.L.R.2d* 922 [codicil as reviving revoked will or codicil]; *supra*, §165.)

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VII. TESTAMENTARY INTERESTS

A. Interpretation and Construction of Donative Instruments.

1. In General.

a. Statutory Framework.

14 Witkin Sum. Cal. Law Wills § 183

[§ 183] Statutory Framework.

(1) *Enactment.* As part of the continuing revision of the Probate Code, the 1994 Legislature repealed the existing provisions governing the construction of wills (former Prob.C. 6140 et seq.) and added similar provisions applicable to wills, trusts, deeds, and other instruments (*Prob.C. 21101* et seq.).

(2) *Scope.* "Unless the provision or context otherwise requires," *Prob.C. 21101* et seq. apply to a will, trust, deed, and "any other instrument." (*Prob.C. 21101.*) For purposes of the Probate Code, "instrument" means a will, trust, deed, or "other writing that designates a beneficiary or makes a donative transfer of property." (*Prob.C. 45.*)

(3) *Application.* *Prob.C. 21101* et seq. apply to all instruments, regardless of when they were executed. (*Prob.C. 21140.*)

(4) *Topics Covered.* The statutory rules of construction cover a variety of topics, including the following:

- (a) General rules of construction. (See *infra*, §184 et seq.)
- (b) Rules governing the meaning of language. (See *infra*, §188 et seq.)
- (c) Classification and treatment of testamentary gifts. (See *infra*, §241 et seq.)
- (d) Survival requirements. (See *infra*, 213 et seq.)
- (e) Class gifts. (See *infra*, §221 et seq.)
- (f) Ademption. (See *infra*, §251 et seq.)
- (g) Choice of law. (See *supra*, §56.)

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A. Interpretation and Construction of Donative Instruments.

1. In General.

b. Testator's Intention.

14 Witkin Sum. Cal. Law Wills § 184

[§ 184] Testator's Intention.

(1) *Basic Rule.* "The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." (*Prob.C. 21102(a).*) (See *Rest.3d, Property (Wills and Other Donative Transfers)* §10.1; *Estate of Wilson* (1920) 184 C. 63, 66, 193 P. 581; *Estate of Wilson* (1924) 65 C.A. 680, 697, 225 P. 283; *Estate of Kelly* (1931) 112 C.A. 758, 760, 297 P. 620; *Estate of Thompson* (1937) 18 C.A.2d 680, 683, 64 P.2d 984; *Estate of Lawrence* (1941) 17 C.2d 1, 6, 108 P.2d 893; *Estate of Sahlender* (1948) 89 C.A.2d 329, 350, 201 P.2d 69; *Estate of Lefranc* (1952) 38 C.2d 289, 295, 239 P.2d 617; *Estate of Karkeet* (1961) 56 C.2d 277, 281, 14 C.R. 664, 363 P.2d 896, supra, §156; *Estate of Shannon* (1965) 231 C.A.2d 886, 892, 42 C.R. 278; *Estate of Becker* (1969) 270 C.A.2d 31, 34, 75 C.R. 359 ["While judges may pan the stream for golden nuggets of intent, they are required to stay within the banks of the testator's actual expression"]; *Estate of Newmark* (1977) 67 C.A.3d 350, 356, 359, 136 C.R. 628, citing the text; *Estate of Austin* (1980) 113 C.A.3d 167, 173, 169 C.R. 648, quoting the text; *Estate of Hilton* (1988) 199 C.A.3d 1145, 1168, 245 C.R. 491; 3 C.E.B., Decedent Estate Practice, §24.7; 80 Am.Jur.2d (2002 ed.), Wills §11008 et seq.)

(2) *Objective Test.* It is, however, even more difficult in testamentary instruments than in contracts to discover the undisclosed or subjective intent of the transferor, and therefore the objective standard is applied: The intention to be determined is that which is expressed in the language of the instrument. (*Prob.C. 21102(a)*; see *Estate of Young* (1899) 123 C. 337, 344, 55 P. 1011; *Estate of Hoytema* (1919) 180 C. 430, 432, 181 P. 645; *Estate of Johnson* (1930) 107 C.A. 236, 240, 290 P. 314; *Estate of Brown* (1931) 119 C.A. 195, 197, 6 P.2d 319; *Estate of Maloney* (1938) 27 C.A.2d 332, 335, 80 P.2d 998; *Gore v. Bingaman* (1938) 29 C.A.2d 460, 469, 85 P.2d 172; *Estate of Simoncini* (1991) 229 C.A.3d 881, 889, 890, 280 C.R. 393, citing the text [general intent that testator's children share estate equally did not render ambiguous specific language setting value of real property distributed to one child at \$ 400,000]; *Rest.3d, Property (Wills and Other Donative Transfers)* §11.1 et seq. [resolving ambiguities]; 85 A.L.R.3d 1181 [effect of gift to be disposed of "as already agreed"].)

(3) *Rules of Construction.* The rules of construction in *Prob.C. 21101* et seq. apply "where the intention of the transferor is not indicated by the instrument." (*Prob.C. 21102(b).*) (See *Unif.Prob.C.*, §2-603; 26 *U.C.L.A. L. Rev.* 285.) As the court said in *Estate of Keller* (1955) 134 C.A.2d 232, 236, 286 P.2d 889: "[W]hat the testator intended to accomplish is to be gathered if possible by giving the most ordinary interpretation to the language used without resorting to specious and fanciful reasoning. ... Courts are not invested under the guise of construction with the privilege

of rewriting a testator's will." (Cf. *Estate of Norris* (1947) 78 C.A.2d 152, 160, 177 P.2d 299 ["Many times these rules of construction are resorted to as a form of rationalization, that is, to justify a construction already made"].) (On testator's choice of law, see *Prob.C. 21103*, supra, §56.)

(4) *Questionable Value of Precedents*. In cases dealing with interpretation of wills, as in other controversies, counsel and courts draw freely upon the enormous volume of reported decisions. But in ascertaining the intention of a particular testator, decisions in other cases are seldom controlling. "Of this class of questions it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value." (*Estate of Henderson* (1911) 161 C. 353, 357, 119 P. 496; see *Estate of Keller*, supra, 134 C.A.2d 238 ["no two wills are exactly alike and but few are sufficiently similar in the wording of dispositive provisions so that a decision interpreting one would be of any great help in interpreting another"].)

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A. Interpretation and Construction of Donative Instruments.

1. In General.

c. Surrounding Circumstances.

14 Witkin Sum. Cal. Law Wills § 185

[§ 185] Surrounding Circumstances.

(1) *Common Law Development.* As an aid to the understanding of doubtful language in an instrument, and therefore in the discovery of the transferor's expressed intent, common law has long authorized the consideration of the surrounding circumstances. (See *Estate of Briggs* (1921) 186 C. 351, 354, 199 P. 322; *Estate of Fries* (1963) 221 C.A.2d 725, 727, 34 C.R. 749; *Estate of Russell* (1968) 69 C.2d 200, 208, 70 C.R. 561, 444 P.2d 353, *infra*, §187; *Estate of Verdisson* (1992) 4 C.A.4th 1127, 1136, 6 C.R.2d 363, citing the text; 50 Cal. L. Rev. 283; 16 A.L.R.3d 386 [extrinsic evidence to clarify location of devised real property]; 16 A.L.R.3d 432 [extrinsic evidence to identify securities]; 21 A.L.R.3d 778 [extrinsic evidence to determine whether fee interest or life estate is given]; 2 Cal. Evidence (4th), *Documentary Evidence*, §78.)

In *Estate of Sullivan* (1948) 86 C.A.2d 890, 195 P.2d 894, the testator devised to appellants "all of my property at 1215 Hellman Street, also known and described as Lot 1 Tract 1772." The physical surroundings, viewed by the judge, were held to show an intention to give only a house known as 1215 Hellman Street, and not other property on Lot 1, separated by a fence. (86 C.A.2d 894.) (See *Estate of Pierce* (1948) 32 C.2d 265, 268, 273, 196 P.2d 1, *infra*, §229.)

(2) *Codification.* Nothing in *Prob.C. 21102* (*supra*, §184) limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the testator. (*Prob.C. 21102(c)*.) (See *Rest.3d, Property (Wills and Other Donative Transfers)* §10.2 [circumstantial evidence of intent].) The Law Revision Commission Comment makes the following points:

(a) *Prob.C. 21102(c)* "neither expands nor limits the extent to which extrinsic evidence admissible under former law may be used to determine the transferor's intent as expressed in the instrument."

(b) Under the parol evidence rule (*C.C.P. 1856*), "extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor."

(c) Nothing in *Prob.C. 21102(c)* "affects the law governing the reformation of an instrument to effectuate the intention of the transferor in case of mistake or for other cause."

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1. In General.

d. Testator's Oral Declarations.

14 Witkin Sum. Cal. Law Wills § 186

[§ 186] Testator's Oral Declarations.

(1) *Former Exclusionary Rule.* Former Prob.C. 105, allowing evidence of circumstances to explain ambiguities, excluded "the oral declarations of the testator as to his intentions." This exclusion, though criticized and subject to exceptions, was the general rule; i.e., if an intention was apparent in the language of the will, it could not be shown that the testator had a different intention. (See *Estate of Bourn (1938)* 25 C.A.2d 590, 601, 78 P.2d 193 [conversations with draftsman of will, involving declarations by testator about her intent, were inadmissible]; *Estate of Pierce (1948)* 32 C.2d 265, 274, 196 P.2d 1 [oral declarations of testator were inadmissible to explain ambiguity in gift to "children (lawful issue)"]; *Estate of Avila (1948)* 85 C.A.2d 38, 39, 192 P.2d 64 [declarations to attorney were inadmissible]; *Estate of Carter (1956)* 47 C.2d 200, 207, 302 P.2d 301; *Estate of Flint (1972)* 25 C.A.3d 945, 953, 102 C.R. 345; *Estate of White (1970)* 9 C.A.3d 194, 200, 87 C.R. 881 [recognizing but circumventing rule]; *Estate of Kime (1983)* 144 C.A.3d 246, 264, 193 C.R. 718 [oral declarations were admissible to indicate testator's state of mind with respect to meaning of ambiguous language and to identify beneficiary]; 50 Cal. L. Rev. 283, 292; 14 Stanf. L. Rev. 409; 22 Hastings L. J. 1349, 1360.)

(2) *Exceptions to Exclusionary Rule.* The following exceptions and distinctions were recognized in holding oral declarations of the testator admissible:

(a) Where the oral declarations were not mere "fugitive utterances or declarations" but instructions to his attorney. (See *Estate of Dominici (1907)* 151 C. 181, 184, 90 P. 448 [identity of devisee]; *Estate of Little (1915)* 170 C. 52, 54, 148 P. 194 [same]; *Estate of Greenwald (1937)* 19 C.A.2d 291, 296, 65 P.2d 70; *Estate of Sandersfeld (1960)* 187 C.A.2d 14, 20, 9 C.R. 447; *Estate of McDonald (1961)* 191 C.A.2d 565, 570, 12 C.R. 823; *Estate of Webb (1977)* 76 C.A.3d 169, 175, 142 C.R. 642.)

(b) Where the oral declarations did not relate to intent, but were an aid to interpretation of an uncertain or imperfect description. This was proper, e.g., where there was a latent ambiguity. (See *Estate of Brisacher (1938)* 27 C.A.2d 327, 330, 80 P.2d 1033 [two rings answered description; declarations admitted to show which ring was meant]; *Estate of Hotaling (1946)* 72 C.A.2d 848, 856, 165 P.2d 681 [latent ambiguity in description of property]; *Estate of Resler (1954)* 43 C.2d 726, 735, 278 P.2d 1 [ambiguity about amount of devise]; *Estate of Mohr (1970)* 7 C.A.3d 641, 647, 86 C.R. 731 [meaning of "survivor"; testator's letter was admitted to show intended nonlegal meaning of surviving spouse of

predeceased sister].)

(c) Where the oral declaration indicated the testamentary or nontestamentary character of the instrument. (See *Estate of Spitzer* (1925) 196 C. 301, 306, 237 P. 739 [prior declaration of intent to make will, and subsequent declaration that all was taken care of, to show testamentary character of letter]; 21 A.L.R.2d 319 [admissibility of extrinsic evidence on issue of testamentary intent]; cf. *Estate of Janes* (1941) 18 C.2d 512, 515, 116 P.2d 438 [parol evidence to show that testator did not intend instrument labeled "copy" to be his will].)

(3) *Repeal of Exclusion.* Former Prob.C. 105 was repealed, effective January 1, 1985. With the removal of the statutory prohibition, admissibility of the testator's oral declarations is now governed by the general rules of evidence. (On testator's statements concerning will as within exception to hearsay rule, see 1 *Cal. Evidence* (4th), *Hearsay*, §221 et seq.; on evidence to explain ambiguity in will as outside parol evidence rule, see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §76 et seq.) It has been suggested that the only criteria for the admission of any extrinsic evidence as an aid in interpretation of ambiguous documents should be its relevancy and weight. (See 50 *Cal. L. Rev.* 283, 298; 22 *Hastings L. J.* 1349, 1363.)

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1. In General.

e. Appellate Review of Judge's Interpretation.

14 Witkin Sum. Cal. Law Wills § 187

[§ 187] Appellate Review of Judge's Interpretation.

In *Parsons v. Bristol Dev. Co.* (1965) 62 C.2d 861, 865, 44 C.R. 767, 402 P.2d 839, the Supreme Court clarified the roles of trial and reviewing courts in construing a writing, both with and without extrinsic evidence. (See 9 Cal. Proc. (4th), Appeal, §377.)

In *Estate of Russell* (1968) 69 C.2d 200, 70 C.R. 561, 444 P.2d 353, *Parsons* was applied to review of the probate judge's construction of a will. The testator made a holographic will leaving nearly all her estate to "Chester H. Quinn & Roxy Russell." Chester Quinn was her close friend and companion for 25 years. Roxy Russell was her dog, who predeceased her. Plaintiff, the testator's niece and sole heir at law, brought an heirship proceeding to establish her right to one-half of the estate. Defendant Quinn, over objection, introduced evidence of the testator's friendly relationship with him, and her antagonism toward plaintiff. The only provision for plaintiff was in the will--leaving her a \$ 10 gold piece and diamonds. The probate judge determined that the testator's intention was to leave the entire estate (except for these bequests) to Quinn; that the reference to the dog was precatory and did not create a trust for the dog or a gift to the dog, but merely indicated the intention that Quinn was to use whatever portion of the estate might be necessary for its care. Accordingly, plaintiff's claim was denied. *Held*, reversed; plaintiff was entitled to half the estate, despite the testator's expressed intention to limit the extent of the gifts to her.

(a) *Plain meaning rule repudiated.* The older theory, that extrinsic evidence is inadmissible where the terms of a written instrument are clear, is no longer followed. The modern view is that, in order to determine initially whether the terms are clear, the court must examine the surrounding circumstances to ascertain what the parties meant by the words used; only then can it be determined whether the seemingly clear language is in fact ambiguous. (69 C.2d 209, citing *Cal. Evidence*.) When this evidence is introduced the judge is placed in the position of the testator whose language the judge is interpreting. (69 C.2d 210.) Hence, extrinsic evidence was properly offered by plaintiff to ascertain the meaning of the words of gift to *Chester Quinn and Roxy Russell*. (69 C.2d 213.)

(b) *Appellate review where extrinsic evidence is not in conflict.* Under *Parsons*, the reviewing court is not bound by the trial judge's construction where there is no extrinsic evidence or the extrinsic evidence is without conflict. (See 9 Cal. Proc. (4th), Appeal, §377.) And, viewing the will in light of the surrounding circumstances, the judge's interpretation was erroneous. No words gave the entire residue to Quinn; a bequest to two beneficiaries cannot be

equated with a gift to one to use what might be necessary for the other; and there was no language to show an intent to create a trust. (69 C.2d 214.) The only meaning of which the words were reasonably susceptible was that the will made a disposition to two as tenants in common; because a dog cannot be a beneficiary, the attempted gift to one was void; and a void gift to a residuary beneficiary passes to heirs at law. (69 C.2d 215.)

(c) *Inadmissible evidence of intention.* Because, in the light of the extrinsic evidence, the terms of the will were not reasonably susceptible of the meaning claimed by Quinn, his extrinsic evidence to show that intention should have been excluded. (69 C.2d 215.) (See 58 Cal. L. Rev. 196; *Estate of Balyeat* (1968) 268 C.A.2d 556, 560, 74 C.R. 120; *Estate of Taff* (1976) 63 C.A.3d 319, 324, 133 C.R. 737 [following *Russell* and citing the text]; *Estate of Hilton* (1988) 199 C.A.3d 1145, 1168, 245 C.R. 491 [quoting *Russell*].)

SUPPLEMENT: [This section is current through the latest supplement]
Parsons case:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §383.



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a. In General.

1. Ordinary Words.

14 Witkin Sum. Cal. Law Wills § 188

[§ 188] Ordinary Words.

"The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained." (*Prob.C. 21122.*) (See *Fancher v. Fancher* (1909) 156 C. 13, 14, 103 P. 206 ["monument" given literal meaning of shaft, etc.; held not to comprehend memorial library]; *Estate of Friedrichs* (1930) 107 C.A. 142, 144, 290 P. 54 [gift of testator's "business" held, in light of circumstances, to mean all property used in the business, including real property]; *Estate of Chamberlain* (1941) 46 C.A.2d 16, 19, 115 P.2d 235 ["cash" held not to include stocks and bonds]; *Estate of Shafer* (1969) 269 C.A.2d 538, 543, 75 C.R. 39 ["the parent" and "parent surviving" held limited to those in lineal consanguinity to testator]; *Estate of Newmark* (1977) 67 C.A.3d 350, 357, 136 C.R. 628; *Estate of Verdisson* (1992) 4 C.A.4th 1127, 1138, 6 C.R.2d 363 ["money" held to include return of life insurance premium and to exclude interest in mutual fund]; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1017 et seq.; 1 *A.L.R.2d* 194 ["proceeds" of assets as principal or income]; 35 *A.L.R.2d* 1095 ["bonds"]; 36 *A.L.R.2d* 1323 [gift for "college education"]; 67 *A.L.R.2d* 1444 ["funds"]; 27 *A.L.R.3d* 1386 ["securities"]; 28 *A.L.R.3d* 1169 ["business" or "business enterprise"]; 29 *A.L.R.3d* 574 ["building," "house," or "dwelling house"]; 36 *A.L.R.3d* 323 [gift to "parent" or "parents"].)

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a. In General.

2. Technical Terms.

14 Witkin Sum. Cal. Law Wills § 189

[§ 189] Technical Terms.

"Technical words are not necessary to give effect to a disposition in an instrument. Technical words are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the transferor and that the transferor was unacquainted with the technical sense." (*Prob.C. 21122.*)

Under this rule, technical terms will ordinarily be given a technical meaning, particularly where the instrument was drawn by an attorney. (See *Estate of Northcutt* (1940) 16 C.2d 683, 689, 107 P.2d 607; *Estate of Bourn* (1938) 25 C.A.2d 590, 595, 78 P.2d 193 ["annuity"]; *Estate of O'Connor* (1955) 130 C.A.2d 258, 263, 278 P.2d 748 ["residue" and "remainder" of estate]; *Estate of Loescher* (1955) 133 C.A.2d 589, 594, 284 P.2d 902 [same]; *Estate of Carter* (1956) 47 C.2d 200, 205, 302 P.2d 301; *Lombardi v. Blois* (1964) 230 C.A.2d 191, 198, 40 C.R. 899 ["The crucial phrases wrought in changeless Latin represent hardened legal concepts well known to every lawyer"; "per stirpes"]; cf. *Estate of Marin* (1945) 69 C.A.2d 147, 150, 158 P.2d 412 [attorney's draft may be construed in popular sense where he was not acquainted with facts]; *Estate of Keller* (1955) 134 C.A.2d 232, 236, 240, 286 P.2d 889 ["rest, residue and remainder" given nontechnical interpretation]; *Kropp v. Sterling Savings & Loan Assn.* (1970) 9 C.A.3d 1033, 1042, 88 C.R. 878 ["personal representatives" may be given wide nontechnical meaning of next of kin, heirs, or descendants].)

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3. Layperson's Will.

14 Witkin Sum. Cal. Law Wills § 190

[§ 190] Layperson's Will.

A will drawn by the testator may be given a layperson's interpretation. (See *Estate of Peabody* (1908) 154 C. 173, 177, 97 P. 184 ["transfer" given nontechnical meaning, in will written by testator who, though educated, was unfamiliar with legal terminology]; *Estate of Henderson* (1911) 161 C. 353, 358, 119 P. 496 ["legacies" and "legatees" held to refer to gifts and takers of real as well as personal property]; *Estate of Wilson* (1920) 184 C. 63, 68, 193 P. 581 ["heirs"]; *Estate of Coleman* (1922) 189 C. 612, 619, 209 P. 571; *Estate of Thompson* (1937) 18 C.A.2d 680, 684, 64 P.2d 984; *Estate of Rowley* (1954) 126 C.A.2d 571, 576, 272 P.2d 911; *Estate of Nordgren* (1931) 115 C.A. 634, 637, 2 P.2d 481 [gift of "building and loan stock" held to include only capital stock and not investment certificates; court gave "stock" its technical meaning, referring to "intelligence" of testator]; *Estate of Rankin* (1953) 118 C.A.2d 184, 186, 257 P.2d 95 [codicil by layperson familiar with terminology; "distribution of my estate" given usual meaning of distribution in probate, not later time of termination of testamentary trust]; *Estate of Plumer* (1958) 159 C.A.2d 389, 392, 324 P.2d 346 ["I want my friends to be remembered," naming them, held a gift of residue of estate]; *Estate of Conway* (1958) 161 C.A.2d 704, 711, 327 P.2d 173.)

In *Estate of Lewis* (1949) 91 C.A.2d 322, 204 P.2d 898, a gift of property was to be "equally divided between Luella Martin at Perris California. And Stanley Keller, Roy C. Keller and James L. Keller. All three live at Willowbrook California." *Held*, punctuation was not significant; "between" should be construed to mean "among," and the four beneficiaries should take equal shares. (91 C.A.2d 324.) (See *Estate of Backesto* (1925) 71 C.A. 409, 413, 235 P. 670 ["between" interpreted as meaning "among," where reference to more than two persons was clearly intended].)

In *Estate of Phillips* (1966) 247 C.A.2d 510, 55 C.R. 658, the testator left "the balance" of her estate to her brother, "and at his death it shall go to a Tuberculosis instute." It was further provided that "He must give an account of any big amount before his death and handle all my affairs." *Held*: (a) The phrase "handle all my affairs" was an appointment of the brother as executor. (b) The brother did not take a life estate with power to consume principal; "it"--the balance--was to go to charity, hence he could only take the interest. (247 C.A.2d 511.)

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4. Testator's Dominant Purpose.

14 Witkin Sum. Cal. Law Wills § 191

[§ 191] Testator's Dominant Purpose.

It is frequently declared that the meaning of particular words or phrases must be subordinated to the general scheme or dominant purpose of the testator as it appears from the will. This is perhaps another way of saying that the testator's intention is the paramount consideration. (See *Estate of Puett* (1934) 1 C.2d 131, 133, 33 P.2d 825; *Estate of Hollingsworth* (1940) 37 C.A.2d 432, 435, 99 P.2d 599 [gift to employees of 2 months' "salary or wages" held to include salesman on commission]; *Estate of Nathan* (1949) 89 C.A.2d 789, 793, 201 P.2d 865; *Estate of O'Connell* (1972) 29 C.A.3d 526, 531, 105 C.R. 590.)

In carrying out this policy, the court may transpose, interpolate, or substitute words where the terminology is obviously inaccurate or confused. (*Estate of Stratton* (1896) 112 C. 513, 518, 44 P. 1028; *Estate of Goetz* (1910) 13 C.A. 292, 295, 109 P. 492; *Estate of Backesto* (1925) 71 C.A. 409, 413, 235 P. 670; *Estate of Heard* (1944) 25 C.2d 322, 328, 153 P.2d 553; *Estate of Akeley* (1950) 35 C.2d 26, 29, 215 P.2d 921, *infra*, §203.)

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5. Punctuation.

14 Witkin Sum. Cal. Law Wills § 192

[§ 192] Punctuation.

Punctuation may be disregarded where the natural sense of the words is apparent without it and the punctuation would alter or make it more obscure. (See *Estate of Lewis* (1949) 91 C.A.2d 322, 324, 204 P.2d 898, supra, §190.) But where it is grammatically used by an experienced draftsman, it may be considered in determining the testator's intent. (*Estate of Jones* (1961) 55 C.2d 531, 535, 11 C.R. 574, 360 P.2d 70; see 70 A.L.R.2d 215 [changing, deleting, or adding punctuation].)

Estate of Cuneo (1969) 1 C.A.3d 1008, 82 C.R. 261, is an odd illustration of this practice. On a prior appeal in a will contest, the Supreme Court opinion inserted punctuation in a document translated from Italian in order to determine what was the will of the decedent. In the present proceeding to determine interests in the estate, the appellate court held that other expert evidence was admissible to show a different punctuation, and was improperly excluded. The former punctuation was for a limited purpose; the present offer of proof was for a different purpose, construction of the will. (1 C.A.3d 1011.)

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b. Particular Terms.

1. "Personal Effects."

14 Witkin Sum. Cal. Law Wills § 193

[§ 193] "Personal Effects."

Endless difficulty in interpretation is caused by a layperson's will bequeathing "personal effects." (See 30 A.L.R.3d 797 ["personal belongings," "belongings," "personal effects," or "effects"]; 80 Am.Jur.2d (2002 ed.), Wills §1097 et seq.) When used without other language, the phrase generally includes only such tangible personal property as is worn, carried, or otherwise intimately associated with the person. (See *Estate of Sorensen* (1941) 46 C.A.2d 35, 38, 115 P.2d 241.) The same is true of a gift of "my personal things," which is the substantial equivalent of "personal effects" and does not include real property, securities, or money. (See *Estate of Klewer* (1954) 124 C.A.2d 219, 222, 268 P.2d 544.)

A broader construction may sometimes be indicated. In *Estate of Schuster* (1955) 137 C.A.2d 125, 289 P.2d 847, the testator first referred to "my effects" including real property, and then left "Any and all the rest of my effects" to her mother. *Held*, the term was used in the same sense in both provisions. Hence, the last was a bequest of the entire residuary estate regardless of its character, and not merely of clothing, furniture, paintings, and other purely personal items not specifically bequeathed. (137 C.A.2d 129.)

In *Estate of Douglass* (1945) 70 C.A.2d 279, 161 P.2d 66, the bequest was of "[a]ll of the rest of my personal effects of every kind and description, including all of the rest of my silver, and all of my linens and china." *Held*, this included two automobiles, for the additional language enlarged the meaning of the phrase, and the rule of *ejusdem generis* would not be applied to limit the bequest to articles similar to silver, linens, and china. (70 C.A.2d 282.)

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b. Particular Terms.

2. "Personal Property."

14 Witkin Sum. Cal. Law Wills § 194

[§ 194] "Personal Property."

A layperson's will frequently refers to "personal property," and the term will usually be given its narrow popular meaning of "personal effects," such as household goods, rather than the legal meaning of everything that is not real property. (See *Estate of La Fetra* (1936) 14 C.A.2d 599, 602, 58 P.2d 678; *Estate of Lovejoy* (1940) 38 C.A.2d 69, 73, 100 P.2d 547; *Estate of Graham* (1957) 49 C.2d 333, 337, 316 P.2d 945; *Estate of Nielsen* (1962) 204 C.A.2d 357, 362, 22 C.R. 260, quoting the text; *Estate of Swallow* (1962) 211 C.A.2d 359, 363, 27 C.R. 235; *Estate of Dodge* (1971) 6 C.3d 311, 323, 325, 98 C.R. 801, 491 P.2d 385; 80 Am.Jur.2d (2002 ed.), Wills §1094 et seq.; 31 A.L.R.5th 499 [what passes under term "personal property" in will]; cf. *Estate of Puett* (1934) 1 C.2d 131, 133, 33 P.2d 825 [gift of apartment and "all the personal property" therein was intended to provide home and all furnishings, but not to include box containing promissory notes and stamp and coin collection discovered there after testator's death].)

However, the same term in a will drafted by an attorney may be given its technical legal meaning. (See *Estate of Northcutt* (1940) 16 C.2d 683, 689, 107 P.2d 607 [includes money on deposit in bank].) And the term when used in the will of an illiterate may justify even a broader meaning than this. (See *Estate of Olsen* (1935) 9 C.A.2d 374, 379, 50 P.2d 70 [to avoid partial intestacy, "all my personal property" in holographic will was interpreted to mean "all my own property," thus including all personally owned property, real and personal].)

In *Estate of Randall* (1966) 240 C.A.2d 85, 49 C.R. 280, the testator was in the Veterans Administration Hospital. She executed an attorney-drawn will, which gave her grandniece household goods, books, furniture, jewelry, clothing "and personal effects," and left the residue to L University. The grandniece claimed the sum of \$ 5,568.09 in the "Patient's Fund Account." Normally the words "personal effects" would not include the deposit (see *supra*, §193), but extrinsic evidence was admissible to show that the term was used not in a technical or popular meaning, but in a special meaning of local significance. This evidence, erroneously excluded by the probate judge, consisted of (a) a qualified witness from the hospital who would testify that the patients there commonly used the words "personal effects" to include their money on deposit in that account; and (b) correspondence from the testator to the father of the grandniece stating that she had money on deposit in that fund which would be a part of her "effects, like clothes, jewelry, etc.," which the grandniece was to claim. (240 C.A.2d 86.)

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3. "Belongings."

14 Witkin Sum. Cal. Law Wills § 195

[§ 195] "Belongings."

Just as "personal effects" may be narrowly or broadly interpreted (*supra*, §193), so "belongings" or "personal belongings" can be given the limited meaning of things associated with the person (*Estate of Klewer (1954) 124 C.A.2d 219, 222, 268 P.2d 544*), or the broad meaning of all the property owned by the testator. (See *Estate of Olson (1956) 144 C.A.2d 694, 696, 301 P.2d 501* [to carry out express intention to disinherit son and avoid intestacy]; *Estate of Johnson (1970) 5 C.A.3d 173, 181, 84 C.R. 914; 80 Am.Jur.2d (2002 ed.)*, *Wills §1297 et seq.* ["belongings"]; 33 *A.L.R.2d 550* ["possessions"]; 41 *A.L.R.2d 946* ["things" or "personal things"]; 53 *A.L.R.2d 1059* ["personal estate"]; 30 *A.L.R.3d 797* ["personal belongings," "belongings," "personal effects," or "effects"]; 21 *A.L.R.4th 383* ["furniture" or "furnishings"].)

In *Estate of Kuttler (1958) 160 C.A.2d 332, 344, 325 P.2d 624*, decedent left a holographic writing held testamentary in the first decision. (*160 C.A.2d 332*.) She expressly disinherited certain heirs and authorized her fiancé' and her sister "to dispose of my belongings as they see fit." Under the holding of the prior case that this constituted a general power of appointment, the latter exercised the power in favor of themselves. The probate judge, however, construed the word "belongings" strictly as referring only to tangible personal property, thereby giving the real property and intangibles to the disinherited heirs. *Held*, reversed; this interpretation frustrated the testator's dominant purpose of excluding these heirs, and no substantial evidence of intention was produced to overcome the presumption against intestacy (*infra*, §201). (*Estate of Kuttler (1960) 185 C.A.2d 189, 202, 8 C.R. 160.*)

When the term is used by an attorney in a residuary clause, it should be given the limited meaning of chattels susceptible of identification and manual delivery. (*Estate of Hampton (1968) 262 C.A.2d 532, 536, 68 C.R. 828.*)

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4. "Money" or "Cash."

14 Witkin Sum. Cal. Law Wills § 196

[§ 196] "Money" or "Cash."

(1) *Money*. The word "money" "may be used to mean cash only, personal property, or even wealth--that is, property of any kind that may be converted into cash." (*Estate of Whitney (1958)* 162 C.A.2d 860, 865, 329 P.2d 104 ["money from estate be tythed" 25% to certain charity, held to mean not money *in* estate but money *from* estate, and to call for 25% of distributable property]; see *Estate of Goyette (2004)* 123 C.A.4th 67, 71, 19 C.R.3d 760 [term "my money" in holographic will included checking, savings, and retirement accounts, certificates of deposit, money market accounts, treasury bills, and savings bonds]; 80 Am.Jur.2d (2002 ed.), *Wills* §1105 et seq.; 67 A.L.R.2d 1444 ["funds"]; 100 A.L.R.2d 1004 [testamentary language passing United States bonds]; 76 A.L.R.3d 1254 ["money" or "moneys" as including real property].)

(2) *Cash*. The term "cash" is likewise given a limited (money or equivalent) or broad meaning, to carry out the dominant purpose of the testator. (See *Estate of O'Connell (1972)* 29 C.A.3d 526, 531, 105 C.R. 590 ["all cash remaining in my savings and checking accounts" held to include certificate of deposit]; 80 Am.Jur.2d (1975 ed.), *Wills* §1265 et seq.; 31 A.L.R.4th 688 ["bank," "checking," or "savings" account].)

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c. Gift to Person or His Estate.

14 Witkin Sum. Cal. Law Wills § 197

[§ 197] Gift to Person or His Estate.

A difficult problem of interpretation is presented where the testator makes a gift to the estate of a third person. Some courts hold it void for lack of a proper distributee, because the "estate" is not an entity. (See *Estate of Glass* (1913) 164 C. 765, 767, 130 P. 868.) However, in *Estate of Brunet* (1949) 34 C.2d 105, 207 P.2d 567, such a gift in a layperson's holographic will was upheld. The testator devised property "[t]o Otto Speckter or his Estate." Speckter predeceased the testator and the court distributed the property "to the heirs or devisees of Otto Speckter, deceased, subject to the administration of his estate." *Held*, the decree was proper. (a) The words "or his estate" were not words of limitation, defining the extent of the interest given, but were words of donation, designating the recipients of the devise. (b) The devise did not lapse on Speckter's death. The word "estate" should not be given the technical meaning of describing the devisee's interest or any particular property. Giving effect to the whole phrase, and applying the policy against intestacy, the testator intended to describe alternative takers of the devise, and therefore he made a valid substitutional gift. (34 C.2d 107.) (See 23 So. Cal. L. Rev. 635; 10 A.L.R.3d 483 [validity, construction, and effect of bequest to person's estate or to person or his estate]; cf. *Dorland v. Dorland* (1960) 178 C.A.2d 664, 669, 3 C.R. 262 [judgment requiring conveyance to "estate" was subject to court's power to correct clerical error].)

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d. Gift to Survivor of Two Persons.

14 Witkin Sum. Cal. Law Wills § 198

[§ 198] Gift to Survivor of Two Persons.

In *Estate of Christen* (1965) 238 C.A.2d 521, 48 C.R. 26, the testator made a holographic will leaving the residue of his estate to "Joseph P. Kelly or Father Flannagans Boys home, or the survivor of them." *Schade v. Stewart* (1928) 205 C. 658, 662, 272 P. 567, 12 Summary (10th), *Real Property*, §266, and *Estate of Brunet* (1949) 34 C.2d 105, 207 P.2d 567, supra, §197, suggest the proper interpretation. The testator meant that if Kelly predeceased him (which happened), the property should go to the survivor, Father Flannagan's Boys' Home. What would have happened had both named residuary legatees survived was not involved. (238 C.A.2d 525, 526.) (See 19 A.L.R.3d 1213 [gift to A or B or A or B or survivor].)

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3. Other Rules of Construction.

a. Construction as a Whole and Reconciling Parts.

1. Where Reconciliation Is Possible.

14 Witkin Sum. Cal. Law Wills § 199

[§ 199] Where Reconciliation Is Possible.

(1) *Construction as a Whole*. "All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument." (*Prob.C. 21121*.)

(2) *Construction To Give Every Expression Effect*. "The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative." (*Prob.C. 21120*.)

These provisions codify the familiar doctrine that the different parts of the will are to be harmonized if possible. (See *Estate of Robinson* (1911) 159 C. 608, 609, 115 P. 49 [gift to "my heirs ... including my niece above named," person named was testator's deceased wife's niece; provision was given effect by treating her as niece and heir]; *Estate of Briggs* (1921) 186 C. 351, 354, 199 P. 322; *Estate of Combs* (1934) 136 C.A. 286, 291, 28 P.2d 711; *Estate of Mayne* (1938) 28 C.A.2d 340, 343, 82 P.2d 504 [contradictory provisions harmonized]; *Estate of Brunet* (1949) 34 C.2d 105, 109, 207 P.2d 567; Cal. Transactions Forms, 4 Estate Planning §19:60 et seq.)

(3) *Construction of Multiple Documents*. A codicil is to be treated and construed as part of the will. (*Estate of Shirley* (1930) 107 C.A. 267, 268, 290 P. 302.) And a document, attached to the will and waiving community property rights, will be construed with it. (*Estate of Wyss* (1931) 112 C.A. 487, 492, 297 P. 100.) (See 65 A.L.R.3d 1325 [separate gifts to same person in same or substantially same amounts, made in separate wills or codicils, as cumulative or substitutionary].)

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2. Where Inconsistency Remains.

14 Witkin Sum. Cal. Law Wills § 200

[§ 200] Where Inconsistency Remains.

Former Prob.C. 104 laid down a specific rule dealing with inconsistent parts of a will: "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefore, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will."

This statute produced a considerable amount of case law. (See *Estate of Hamon* (1922) 60 C.A. 154, 160, 212 P. 399 [absolute gift was not made contingent by uncertain language in later clause]; *Estate of Mallon* (1939) 34 C.A.2d 147, 155, 93 P.2d 245 [subsequent precatory language]; *Estate of Murray* (1945) 70 C.A.2d 300, 303, 160 P.2d 880; *Estate of Ferdun* (1949) 91 C.A.2d 622, 626, 205 P.2d 456 [holographic will; absolute devise of realty held not modified by subsequent precatory language telling devisee to leave it, on his death, to certain relatives of testator]; *Estate of Kearns* (1950) 36 C.2d 531, 534, 225 P.2d 218; *Estate of Sargavak* (1953) 41 C.2d 314, 319, 259 P.2d 897; *Estate of Eggleston* (1954) 129 C.A.2d 601, 605, 277 P.2d 469.)

Similarly, a clear disposition in a will would not be revoked by a doubtful expression or inconsistent disposition in a codicil. (*Estate of Dominici* (1907) 151 C. 181, 189, 90 P. 448; *Estate of Shirley* (1930) 107 C.A. 267, 269, 290 P. 302; *Estate of Norrish* (1933) 135 C.A. 166, 168, 26 P.2d 530; *Estate of Dunn* (1939) 32 C.A.2d 240, 242, 89 P.2d 667.)

However, if the later clause was sufficiently clear and distinct, it would be given effect as a limitation or qualification of the earlier clause. (*Estate of Carothers* (1911) 161 C. 588, 593, 119 P. 926; *Estate of Tooley* (1915) 170 C. 164, 166, 149 P. 574; *Estate of Stoddart* (1923) 62 C.A. 233, 238, 216 P. 985; *Estate of Dolsen* (1949) 90 C.A.2d 575, 579, 203 P.2d 775 [earlier paragraph indicated devise in fee, later provision was held to make it a life estate only]; *Estate of Holmes* (1961) 191 C.A.2d 285, 295, 12 C.R. 629 [unambiguous handwritten codicil clearly changed dispositive provisions of will; extrinsic evidence was properly excluded]; *Estate of Wiemer* (1962) 209 C.A.2d 7, 12, 25 C.R. 693 [formal will followed over 5 years later by holographic instrument complete in itself and inconsistent with first will; latter was controlling].)

Former Prob.C. 104 was repealed effective January 1, 1985. However, the decisions cited above may remain relevant in resolving inconsistencies.

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1. In General.

14 Witkin Sum. Cal. Law Wills § 201

[§ 201] In General.

"Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer." (*Prob.C. 21120.*)

This is a strong presumption, sometimes expressed in the statement that "the very fact of making a will raises a presumption that the testator intended to dispose of all of his property," and the idea that the testator intended to die testate as to one portion and intestate as to another is so unusual that any reasonable construction that can avoid it will be accepted. (See *Estate of Olsen* (1935) 9 C.A.2d 374, 379, 50 P.2d 70; *Estate of Fuller* (1933) 135 C.A. 781, 785, 28 P.2d 399 [property that "stands in my name" held to include stock held by former trustee which should have been transferred to testator]; *Estate of Deffebach* (1936) 14 C.A.2d 268, 270, 57 P.2d 1340 [ambiguity about which legatees took particular secured notes was resolved by giving election to legatee first named]; *Estate of Lawrence* (1941) 17 C.2d 1, 9, 108 P.2d 893; *Estate of Brunet* (1949) 34 C.2d 105, 109, 207 P.2d 567, supra, §197; *Estate of Schuster* (1955) 137 C.A.2d 125, 130, 289 P.2d 847; *Estate of Kuttler* (1958) 160 C.A.2d 332, 346, 325 P.2d 624; *Estate of Kuttler* (1960) 185 C.A.2d 189, 197, 8 C.R. 160, supra, §156; *Estate of Karkeet* (1961) 56 C.2d 277, 281, 14 C.R. 664, 363 P.2d 896, supra, §156; *Estate of Nichols* (1962) 199 C.A.2d 783, 794, 19 C.R. 93, citing the text; *Estate of Hartson* (1962) 200 C.A.2d 757, 765, 19 C.R. 694; *Estate of Stephenson* (1965) 235 C.A.2d 326, 329, 45 C.R. 121; *Estate of Verdisson* (1992) 4 C.A.4th 1127, 1137, 6 C.R.2d 363 ["properties" held to include both real and personal property to avoid partial intestacy]; *Estate of Goyette* (2004) 123 C.A.4th 67, 71, 19 C.R.3d 760 [term "my money" in holographic will held to include checking, savings, and retirement accounts, certificates of deposit, money market accounts, treasury bills, and savings bonds to avoid partial intestacy]; 25 Cal. L. Rev. 126.)

A good illustration of the extremely liberal interpretation this doctrine may sanction appears in *Estate of Wignall* (1947) 80 C.A.2d 958, 183 P.2d 26. The testator (a) declared that "the following bequests" (in small amounts) were to be paid to named persons, unless they died before distribution, in which event their issue or surviving spouse should receive the legacies; (b) directed that the residue (a large sum) should go to her brother; (c) declared generally that she intentionally omitted any others (among whom were respondent cousins). Her brother died several years before the testator, leaving appellant, his wife, surviving him. *Held*, appellant was entitled to the residue. To avoid nearly complete intestacy, the court interpreted the introductory declaration, which apparently referred only to the listed legatees, as

applicable also to the residuary legatee, thus allowing his widow to take his share. Although the construction thus adopted practically rewrote a reasonably clear provision, the result unquestionably carried out the probable, if unexpressed, intention of the testator, by giving the bulk of the estate to the wife of the person admittedly first in her affections, rather than to cousins who were either intentionally left nothing or small legacies. (80 C.A.2d 960.)

Almost as liberal is *Estate of O'Brien* (1946) 74 C.A.2d 405, 168 P.2d 432. The testator made a holographic will, leaving his ranch, sheep, and money to Mr. and Mrs. B, and then provided that M and P "will take charge of the rest including bonds." *Held*, to prevent partial intestacy, the latter provision would not be narrowly construed as an appointment of M and P as executors to administer the balance of the estate, but rather as a bequest to them as residuary legatees. (74 C.A.2d 409.) (See *Estate of Akeley* (1950) 35 C.2d 26, 29, 215 P.2d 921, *infra*, §203.)

In *Estate of Becker* (1969) 270 C.A.2d 31, 75 C.R. 359, the testator disposed of "all income," but added the words "derived from my several bank accounts, also all income derived from all my stocks." After making the will, she purchased an annuity. *Held*, the added words should be construed as mere directions to the executor as to what her property was and where to look for it; she intended to dispose of all her income, and the annuity was covered. (270 C.A.2d 35.)

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SUPPLEMENT: [This section is current through the latest supplement]



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2. When Language Is Certain.

Witkin Sum. Cal. Law Wills § 202

[§ 202] When Language Is Certain.

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 275, lines 2 and 3, In *Estate of Barnes*, sentence "The will had no *disinheritance* clause" should be "The will had no *residuary* clause".



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2. When Language Is Certain.

14 Witkin Sum. Cal. Law Wills § 202

[§ 202] When Language Is Certain.

Where the language of a will is clear and certain, the fact that the testator failed to provide for a contingency does not justify application of the rule against intestacy. It is improper to read into the will changes based on speculation about what might have been the testator's intent had the testator foreseen the development. (See *Estate of Young* (1899) 123 C. 337, 343, 55 P. 1011; *Estate of Beldon* (1938) 11 C.2d 108, 112, 77 P.2d 1052 ["If he used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended"]; *Estate of Mathie* (1944) 64 C.A.2d 767, 781, 149 P.2d 485 [forfeiture provision cut off contesting husband, but, in absence of residuary clause, intestacy resulted as to that portion, and he took share as heir]; *Estate of Smith* (1948) 31 C.2d 563, 569, 191 P.2d 413; *Estate of Klewer* (1954) 124 C.A.2d 219, 223, 268 P.2d 544; *Estate of Halsell* (1955) 133 C.A.2d 665, 671, 284 P.2d 821.)

Estate of Hoytema (1919) 180 C. 430, 181 P. 645, is an unusually strict decision. A holographic will directed that it be sent to testator's brother, if alive, and added: "Should he be dead," the property should be disposed of in a specified manner. *Held*, (a) her only disposition was dependent on his prior death, and the will failed to indicate disposition if he survived her; (b) hence, upon predeceasing him, she died almost totally intestate. "Courts are not permitted in order to avoid a conclusion of intestacy to adopt a construction based on conjecture as to what the testator may have intended though not expressed." (180 C. 432.) The court may perhaps have unduly emphasized the supposed conditional nature of the reference.

In *Estate of Deacon* (1959) 172 C.A.2d 319, 342 P.2d 261, the second paragraph of a will included the sentence: "If there should be a balance, ... then such balance is to be distributed as hereinafter set forth." Nothing was thereafter set forth and there was no general residuary clause. *Held*, the testator died intestate as to that balance; there was no way to connect the statement with a disposition of different property in the fifth paragraph. (172 C.A.2d 323.)

In *Estate of Barnes* (1965) 63 C.2d 580, 47 C.R. 480, 407 P.2d 656, the testator, in an attorney-drawn will, provided that all of her property was to go to her husband, except that, in the event of simultaneous death of both, it should go to H, her nephew. The will had no disinheritance clause. The husband died first, and then the testator died leaving only collateral heirs. H, not an heir because his mother (testator's sister) survived, contended that, because of

evidence of deep affection the testator had for him, and under the rule of avoiding intestacy, the will should be construed as making a gift by implication to him (see *infra*, §207). The probate judge agreed. *Held*, reversed. The rule of construction to avoid intestacy does not become applicable merely because the will fails to dispose of the property. And there was no "dominant dispositive plan" to make a gift by implication applicable under *Brock v. Hall* (1949) 33 C.2d 885, 206 P.2d 360, 13 Summary (10th), *Trusts*, §313. (63 C.2d 584.) In brief, "a court may not write a will which the testator did not write." (63 C.2d 583.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 275, lines 2 and 3, In *Estate of Barnes*, sentence "The will had no *disinheritance* clause" should be "The will had no *residuary* clause".



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14 Witkin Sum. Cal. Law Wills § 203

[§ 203] When Beneficiary Is Not Named.

The rule against partial intestacy cannot be invoked to supply a missing beneficiary, no matter how clearly the intent is shown by extrinsic evidence. In *Estate of De Moulin (1950) 101 C.A.2d 221, 225 P.2d 303*, the testator dictated a will, leaving \$ 100 each to his son and daughter, and in the 5th clause appointed his wife executor without bond. The 4th clause read: "all the rest, residue and remainder of my estate ... and all factory stock" in an Illinois factory. His secretary testified over objection that in typing this clause she inadvertently omitted the introductory words "I bequeath to my wife, Mary E. De Moulin," that the testator had told her he wanted his wife to have the property, and that he had seen the correct language in her longhand notes but had only glanced at the typed will. *Held*, reversing the lower court, distribution should follow the rules of succession. Under the settled rule, uncertainty on the face of the will must be resolved from the words of the will itself, without the oral declarations of the testator (citing former Prob.C. 105). And the exception--instructions to a draftsman are received to clarify an imperfect description of a beneficiary (*supra*, §186)--does not apply where there is a total failure to name a beneficiary. Moreover, a will is not ambiguous merely because it does not dispose of all the property. (*101 C.A.2d 224.*) (On effect of repeal of former Prob.C. 105, see *supra*, §186.)

The foregoing should be contrasted with the liberal approach of *Estate of Akeley (1950) 35 C.2d 26, 215 P.2d 921*. The testator made a holographic will which, after several bequests, stated: "all the rest, residue and remainder of my estate I give and bequeath as follows," specifying "25 percent" to each of three charities. She left no heirs, and the state sought to escheat 25% of the residue as property not disposed of. *Held*, the entire residue was properly distributed to the charities. (a) The testator knew she had no heirs and intended to dispose of all her estate. (b) Technical words, like "25 percent," will be given a different construction to carry out the manifest intention of a layperson's will. (c) The presumption against intestacy is especially applicable in construction of a residuary clause. (d) The language of intention to dispose of the entire estate ("all the rest," etc.), and the use of specified percentages aggregating less than the whole, created an ambiguity. In resolving it in the light of the language and surrounding circumstances (no relatives, layperson's will), the probate court properly disregarded the mathematical figures as surplusage; and, where that court's interpretation is reasonable, the appellate court will not substitute another though it be equally tenable. (*35 C.2d 29.*) The dissent argued that the phrase "all the rest," etc., merely designated the fund from which the bequests were to be

paid, the legatees and quantum being specified "as follows"; that there was no room for the presumption against intestacy; and that the trial court's interpretation of the document was not binding on the appellate court (see 9 *Cal. Proc.* (4th), *Appeal*, §376). (35 *C.2d* 31.)

SUPPLEMENT: [This section is current through the latest supplement]

Trial court's interpretation not binding on appellate court:

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §382.



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b. Avoiding Total or Partial Intestacy.

4. When Testamentary Intent Is Uncertain.

14 Witkin Sum. Cal. Law Wills § 204

[§ 204] When Testamentary Intent Is Uncertain.

A generally recognized qualification of the presumption against intestacy is that it relates to the construction of a will, the terms of which are uncertain. If the uncertainty is about testamentary intent, i.e., if there is doubt whether the instrument is actually a will, the rule is inapplicable. (*Estate of Anthony* (1913) 21 C.A. 157, 160, 131 P. 96; *Estate of Kelleher* (1927) 202 C. 124, 129, 259 P. 437.)

But this limiting rule is not always followed, and the presumption has been invoked at times to support the determination that a writing was actually a valid will. (See *Estate of Janes* (1941) 18 C.2d 512, 515, 116 P.2d 438; cf. *Estate of Spies* (1948) 86 C.A.2d 87, 90, 194 P.2d 83 [presumption unnecessary, instrument was clearly testamentary].)

Another departure from this limitation is found in cases construing an apparently conditional will to save it from nullification. (See *supra*, §114.) And in *Estate of Holmes* (1948) 88 C.A.2d 360, 365, 198 P.2d 708, *supra*, §174, the presumption was invoked as an additional reason for concluding that an instrument found torn into pieces was not mutilated by the testator and therefore was not revoked.

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14 Witkin Sum. Cal. Law Wills § 205

[§ 205] Favoring Blood of Testator.

Although it is not declared in the statutes, the cases have established the rule that where a will is capable of two interpretations, under one of which the blood of the testator will take, and under the other the property will go to strangers, the interpretation by which the blood of the testator takes is preferred. (*Estate of Hartson* (1933) 218 C. 536, 540, 24 P.2d 171; *Estate of Boyd* (1938) 24 C.A.2d 287, 289, 74 P.2d 1049 [cousin preferred to charity]; *Estate of Nichols* (1962) 199 C.A.2d 783, 794, 19 C.R. 93, citing the text; *Estate of Garner* (1964) 228 C.A.2d 506, 513, 39 C.R. 577; cf. *Estate of Watts* (1918) 179 C. 20, 23, 175 P. 415 [where effect of language is clearly contrary, presumption has no force]; see 40 Cal. L. Rev. 63.)

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 - d. Favoring Validity of Will.

14 Witkin Sum. Cal. Law Wills § 206

[§ 206] Favoring Validity of Will.

If the will is open to a construction that makes it valid as well as one that makes it illegal, the construction that sustains it should be followed. (*Estate of Ingram* (1930) 104 C.A. 1, 8, 285 P. 365; *Estate of Spreckels* (1912) 162 C. 559, 569, 123 P. 371.) However, the construction must be a permissible one under the terms of the will; the court cannot substitute its own valid provision for a clearly invalid one. (*Estate of Fritze* (1927) 85 C.A. 500, 505, 259 P. 992; *Estate of Doane* (1923) 190 C. 412, 415, 213 P. 53.)

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14 Witkin Sum. Cal. Law Wills § 207

[§ 207] Allowing Gift by Implication.

"Technical words are not necessary to give effect to a disposition in an instrument." (*Prob.C. 21122*.) Hence, the intention to make a gift may be shown by language that does not amount to the usual words of devise or bequest, as where there is a recital or a direction that necessarily implies a gift. (See *Estate of Blake* (1910) 157 C. 448, 466, 108 P. 287 ["Bequests by implication have from remote times been sustained where no direct language in a will is found to support them but where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest"]; *Estate of White* (1948) 84 C.A.2d 409, 416, 190 P.2d 968; *Estate of Hubbard* (1954) 122 C.A.2d 942, 947, 266 P.2d 196; *Estate of Nichols* (1962) 199 C.A.2d 783, 794, 19 C.R. 93, citing the text; *Estate of Campbell* (1967) 250 C.A.2d 576, 582, 58 C.R. 723; 73 A.L.R.2d 484 [gift by implication after estate during life or until marriage, where property is expressly given over at death and first taker marries, or vice versa]; 80 Am.Jur.2d (2002 ed.), Wills §1187 et seq.; cf. *Brock v. Hall* (1949) 33 C.2d 885, 888, 206 P.2d 360, 13 Summary (10th), Trusts, §313 [doctrine applied to inter vivos trust].)

The simplest example is such a short expression as "to A, \$ 100." (*Estate of Weber* (1926) 76 C.A. 723, 725, 245 P. 776.) And an unqualified gift of the rents, issues, and profits of a fund or property may amount to a gift of the fund or property itself. (*Estate of Franck* (1922) 190 C. 28, 32, 210 P. 417.)

Where the will makes a contingent gift to B, with a gift over to C if B dies without issue, but contains no provision covering the situation where B dies with issue, the obvious intent of the testator in most cases is that C does not get the property if B has issue and dies. Hence, the courts will usually raise a gift by implication to the issue of B. (*Estate of Blake*, supra; *Rest., Property* §272.)

However, a strong showing of the testator's intention is required to imply the gift. (*Estate of Swan* (1936) 5 C.2d 635, 639, 55 P.2d 1171; *Estate of Vizelich* (1933) 129 C.A. 347, 353, 18 P.2d 773; *Estate of Ottovoggio* (1944) 62 C.A.2d 880, 884, 145 P.2d 700; *Estate of Kincaid* (1959) 174 C.A.2d 84, 88, 344 P.2d 85 [gift cannot be based on conjecture, where gift subject to express condition precedent is not fulfilled].)

In *Estate of Maxwell* (1958) 158 C.A.2d 544, 322 P.2d 1018, the testator gave token gifts to his grown children by a previous marriage, and bequeathed the remainder "to my wife ... and in the event of her death occurring at the same

time as my own," to their two young children. The second wife predeceased him, thus creating a contingency not provided for. *Held*, the decedent died intestate except as to the widow's share of a third surviving wife. The purpose of the provision as it read was explainable by the circumstances then existing, and there was no evidence in the will disclosing any intention to make the gift to the younger children effective if the wife died first. (158 C.A.2d 548.)

No gift will be implied where it would contradict other express unambiguous provisions. (*Estate of Page* (1967) 254 C.A.2d 702, 715, 62 C.R. 740.) And it has been held that a statement in a will referring to a conveyance by deed to a grantee cannot be treated as a devise by implication in the event the deed itself is ineffective. (*Estate of Case* (1938) 28 C.A.2d 264, 265, 82 P.2d 499 ["I have deeded my property. ... The deed must be placed on record"].)

West's Key Number Digest, Wills k.445.1 et seq.

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f. Will Speaks From Time of Testator's Death.

14 Witkin Sum. Cal. Law Wills § 208

[§ 208] Will Speaks From Time of Testator's Death.

(1) *In General.* Because the will is not to take effect until the testator's death, it is often said that it "speaks from the date of his death," and is construed as operating according to the state of things then existing. This rule is generally applied to the determination of property interests. In *Estate of Babb* (1927) 200 C. 252, 252 P. 1039, the testator first gave A all money in the bank "at the time of my decease," and then gave B all his interest in an estate in the process of distribution. *Held*, A was entitled to money from the estate that had been deposited in the bank before the testator's death. (200 C. 255.) (See 80 Am.Jur.2d (2002 ed.), *Wills* §1165 et seq.)

However, if the language used by the testator indicates an intention that the date of execution shall govern, this intention will be given effect. (See *In re Pearsons* (1893) 99 C. 30, 34, 33 P. 751 [devise of property to aunts, "which I hold jointly with them," thus referring to existing, not future conditions].) Another exception is usually recognized where the question relates to the identity of the beneficiary. If the will gives property to "Mrs. C," and between the date of execution and the date of death of the testator, Mr. C obtains a divorce or his wife dies and he remarries, the will is interpreted as giving the property to the person who was "Mrs. C" at the time of execution.

(2) *Where Law of Succession Has Changed.* If the testator makes a gift to "my heirs, as provided by the laws of the State of California," does the testator mean the law in effect at the time of execution of the will, or that in force at the later period when the testator dies or the gift takes effect? The general rule is that the "heirs" are the persons who are entitled to succeed to the testator's property under the statutes of succession in effect at the date of death, and the law at that time is applied. (See 26 Cal. L. Rev. 413, 432-434; *Rest.2d, Property (Donative Transfers)* §29.4; *Estate of Davison* (1950) 96 C.A.2d 263, 267, 215 P.2d 504 [applying later liberalized statute on charitable gifts to sustain gift].)

In *Estate of Wilson* (1924) 65 C.A. 680, 225 P. 283, a contrary result was reached on special facts. The testator made a will in 1896, with a provision for "my heirs," etc., which would have benefited her own relatives. When she died, a 1905 statute was in effect, providing for succession to certain property by relatives of a predeceased spouse. *Held*, in view of the circumstances, and the lack of any indication of an intention to adopt the unknown future statute, the beneficiaries should be determined by the prior law. (65 C.A. 687.) Thus, while the validity and effect of the will is determined by the law at the time of the testator's death, the construction of the language used may properly call for the application of the law existing at the time of execution. (See *Estate of Hotaling* (1946) 74 C.A.2d 898, 901, 170 P.2d

111 [change in law providing for proration of federal estate tax among all devises and bequests; law at time of execution was consulted in determining intention].)

West's Key Number Digest, Wills k.481

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g. Compliance With Internal Revenue Code.

14 Witkin Sum. Cal. Law Wills § 209

[§ 209] Compliance With Internal Revenue Code.

(1) *Statutory Framework.* Part 5 of Division 11 of the Probate Code (*Prob.C. 21500* et seq.) permits incorporation by reference of statutory provisions designed to conform wills, trusts, deeds, and other instruments to federal tax law. Part 5 has three Chapters:

(a) Chapter 1 (*Prob.C. 21500* et seq.) contains general provisions.

(b) Chapter 2 (*Prob.C. 21520* et seq.) contains marital deduction gift provisions designed to satisfy both federal estate tax and federal gift tax requirements. (See Law Rev. Com. Comments to *Prob.C. 21520*.)

(c) Chapter 3 (*Prob.C. 21540, 21541*) contains provisions relating to charitable remainder unitrusts, charitable remainder annuity trusts, and charitable lead trusts. (See 13 *Summary* (10th), *Trusts*, §310.)

(2) *Application.* Generally, *Prob.C. 21500* et seq. apply to distributions made on or after January 1, 1988, whether the transferor died before, on, or after that date. (*Prob.C. 21501*.) However, the statutes do not apply to an instrument the terms of which "expressly or by necessary implication make this part inapplicable." (*Prob.C. 21502(a)*.)

(3) *Incorporation by Reference.* "By an appropriate statement made in an instrument," a transferor may incorporate by reference any of the provisions of *Prob.C. 21500* et seq. (including amendments, unless expressly provided otherwise), "as though the language of the incorporated provision were set forth verbatim in the instrument." (*Prob.C. 21502(b)*.)

(4) *Construction of Instruments.* If an instrument contains a marital deduction gift or evidences an intent to create a charitable remainder unitrust, a charitable remainder annuity trust, or a charitable lead trust, the provisions of the instrument, including those applicable to fiduciaries, must be construed to comply with relevant provisions of the Internal Revenue Code. (*Prob.C. 21522, 21540, 21541*; see *Prob.C. 21500* ["Internal Revenue Code" defined]; *Prob.C. 21520* ["marital deduction" and "marital deduction gift" defined].)

(5) *Other Statutory Provisions.* The statute contains specific provisions with respect to the following:

- (a) The application of a formula clause intended to eliminate or minimize federal estate tax (*Prob.C. 21503*).
- (b) The computation of the maximum marital deduction for instruments executed before the effective date of the Economic Recovery Tax Act (September 13, 1981) (*Prob.C. 21523*).
- (c) The terms of marital deduction trusts (*Prob.C. 21521, 21524*).
- (d) Survivorship requirements for marital deduction gifts (*Prob.C. 21525*).
- (e) Protection for a good faith qualified terminable interest property (QTIP) trust election (*Prob.C. 21526*).

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4. Gifts Dependent on Contingency.

a. In General.

1. Nature and Types of Conditions.

14 Witkin Sum. Cal. Law Wills § 210

[§ 210] Nature and Types of Conditions.

(1) *Presumption of Vesting.* There is a general presumption that gifts vest at the time of the testator's death, when the will becomes effective. (See *In re De Vries* (1911) 17 C.A. 184, 190, 119 P. 109; *Estate of Ritzman* (1921) 186 C. 567, 569, 199 P. 783; *Estate of Backesto* (1925) 71 C.A. 409, 416, 235 P. 670; *Estate of Norris* (1947) 78 C.A.2d 152, 166, 177 P.2d 299; *Estate of Liddle* (1958) 162 C.A.2d 7, 14, 328 P.2d 35; 40 Cal. L. Rev. 49, 65; 12 *Summary* (10th), *Real Property*, §142.) The testator may, however, by appropriate language, make a contingent gift, i.e., one that depends upon the occurrence of an uncertain event. (See *Estate of Blake* (1910) 157 C. 448, 459, 108 P. 287; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1169 et seq.; C.E.B., 1 *Will Drafting* 3d, §12.21 et seq.; *infra*, §213 et seq.)

(2) *Condition Precedent.* The condition may be precedent, preventing the interest from vesting until it happens. (See *Estate of Catlett* (1953) 117 C.A.2d 315, 317, 255 P.2d 464 [condition that successful arrangement be made to give testator board and lodging at home of beneficiary]; *Estate of Anderson* (1955) 135 C.A.2d 642, 647, 287 P.2d 825 [trust to continue so long as testator's son was employed in laundry; employment held condition precedent to operation of trust]; 12 *Summary* (10th), *Real Property*, §137.) If the time for performance of the condition is stated, this tends to show that it is precedent. (*Estate of Alpers* (1967) 251 C.A.2d 40, 46, 58 C.R. 841.)

(3) *Condition Subsequent.* The condition may be subsequent, in which case the interest vests, subject only to defeasance upon the happening of the condition. (See *Newlove v. Mercantile Trust Co. of San Francisco* (1909) 156 C. 657, 661, 105 P. 971; 12 *Summary* (10th), *Real Property*, §18; 54 *A.L.R.4th* 1098 [testamentary directive to devisee to pay sum to third party as constituting charge or imposing personal liability].) (On validity of condition despite ignorance of it, see *infra*, §211.)

(4) *Legal Object Required.* In all cases, the condition must have a legal object or it will fail. (See 14 *A.L.R.3d* 1219 [validity of gift conditioned on divorce or separation]; 22 *A.L.R.3d* 771 [gift referring to donee's services to testator as absolute or conditional]; 25 *A.L.R.3d* 762 [gift conditioned on donee's support of testator]; 28 *A.L.R.3d* 1325 [gift conditioned on beneficiary's remaining married]; 74 *A.L.R.3d* 1095 [effect of invalid gift conditioned on divorce where there is alternative provision conditioning gift upon spouse's death]; 89 *A.L.R.3d* 984 [condition that devisee or legatee renounce, embrace, or adhere to specified religious faith]; 11 *A.L.R.4th* 940 [gift to child conditioned on specified

arrangements for parental control]; 12 *Summary* (10th), *Real Property*, §190 et seq. [validity of conditions restricting property interests].)

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2. Impossibility or Ignorance of Condition.

14 Witkin Sum. Cal. Law Wills § 211

[§ 211] Impossibility or Ignorance of Condition.

Former Prob.C. 142 expressly recognized both substantial compliance and the excuse of impossibility; the statute was repealed in 1985, and the matter is now left to case law development. (See *40 A.L.R.4th 193* [effect of impossibility of performance of condition precedent].)

In *Estate of Nathan (1949) 89 C.A.2d 789, 201 P.2d 865*, the will gave a \$ 5,000 legacy to a household servant, "in the event she shall have been in my employ during the five years following the date of this Will and living at the time of my death." The testator died a year and a half after making the will. *Held*, the legacy vested. The testator's general purpose was to reward a faithful employee, and the liberal interpretation authorized by former Prob.C. 142 has been uniformly followed by decisions upholding legacies to employees. Accordingly, the word "during" should not be construed as meaning "throughout" or "for." (*89 C.A.2d 792.*)

Former Prob.C. 142 also recognized the excuse of impossibility where, unknown to the testator, the condition is impossible of fulfillment (unless the condition was "the sole motive" for the disposition). The statute was silent on the situation where the condition could be performed but the beneficiary has no knowledge of it. The general rule is that ignorance does not render the condition ineffective. This rule, with its harsh effect, was approved in *Estate of Alpers (1967) 251 C.A.2d 40, 58 C.R. 841*. The testator's sons and daughter were disputing the ownership of certain property. She devised land to the daughter, but in a later clause declared that, unless the daughter within 1 year voluntarily and without consideration released her claim to the other property, "she shall not receive any part of the devise." The daughter was never informed of this condition. *Held*, nevertheless, the devise was forfeited for noncompliance. (*251 C.A.2d 47.*)

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b. Condition and Gift Over.

14 Witkin Sum. Cal. Law Wills § 212

[§ 212] Condition and Gift Over.

Suppose the gift is to A, B, and C, but if any one dies, his share is to go to D. The language is of present gift with a substitutional provision or "gift over" when the condition (death) happens; under the general rule the condition is treated as subsequent, and the gift is presumed to vest, subject to defeasance. (*Rest., Property* §253; see *Rest., Property* §§254, 260; 74 *A.L.R.3d* 1108 [gift over on spouse predeceasing testator, where gift to spouse fails because of divorce].)

The California law favors the vesting of estates, unless a contrary intention is clearly manifested. (See *supra*, §210.) However, it has been held that a "gift over" clause in a will is a strong indication that the testator did not intend an immediate vesting of interest in the beneficiary at the time of the testator's death. (*Estate of Blake* (1910) 157 C. 448, 464, 108 P. 287 [gift to daughters at age 30, with gift over to survivors if any died without issue]; *Anglo Calif. Nat. Bank of San Francisco v. Kidd* (1943) 58 C.A.2d 651, 654, 137 P.2d 460; *Estate of Faris* (1949) 89 C.A.2d 515, 517, 201 P.2d 63; see 40 *Cal. L. Rev.* 49.)

Conversely, the absence of a gift over tends to indicate a vested gift. (*Estate of Yates* (1915) 170 C. 254, 256, 149 P. 555; *O'Neil v. Ross* (1929) 98 C.A. 306, 329, 277 P. 123; *Estate of Riemer* (1945) 69 C.A.2d 634, 637, 159 P.2d 677.)

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c. Contingency of Survival.

1. Nature of Requirement.

14 Witkin Sum. Cal. Law Wills § 213

[§ 213] Nature of Requirement.

The requirement of survival as a contingency may arise in various ways:

(1) *Express Language*. The testator may use express language of survival, by making the gift to those "who survive," or "who are living," etc. (See *Rest., Property* §250; *Estate of Jameson* (1949) 93 C.A.2d 35, 38, 208 P.2d 54 ["if my husband ... survives distribution of my estate"; but see *infra*, §216]; *Estate of Rankin* (1953) 118 C.A.2d 184, 187, 257 P.2d 95; Cal. Transactions Forms, 1 Estate Planning §§6:21 et seq., 6:105 et seq.; C.E.B., 1 Will Drafting 3d, §12.21 et seq.; 49 Cal. L. Rev. 297, 431.)

(2) *Gift to Heirs of Living Person*. The requirement is implied from a gift to heirs of a living person. Until that person dies, he or she has no heirs, and the identity of those who are to take is uncertain. Hence, those who take must survive the ancestor, except where the term "heirs" is not used in the technical sense, but means heirs apparent, or children, etc. (See *Rest., Property* §249.)

(3) *Gift of Alternate Remainder*. The requirement is also implied from a gift of a remainder in the alternative, e.g., to "B or his children." B must survive the life tenancy or other preceding interest in order to take; if B dies before the life tenant, B's children take. (*Rest., Property* §252; cf. *Estate of Norris* (1947) 78 C.A.2d 152, 162, 177 P.2d 299 [discussing possible application of *Rest., Property* §252, but holding the particular remainder vested]; 36 Cal. L. Rev. 129.)

West's Key Number Digest, Wills k.546.1 et seq.

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c. Contingency of Survival.

2. Statutory Rules.

14 Witkin Sum. Cal. Law Wills § 214

[§ 214] Statutory Rules.

A transferee who fails to survive the transferor of an at-death transfer or who fails to survive until a future time required by the instrument does not take under the instrument. (*Prob.C. 21109(a)*.) (See *48 Hastings L. J.* 667 [The Hazards of Tinkering with the Common Law of Future Interests]; Cal. Transactions Forms, 1 Estate Planning §§6:21 et seq., 6:105 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §1.2 [requirement of surviving the decedent].)

If it cannot be determined by clear and convincing evidence that the transferee survived until a future time required by the instrument, the transferee is deemed not to survive until the required future time. (*Prob.C. 21109(b)*.) (See *Prob.C. 220* [if title depends on priority of death and it cannot be established by clear and convincing evidence that one person survived another, the property of each is dealt with as if that person survived the other].) (See 56 Proof of Facts 3d 255 [proof of survivorship of common disaster].)

Subject to *Prob.C. 21110* (anti-lapse statute; *infra*, §263), if a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, and no alternate disposition is provided, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest. (*Prob.C. 21111(b)*.) A transfer of "all my estate" or words of similar import is a residuary gift for purposes of *Prob.C. 21111*. (*Prob.C. 21111(c)*.)

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c. Contingency of Survival.

3. Survival of Life Tenant.

14 Witkin Sum. Cal. Law Wills § 215

[§ 215] Survival of Life Tenant.

If it is found that the condition precedent of survival is imposed by the will (see *supra*, §213), the next question is the time at which it is to be determined. Thus, suppose the will gives property to L for life, with remainder to the children of L who survive him; must the children merely survive the testator or also survive the life tenant? The general rule is that, in the absence of any other indication by the testator, the controlling time is when the preceding estate terminates and the remainder is to be distributed; hence, the children must survive the life tenant in order to take a vested estate. (See *Rest., Property* §251; 49 *Cal. L. Rev.* 440; 20 *A.L.R.2d* 830 [words of survivorship in will disposing of estate in remainder as referring to death of testator or to termination of intervening estate]; cf. *Estate of Ash* (1966) 64 *C.2d* 497, 501, 50 *C.R.* 549, 413 *P.2d* 149 [survival of multiple life tenants].)

In *Estate of Dolsen* (1949) 90 *C.A.2d* 575, 203 *P.2d* 775, the testator devised land to three named sons, equally, adding that, if any "predecease me," his share should go to the survivors, and, "in the event of the decease" of any son, the survivors should receive his share. All sons survived the testator, but one died afterwards. *Held*, the sons received a life estate with remainder to the survivors. Former Prob.C. 122 (stating that words referring to death "simply" relate to time of testator's death) was inapplicable, for the will referred to survival in two contingencies: death of the testator and death of any son subsequently. Hence, the interest of the dead son terminated on his death. (90 *C.A.2d* 577.)

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4. Survival Until Distribution.

14 Witkin Sum. Cal. Law Wills § 216

[§ 216] Survival Until Distribution.

Even though a gift is expressly conditional on the taker surviving until distribution of the estate (see *supra*, §213), policy favors an earlier vesting where there has been unreasonable delay in preparing the estate for distribution. (See 59 *A.L.R.3d* 1043 [validity and construction of bequest and limitation over to another in event that original beneficiary dies before distribution, payment, or receipt].)

In *Estate of Taylor* (1967) 66 *C.2d* 855, 59 *C.R.* 437, 428 *P.2d* 301, the testator left one-third of the residue of her estate to E.G. if she survived distribution of the estate; but, if she predeceased distribution, this one-third was to go to H.D. and W.D. H.D. became executor in December 1963; he petitioned for final distribution on March 4, 1965; hearing on the petition was set for March 29, but E.G. died March 15. *Held*, E.G.'s interest vested in September 1964, when distribution could have been had; hence, the one-third interest went to her estate.

(a) There was evidence to support the probate judge's findings that H.D., the executor, knew that E.G. was ill and without funds; she requested expedition of distribution; there was sufficient cash to pay all taxes, and it was unnecessary to sell many of the securities which had been held for sale in the fall of 1964; hence, the overall delay was unreasonable. (66 *C.2d* 857.)

(b) The court disposed of several contentions of H.D. and W.D. as follows: (1) That E.G. could have petitioned for preliminary distribution. She was under no obligation to do so. (2) Only H.D. acted wrongfully (as executor), hence half of one-third should go to W.D. The rule is not designed to prevent an executor from profiting by his own wrong but to vest the estate at the time when distribution should have occurred. (3) The rule results in undesirable uncertainty. A clause requiring survivorship to distribution itself creates uncertainty, and little or none is added. (4) Unreasonable delay could be regarded as an excuse of the condition precedent, or survivorship to the time when distribution was possible could be considered a substantial compliance. (66 *C.2d* 858.) (See *Estate of Huber* (1973) 31 *C.A.3d* 126, 132, 107 *C.R.* 89 [following *Taylor*].)

Estate of Germond (1971) 4 *C.3d* 573, 94 *C.R.* 153, 483 *P.2d* 769, distinguished *Taylor* and reached a different conclusion. The testator left her property to her sister, but added the provision that, in the event of her death "prior to

distribution to her of my estate," the whole should go to 10 named charities. The sister died 22 1/2 months after the death of the testator. Distribution had not yet been made, but the probate court, following *Taylor*, found that the estate could have been distributed about 15 months after the testator's death, and ordered distribution to the heirs of the sister. *Held*, reversed. Although there was evidence that the executor could have prepared and filed the federal estate tax return more promptly, even if he had not delayed it he could not have distributed the estate prior to the sister's death "without proceeding in other respects in a manner not required by reasonable standards of probate practice." (4 C.3d 577.) The court carefully examined all of the problems facing the executor, and concluded that "a reasonably prompt executor" could not have obtained distribution before the sister's death. (4 C.3d 580 and footnote 3.)

In *Estate of Justesen* (1999) 77 C.A.4th 352, 91 C.R.2d 574, decedent left one-half her estate to S, with gifts to others if S did not survive distribution. When S died 22 months later, the estate had not yet been distributed. *Held*, S's estate was entitled to the devise. Both the executor's delay in filing the inventory and appraisal and the probate court's delay in resolving a claim to the remaining estate were unreasonable and prejudicial. S's contingent interest in the devise vested at the time distribution should have been made. (77 C.A.4th 358, following *Estate of Taylor*.)

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c. Contingency of Survival.

5. Language That Does Not Create Contingency.

14 Witkin Sum. Cal. Law Wills § 217

[§ 217] Language That Does Not Create Contingency.

(1) *General Rule.* Generally speaking, language of a present gift, and the absence of indications of a contingency (see *supra*, §213), will result in a different construction. (*Rest., Property* §§255, 256, 257; see *Estate of Ferry* (1961) 55 C.2d 776, 786, 13 C.R. 180, 361 P.2d 900 [express words of survival used for one interest, none implied as to other that was not so conditioned]; 49 Cal. L. Rev. 438.)

(2) *Language of Present Gift With Postponed Possession.* Where there is language of a present gift, an additional provision merely postponing possession does not impose the contingency of survival. Thus, suppose the will gives a sum of money to A, but adds the qualification "payable when A reaches the age of 21," or similar language. The donee takes a vested interest under the language of present gift, and the qualification is treated as a mere postponement of possession. Hence, if A dies before 21, A's successors take. (See *Rest., Property* §257; *Estate of Hamon* (1922) 60 C.A. 154, 158, 212 P. 399 [gift to nephew, then later provision that it should be paid to him on his marriage or 30th birthday]; *Estate of Riemer* (1945) 69 C.A.2d 634, 635, 159 P.2d 677; *Estate of Norris* (1947) 78 C.A.2d 152, 166, 177 P.2d 299; 36 Cal. L. Rev. 129; 40 Cal. L. Rev. 51, 53; 30 A.L.R.2d 127 [gift on marriage as vested or contingent].)

But where a will provided for payments to a son at various ages, with a gift over to another if he died before reaching any specified age, it was held that the provision was conditional, and the gift did not vest. (*In re Rogers* (1892) 94 C. 526, 532, 29 P. 962; see 40 Cal. L. Rev. 51.)

(3) *Language of Vesting.* The testator's use of the words "shall vest" or "shall belong to" does not necessarily imply a contingency. (See 40 Cal. L. Rev. 61; 12 Summary (10th), *Real Property*, §142.) In *Estate of Easter* (1944) 24 C.2d 191, 148 P.2d 601, a decree of distribution, construing the will, created a trust for the widow's life. It was further provided that at her death the corpus "shall go to and vest in the heirs at law," and the trustee was directed "to convey, deliver and pay over" to them. *Held*, the remainders were contingent until termination of the trust. (24 C.2d 195.) (See dissent, 24 C.2d 196; 32 Cal. L. Rev. 320; 40 Cal. L. Rev. 61.) But in *Estate of Stanford* (1957) 49 C.2d 120, 130, 315 P.2d 681, *Easter* was distinguished on the ground that the court was giving effect to a decree and not interpreting the language of the original will. (Cf. *Estate of Haney* (1959) 174 C.A.2d 1, 8, 344 P.2d 16 [use of words "shall vest" in attorney-drawn will may show clear intention to impose condition of survival].)

(4) *Contingent Gift of Corpus and Unconditional Gift of Income.* Even where the language is not of present gift, but provides for a postponed and apparently contingent gift of the *corpus* of property, it may be considered vested if accompanied by an unconditional gift of the entire interim income. Thus, the will gives property to A "when he reaches the age of 21" (apparently contingent, with requirement of survival), but also gives him the income of the property immediately, i.e., from the time the will takes effect. The gift of the income indicates that the corpus also is intended to vest, with only its possession postponed. (*Rest., Property* §258; see *Rest., Property* §259; *Estate of Klein* (1937) 23 C.A.2d 708, 711, 74 P.2d 79; cf. *Estate of Blake* (1910) 157 C. 448, 464, 108 P. 287 [rule recognized, but held inapplicable where language of gift was deemed clearly contingent].)

(5) *Conditional Language Indicating Time of Possession.* An extremely liberal interpretation in favor of vesting was given in *Estate of Welch* (1948) 83 C.A.2d 391, 188 P.2d 797. The testator devised half his estate to his daughter in trust for his grandson (son of a predeceased son). The trustee was authorized to devote any part of the income or principal to the care and maintenance of the beneficiary, to accumulate income not used, and to convey the corpus and accumulated income to the beneficiary at age 25. The will expressly declared that the trustee was given unrestricted control over principal and income, and that the beneficiary "shall have no vested right in the net income or principal of said trust estate until he shall have attained the age of twenty-five years." The beneficiary, a member of the Army Air Forces, was killed in action at age 20, and left a surviving wife and child. *Held*, reversing the trial court, the beneficiary's interest was vested and went to the widow and child. The language quoted above related only to time of possession, and was not used in its technical sense. (83 C.A.2d 397.) (See *Rest., Property* §258, Comment f [force of construction in favor of vesting, where postponed gift of corpus is accompanied by immediate gift of income, is weakened by a direction to accumulate income above that necessary for support].)

(6) *Direction To Divide and Pay Over.* Suppose the will gives property to the testator's wife for life, and then provides that upon her death it shall be divided and paid over in equal shares to the testator's brothers and sisters. Does this mean that the latter must survive the life tenant in order to take, i.e., is the condition of survival implied? Under the "divide and pay over rule" the condition is implied, but the better view, carrying out the policy in favor of vesting, repudiates the rule and treats the provision as one postponing possession only, and not vesting. (*Rest., Property* §260; see 16 A.L.R.2d 1383 [divide and pay over rule for purposes of determining vested or contingent character of estate]; *supra*, §212.)

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4. Gifts Dependent on Contingency.

d. Contingency of Death Alone.

14 Witkin Sum. Cal. Law Wills § 218

[§ 218] Contingency of Death Alone.

(1) *In General.* If a gift is made contingent on death, the contingency is certain to happen, and the only question is the time of death. (See *80 Am.Jur.2d* (2002 ed.), *Wills §1192* et seq.; *51 A.L.R.2d* 205 [construction and effect of gift over in case of death].)

(2) *Time of Death.* The basic rule, applicable to the simple case where there is no postponement of possession, makes the time of the testator's death controlling. Thus, the testator gives property "to B and his heirs, but if B dies, then to C." C gets a vested interest if B dies before the testator. (*Rest., Property §263.*)

(3) *Time of Possession.* If possession is postponed, the time of possession, i.e., the time when the preceding estate terminates, is controlling. Thus, T gives property "to L for life, remainder to C and his heirs, but if C dies, then to D." D gets a vested interest if C dies before termination of the life estate, even though C outlives the testator; the heirs of C take nothing. (*Rest., Property §264*; see *Estate of Thompson* (1937) *18 C.A.2d* 680, 683, *64 P.2d* 984 [court reached same conclusion on basis of testator's intent rather than rule of construction]; *Estate of Young* (1932) *215 C.* 127, 132, *8 P.2d* 846 [postponement of possession by operation of law].)

West's Key Number Digest, Wills k.537.1 et seq.

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e. Contingency of Death Without Issue.

1. In General.

14 Witkin Sum. Cal. Law Wills § 219

[§ 219] In General.

Where the gift is "to B and his heirs, but if B dies without issue, then to C," the jurisdictions are in conflict on the controlling time of B's death. (See *Rest., Property* §§265, 266; on meaning of "issue," see *Prob.C.* 50, *supra*, §49.)

(1) *Theory of Successive Gifts.* Under one view, the two gifts are successive; C takes at the death of the first taker (B), whenever it occurs. The fact that B outlives the testator makes no difference; if B dies without issue surviving him at the time of his own death, C gets the property. (*Rest., Property* §267; *Estate of Briggs* (1921) 186 C. 351, 356, 199 P. 322; *Estate of Zeiger* (1937) 21 C.A.2d 154, 155, 68 P.2d 730.) Although California apparently follows this view, there are decisions, in part influenced by other factors, that make the time of the testator's death determinative. (See *Smith v. Wood* (1933) 217 C. 541, 544, 20 P.2d 48 [construing decree of distribution of foreign court]; *infra*, §220.)

(2) *Theory of Alternate Gifts.* The other view is that the two gifts are alternative, the second one being substitutional, to prevent lapse of the gift on death of the first taker, just as if it were the simple case of death only; e.g., gift to B, and in case of his death, to C. Under this view, the time of the testator's death is controlling, and if B survives the testator, he gets a vested estate, because he did not die without issue during the testator's lifetime. Even though B later dies without issue, C gets nothing. (See criticism, *Rest., Property* §266, Comment d.)

West's Key Number Digest, Wills k.545(1)

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e. Contingency of Death Without Issue.

2. Where Distribution or Possession Is Postponed.

14 Witkin Sum. Cal. Law Wills § 220

[§ 220] Where Distribution or Possession Is Postponed.

(1) *Gift in Trust or Subject to Defeasance.* "To B and his heirs," in trust or subject to other control or defeasance for a specified period, "but if B dies without issue, then to C." Here, distribution of the estate is postponed, and the controlling time is when the period ends. B must outlast the period to get a vested interest, and if he does, C takes nothing, even though later B dies without issue. (*Rest., Property* §268; see *Estate of Hamon* (1922) 60 C.A. 154, 160, 212 P. 399; *Estate of Vizelich* (1933) 129 C.A. 347, 350, 18 P.2d 773 [date of final decree of distribution determined vesting]; *Estate of Faris* (1949) 89 C.A.2d 515, 517, 201 P.2d 63 [gift to son to be turned over at age 25, and if he dies without issue then to brothers; held that gift over takes effect only if son dies without issue prior to 25]; 73 A.L.R.2d 466 [construction and effect of gift over in event of death without issue and another contingency].)

(2) *Gift Postponed by Intervening Estate.* "To B for life (or years), remainder to C and his heirs, but if C dies without issue, then to D." The general rule makes the termination of the preceding estate the controlling time. If C outlives B's life estate or estate for years, he takes it absolutely and D gets nothing. (*Rest., Property* §269; see 26 A.L.R.3d 407 [construction of gift over if remainderperson dies without issue].)

In California, the minority and much criticized theory of "indefinite failure of issue" (see *Rest., Property* §266, Comment a) was followed at one time. In *Estate of Carothers* (1911) 161 C. 588, 119 P. 926, T gave property to his wife for life, at her death to vest absolutely in his son W; and in case W died without issue, to T's son J, and at his death to his daughter E. T died, his wife died, and W, claiming absolute ownership (on termination of the life estate) conveyed it to third persons. Later W died without issue, J died, and the heirs of E claimed. *Held*, the heirs of E were entitled. W's estate vested on death of the life tenant, but subject to defeasance on his subsequent death without issue. Although the court found additional evidence of the actual intention of the testator, it declared that in the absence of contrary intention the proper construction was death without issue at any time, and not death without issue during the life tenancy. (161 C. 595.) (See *Musson v. Fuller* (1943) 57 C.A.2d 5, 8, 133 P.2d 682; 31 Cal. L. Rev. 605.)

(3) *Conditions Regarding Issue.* "A condition in a transfer of a present or future interest that refers to a person's death 'with' or 'without' issue, or to a person's 'having' or 'leaving' issue or no issue, or a condition based on words of similar import, is construed to refer to that person's being dead at the time the transfer takes effect in enjoyment and to

that person either having or not having, as the case may be, issue who are alive at the time of enjoyment." (*Prob.C. 21112*, based on former *Prob.C. 6149*.)

The Legislative Committee Comment to former *Prob.C. 6149* points out that the statute changed the indefinite failure of issue rule in *Estate of Carothers*, supra, and adopts the majority Restatement position. The Comment offers the following illustrations: "[I]f the devise is to A for life, remainder to B and his heirs, but if B dies without issue, then to C, the devise is read as meaning if B dies before A without issue living at the death of A. If B survives A, whether or not B then has living issue, B takes the devise absolutely. If B predeceases A with issue then living but at the time of A's subsequent death B does not have living issue, the devise goes to C."

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5. Gift to a Class.

a. In General.

14 Witkin Sum. Cal. Law Wills § 221

[§ 221] In General.

Frequently, a will makes a gift to the "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "descendants," "family," etc., of the testator or some other person. Does the testator intend the gift to go to the group or class of persons which may, at the time the gift takes effect (e.g., at death of the testator), increase or decrease in number by birth or death of additional members, or does the testator intend to refer only to particular individuals constituting the group at the time of execution of the will? The question is one of intention, to be gathered from the language of the will and the surrounding circumstances, but where nothing appears to contradict it, the inference from the use of group terms is that a gift to a class is intended. (See *Estate of Henderson* (1911) 161 C. 353, 360, 119 P. 496 ["residuary legatees"]; *Estate of Backesto* (1925) 71 C.A. 409, 417, 235 P. 670 ["children" of several persons]; *Estate of Watson* (1926) 77 C.A. 493, 494, 246 P. 1087 ["nieces and nephews"]; *Estate of Clark* (1944) 64 C.A.2d 636, 641, 149 P.2d 465; *Estate of Haney* (1959) 174 C.A.2d 1, 12, 344 P.2d 16; *Estate of Doyle* (1962) 202 C.A.2d 434, 440, 21 C.R. 123; *Fuller v. Fuller* (1964) 229 C.A.2d 532, 537, 40 C.R. 393, *infra*, §233, citing the text; *Rest.2d, Property (Donative Transfers)* §25.1 et seq.; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1205 et seq.; Cal. Transactions Forms, 1 Estate Planning §§6:6 et seq., 6:60 et seq.; C.E.B., 1 Will Drafting 3d, §12.27 et seq.; 27 *Cal. L. Rev.* 759; 40 *Cal. L. Rev.* 57; 61 *A.L.R.2d* 212 [gift to class]; 74 *A.L.R.3d* 1073 [gift to person or persons meeting specified qualifications and authorizing another to determine who qualifies].)

Among the various indications of a contrary intent are two that are common:

(1) Where the testator designates the class, but also names the individuals who comprise it. This justifies the inference that the testator intended that only those persons should take, and referred to the class merely for purposes of identifying the individuals. (*Estate of Murphy* (1909) 157 C. 63, 67, 106 P. 230 [gift to be "equally divided among the four children of my late sister," naming each one]; *Estate of Sullivan* (1939) 31 C.A.2d 527, 529, 88 P.2d 225; *Estate of Burnett* (1941) 42 C.A.2d 427, 430, 109 P.2d 26; *Estate of Moore* (1955) 135 C.A.2d 122, 134, 286 P.2d 939 [holographic will, gift "to Carrie D. Griffin and her sister, Anna M. Davis, equally divided"]; *Rest., Property* §280; 13 *A.L.R.4th* 978 [gift to persons individually named but also described in terms of relationship to testator or another as class gift].)

(2) Where the testator numbers those who take (e.g., "to my two children"), this may be as sufficient an

identification of the individuals as naming them, and it tends to refute the inference of a class gift. (*Rest., Property* §280, Comment c; see *Estate of Murphy*, supra.)

In *Estate of Hermon* (1995) 39 C.A.4th 1525, 46 C.R.2d 577, decedent's will, executed during marriage, made contingent gifts to a class including his "spouse's children" and "spouse's issue." Decedent was later divorced and then died without changing his will. *Held*, the children of the former spouse were not entitled to share in the class gift. The intention of the testator is controlling, and nothing in the will shows an intention to provide for the children or issue of a former spouse. "We think it a more logical construction to hold that when a testator provides for his spouse's children, he normally intends to exclude children of an ex-spouse after dissolution, unless a contrary intention is indicated elsewhere in his will." (39 C.A.4th 1531.) (See *Estate of Jones* (2004) 122 C.A.4th 326, 335, 18 C.R.3d 637, citing the text [following *Estate of Hermon*; residuary devise to testator's adult stepdaughters in will written before dissolution was class gift, which failed where marital settlement agreement showed testator's intent to make clean break with former spouse].)

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5. Gift to a Class.
b. Restatement.

14 Witkin Sum. Cal. Law Wills § 222

[§ 222] Restatement.

Volume 3 of the Restatement Second, Property (Donative Transfers) was published in 1988. Part VI of Division II, entitled "Class Gifts," is divided into the following topics and chapters:

Topic 1. Class Gifts to Others Than "Heirs" and the Like.

Chapter Twenty-Five. Primary Meaning of Class Gift Term. (§§25.1-25.10.)

Chapter Twenty-Six. Time Within Which a Class Member Must Be in Being in Order To Share in the Class Gift--Increase in the Class Membership. (§§26.1-26.2.)

Chapter Twenty-Seven. A Class Member Fails To Meet a Requirement of Survival or To Fulfill Some Other Condition--Decrease in the Class Membership. (§§27.1-27.3.)

Chapter Twenty-Eight. Share of Each Class Member. (§§28.1-28.5.)

Topic 2. Class Gifts to Heirs and the Like.

Chapter Twenty-Nine. Gifts to Heirs and the Like as Words of Purchase. (§§29.1-29.8.)

Chapter Thirty. Effect of Limitations to "Heirs," "Heirs of the Body," "Next of Kin," or "Relatives" Under the Rule in Shelley's Case and the Doctrine of Worthier Title. (§§30.1-30.2.)

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5. Gift to a Class.

c. Proportions in Which Members Take.

1. Case Law Background.

14 Witkin Sum. Cal. Law Wills § 223

[§ 223] Case Law Background.

(1) *Per Capita Distribution*. The general rule, in the absence of evidence of a contrary intention, is that the members of the class take *per capita* and not *per stirpes*, i.e., they share equally. This rule has been applied in California not only where there is a gift to a single class, but also where a gift is made to several classes (e.g., the children of several persons), and where the gift is to a person and the children of another person. (*Estate of Backesto* (1925) 71 C.A. 409, 412, 235 P. 670 [children of several persons]; *Estate of Rauschenplat* (1931) 212 C. 33, 35, 297 P. 882 [to sister, children of deceased half brother, and another person]; *Estate of Carroll* (1944) 62 C.A.2d 798, 801, 145 P.2d 644 [residue left "equally between" niece and sons of W. B.]; see *Rest.2d, Property (Donative Transfers)* §28.1 et seq.; 80 Am.Jur.2d (2002 ed.), *Wills* §1237 et seq.; 19 Cal. L. Rev. 442.)

(2) *Per Stirpes Distribution*. "We review the final apportionment of the fortune [\$ 40,000,000] of Henry Miller amassed from a fabulous empire of land and cattle and preserved for his posterity within the impregnable walls of a trust for half a century." (*Lombardi v. Blois* (1964) 230 C.A.2d 191, 193, 40 C.R. 899.)

In *Lombardi*, the testator, by an inter vivos trust and a substantially identical testamentary trust, provided as follows: (a) Income to daughter Nellie Nickel and her husband J. Nickel for their lives, and to survivor. (b) On their deaths, income to their children per stirpes during lives of children living at time of testator's death; on death of any child leaving issue, share to go to issue, but if no issue, to other children and issue per stirpes and not per capita. (c) On death of Nellie and J. Nickel and all children living at testator's death, corpus to descendants of Nellie and J. Nickel "per stirpes and not per capita."

The testator died in 1916; surviving were Nellie and J. Nickel, and three children (George, J. Jr., Beatrice). J. Nickel died in 1937, and all income was paid to Nellie. Nellie died in 1944, and income was paid to George, J. Jr., and Beatrice. J. Jr. died in 1959, and income was paid to George and Beatrice. George died in 1962, and income was paid one-half to Beatrice, and one-half to George's issue (Sally, George Jr., Mary, one-eighth each; one-eighth in equal shares to Nina, as surviving issue of John, fourth child of George who predeceased him in 1954). Beatrice, the last survivor of the children living at the testator's death, died in 1962, and the trust terminated.

The "descendants" entitled to the corpus were in two groups: (a) Issue of Nellie's son George (Nickel remaindermen); (b) issue of Nellie's daughter Beatrice (Bowles remaindermen).

Held, the testator intended that the corpus should go to the descendants of his daughter and her husband "by roots, stocks or families and not by heads, individually, or in equal shares. Literally, the descendants take through or as representatives of their families." (230 C.A.2d 198.) Because the descendants of Nellie and her husband emanate from two roots--those of George and Beatrice, the Nickel remaindermen take by right of representation of their father George (one-half), and the Bowles remaindermen take by right of representation of their mother Beatrice (one-half).

This determination was made after an extended examination of the authorities, and the court expressly rejected the contention that the family roots or stocks are to be found among the first takers, i.e., that "the first generation of takers having a living member at the date the stirpital gift is distributed is the generation whose members comprise the stirpes." (230 C.A.2d 207.) On the contrary: "[F]rom the definitions of the technical terms involved and from the California cases discussed above, a rule emerges, namely, that where a division or distribution is directed 'per stirpes' or 'by right of representation' absent any language indicating a contrary intent, the family roots or stocks are to be found among the ancestors of those persons who are to take the property or estate rather than among the takers themselves, irrespective of whether or not such ancestors were ever entitled to take." (230 C.A.2d 206.)

The opinion concludes on the same nostalgic note as its introduction: "The saga comes to an end. The lawyer's skillful language, which for two generations made secure the fortune of Henry Miller, now unlocks its riches for division according to the two surviving families of the founder. This, we are satisfied, is what Henry Miller intended to accomplish." (230 C.A.2d 217.)

In *Estate of Edwards* (1988) 203 C.A.3d 1366, 250 C.R. 779, the testator (Anna) created a residuary trust allocating income in one-seventh shares to her designated nieces and grandnieces. On termination, the principal of the trust was to be divided "per stirpes in my said grandnieces and in the lawful issue of my said four nieces." The trust terminated by its express terms on the death of the four nieces named in the trust income provisions and when the designated grandnieces reached age 50. In a subsequent action to interpret the principal distribution language, the judge found that Anna intended that the principal should be divided per stirpes into seven shares, representing the "ancestral lines" of Anna's nieces and nephews, with each share then to be divided among the issue of each niece and nephew by right of representation. The judge further found that because only five of the seven nieces and nephews had issue, the principal should be divided into five shares. *Held*, this distribution was erroneous; the trust corpus should be distributed in nine equal shares to the five issue of the named nieces and the four income beneficiary grandnieces.

(a) "While current authority holds that in a traditional per stirpes division the family roots are found not among the persons who are to take the property but among the ancestors of the takers, this rule succumbs to a contrary intent. ... Such a contrary intent is evident in this case by Anna's command that the designated grandnieces who reach the age of 50 (or if they have died, their issue) constitute some of the family roots under the stirpital division. The grandnieces who are alive at the trust's termination thus become both the roots and the takers." (203 C.A.3d 1373.)

(b) "Anna expressly and in plain language identified the family roots for the stirpital division of the trust corpus as her nine grandnieces and grandnephews. ... We therefore find that the 'nine share theory' most accurately conforms to Anna's intent according to the commonsense, literal interpretation of her words. This theory does not constitute a per capita distribution, since the right of representation principle is applicable to the descendants/heirs of the designated family roots, the grandnieces and grandnephews." (203 C.A.3d 1373, 1374.)

(c) Respondents' five share theory incorrectly relied on the trust's income provisions, which allocated income according to a per capita scheme and did not mention the term "per stirpes." Moreover, this approach failed to give meaning to the trust's principal distribution language in violation of the rule against rendering testamentary words surplusage. (203 C.A.3d 1374.)

(d) Appellants' theory (dividing the principal equally into three shares) assumed that the words "per stirpes" created both the mode of distribution and the family roots for purposes of that division. However, the entirety of the trust principal provision indicated that Anna intended to use "per stirpes" solely as a method of distribution and to create her own class of takers. (203 C.A.3d 1374.)

(e) Cross-appellants' six share theory was incorrect because it did not give "full effect to Anna's words that the principal be divided per stirpes 'in the lawful issue of my said four nieces.' According to the ordinary meaning of this language, the nieces' issue were entitled to take per stirpes rather than the nieces who had issue." (203 C.A.3d 1375.)

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2. Law Revision Commission Recommendations.

14 Witkin Sum. Cal. Law Wills § 224

[§ 224] Law Revision Commission Recommendations.

In 1985, the California Law Revision Commission recommended legislation to provide alternative provisions specifying the manner of distribution of property to descendants under a will or trust. (18 Cal. Law Rev. Com. Reports, p. 269.) The Commission pointed to the benefits of its proposed legislation: "The drafter of a will or trust could select among these alternatives by a simple reference in the instrument to the desired statutory alternative. This would bring clarity and certainty to provisions for distribution to descendants and would encourage those drafting wills and trusts to consider the more popular alternatives and to discuss them with clients."

The Report recommended adoption of the following four statutory alternatives, and explained the distribution pattern under each:

"(1) *A pure stirpital distribution pattern.* Under this distribution pattern, the initial division of the property is made at the generation of the children of the deceased beneficiary, whether or not any children are living. Grandchildren and more remote generations divide the share of their deceased parent."

"(2) *The distribution pattern for intestate succession.* Under this distribution pattern, the initial division of the property is made at the first generation of descendants having at least one living member. The number of shares is equal to the number of living members of that generation plus the number of deceased members who leave surviving descendants. Each living member of that generation takes one share. More remote generations divide the share of their deceased parent, except that if a descending share reaches a generation all of whose members in that line are deceased, that share is divided in the same manner at the next generation having at least one living member."

"(3) *The distribution pattern called 'per capita at each generation.'* Under this distribution pattern, the initial division of the property is made at the first generation having at least one living member. The number of shares is equal to the number of living members of that generation plus the number of deceased members who leave surviving descendants. Each living member of that generation takes one share. The shares of deceased members of that generation are aggregated into a lump sum. The lump sum descends to the next generation of descendants of the deceased ancestors which has at least one living member. There the process is repeated, with each living member taking one share and the

shares of deceased members being aggregated and descending further."

"(4) *The distribution pattern called 'per capita.'* Under this distribution pattern, subject to the antilapse statute, each living member of the designated class takes one share, equal to every other living member of the designated class. This statutory choice should be available only when all members of the designated class are in the same generation. When the members of the designated class are from several generations, there is a likelihood that the drafter of the will or trust did not intend members of more remote generations to take a share without regard to whether the member's parent or other ancestor is living or dead."

Three of the Commission's four recommended alternative provisions (Nos. (1), (2), and (3)) were enacted in 1985 as *Prob.C.* 245, 246, and 247. Originally applicable to wills and trusts, the statutes were amended in 1990 to apply to other instruments as well. (See *infra*, §225 et seq.)

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3. Express Intention or No Specification.

14 Witkin Sum. Cal. Law Wills § 225

[§ 225] Express Intention or No Specification.

When a will, trust, or other instrument calls for property to be distributed or taken "in the manner provided in" *Prob.C. 240*, or when a will, trust, or other instrument that expresses no contrary intention provides for issue or descendants to take without specifying the manner, "the property to be distributed shall be distributed in the manner provided in" *Prob.C. 240*. (*Prob.C. 245(a)*.)

Use of the following words, without more, as applied to issue or descendants is not an expression of contrary intention:

(1) "Per capita" when living members of the designated class are not all of the same generation. (*Prob.C. 245(b)(1)*.)

(2) Contradictory wording, such as "per capita and per stirpes" or "equally and by right of representation." (*Prob.C. 245(b)(2)*.)

Prob.C. 245 gives the option of selecting the distribution system used in the case of intestate succession. (See *supra*, §75.) Under *Prob.C. 240*, "if the first generation of issue of the deceased ancestor are themselves all deceased, the initial division of the property is not made at that generation, but is instead made at the first descending generation of issue having at least one living member."

The Law Revision Commission Comment explains the intended effect of *Prob.C. 245*: "Subdivision (b) provides that certain language is not an expression of a contrary intention sufficient to negate application of Section 245. For example, if property in a testamentary trust is to be distributed when the trust terminates to 'the descendants of the testator per capita' and at the time of distribution the testator's three children survive and one of the surviving children has five children, each of the surviving children takes a one-third share; the five grandchildren of the testator take nothing since their parent survives. This results from applying the distribution scheme of Section 240. Under paragraph (1) of subdivision (b) of Section 245, this scheme is not negated by use of the term 'per capita,' since the living members of the designated class ('descendants of the testator') are not all of the same generation. In this context, it is reasonable to

assume that the use of the term 'per capita' is not intended to provide a share for a class member whose parent or other ancestor is still living and takes a share, although the drafter of the instrument may provide for such a result by appropriately clear language. In order for the testator's grandchildren in the above example to take under Section 245, their parent (the testator's child) must be dead at the time of distribution. In such a case, the testator's two living children each take a one-third share and the five children of other deceased child share equally in the one-third share their deceased parent would have taken."

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4. Specification of Division by Representation.

14 Witkin Sum. Cal. Law Wills § 226

[§ 226] Specification of Division by Representation.

When a will, trust, or other instrument calls for property to be distributed or taken "in the manner provided in" *Prob.C. 246*, "the property to be distributed shall be divided into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner." (*Prob.C. 246(a)*.)

Unless the instrument expressly provides otherwise, if an instrument executed on or after January 1, 1986, calls for property to be distributed or taken "per stirpes," "by representation," or "by right of representation," the property is distributed in the manner provided in *Prob.C. 246(a)*. (*Prob.C. 246(b)*.)

If an instrument executed before January 1, 1986, calls for property to be distributed or taken "per stirpes," "by representation," or "by right of representation," the property is distributed in the manner provided in *Prob.C. 246(a)*, "absent a contrary intent of the transferor." (*Prob.C. 246(c)*.)

The Law Revision Commission Comment makes the following points:

(1) *Prob.C. 246* gives the option of selecting a pure stirpital representation system. Under this system, "the roots or stocks are determined at the children's generation whether or not any children are then living."

(2) "The terms defined in subdivision (b) are subject to some other definition which may be provided in the instrument. For example, many wills define 'by right of representation' to refer to the distribution pattern for intestate succession, rather than to a pure stirpital distribution pattern as under subdivision (a). ... In such a case, the definition provided in the instrument will control."

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5. Specification of Division Per Capita at Each Generation.

14 Witkin Sum. Cal. Law Wills § 227

[§ 227] Specification of Division Per Capita at Each Generation.

When an instrument calls for property to be distributed or taken "in the manner provided in" *Prob.C. 247*, "the property to be distributed shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased." (*Prob.C. 247(a)*.)

Unless the instrument expressly provides otherwise, if an instrument executed on or after January 1, 1986, calls for property to be distributed or taken "per capita at each generation," the property is distributed in the manner provided in *Prob.C. 247(a)*. (*Prob.C. 247(b)*.)

If an instrument executed before January 1, 1986, calls for property to be distributed or taken "per capita at each generation," the property is distributed in the manner provided in *Prob.C. 247(a)*, "absent a contrary intent of the transferor." (*Prob.C. 247(c)*.)

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d. Persons Included in Class.

1. In General.

14 Witkin Sum. Cal. Law Wills § 228

[§ 228] In General.

(1) *Children*. Where the gift is to "children," ordinarily only the first generation is meant; grandchildren are not included unless there is some affirmative showing of that intention (e.g., that the testator knew that there were no children, nor any possibility of them), or where the issue of a deceased child is included by operation of the anti-lapse statute. (See *Estate of Willson* (1915) 171 C. 449, 455, 153 P. 927; *Estate of Vizelich* (1933) 129 C.A. 347, 352, 18 P.2d 773; *Rest.2d, Property (Donative Transfers)* §25.1 et seq.; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1218 et seq.; 30 *A.L.R.4th* 319 ["child" or "children" as including grandchild or grandchildren]; cf. *Estate of Craig* (1944) 64 C.A.2d 132, 138, 148 P.2d 100 [testator's plan held to include grandchildren]; *Estate of Brown* (1962) 199 C.A.2d 274, 282, 18 C.R. 435 ["children" and "grandchildren" interpreted, under circumstances, to mean lineal descendants].)

(2) *Issue or Descendants*. A gift to "issue" or "descendants" includes those of any generation, if capable of inheriting; and it does not exclude illegitimate issue. (*Rest.2d, Property (Donative Transfers)* §25.9; see *Estate of White* (1945) 69 C.A.2d 749, 753, 160 P.2d 204 ["issue" does not include surviving spouse; "lawful issue" means legitimate lineal descendants].)

(3) *Family*. A gift to the "family" of a person ordinarily includes only the spouse and issue. (*Rest.2d, Property (Donative Transfers)* §25.10.) (See 5 *A.L.R.3d* 715 [gift to "relatives" or "relations"]; on gifts to grandchildren, brothers and sisters, nephews and nieces, and cousins, see *Rest.2d, Property (Donative Transfers)* §25.8; 51 *A.L.R.3d* 1250 ["grandchild" or "grandchildren" as including great-grandchild or great-grandchildren].) However, in California, "family" has been considered the equivalent of heirs or next of kin, with the property going to the persons entitled under the law of succession. (See *Estate of McCrum* (1929) 97 C.A. 576, 579, 275 P. 971.)

(4) *Heirs, Next of Kin, Relatives, etc.* A transfer of a present or future interest to an indefinite class, such as "heirs," "next of kin," "relatives," or "family," or "the persons entitled thereto under the intestate succession laws," or to persons described by "words of similar import," is a transfer to those who would be the person's heirs, their identities and respective shares to be determined "as if the transferor or other designated person were to die intestate at the time when the transfer is to take effect in enjoyment and according to the California statutes of intestate succession of property not acquired from a predeceased spouse in effect at that time." (*Prob.C. 21114*, *infra*, §233.)

(5) *Half Bloods, Adopted Persons, Persons Born Out of Wedlock, Stepchildren, Foster Children, and Their Issue.* Generally, "halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of these persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession." (*Prob.C. 21115(a)*.) (On relationship for purposes of intestacy, see *supra*, §86 et seq.) (See *49 A.L.R.2d 1362* [gift to class or group as including half bloods]; *28 A.L.R.3d 1307* ["children" as including stepchildren].) However, in specified circumstances, special rules apply to adopted persons (see *infra*, §§229, 230) and to persons born out of wedlock (see *infra*, §231).

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2. Adopted Children.

14 Witkin Sum. Cal. Law Wills § 229

[§ 229] Adopted Children.

(1) *In General.* Whether an adopted child is included in a class gift has been the subject of much controversy. In the absence of statutory provision, it seems to be the general rule that there must be affirmative evidence of an intent to include. (See 31 *So. Cal. L. Rev.* 441; 36 *A.L.R.5th* 395 [adopted child as within class named in testamentary gift]; 37 *A.L.R.5th* 237 [adopted child as within class named in deed or inter vivos trust instrument]; *Rest.2d, Property (Donative Transfers)* §25.4.)

(2) *Constructional Preference.* California, however, appeared to created a presumption or constructional preference in favor of inclusion.

In *Estate of Pierce* (1948) 32 *C.2d* 265, 196 *P.2d* 1, a holographic will left interests in trust, with a provision that, on the death of a beneficiary, his or her share should go to "his or her children (lawful issue)." On death of P, a beneficiary, the claim of his adopted children was sustained by the probate court, despite evidence that the testator opposed their adoption and refrained from disinherit P on P's promise not to adopt them. *Held*, reversed. (a) In interpreting statutes, such as succession laws, the term "child" or "children" is generally held to include an adopted child or children. But these rules do not govern the interpretation of private instruments such as wills. (b) In this will the scope of the qualifying words ("lawful issue") was uncertain. Accordingly, the extrinsic evidence of the circumstances surrounding the making of the will was admissible, and clearly showed that the testator did not intend that the adopted children should take. (32 *C.2d* 268.) (See 22 *So. Cal. L. Rev.* 89.)

Thus, *Pierce* recognized the possibility of including adopted children but the court found convincing evidence of a contrary intent, and made no suggestion of a constructional preference. However, in *Estate of Stanford* (1957) 49 *C.2d* 120, 135, 315 *P.2d* 681, the court, stressing the modern statutory law and policy giving adopted children the full status of natural children, held the adopted children included on very slight evidence of intent. (See 49 *C.2d* 141.)

In *Estate of Heard* (1957) 49 *C.2d* 514, 522, 319 *P.2d* 637, involving the interpretation of "lawful issue," the court discussed "children" as well as "issue" cases, and reaffirmed *Stanford*. (See 31 *So. Cal. L. Rev.* 441; 9 *Hastings L. J.* 326.) (See *Wells Fargo Bank v. Huse* (1976) 57 *C.A.3d* 927, 935, 129 *C.R.* 522; *Estate of Huntington* (1976) 58 *C.A.3d*

197, 207, 129 C.R. 787; cf. *Estate of Clancy* (1958) 159 C.A.2d 216, 223, 323 P.2d 763 [following *Heard* but finding evidence of intent to include].)

Where a will made a gift to children, referring to the time the estate should be ready for distribution, it was properly construed to include a child adopted after the testator's death and prior to distribution. (*Estate of McCallen* (1975) 53 C.A.3d 142, 152, 125 C.R. 645.)

(3) *Natural Child Adopted Out*. A natural child who would otherwise be included in the class may be excluded if the child has been adopted by a third person so as to sever the natural parental relationship. (See *Estate of Russell* (1971) 17 C.A.3d 758, 768, 95 C.R. 88 [testator familiar with status of adopted children, did not provide for possibility of adoption of class remaindermen]; 71 A.L.R.4th 374 [adoption as precluding gift under natural relative's will]; cf. *Estate of Haneberg* (1971) 19 C.A.3d 643, 648, 96 C.R. 807 [distinguishing *Russell*; will here executed in 1926, before 1955 amendment to former statute completely removing adopted child from natural family and relatives; child entitled to share]; see *Rest.2d, Property (Donative Transfers)* §25.5.)

In *Newman v. Wells Fargo Bank* (1996) 14 C.4th 126, 59 C.R.2d 2, 926 P.2d 969, a testamentary trust provided for distribution of income to the testator's brothers and sisters and their "issue" and distribution of principal to their "children." Long before the will was prepared, one brother had been married and had a son. After the brother was divorced, the son was adopted by the mother's second husband. The testator executed the will and died in 1972, and the brother died in 1993. In this action, a creditor of the son claimed a portion of his purported share of the income. The trial court, relying on the law of intestate succession in effect at the time the will was executed, found that the "adopted-out" son was not a beneficiary of the trust, and ruled against the creditor. The Court of Appeal, relying on the law in effect at the time the brother died, found that the son was a beneficiary of the trust despite the adoption, and reversed. *Held*, the trial court was correct: the son was not an income beneficiary, and his creditor was not entitled to a share of income.

(a) Nothing on the face of the will or in its execution shows whether the testator intended that a child adopted out of the family be on an equal footing with that child's cousins for purposes of distributions. (14 C.4th 136.) Where the testator's intent is not shown, the court applies a presumption that the testator is aware of the law in effect at the time the will is executed, including the law of intestate succession, and intends that law to govern construction of the will. Under former Prob.C. 257 (supra, §89), in effect in 1972, the adoption caused a complete severance of the relationship between the adopted son and his natural father for purposes of inheritance. (14 C.4th 137, 138.) Under former Prob.C. 6408 (now Prob.C. 6450, supra, §94), adopted in 1985, the relationship between the adopted son and his natural father continued for purposes of inheritance despite the adoption. However, the new statute was prospective, and the law applicable before January 1, 1985, continued to apply to decedents who died before that date. Thus, to find the testator's presumed intent, the court looks to the law in effect when the will was executed. (14 C.4th 139.)

(b) The creditor argues that, because the testator made a gift of a future interest to a class, the class members are not to be determined until the death of the designated ancestor (the brother) under the law in effect at the time of his death. *Estate of Joslyn* (1995) 38 C.A.4th 1428, 45 C.R.2d 616, *infra*, §230, has reached that result in the context of adult adoption. "[W]e do not agree with *Joslyn* that a legislative change in public policy that is enacted subsequent to the death of a testator may fairly be deemed to reflect the intent of the testator. We presume that provisions in a will are made with an understanding of, and an intent to act pursuant to, the law and public policy as it exists when the will is executed. It is more reasonable to assume that a testator who intends a different disposition will make express provision governing the status of adopted children than to assume that the testator intends that their status not be established until some future time and be contingent on legislative fiat." (14 C.4th 140.)

One justice dissented, contending that the terms "issue" and "children" should be construed using their ordinary meanings, not their technical meanings under the law of intestate succession. (14 C.4th 143.)

(4) *Statutory Rule*. Generally, adopted persons, and their issue when appropriate to the class, are included in terms

of class gift or relationship under the intestate succession rules for determining relationship and inheritance rights. (*Prob.C. 21115(a)*, supra, §228; for exception, see *Prob.C. 21115(b)*, infra, §230.)

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14 Witkin Sum. Cal. Law Wills § 230

[§ 230] Adopted Adults.

(1) *Case Law Development.* In *Williams v. Ward* (1971) 15 C.A.3d 381, 93 C.R. 107, the testator left a will devising real property to his daughter C for life, with remainder "to her children, if any there be." At the time of the will the testator knew that C was single and had undergone surgery making childbirth questionable. In 1967, C, aged 73, adopted plaintiff adults. They brought an action for declaratory relief to establish rights as potential remaindermen. *Held*, judgment for plaintiffs reversed. The word "children" ordinarily refers to minors, and adult adoption was not permitted in California until 1951, 21 years after the testator's death. Accordingly, in the absence of other evidence of intent, it was improbable that the testator would have meant to include adults when at the time of making the will this was contrary to public policy. (15 C.A.3d 384.) (Cf. *Estate of Pittman* (1980) 104 C.A.3d 288, 292, 294, 163 C.R. 527 [exception recognized where adoptee was taken into adoptive parents' home as minor and reared by them].)

In *Abramovic v. Brunken* (1971) 16 C.A.3d 719, 94 C.R. 303, the testator in 1940 left property in trust for his son J, with remainder to others if J should die without issue. The law permitting adult adoption in California went into effect about 10 years later, and J adopted B, aged 32. *Held*, B had no interest. The testator had no knowledge of the future law, and the lower court properly found that he used the word "issue" to mean natural children. (16 C.A.3d 723.) (Cf. *Estate of Moulton* (1976) 63 C.A.3d 1, 9, 133 C.R. 500 [under intestacy laws in effect on death of life tenant, "lawful issue" included subsequently adopted adult child; *Abramovic* distinguished].)

In *Estate of Joslyn* (1995) 38 C.A.4th 1428, 45 C.R.2d 616, a trustee petitioned to determine whether a beneficiary's stepdaughter was within the class of "descendants" entitled to take pursuant to a will. The will, executed in Illinois in 1937, established a trust fund for the benefit of each of the testator's children, and on the death of each child, the income was to be distributed to the child's living descendants. If an income beneficiary died without leaving descendants, the principal of that beneficiary's fund was to be paid to persons appointed in the beneficiary's will. A later codicil, executed in California in 1945, limited the exercise of the power of appointment to the testator's "lawful living descendants ... , spouses of such descendants, or the spouse of such beneficiary." Eight months after the testator's death in 1949, her son remarried and became the stepfather of his new wife's 9-year-old girl. The son adopted her when she was 24 years old. After the son's death in 1992, the trustee of his fund petitioned for instructions. The trial court found that the testator intended the class "descendants" to include the stepdaughter. *Held*, affirmed.

(a) When the testator executed the codicil, the will was republished in California. (On codicil as republication of will, see *supra*, §161.) California law and public policy has long favored equal treatment for adopted children. Thus, it could be presumed that the testator, saying nothing to the contrary in her codicil, did not intend to exclude adopted children when she limited her children's exercise of their power of appointment. (38 C.A.4th 1434.)

(b) When the codicil was executed, however, and continuing through the time of the testator's death, California did not allow the adoption of adults, and her son had not yet become the stepfather of the girl. Taking into account only the testator's probable intent with reference to family circumstances and prevailing social mores existing during her lifetime would weigh against including the stepdaughter in the class of descendants entitled to take under the will. Nevertheless, although circumstances surrounding the execution of the will, including prevailing social attitudes, are relevant, under *Estate of Stanford* (1957) 49 C.2d 120, 315 P.2d 681, *supra*, §229, those attitudes are not determinative. Facts occurring after the testator's death may be taken into consideration. (38 C.A.4th 1435.)

(c) Normally the members of a class who are to take under a will are ascertained by applying the statute of succession as of the time of the death of the designated ancestor. Because the class here was designated by the testator as the "living descendants" of her son, i.e., those descendants who were living at the time of his death, the law regarding adopted adults that existed at the time of the son's death could be considered. By that time, the adoption of adults was legal and adoptees could inherit both by and through their adopting parent. (38 C.A.4th 1436.)

(d) There has been a split of authority as to the circumstances under which adult adoptees are entitled to benefit from class gifts. (38 C.A.4th 1437, citing *Williams v. Ward*, *Abramovic v. Brunken*, and *Estate of Pittman*.) The reasoning in *Pittman*, recognizing an exception to the exclusion of adult adoptees from class gifts for those adoptees taken into the adoptive parent's home as minors and reared by the adoptive parent *in loco parentis*, is persuasive. Under *Pittman*, although adult adoptees are presumed to be excluded from the class, they still have the burden to prove that they fall within an exception to the general rule, i.e., that they were taken into the adoptive parent's home as minors and reared by the adoptive parent. (38 C.A.4th 1437.)

(e) Although *Pittman* was also concerned with adoptions entered into for financial gain or as a spite device, a showing of either does not necessarily defeat a devise. Adult adoptees who can show that they were reared by the adoptive parent will seldom be able to counter the charge that the adoption was for the purpose of financial gain. A significant percentage of adult adoptions involve stepparent-stepchild relationships. One valid reason for undertaking to establish the legally recognized parent-child relationship after the stepchild has reached adulthood is to ensure the orderly transfer of the family estate. An adopted stepchild should not have to refute an element of financial gain in order to bring himself within the class entitled to enjoy the benefits of the estate. (38 C.A.4th 1439.)

(f) Here, there was ample evidence of a strong father-daughter relationship between the son and his stepdaughter. It was the stepdaughter who cared for him during his last days. Although the parties conceded that the adoption was related to the death of the son's father and an earlier will contest, the trial court was not compelled to conclude that the motive or purpose of this adoption was spite. (38 C.A.4th 1440.) (For a case rejecting the retroactive construction approved in *Joslyn*, see *Newman v. Wells Fargo Bank* (1996) 14 C.4th 126, 59 C.R.2d 2, 926 P.2d 969, *supra*, §229.)

In *Ehrenclou v. MacDonald* (2004) 117 C.A.4th 364, 12 C.R.3d 411, the settlor, in a 1954 trust, provided income to his adopted daughter for life, with the principal distributed at her death to her "then living lawful issue." At that time, the daughter had two children. In 1992, she adopted two adults under the law of Colorado, her state of residence. On her death in 2001, the two original children sought a declaratory judgment that only they were "lawful living issue" under the terms of the trust. *Held*, the adult adoptees were not entitled to a share of the assets.

(a) The trust's choice-of-law provision selected California law to govern the construction of the trust, and the issue here is not one of inheritance, but one of construction. (117 C.A.4th 369, 371.) Under California law, the adopting and adopted persons are in a parent and child relationship, the same as a natural parent and child, and subject to the same rights and duties. Presuming that the settlor "intended his words to reflect California law, a person adopted under

California law is 'lawful issue' of the adopting person as these words are used in the 1954 trust." (117 C.A.4th 372.) However, "[u]nless the legal relationship between an adopted person and an adopting person embraces all of the natural rights and duties of a parent and child, it cannot be said that the adopted person is the 'issue' of the adopting person, at least insofar as that word is construed under California law." (117 C.A.4th 372, 373.)

(b) Here, the determination whether the adult adoptees have the status of being the daughter's children, with the rights and duties between them of parent and child, and are thus the daughter's "lawful living issue," turns on the Colorado adoption decree. (117 C.A.4th 373.) The status conferred on an adult adoptee by Colorado law is that of an heir at law, and is markedly different from that status under California law. Colorado law does not impose obligations on the adopted person and does not sever the parent-child relationship with his or her natural parents. Thus, an adult adoption in Colorado does not resemble a parent-child relationship as the settlor "is presumed to have contemplated under California law." (117 C.A.4th 374.)

(c) Under California law, the law of the state where the adoption took place must determine the status of the parties to the adoption. (117 C.A.4th 375, citing *Estate of Grace* (1948) 88 C.A.2d 956, 200 P.2d 189, supra, §54.) Because the adult adoptees here did not stand in the relation to the daughter as children of a parent but only as heirs at law, they are not within the class of her "lawful living issue" under California law for purposes of the 1954 trust. (117 C.A.4th 377.) One justice, concurring, was troubled by the result: "The most logical and natural inference of the trust language here is that the California substantive rule should be applied in the first instance, not the California rule that adopts another state's substantive rule." (117 C.A.4th 378.)

(2) *Statutory Rule.* The issue of adult adoption has been resolved in part by statute. In construing a transfer by a transferor who is not the adoptive parent, a person adopted by the adoptive parent is not considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse. (*Prob.C. 21115(b)*, based on former *Prob.C. 6152(b)*.) This provision is designed "to preclude the adoption of a person (often an adult) solely for the purpose of permitting the adoptee to take under the will of another." (Legislative Com. Comment to former *Prob.C. 6152(b)*.) (See *Estate of DeLoreto* (2004) 118 C.A.4th 1048, 1053, 13 C.R.3d 513 [*Prob.C. 21115(b)* applied to testamentary trust even though statute was enacted after testator's death; adults adopted by testator's son were not testator's grandchildren for purposes of trust distributions].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Interpretation and Construction of Donative Instruments.

5. Gift to a Class.

d. Persons Included in Class.

4. Out of Wedlock Children.

14 Witkin Sum. Cal. Law Wills § 231

[§ 231] Out of Wedlock Children.

(1) *In General.* Historically, a child born out of wedlock was excluded unless legitimated or acknowledged for inheritance. But the judicial approach was gradually modified, and the Rest.2d, Property (Donative Transfers) takes a contrary position: A child born out of wedlock is deemed included, unless a contrary intent is manifested. (*Rest.2d, Property (Donative Transfers) §25.2.*) (See *34 A.L.R.2d 4* ["children" as including illegitimate children]; *17 A.L.R.4th 1292* ["grandchildren" as including illegitimate grandchildren].)

(2) *Statutory Rule.* Generally, persons born out of wedlock, and their issue when appropriate to the class, are included in terms of class gift or relationship under the intestate succession rules for determining relationship and inheritance rights. (*Prob.C. 21115(a)*, supra, §228.) However, in construing a transfer by a transferor who is not the natural parent, a person born to the natural parent is not considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse. (*Prob.C. 21115(b)*, based on former Prob.C. 6152(b).) This provision is intended "to exclude a child born out of wedlock (where the testator is not the parent) if the child never lives while a minor as a regular member of the parent's household." On the other hand, "a child will be included in class gift terminology in the testator's will if the child lived while a minor as a regular member of the household of the parent's spouse or surviving spouse. As a result, a child born of a marital relationship will almost always be included in the class, consistent with the testator's likely intent." (Law Rev. Com. Comment to former Prob.C. 6152(b).)

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e. Time When Class Is Ascertained.

14 Witkin Sum. Cal. Law Wills § 232

[§ 232] Time When Class Is Ascertained.

At one time, the time for ascertaining the membership of a class was governed by statute:

(1) *Immediate Gift: Death of Testator.* Former Prob.C. 21113(a) provided: "A transfer of a present interest to a class includes all persons answering the class description at the transferor's death."

(2) *Postponed Possession: Time of Possession.* Former Prob.C. 21113(b) provided: "A transfer of a future interest to a class includes all persons answering the class description at the time the transfer is to take effect in enjoyment."

(3) *Posthumous Children.* Former Prob.C. 21113(c) provided: "A person conceived before but born after the transferor's death or after the time the transfer takes effect in enjoyment takes if the person answers the class description."

These provisions were repealed as unnecessary in 2002. The statutes "inadequately codified" the common law "rule of convenience" by failing to codify the common law exceptions. The repeal "does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law." (Law Rev. Com. Comment.) (See generally *80 Am.Jur.2d* (2002 ed.), *Wills* §1224 et seq.; *6 A.L.R.2d* 1342 [time of ascertaining class membership for gift taking effect at testator's death]; *33 A.L.R.2d* 242 [time for ascertaining class membership for testamentary gift in place of deceased remainderpersons]; on requirement that transferee of at-death transfer survive transferor or until future time required by transferring instrument, see *Prob.C. 21109*, supra, §214; on rights of posthumous children, see *Prob.C. 6407*, supra, §87 [inheritance by afterborn heirs]; C.C. 43.1 [unborn child as existing person]; C.C. 698 [right of posthumous child to take future interest]; and C.C. 739 [future interest defeated by birth of posthumous child].)

The following provisions of the Restatement 2d, Property (Donative Transfers) are relevant to the increase or decrease of a class:

(1) Where a gift "immediate in form" is made to a class, the disposition excludes persons conceived or adopted after the effective date of the dispositive instrument if a class member (or substitute) is available to take on that date. If

a class member (or substitute) is not available to take on that date, the disposition does not exclude a person on the ground that he or she was conceived or adopted too late. (*Rest.2d, Property (Donative Transfers) §26.1.*)

(2) Where a gift "postponed in form" is made to a class, the disposition excludes persons conceived or adopted after the end of the postponed period if a class member (or substitute) is available to take at that time. If a class member (or substitute) is not available to take at that time, the disposition does not exclude a person on the ground that he or she was conceived or adopted too late. (*Rest.2d, Property (Donative Transfers) §26.2.*)

(3) Where a gift is to a one-generation class, a person within the class who dies before the date of the dispositive instrument is excluded. The shares of other class members are enlarged to that extent except to the extent that a substitute taker is provided or the anti-lapse statute applies. (*Rest.2d, Property (Donative Transfers) §27.1.*)

(4) Where a gift is to a one-generation class, a person within the class who dies after the date of the dispositive instrument but before it takes effect is excluded. The shares of other class members are enlarged to that extent except to the extent that a substitute taker is provided or the anti-lapse statute applies. (*Rest.2d, Property (Donative Transfers) §27.2.*)

(5) Where a gift is to a one-generation class, a person within the class who dies after the dispositive instrument takes effect but before distribution is not excluded, if the death does not make the fulfillment of a condition impossible, unless additional language, circumstances, or an applicable statute provide otherwise. The shares of other class members are enlarged to that extent except to the extent that a substitute taker is provided. (*Rest.2d, Property (Donative Transfers) §27.3.*)

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a. In General.

14 Witkin Sum. Cal. Law Wills § 233

[§ 233] In General.

(1) *General Rule.* If a statute or an instrument provides for transfer of a present or future interest to, or creates a present or future interest in, a designated person's "heirs," "heirs at law," "next of kin," "relatives," or "family," or words of similar import, the transfer is to the persons who would succeed to the designated person's intestate estate if the designated person died when the transfer is to take effect in enjoyment. For this purpose, the intestate estate is determined by the intestate succession law of the transferor's domicile. If the designated person's surviving spouse is living but is remarried at the time the transfer is to take effect in enjoyment, the surviving spouse is not an heir of the designated person for this purpose. (*Prob.C. 21114.*) (See 79 *A.L.R.2d* 1438 [husband or wife as heir within provision of will or trust]; *Rest.2d, Property (Donative Transfers)* §29.1; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1060 et seq.; Cal. Transactions Forms, 1 Estate Planning §§6:6 et seq., 6:60 et seq.; 26 *Cal. L. Rev.* 413; 53 *Harv. L. Rev.* 207.)

(2) *Construction of Terms.* Except as otherwise provided, half bloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of these persons when appropriate to the class, are generally included in class gifts. (*Prob.C. 21115(a)*; see *Prob.C. 21115(b)* [exceptions applicable to adopted and out of wedlock persons]; supra, §228 et seq.) These provisions apply in determining the persons who would be a designated person's heirs under *Prob.C. 21114*. (*Prob.C. 21115(c)(3)*.) The rules for determining intestate succession under *Prob.C. 21115* are "those in effect at the time the transfer is to take effect in enjoyment." (*Prob.C. 21115(d)*.)

(3) *Property Inherited From Predeceased Spouse.* At one time, the statutory rules dealing with real property inherited from a predeceased spouse (*Prob.C. 6402.5*; see supra, §85) came within the general rule. (See *Estate of Watts* (1918) 179 C. 20, 22, 175 P. 415 [testator inherited community property from husband, made gift by will to "my heirs"; relatives of predeceased husband were included as to that property]; *Dickey v. Walrond* (1927) 200 C. 335, 339, 253 P. 706 [statutes of succession govern shares that heirs take; i.e., they do not share per capita, as in an ordinary class gift]; *Rest.2d, Property (Donative Transfers)* §29.6 et seq.; 26 *Cal. L. Rev.* 413, 430.) A 1990 amendment excluded the operation of the predeceased spouse statute from *Prob.C. 21114*.

(4) *Worthier Title Doctrine Abolished.* The common law doctrine of "worthier title," that a grantor either cannot, or does not intend to, convey an interest to his own heirs, has been generally held inapplicable to testamentary dispositions; and it is now expressly abolished in California as to both grants and devises. The meaning of a transfer of a

legal or equitable interest to a transferor's own heirs or next of kin is determined by the general rules applicable to the interpretation of instruments. (*Prob.C. 21108*; see 12 *Summary* (10th), *Real Property*, §12.)

(5) *Determination of Nature of Gift*. In *Fuller v. Fuller* (1964) 229 C.A.2d 532, 40 C.R. 393, the testator died in 1905. His will left "the use" of the estate to his children "so long as any of said children are living"; and, after death of the last survivor, the will directed division among "the heirs" of the children. He left five sons and a daughter. The last survivor died in 1961. Several generations of heirs were left, and the question was what share the surviving widows of two of the sons should take. The trial judge gave each one-sixth, assuming that the testator intended the "families" of the six children to share equally. *Held*, each was entitled only to one-twelfth.

(a) The widows were heirs of the children, hence clearly members of the class. (229 C.A.2d 538, citing the text.)

(b) As to their shares, the presumption is that the testator intended the laws of succession to determine not only members of the class but the share of each. (229 C.A.2d 539.)

(c) Which statute of succession? Where a spouse survives, two different statutes could apply: former Prob.C. 201 (now Prob.C. 6101; community property) and former Prob.C. 223 (now Prob.C. 6401; separate property). The answer, the court thought, was the separate property statute: "Although the property actually being distributed is neither the separate nor community property of the deceased life tenants and the remainderman interests do not pass through them, it seems only reasonable to consider that from the viewpoint of the testator's construed intent it should be treated as though it were. Certainly he should not be deemed to have intended it to be regarded as though it were property acquired as a result of the joint efforts of his children and their spouses." (229 C.A.2d 541.)

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b. Time When Heirs Are Ascertained.

14 Witkin Sum. Cal. Law Wills § 234

[§ 234] Time When Heirs Are Ascertained.

(1) *Case Law Development.* The general rule was that the heirs were ascertained at the time of the death of the ancestor, in the absence of a showing of different intention. If the gift was to heirs of the testator, the testator was the ancestor, and the time periods usually coincided. (See *Estate of Newman* (1924) 68 C.A. 420, 424, 229 P. 898; *Rest.2d, Property (Donative Transfers)* §29.4; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1228 et seq.; supra, §208.)

There were, however, a number of exceptions to the rule of ascertaining the class at the death of the testator, where the context showed that the testator intended an artificial group of persons who would have been heirs had the testator died at another (usually later) time: (a) Expression of futurity in the testator's description of his "heirs," e.g., laws of succession then in force, i.e., at termination of a trust, or "my then living heirs at law." (b) "Sole heir" cases, in which the life tenant was sole heir of the testator but the will devised the remainder to the testator's "heirs"; the "sole heir" obviously could not be plural. (c) Class of heirs determinable on termination of the trust because the gift to heirs was substituted, the primary gift being contingent. Whether heirs would take at all is postponed until resolution of the contingency, hence identity of the heirs was likewise deemed to have been postponed. (See *Estate of McKenzie* (1966) 246 C.A.2d 740, 744, 54 C.R. 888, *infra*, §235 [summarizing exceptions]; *Wells Fargo Bank v. Title Ins. & Trust Co.* (1971) 22 C.A.3d 295, 300, 99 C.R. 464 [applying contingent gift exception].)

If a life estate was given to a third person, who survived the testator, and the remainder was given to the third person's heirs, the question was whether they were to be ascertained at the death of the testator, or at the later time when the life estate terminated by the death of the ancestor (the third person). Under the general rule, the heirs would therefore include those in the class at the time of termination of the life estate (see *Estate of Wilson* (1920) 184 C. 63, 71, 193 P. 581), in conformity with the statutory rule on gifts to a class. (See 26 *Cal. L. Rev.* 413, 423; 60 *A.L.R.2d* 1394 [time for ascertaining "heirs," "next of kin," or "descendants" of person who is not testator, settlor, grantor, life tenant, or remainderperson]; supra, §232.)

In *Estate of Miner* (1963) 214 C.A.2d 533, 29 C.R. 601, a testamentary trust provided that, on the death of the life tenant, the corpus should be delivered "to my heirs in accordance with the laws of succession of the State of California, then in force." *Held*, the word "then," used as an adverb of *time* (and not merely to denote an event or mere sequence of interests), postpones ascertainment of the class until the time indicated. Hence, the lower court properly determined the

members of the class by applying the statute of succession in force at the death of the life tenant. (214 C.A.2d 544.)

An exception to the rule of determining heirs as of the date of the ancestor's death was made where the ancestor died before the will took effect; e.g., T gave a life estate to A, with remainder to the heirs of A, and A died before T. The presumption was that the testator did not intend the class to be determined until he (the testator) died, and therefore the date of the testator's death governed. (*Estate of Page* (1919) 181 C. 537, 540, 185 P. 383; see *Rest.2d, Property (Donative Transfers)* §29.4, Comment g.)

In *Estate of Woodworth* (1993) 18 C.A.4th 936, 22 C.R.2d 676, decedent died in 1971, leaving property in trust to his surviving spouse for life, with a remainder to his sister if she survived, and if not, to her heirs at law. The sister died in 1980, leaving her property to her husband. He died in 1988, leaving his property to the University of California. The life tenant died in 1991, and the trustee petitioned for instructions to determine whether the sister's heirs at law should be determined as of 1980 (husband, niece, and nephew) or 1991 (niece and nephew). *Held*, applying the common law preference for early vesting, the heirs should be determined as of the sister's date of death in 1980, and thus the University of California was entitled to share in the property. The court noted, however, that, had the decedent died after January 1, 1985, the heirs would have been determined under the statutory rule as of 1991, the time at which the devise took effect in enjoyment. (18 C.A.4th 942, footnote 3.)

(2) *Statutory Rule*. The identities and respective shares of heirs are determined under the intestate succession laws of the transferor's domicile as if the transferor or other designated person died when the transfer is to take effect in enjoyment. (*Prob.C. 21114*.) (On intestate succession, see *supra*, §74 et seq.) The Law Revision Commission Comment notes that the statute was amended in 2002 to conform to *Unif.Prob.C.*, 2-711.

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c. Words or Circumstances Showing Different Intent.

14 Witkin Sum. Cal. Law Wills § 235

[§ 235] Words or Circumstances Showing Different Intent.

(1) *In General.* The testator's intention to give property in a different manner from that specified in the succession statutes may be shown either by words or qualification, or by circumstances.

Where the gift is not simply to "heirs" or "relations," but other words are added, this may show an intention that particular heirs only are to take. Thus, the gift may be to "heirs of the body" and thereby is limited to lineal descendants (*Rest.2d, Property (Donative Transfers)* §29.1, Comments b, j); or to "my heirs hereinabove named," which limits them to those mentioned (*Rest.2d, Property (Donative Transfers)* §29.1, Comment g). Where the language shows an intention to exclude a particular heir, this is given effect. (See *Rest.2d, Property (Donative Transfers)* §29.1, Comments c, i, j.)

The difficulty of interpreting peculiar qualifying language is illustrated by *Estate of Marshall* (1917) 176 C. 784, 786, 169 P. 672, where claimants, relations of the predeceased husband of the testator who would have taken a share under a statute then in force, were held to be excluded by a gift to "my own family." Another illustration is *Estate of Page* (1919) 181 C. 537, 540, 185 P. 383, where the testator's will made gifts to "his lawful heirs" and "my lawful heirs," and the court permitted relatives of the predeceased husband to share in both. (See *Estate of Hartson* (1962) 200 C.A.2d 757, 768, 19 C.R. 694 ["legal heirs" of deceased child given nontechnical meaning to include issue or descendants of testator]; 100 A.L.R.2d 1069 [effect of word "nearest" or "immediate"].)

(2) *Life Tenant or Beneficiary as Heir.* If the testator gives a life estate to his child, with remainder to the testator's heirs, and then dies leaving the child as his sole heir, may the child life tenant also be his heir and take the remainder?

In *Estate of Wilson* (1920) 184 C. 63, 193 P. 581, the court found a contrary intent in the language of the will, which called for distribution of the remainder "among my heirs." It was held that the testator could not have intended her son, since she directed distribution among more than two persons; in the rest of the will she referred to her "son" in express terms; and other language clearly indicated her intention to give him only a life estate. (184 C. 68.) (See *Rest.2d, Property (Donative Transfers)* §29.1, Comments c, j; §29.4, Comment f; 26 Cal. L. Rev. 413, 420.)

The same result was reached in *Estate of Hoover* (1936) 16 C.A.2d 529, 531, 60 P.2d 1010, where a life estate in trust was created for the testator's daughter, with remainder after her death to "my heirs then living." *Held*, she was

obviously excluded from the remainder. (16 C.A.2d 531.) (See *Estate of Rutan* (1953) 119 C.A.2d 592, 601, 260 P.2d 111.)

In *Estate of McKenzie* (1966) 246 C.A.2d 740, 54 C.R. 888, the testator created a testamentary trust for nephew C and after his death for his wife. On death of both, the corpus was to go to the testator's "heirs at law." When the testator died, C was 71 and his wife 51, and they had no children. C died leaving his widow as his sole heir; then she died and the trust terminated. The probate judge, over the objection of other heirs, ordered distribution of one-third of the corpus to the estate of C. Held, decree affirmed; a life beneficiary of a trust may also come within the category of "heirs" entitled to take as remaindermen on termination.

(a) In its technical meaning, the term includes a life beneficiary; though the remainder cannot be enjoyed personally, it becomes part of his estate. (246 C.A.2d 743.)

(b) The instant case did not come within any of the exceptions (*supra*, §234). It was not a sole heir case, for there were other heirs when the testator died; it was not a substituted gift, for time of enjoyment, not determination of identity, was postponed; and there was no expression of futurity in the description. (246 C.A.2d 745.)

(c) The established technical meaning of the language used should not be discarded on the theory that it brings about a result contrary to the probable intent of the testator. (246 C.A.2d 748.)

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B. Mistake of Omission or in Description.
1. Mistake of Omission Cannot Be Corrected.

14 Witkin Sum. Cal. Law Wills § 236

[§ 236] Mistake of Omission Cannot Be Corrected.

If the testator actually intended to make a gift to A but the instrument as written fails to do so, or if the testator intended to make a different kind of gift, the will must stand. Correction would require the addition of a new provision, and the court cannot add anything to the will; a testamentary gift can only be made by the testator in writing. (See *Estate of Lyons* (1939) 36 C.A.2d 92, 95, 96 P.2d 1018 [petitioner contended that testator mistakenly left bequest to another]; *Estate of Tompkins* (1901) 132 C. 173, 176, 64 P. 268; *Estate of Zilke* (1931) 115 C.A. 63, 65, 1 P.2d 475; *Estate of Page* (1967) 254 C.A.2d 702, 719, 62 C.R. 740; 90 A.L.R.2d 924 [draftsman's mistakes]; cf. *Estate of De Moulin* (1950) 101 C.A.2d 221, 225, 225 P.2d 303, supra, §203.)

In *Estate of Townsend* (1963) 221 C.A.2d 25, 34 C.R. 275, the testator in paragraph 14 of a formal will stated that "I have purposely provided as I have" for niece V because V had been close to her and cared for her; she expressly disinherited "my other living relatives" because she had already done as much as she desired for them, and "limited" the share of "my nieces and nephews" because they were not close to her. But the only bequest to niece V was in paragraph 6: "all of the balance of furniture, linens, dishes, and personal effects of which I may die possessed." A brother and sister, claiming partial intestacy, were awarded the residue of the estate. *Held*, affirmed. The clear intent of the testator was to prefer niece V. And the attorney who drew the will testified, from his written notes, that the testator had instructed him to provide for the residue to go to niece V. But there was no residuary clause, for "personal effects" only refers to tangible things and subjects of personal use. Hence, the testimony was offered not to explain an ambiguity, but to correct a mistake of omission, which could not be done. (221 C.A.2d 27, citing the text.)

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2. Mistake in Description.
a. In General.

14 Witkin Sum. Cal. Law Wills § 237

[§ 237] In General.

If the provision is made intentionally, but it does not accurately describe the person who is to take as beneficiary or the property that is given, extrinsic evidence may be admitted to correct it. This is not an attempt to add to, or strike anything from, the will, but is part of the process of interpreting the will. (See *Rest.3d, Property (Wills and Other Donative Transfers) §12.1* [reforming donative document to correct mistake]; *80 Am.Jur.2d (2002 ed.)*, *Wills §1041* et seq.; *2 Proof of Facts 2d 693*; *infra*, §238 et seq.) (On kind of evidence that may be introduced for that purpose, and admissibility of declarations of testator, see *2 Cal. Evidence (4th), Documentary Evidence, §78*; on correction of mistake consisting of inept use of words or punctuation by construction of will, see *supra*, §188 et seq.)

In *Estate of Sandersfeld (1960) 187 C.A.2d 14, 9 C.R. 447*, the testator devised a life estate in her "home, situated at 8942 Crescent Ave.," together with its furnishings. The home was situated on a parcel of 4 1/2 acres, the bulk of which was formerly an orchard, now abandoned. *Held*, there was a latent ambiguity; the trial judge properly admitted extrinsic evidence to resolve it; the declarations of the testator to the attorney-draftsman were also admissible; and from all of this evidence the probate judge properly concluded that the intention was to devise only the house and land ordinarily used in connection with it (75 by 100 feet). (*187 C.A.2d 17.*) (See *Estate of McDonald (1961) 191 C.A.2d 565, 569, 12 C.R. 823* [devise of "that property on which is presently located McDonald's Cleaners ... and described as: The East 34 1/2 feet of Lot 28"; McDonald's Cleaners extended beyond the parcel described, and was properly awarded].)

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2. Mistake in Description.
b. Wholly Inaccurate Description.

14 Witkin Sum. Cal. Law Wills § 238

[§ 238] Wholly Inaccurate Description.

The description may be wholly inaccurate, yet the testator's intention to benefit a particular person or to give particular property may be shown by extrinsic evidence. The simplest example is mere clerical error, or misspelling. (See *Estate of Moeller* (1926) 199 C. 705, 713, 251 P. 311.)

More difficult are the situations where the entire name is wrong. In *Estate of Regnier* (1932) 123 C.A. 514, 11 P.2d 639, the testator left property to the "French Orphans of France." The "Fraternite Franco-Americaine" claimed the property, showing that it was the successor to the "French War Orphans Relief," and that decedent had dealt with its officer in the past. *Held*, the provision was subject to correction, and the lack of similarity in name was no obstacle in view of the evidence of decedent's dealings. (123 C.A. 516.)

But in *Estate of Zilke* (1931) 115 C.A. 63, 1 P.2d 475, a holographic will left all property to "Offens home of San Francisco." There was no institution with a name similar to "Orphan's Home," and the court divided the property among the seven orphan asylums of the city. *Held*, decree reversed; the language did not refer to "orphans' homes," but to a single institution which could not be identified. (115 C.A. 65.)

In *Estate of Lynch* (1904) 142 C. 373, 75 P. 1086, the testator left a certain lot in Tulare County, "described as follows," but gave the wrong quarter section. *Held*, it was void; striking out the false words would leave no intelligible description at all. The court conceded that if the will had referred to "my land," and it were shown as in this case that he owned one piece, that would be sufficient; but it refused to give effect to the presumption that one intends to dispose only of his own property. (142 C. 375.)

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c. Partially Inaccurate Description.

14 Witkin Sum. Cal. Law Wills § 239

[§ 239] Partially Inaccurate Description.

If the description is partly accurate and partly inaccurate, it may be corrected by resort to extrinsic evidence, provided the correction can be made by striking out the false part. In other words, the court can reject something in the will but cannot add anything to it. If the elimination of the false part still leaves enough to describe the person or property with sufficient certainty, the gift will be effective; but, if the elimination leaves nothing to indicate the subject, it is void. This has sometimes been called the *doctrine of false demonstration*.

In *Estate of Donnellan* (1912) 164 C. 14, 127 P. 166, the testator left property "to my niece Mary, a resident of New York ... daughter of my deceased sister." Annie Sheridan and Mary Smith, both daughters of the deceased sister, claimed the property. Annie lived in New York, Mary did not; one qualified under the name, the other under the description. Unless either the name or the description could be rejected, the gift would fail. Several witnesses testified that the testator knew she had one niece, and had known her to be in New York. No evidence showed knowledge of more than one niece. *Held*, Annie was intended. (164 C. 23.) (See 1 Cal. L. Rev. 87.)

In *Estate of Heins* (1933) 132 C.A. 131, 22 P.2d 549, the testator bequeathed "all of my common stock of the Pacific Gas and Electric Company." He owned no common shares, but did have preferred shares. *Held*, distribution of these shares was proper. (132 C.A. 133.)

In *Estate of Greenwald* (1937) 19 C.A.2d 291, 65 P.2d 70, the will made a bequest of \$ 15,000 to Duncan, and further provided that notes of the legatee held by the testator should be credited against the bequest. The testator held Duncan's personal notes, and also notes of a corporation of which Duncan owned all but qualifying shares. *Held*, there was a latent ambiguity, justifying resort to extrinsic evidence of the testator's intent; and, upon testimony of the attorney who drafted the will, and a showing that the forms of the notes and signatures had never been discussed with the testator, the court concluded that the testator believed the corporation notes to be obligations of Duncan, and credited both types against the bequest. (19 C.A.2d 299.)

In *Estate of Cleaver* (1981) 126 C.A.3d 341, 178 C.R. 729, the testator made a gift of part of her estate to "The Archbishop of Los Angeles and San Diego, a corporation sole." The claimants were two corporations sole: "The Roman Catholic Archbishop of Los Angeles" and "The Bishop of the Protestant Episcopal Church in Los Angeles." The trial

judge took extrinsic evidence of the evolution of the official titles and jurisdictions of the two claimants, the religious orientation of the testator, and her statements and conduct prior to execution of the will; and he concluded that the testator intended the beneficiary to be the Episcopal entity. *Held*, affirmed. The evidence showed that the Episcopal Bishop's diocese at the time the will was executed included Los Angeles and San Diego; that the testator, though not a member of any church, had been involved in fund-raising for the Episcopal Church and was personally acquainted with the Episcopal Bishop; and that she had no connection with the *Roman Catholic Church*. (126 C.A.3d 348, 349.) Thus, except for the use of the term "archbishop," there was no evidence to suggest any beneficiary except the Episcopal entity. (126 C.A.3d 348, 349.)

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3. Description Applicable to Two Persons or Things.

14 Witkin Sum. Cal. Law Wills § 240

[§ 240] Description Applicable to Two Persons or Things.

In *Estate of Donnellan* (1912) 164 C. 14, 127 P. 166, supra, §239, the court gave the illustration of a gift "to my niece, daughter of my sister Jane, residing in Alameda County," and the subsequent disclosure that the sister had two daughters residing there. In order to remove the uncertainty, it might be shown that at the time the testator made the will his sister Jane had only one daughter whom he knew, that he lost touch with his sister before the second child was born, and that he never knew of the latter's existence. (164 C. 20.)

In *Estate of Nunes* (1954) 123 C.A.2d 150, 266 P.2d 574, reversing the trial court, extrinsic evidence was held admissible to identify "Joe E. Nunes, a nephew of mine." The claimants were Joseph E. Nunes, nephew of the half blood, and appellant Joe E. Nunes, a second cousin usually called "nephew" by decedent, whose extrinsic evidence was erroneously excluded. (123 C.A.2d 156.) (See *Estate of Brisacher* (1938) 27 C.A.2d 327, 330, 80 P.2d 1033 [gift of "diamond wedding ring," two rings answered description]; *Estate of Hotaling* (1946) 72 C.A.2d 848, 856, 165 P.2d 681 [devise of testator's property known as "St. George Hotel," interpreted to mean entire premises including stores]; cf. *Estate of Lyons* (1939) 36 C.A.2d 92, 94, 96 P.2d 1018 [two cousins of testator of same name, but additional descriptive language in will held to identify one; hence, extrinsic evidence was not admissible].)

In *Estate of Black* (1962) 211 C.A.2d 75, 27 C.R. 418, the will left the estate "To the University of Southern California known as The U.C.L.A." The decree awarded it to the Regents of the University of California, the judge refusing to consider extrinsic evidence. University of Southern California and the heirs appealed. *Held*, reversed. The judge's conclusion that "of" meant "in," and that the capitalization had no significance, was a strained and unwarranted construction. There was a latent ambiguity and extrinsic evidence should have been admitted to explain it. (211 C.A.2d 87, 89.)

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1. Nature and Classification.

Witkin Sum. Cal. Law Wills § 241

[§ 241] Nature and Classification.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Classification of At-Death Transfers.* See 20B Am.Jur. Legal Forms 2d (2008 ed.), Wills §266:360 et seq.(e) *Annuity.* See 4 Am.Jur.2d (2007 ed.), *Annuities §1* et seq.



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1. Nature and Classification.

14 Witkin Sum. Cal. Law Wills § 241

[§ 241] Nature and Classification.

(1) *Original Terminology.* Originally, gifts under a will were designated by three terms:

- (a) *Devise* (a gift of real property).
- (b) *Bequest* (a gift of personal property).
- (c) *Legacy* (a gift of money).

Frequently, however, the technical distinction was disregarded and the terms were used interchangeably. (See *Estate of Gracey* (1927) 200 C. 482, 491, 253 P. 921; *Childs v. Gross* (1940) 41 C.A.2d 680, 687, 107 P.2d 424; *Estate of Platt* (1942) 21 C.2d 343, 348, 131 P.2d 825.)

(2) *Current Terminology.* The revised Probate Code, omitting the terms "bequest" and "legacy," provides as follows:

(a) *Devise* used as a noun means a disposition of real or personal property by will. Used as a verb, it means to dispose of real or personal property by will. (*Prob.C.* 32, based on *Unif.Prob.C.*, §1-201(7).)

(b) *Devisee* means a person designated in a will to receive a devise. (*Prob.C.* 34(a), based on *Unif.Prob.C.*, §1-201(8).) In the case of a devise to a trust or trustee, the trust or trustee, not the beneficiary, is the devisee. (*Prob.C.* 34(b).)

(3) *Classification of At-Death Transfers.* As originally enacted, *Prob.C.* 21101 et seq. used the term "testamentary gift" ("a transfer in possession or enjoyment that takes effect at or after death"). The statute was amended in 2002 to use the term "at-death transfer" ("a transfer that is revocable during the lifetime of the transferor" but not including a joint tenancy or joint account with right of survivorship). (*Prob.C.* 21104.) The term is used in *Prob.C.* 21109 (survival requirement), *Prob.C.* 21117 (classification of transfers), *Prob.C.* 21132 (change in form of securities), *Prob.C.* 21133 (proceeds of specific gift), and *Prob.C.* 21135 (ademption by satisfaction). (See C.E.B., 3 Decedent Estate Practice, §24.21; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1287 et seq.; 20B *Am.Jur.* Legal Forms 2d (2000 ed.), *Wills* §266:311 et seq.; *Rest.3d, Property* (*Wills and Other Donative Transfers*) §5.1 [classification of devises].)

At-death transfers are classified as follows:

(a) *Specific gift*. "A specific gift is a transfer of specifically identifiable property." (*Prob.C. 21117(a)*.) (See C.E.B., 1 Will Drafting 3d, §12.35 et seq.; *infra*, §242.)

(b) *General gift*. "A general gift is a transfer from the general assets of the transferor that does not give specific property." (*Prob.C. 21117(b)*.) (See C.E.B., 1 Will Drafting 3d, §12.70 et seq.; *infra*, §242.)

(c) *Demonstrative gift*. "A demonstrative gift is a general gift that specifies the fund or property from which the transfer is primarily to be made." (*Prob.C. 21117(c)*.) (See C.E.B., 1 Will Drafting 3d, §§12.75, 12.76; 5 *A.L.R.3d* 466 [devise of things found or contained in particular place or container]; *infra*, §242.) (For priority of demonstrative gift over other general gifts, see *Prob.C. 21403(b)*, *infra*, §659.)

(d) *General pecuniary gift*. A general pecuniary gift is a pecuniary gift within the meaning of *Prob.C. 21118*. (*Prob.C. 21117(d)*.) Under *Prob.C. 21118(b)*, "pecuniary gift" means "a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument." (See C.E.B., 1 Will Drafting 3d, §§12.71, 12.72; 87 *A.L.R.3d* 605 [base for determining bequest of specific percent or proportion of estate or property].)

(e) *Annuity*. "An annuity is a general pecuniary gift that is payable periodically." (*Prob.C. 21117(e)*.) (See *Estate of Benziger* (1943) 61 *C.A.2d* 628, 630, 143 *P.2d* 717; *Estate of Luckel* (1957) 151 *C.A.2d* 481, 488, 312 *P.2d* 24; C.E.B., 1 Will Drafting 3d, §§12.77, 12.78; 61 *Harv. L. Rev.* 702; 66 *A.L.R.2d* 857 [interest on arrearages or unpaid accumulations of annuities]; 4 *Am.Jur.2d* (1995 ed.), *Annuities* §1 et seq.; 1C *Am.Jur.* P.P. Forms (1995 ed.), §1 et seq.; 2A *Am.Jur.* Legal Forms 2d (2004 ed.), *Annuities* §21:1 et seq.) (For priority of annuity over other general gifts, see *Prob.C. 21403(b)*, *infra*, §659.)

(f) *Residuary gift*. "A residuary gift is a transfer of property that remains after all specific and general gifts have been satisfied." (*Prob.C. 21117(f)*.) (See C.E.B., 1 Will Drafting 3d, §§12.79, 12.80; *infra*, §243.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Classification of At-Death Transfers*. See 20B *Am.Jur.* Legal Forms 2d (2008 ed.), *Wills* §266:360 et seq.(e) *Annuity*. See 4 *Am.Jur.2d* (2007 ed.), *Annuities* §1 et seq.



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2. Specific and General Gifts.

14 Witkin Sum. Cal. Law Wills § 242

[§ 242] Specific and General Gifts.

(1) *Specific Gift.* A gift is specific when the transferor has in mind a specific thing, then in existence, which he or she intends the beneficiary to receive on his or her death. (See *Prob.C. 21117(a)*, supra, §241; *Estate of Goodfellow* (1913) 166 C. 409, 411, 137 P. 12 [gift of all interest in estate of a third person; question of ademption]; *Estate of Jepson* (1919) 181 C. 745, 747, 186 P. 352 [bequest of \$ 12,000 invested in certain mortgages; question of ademption]; *Estate of Daly* (1927) 202 C. 284, 287, 260 P. 296 [bequest of one-half of specified number of shares of stock; question of abatement]; *Estate of Mattley* (1930) 110 C.A. 439, 441, 294 P.2d 37 [bequest of insurance policy]; *Estate of Ehrenfels* (1966) 241 C.A.2d 215, 221, 224, 50 C.R. 358 [bequest of "shares of stock of Standard Oil Company of New Jersey ... as presently constituted" and if shares changed to be satisfied with equivalent changed shares; question of ademption]; 2 *Cal. L. Rev.* 166; 63 *A.L.R.4th* 1186 [effect of gift of specified percentage or share of estate, or residuary estate, to include specific property found to be of a greater value than share bequeathed].)

(2) *General Gift.* A gift of all property "of which I may die possessed" clearly includes after-acquired property, and is general. (See *Prob.C. 21117(b)*, supra, §241; *Estate of Dreer* (1932) 122 C.A. 763, 767, 10 P.2d 803; *Estate of Marinos* (1940) 39 C.A.2d 1, 5, 102 P.2d 443 [devise of "all my real property"].)

A gift of stocks or bonds is usually held to be general, despite the fact that a definite number is stated, unless the transferor indicates an intent to give a particular lot. Thus, in *Estate of Jones* (1943) 60 C.A.2d 795, 141 P.2d 764, the testator left his mother "five one thousand dollar Pacific Gas & Electric five per cent bonds." These and others owned by him were redeemed before his death. *Held*, there was no ademption. (60 C.A.2d 798.) (See 22 *A.L.R.2d* 457 [right of general legatee of securities where testator owns none or fewer than those described in will at time of death].)

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3. Residuary Clause.

14 Witkin Sum. Cal. Law Wills § 243

[§ 243] Residuary Clause.

(1) *Nature and Purpose of Clause.* A residuary clause is one by which the testator disposes of property that remains after other devises are satisfied. (See *Estate of Hall* (1920) 183 C. 61, 64, 190 P. 364; *Estate of Mathie* (1944) 64 C.A.2d 767, 779, 149 P.2d 485; C.E.B., 1 Will Drafting 3d, §§12.79, 12.80; 80 Am.Jur.2d (2002 ed.), Wills §1311 et seq.) No particular language is necessary; the clause is sufficient if it shows an intention that the surplus after payment of other gifts shall go to some designated person or persons. (*Estate of Upham* (1899) 127 C. 90, 98, 59 P. 315; see *Estate of Chamberlain* (1941) 46 C.A.2d 16, 19, 115 P.2d 235 [words "rest," "residue," "remainder" or "rest and residue," necessarily import a disposition of residuum]; *Estate of Lefranc* (1952) 38 C.2d 289, 295, 239 P.2d 617; on importance of properly drawn clause, see *Estate of Townsend* (1963) 221 C.A.2d 25, 28, 34 C.R. 275, supra, §236.)

(2) *Scope of Clause.* The ordinary purpose of a residuary clause is to dispose of the remainder of the testator's property that the testator does not wish to give in any particular manner. But another important effect is that it covers void or lapsed devises not protected by the anti-lapse statute. Thus, if the particular devise is illegal, or the devisee predeceases the testator, and the testator would ordinarily have died intestate as to that part, a general residuary clause covers it, and the residuary devisees, not the heirs, take it as "property not disposed by will." (*O'Connor v. Murphy* (1905) 147 C. 148, 153, 81 P. 406 ["The intention to include all ineffectual bequests in the residuary clause is presumed; the intention to exclude must appear from appropriate language evidencing that intention or by clear implication"]; *Estate of Walker* (1925) 196 C. 323, 328, 237 P. 1070; *Estate of Kelleher* (1928) 205 C. 757, 762, 272 P. 1060.) The clause covers a gift held void for undue influence of the beneficiary. (*Estate of Stauffer* (1956) 142 C.A.2d 35, 43, 297 P.2d 1029.) (See 39 A.L.R.3d 1390 [residuary clause as passing property acquired by estate after testator's death]; 35 A.L.R.4th 788 [proper disposition under will providing for percentages or proportions amounting to more or less than whole of residue].)

Former Prob.C. 126 abrogated the common law distinction between the effect of devises of real property, which spoke from the date of making of the will, and bequests of personal property, which spoke from date of death of the testator. At common law, if a devise was void or lapsed, it did not go to residuary devisees (i.e., it was property not disposed of by will at the time of the testator's death and went to heirs). In California, the distinction being abolished, lapsed devises and bequests--realty and personalty--all go to residuary devisees and legatees. (*Estate of Upham*, supra; *Estate of Walker*, supra.) The revised Probate Code uses only the terms "devise" and "devisee." (See supra, §241.)

(3) *Spurious Residuary Clause*. A single gift of "all" property does not constitute a residuary clause. (*Estate of Mathie, supra*; *Estate of Marinos (1940) 39 C.A.2d 1, 9, 102 P.2d 443.*) Thus, where the testator directed payment of debts and then gave "the rest, residue and remainder" to her husband and daughter, the clause was a disposition of the entire estate, and there was no residuary provision. Hence, though the husband forfeited his share under the will by contesting it, the testator died intestate as to that share, and the husband took one-half of the share as an heir. (*Estate of Mathie, supra*; on forfeiture clause, see *infra*, §560 et seq.)

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4. Constructional Preference.

14 Witkin Sum. Cal. Law Wills § 244

[§ 244] Constructional Preference.

The controlling consideration is, of course, the intention of the transferor; but to avoid ademption (*infra*, §253), the tendency is to construe testamentary gifts as general or demonstrative rather than specific. (See *Estate of Jones (1943)* 60 C.A.2d 795, 798, 141 P.2d 764, *supra*, §242; *Estate of Cline (1945)* 67 C.A.2d 800, 804, 155 P.2d 390; 2 Cal. L. Rev. 166; 74 Harv. L. Rev. 743; 64 A.L.R.2d 778 [when legacy is regarded as demonstrative].)

However, circumstances may indicate an intention to make a specific gift. In *Estate of Buck (1948)* 32 C.2d 372, 196 P.2d 769, the gift was of 5,000 shares of stock of the Belridge Oil Co., with additional language in the will: "which shares are now represented in my estate by trustees' certificates." The company was a closely held corporation, sales of its shares were negligible, and the testator, a director of the corporation, was fully aware of these facts. *Held*, the devise was specific, and was adeemed by a transfer prior to death. Thus the opinion rests not only on the terms of the will, but on the proposition that "where there are bequests of shares of a closely held corporation the nonpublic character of the shares bequeathed is evidence of an intent to make a specific gift." (32 C.2d 374.) (See 36 Cal. L. Rev. 338, 340; *Estate of Ehrenfels (1966)* 241 C.A.2d 215, 224, 50 C.R. 358.)

Where specific land is directed to be sold as the exclusive source of payment of a devise, it is held to be specific rather than demonstrative. Thus, in *Estate of Sullivan (1954)* 128 C.A.2d 144, 274 P.2d 946, the testator's holographic will gave \$ 2,000 each to three daughters, adding: "The money to be raised by sale" of a described parcel "or they may have the deed to settle same." Before his death the testator disposed of the land. *Held*, the devises were adeemed; this language showed an intention to make them specific, "because they were made payable from a specific and definitely ascertained source." (128 C.A.2d 147.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. At-Death Transfers.
5. Satisfaction of Pecuniary Gift.

14 Witkin Sum. Cal. Law Wills § 245

[§ 245] Satisfaction of Pecuniary Gift.

A *pecuniary gift* means "a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument." (*Prob.C. 21118(b)*.)

The following rules govern pecuniary gifts, "unless the instrument expressly provides otherwise":

(1) If an instrument authorizes a fiduciary to satisfy a pecuniary gift in whole or in part by distributing property other than money, the property selected for that purpose is valued at fair market value on the date of distribution. (*Prob.C. 21118(a)*.)

(2) If the instrument permits the fiduciary to value the property on another date, the property must fairly reflect net appreciation and depreciation (between the valuation date and the date of distribution) "in all of the assets from which the distribution could have been made." (*Prob.C. 21118(a)*.) This provision incorporates the standard of 26 C.F.R., §26.2642-2(b)(2). (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Interest and Income Accruing During Administration.

14 Witkin Sum. Cal. Law Wills § 246

[§ 246] Interest and Income Accruing During Administration.

(1) *Nature and Scope of Statutory Scheme.* *Prob.C. 12000* et seq. set forth rules relating to the payment of interest and income accruing during administration. The statutory provisions apply "where the intention of the testator is not otherwise indicated by the will." (*Prob.C. 12000.*)

(2) *Rate of Interest.* If interest is payable, the rate is "three percentage points less than the legal rate on judgments in effect one year after the date of the testator's death." The rate remains fixed and is not recomputed in the event of a change in the applicable rate thereafter. (*Prob.C. 12001.*)

(3) *Income and Expenses of Specific Devise.* *Prob.C. 12002*, applicable to specific devises of real and personal property (see Law Rev. Com. Comment), provides as follows:

(a) "Except as provided in *Prob.C. 12002*, a specific devise does not bear interest." (*Prob.C. 12002(a).*)

(b) "A specific devise carries with it income on the devised property from the date of death, less expenses attributable to the devised property during administration of the estate. For purposes of this section, expenses attributable to property are expenses that result directly from the use or ownership of the property, including property tax and tax on the income from the property, but excluding estate and generation-skipping transfer taxes." (*Prob.C. 12002(b).*) The attributable expenses are "those relating directly to the property, including maintenance, insurance, property taxes, and income taxes allocable to income from the property." (Law Rev. Com. Comment.)

(c) "If income of specifically devised property is not sufficient to pay expenses attributable to the property, the deficiency shall be paid out of the estate until the property is distributed to the devisee or the devisee takes possession of or occupies the property, whichever occurs first. To the extent a deficiency paid out of the estate is attributable to the period that commences one year after the testator's death, whether paid during or after expiration of the one year period following the date of death, the amount paid is a charge against the share of the devisee, and the personal representative has an equitable lien on the specifically devised property as against the devisee in the amount paid." (*Prob.C. 12002(c).*) The Law Revision Commission Comment explains:

(1) The second sentence of *Prob.C. 12002(c)* limits the burden on the estate to the first year after the decedent's

death.

(2) Expenses paid out by the estate after the first year are ultimately borne by the distributee of the property.

(3) The equitable lien imposed by *Prob.C. 12002(c)* is not good against a transferee of the property who gives fair consideration for the property without knowledge of the lien.

(d) "If specifically devised property is sold during administration of the estate, the devisee is entitled to the net income from the property until the date of sale, and to interest on the net sale proceeds thereafter, but no interest accrues during the first year after the testator's death." (*Prob.C. 12002(d)*.) (See *15 A.L.R.3d 1038* [bequest of bank deposit or securities as carrying dividends or interest].)

(4) *Interest on General Pecuniary Devise*. "If a general pecuniary devise, including a general pecuniary devise in trust, is not distributed within one year after the testator's death, the devise bears interest thereafter." (*Prob.C. 12003*.)

(5) *Interest on Annuity*. "An annuity commences at the testator's death and shall be paid at the end of the annual, monthly, or other specified period." (*Prob.C. 12004(a)*.) "If an annuity is not paid at the end of the specified period, it bears interest thereafter, but no interest accrues during the first year after the testator's death." (*Prob.C. 12004(b)*.) (See *66 A.L.R.2d 857* [interest on arrearages or unpaid accumulations of annuities].)

(6) *Interest on Devise for Maintenance*. "A devisee of a devise for maintenance is entitled to interest on the amount of any unpaid accumulations of the payments held by the personal representative on each anniversary of the testator's death, computed from the date of the anniversary." (*Prob.C. 12005*.) A devise for maintenance, within the meaning of this provision, includes a devise for support. (Law Rev. Com. Comment.)

(7) *Remaining Income to Residuary or Intestate Distributees*. "Net income received during administration not paid under other provisions of this chapter and not otherwise devised shall be distributed pro rata as income among all distributees who receive either residuary or intestate property. If a distributee takes for life or for a term of years, the pro rata share of income belongs to the tenant for life or for the term of years." (*Prob.C. 12006*.) The Law Revision Commission Comment points out that (1) the reference to intestate property recognizes that there may be a partial intestacy in a testate estate; and (2) the rule applies to a person who receives either or both testate and intestate property.

SUPPLEMENT: [This section is current through the latest supplement]



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7. After-Acquired Property.

14 Witkin Sum. Cal. Law Wills § 247

[§ 247] After-Acquired Property.

(1) *In General.* Except as otherwise provided in *Prob.C. 641* and *642*, governing powers of appointment, "a will passes all property the testator owns at death, including property acquired after execution of the will." (*Prob.C. 21105*, based on *Unif.Prob.C.*, §2-604.) (See *18 A.L.R.2d 519* [gift as including enlarged interest acquired by testator after execution of will].) The statute changed the common law rule, which passed only titles owned at the time of making the will. (*Estate of Winsby (1930) 108 C.A. 614, 618, 291 P. 851.*)

(2) *Property Subject to Power of Appointment.* Former *Prob.C. 125* originally provided for passage of after-acquired property, "including property embraced in a power to devise." Hence, if the testator, having a power of appointment, merely gave all of the estate, the effect was an exercise of the power in favor of the person to whom the estate was given. (See *Childs v. Gross (1940) 41 C.A.2d 680, 687, 107 P.2d 424*; *California Trust Co. v. Ott (1943) 59 C.A.2d 715, 717, 140 P.2d 79*; *Estate of Carter (1956) 47 C.2d 200, 204, 302 P.2d 301.*) This rule was changed in 1969 by the adoption of the Powers of Appointment Act. (See *Prob.C. 6140 et seq.*; *12 Summary (10th), Real Property*, §145 et seq.)

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8. Direction To Convert Real Property into Money.

14 Witkin Sum. Cal. Law Wills § 248

[§ 248] Direction To Convert Real Property into Money.

If an instrument directs the conversion of real property into money at the transferor's death, the real property and its proceeds are deemed personal property from the time of the transferor's death. (*Prob.C. 21107.*) (On common law doctrine of equitable conversion, see 13 *Summary* (10th), *Equity*, §177.)

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9. Exoneration.

14 Witkin Sum. Cal. Law Wills § 249

[§ 249] Exoneration.

"A specific gift passes the property transferred subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of exoneration, regardless of a general directive to pay debts contained in the instrument."
(*Prob.C. 21131*; see *infra*, §661.)

SUPPLEMENT: [This section is current through the latest supplement]



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10. Devise Subject to Uniform Transfers to Minors Act.

14 Witkin Sum. Cal. Law Wills § 250

[§ 250] Devise Subject to Uniform Transfers to Minors Act.

(1) *Nature and Scope of Statutes.* The Uniform Transfers to Minors Act (*Prob.C. 3900* et seq.; see 13 *Summary* (10th), *Personal Property*, §140 et seq.) authorizes the transfer of property to a custodian on behalf of a minor. Under *Prob.C. 6341* et seq., a devise may be subject to the Uniform Act. However, the provisions of *Prob.C. 6341* et seq. "shall not be construed as providing an exclusive method of making devises to or for the benefit of minors." (*Prob.C. 6349(a)*.) In addition, nothing in *Prob.C. 6341* et seq. limits the provisions of the Uniform Act. (*Prob.C. 6349(b)*.)

(2) *Distribution.* If a testator's will provides that devised property shall be paid or delivered to a custodian subject to the Uniform Transfers to Minors Act (or the predecessor statute, the Uniform Gifts to Minors Act), the provisions of *Prob.C. 3900* et seq. are applicable to the devise during the period before distribution of the property. (*Prob.C. 6341(a)*.) The personal representative, on entry of an order for distribution, makes the distribution by transferring the devised property in the form and manner provided by the Uniform Act. (*Prob.C. 6341(c)*.) However, unless the will clearly provides otherwise, if, before the order for distribution, the beneficiary attains the age at which the custodianship was to terminate, the devise is deemed to be a direct devise to the beneficiary. (*Prob.C. 6341(b)*.)

(3) *Custodian.* If a vacancy in the custodianship exists before full distribution of the devised property, a successor custodian must be appointed in the manner provided by the Uniform Act. (*Prob.C. 6341(d)*.) The testator's will may provide for successor or substitute custodians, and may specify the standard of compensation of the custodian. (*Prob.C. 6345*.)

(4) *Estate Proceedings.* Except as otherwise provided in the will or ordered by the court, the custodian named in the will and the person for whom the property is to be held are deemed devisees for purposes of receiving notices that may be required or permitted to be sent to devisees. (*Prob.C. 6347(a)*.)

Unless required by will or ordered by the court, the custodian has no duty to participate in estate proceedings on behalf of the minor, and in no event does the custodian have a duty to participate unless the custodian has filed a written notice of acceptance of the office of custodian with the clerk of the court in which administration is pending. (*Prob.C. 6347(b)*.)

(5) *Jurisdiction of Court.* "Until distribution of the property pursuant to an order for distribution is completed, the

court in which administration of the estate of the testator is pending has exclusive jurisdiction over all proceedings and matters concerning undistributed property, including, but not limited to, the appointment, declination, resignation, removal, bonding, and compensation of, and the delivery or transfer of the undistributed property to, a custodian. After distribution of any property is completed, the court has no further jurisdiction over the distributed property and the property shall be held subject to the California Uniform Transfers to Minors Act." (*Prob.C. 6348.*)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Ademption.

1. By Satisfaction or Advancement.

a. General Law.

Witkin Sum. Cal. Law Wills § 251

[§ 251] General Law.

SUPPLEMENT: [This section is current through the latest supplement]

See 91 Proof of Facts 3d 277 [ademption by satisfaction or extinction]; superseding 1 Proof of Facts 2d, Ademption by Satisfaction, text, p. 329.



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a. General Law.

14 Witkin Sum. Cal. Law Wills § 251

[§ 251] General Law.

The doctrine of advancement by an intestate decedent to an heir (see *infra*, §287) also applies in cases of testacy. In other words, the inter vivos gift is treated as a satisfaction of the provision by will, and the gift in the will is adeemed, i.e., withdrawn or revoked. (See *Estate of Hayne* (1913) 165 C. 568, 572, 574, 133 P. 277 [no particular form is required; express statement in will or codicil clearly is sufficient]; *Estate of Vanderhurst* (1915) 171 C. 553, 556, 154 P. 5; *Estate of Crane* (1936) 6 C.2d 218, 221, 57 P.2d 476 [property settlement agreement providing that neither party would claim any right in the other's estate; no ademption]; *Estate of Brown* (1937) 22 C.A.2d 480, 489, 71 P.2d 345; *Estate of Rawnsley* (1949) 94 C.A.2d 384, 386, 210 P.2d 888; *Rest.3d, Property (Wills and Other Donative Transfers)* §5.4 [ademption by satisfaction]; Cal. Transactions Forms, 1 Estate Planning §7:23 et seq.; C.E.B., 1 Will Drafting 3d, §12.7 et seq.; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1479 et seq.; 1 Proof of Facts 2d, Ademption by Satisfaction §1 et seq.; 83 Proof of Facts 3d 295 [Decedent's Intent That Inter Vivos Gift to Heir Constitute Advancement]; 26 *A.L.R.2d* 9 [satisfaction or ademption of general legacy by inter vivos gift, transfer, or payment]; 74 *A.L.R.5th* 491 [check as advancement].)

Gifts made before execution of the will are ordinarily not considered advancements, because the testator was presumably aware of them at the time of execution. But if the will itself discloses a contrary intent, as where it expressly refers to the gifts as advancements, that intent will be given effect. (*Estate of Hayne*, *supra*, 165 C. 574.)

The rule that no part of an advancement needs to be refunded was applied in *Estate of Nielsen* (1959) 169 C.A.2d 297, 305, 337 P.2d 87. The will referred to prior gifts and loans to various legatees, and directed that these should be deducted from the shares regardless of whether they constituted valid causes of action against the debtor-legatees. H, daughter of the testator, was indebted to her on notes secured by trust deeds. The probate judge held her liable for the full amount of principal and interest. *Held*, reversed. The will clearly treated both gifts and loans as advancements; hence, the debt was no longer an enforceable obligation and could only be deducted from the legacy. (169 C.A.2d 306.)

West's Key Number Digest, Wills k.764

SUPPLEMENT: [This section is current through the latest supplement]

See 91 Proof of Facts 3d 277 [ademption by satisfaction or extinction]; superseding 1 Proof of Facts 2d, Ademption by

Satisfaction, text, p. 329.



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1. By Satisfaction or Advancement.

b. California Statute.

14 Witkin Sum. Cal. Law Wills § 252

[§ 252] California Statute.

(1) *Statutory Development.* The original statutes governing advancements and adempments (former Prob.C. 1050 et seq.) were repealed and replaced by former Prob.C. 6174 in 1984. Former Prob.C. 6174 was in turn repealed and replaced by *Prob.C. 21135* in 1994, when the statutes governing the construction of wills were extended to trusts, deeds, and other documents under the Probate Code.

(2) *Definition.* An "at-death transfer" is "a transfer that is revocable during the lifetime of the transferor" (but not including a joint tenancy or joint account with right of survivorship). (*Prob.C. 21104.*)

(3) *Conditions.* Property given by a transferor during life to a person is treated as a satisfaction of an at-death transfer to that person in whole or in part only if one of the following conditions is satisfied:

(a) "The instrument provides for deduction of the lifetime gift from the at-death transfer." (*Prob.C. 21135(a)(1).*)

(b) "The transferor declares in a contemporaneous writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of the at-death transfer." (*Prob.C. 21135(a)(2).*)

(c) "The transferee acknowledges in writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of the at-death transfer." (*Prob.C. 21135(a)(3).*)

(d) "The property given is the same property that is the subject of a specific gift to that person." (*Prob.C. 21135(a)(4).*)

This rule is applicable in the absence of a contrary intention by the transferor. (*Prob.C. 21102.*)

(4) *Valuation.* For purposes of partial satisfaction, property given during life is valued as of the time the transferee came into possession or enjoyment of the property or as of the time of death of the transferor, whichever occurs first. (*Prob.C. 21135(b).*) However, if the value of the gift is expressed in a contemporaneous writing of the transferor, or in an acknowledgment of the transferee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate. (*Prob.C. 21135(c).*)

(5) *Effect of Failure To Survive.* If the transferee fails to survive the transferor, the gift is treated as a full or partial satisfaction of the gift in applying *Prob.C. 21110* (anti-lapse statute; infra, §263) and *Prob.C. 21111* (survival requirement; supra, §214), unless the transferor's contemporaneous writing provides otherwise. (*Prob.C. 21135(d).*)

(6) *Rules Are Not Exhaustive.* The ademption rules stated in *Prob.C. 21135* are not exhaustive, and nothing in that section is intended to increase the incidence of ademption under California law. (*Prob.C. 21139.*)

SUPPLEMENT: [This section is current through the latest supplement]



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2. By Extinction of Specific Devise.

a. General Rule.

Witkin Sum. Cal. Law Wills § 253

[§ 253] General Rule.

SUPPLEMENT: [This section is current through the latest supplement]
See 91 Proof of Facts 3d 277 [ademption by satisfaction or extinction].



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a. General Rule.

14 Witkin Sum. Cal. Law Wills § 253

[§ 253] General Rule.

If the testator's will makes a gift of a particular thing (by a specific devise), and that thing is not in existence or is no longer a part of the testator's estate at the time of death, the result may be an ademption by extinction, i.e., by destruction or disposition of the subject matter. (See generally *18 Cal. L. Rev. 711*; *43 Cal. L. Rev. 151*; *8 Stanf. L. Rev. 494*; *29 So. Cal. L. Rev. 249*; *3 U.C.L.A. L. Rev. 126*; *61 A.L.R.2d 449* [ademption of specific legacy of securities]; *45 A.L.R.3d 10* [ademption of bequest of proceeds of property]; *65 A.L.R.3d 541* [ademption of legacy of business or interest in business]; *25 A.L.R.4th 88* [ademption of bequest of debt]; *80 Am.Jur.2d (2002 ed.), Wills §1458 et seq.*; C.E.B., 1 Will Drafting 3d, §12.7; *Rest.3d, Property (Wills and Other Donative Transfers) §5.2* [ademption of specific devise by extinction].) (For critical examination of ademption, methods employed to overcome it, and suggested reformulation of rule, see *74 Harv. L. Rev. 741*.)

The following are illustrations of the traditional rule:

(1) Devise of a share of money or property in the estate of a third person in the course of administration, adeemed by testator's receipt of that share and disposition of it before death. (*Estate of Goodfellow* (1913) 166 C. 409, 415, 137 P. 12; *Estate of Babb* (1927) 200 C. 252, 257, 252 P. 1039.)

(2) Devise of real property or an interest in real property adeemed by the subsequent sale of the property. (*Estate of McLaughlin* (1929) 97 C.A. 481, 483, 275 P. 874; *Estate of Sorensen* (1941) 46 C.A.2d 35, 39, 115 P.2d 241; cf. *Estate of Sullivan* (1954) 128 C.A.2d 144, 147, 274 P.2d 946, supra, §244 [devise payable out of proceeds of specific land].)

(3) Gift of a sum of money invested in certain mortgages, adeemed by subsequent payment of debts by mortgagees and cancellation of the mortgages. (*Estate of Jepson* (1919) 181 C. 745, 746, 186 P. 352; *Estate of Calori* (1962) 209 C.A.2d 711, 712, 26 C.R. 281 [payment of note].)

Where there has been a complete extinction of the subject matter, as distinguished from an alteration of interest or change in form (see *infra*, §254 et seq.), the intention of the testator is generally considered immaterial. The only question is whether the specific thing is in existence as a part of the estate; if not, the gift is adeemed, for any attempt to enforce it would mean the giving of a substitute to which the devisee or legatee is clearly not entitled. (See *18 Cal. L.*

Rev. 711; 43 Cal. L. Rev. 151; 8 Stanf. L. Rev. 494.)

California cases have made intent an important practical factor as follows:

(a) The devisee may be able to prevent ademption by evidence of intent to make a general devise, which is not subject to ademption. (See *Estate of Jones (1943) 60 C.A.2d 795, 798, 141 P.2d 764*, supra, §242; cf. *Estate of Buck (1948) 32 C.2d 372, 374, 196 P.2d 769*, supra, §244.)

(b) The court will similarly attempt to construe a devise as demonstrative rather than specific, again with the effect of preventing ademption. (See *Estate of Cline (1945) 67 C.A.2d 800, 806, 155 P.2d 390*.)

(c) By an exceedingly liberal interpretation of the concepts of alteration of interest and change of form, a devise that would be adeemed in most jurisdictions may be saved in California. (See *infra*, §254 et seq.)

West's Key Number Digest, Wills k.765

SUPPLEMENT: [This section is current through the latest supplement]

See 91 Proof of Facts 3d 277 [ademption by satisfaction or extinction].



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b. Statutory Protection of Beneficiary.

14 Witkin Sum. Cal. Law Wills § 254

[§ 254] Statutory Protection of Beneficiary.

At one time, three statutory provisions protected the beneficiary of a specific gift from ademption:

(1) *Sale*. Former Prob.C. 21136 provided that if the transferor entered into an agreement for the sale or transfer of specifically given property after execution of the transfer instrument, the beneficiary of the specific gift had the right to the property "subject to the remedies of the purchaser or transferee."

(2) *Encumbrance*. Former Prob.C. 21137 provided that if the transferor after execution of the transfer instrument placed a charge or encumbrance on specifically given property after execution of the transfer instrument, for the purpose of securing the payment of money or the performance of a covenant or agreement, the beneficiary of the specific gift had the right to the property subject to the charge or encumbrance.

(3) *Alteration*. Former Prob.C. 21138 provided that if the transferor altered, but did not wholly divest, the transferor's interest in property that was specifically given by a conveyance, settlement, or other act after execution of the transfer instrument, the beneficiary of the specific gift had the right to the transferor's remaining interest in the property.

These provisions were repealed in 2002. The Law Revision Commission Comments note that these matters are covered by case law. "Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law."

The following decisions are of note:

In *Estate of White (1948) 84 C.A.2d 409, 190 P.2d 968*, the testator, an author, bequeathed "all unpublished manuscripts" to respondent, and all the rest of his personal property to appellant. Prior to his death the testator had completed a book and contracted to sell it to a publisher. Appellant contended that the royalties should go to him, but the court held that, because the work was as yet unpublished, the manuscript went to respondent, and a gift of the royalties by implication arose in favor of the respondent. (*84 C.A.2d 414.*) (See *62 A.L.R.2d 958* [construction and effect of statute governing executory agreement].)

In *Estate of Erskine* (1948) 84 C.A.2d 323, 190 P.2d 659, the testator devised his interest in a water works system to his daughter, then entered into a contract to sell the system to a third party. By the time of his death an escrow had been opened, but the purchaser had not performed all conditions, and the transfer of title did not take place until 2 months after the testator died. *Held*, applying the predecessor statutes, there was no ademption of the devise, nor could the doctrine of equitable conversion be used to treat the transfer as completed for that purpose. (84 C.A.2d 329.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. By Extinction of Specific Devise.

c. Change in Form.

1. General Rule: No Ademption.

14 Witkin Sum. Cal. Law Wills § 255

[§ 255] General Rule: No Ademption.

Even where the particular subject of the gift no longer exists, ademption will not take place if it is not wholly extinguished but merely changed in form. (See *Estate of Cooper (1951) 107 C.A.2d 592, 595, 237 P.2d 699* [testator gave "[t]hat certain Hudson Automobile, now owned by me"; no ademption where he bought new Hudson which he owned at death]; *43 Cal. L. Rev. 156; 74 Harv. L. Rev. 744.*) (On intent of testator; see *infra*, §256.)

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c. Change in Form.

2. Intent of Transferor.

14 Witkin Sum. Cal. Law Wills § 256

[§ 256] Intent of Transferor.

(1) *California Theory*. In determining whether the change is formal only (supra, §255), the California courts have tended to avoid fixed rules of ademption. Instead they look to the inferred or probable intent of the transferor under the particular circumstances. This approach, contrary to the weight of authority, is taken in a number of cases. (See *Estate of Moore* (1955) 135 C.A.2d 122, 131, 286 P.2d 939 ["California has outgrown this ancient doctrine of strict ademption in favor of effectuation of the actual intent of the testator so far as it can be discerned"]; *Estate of Austin* (1980) 113 C.A.3d 167, 173, 169 C.R. 648; cf. *Estate of Sullivan* (1954) 128 C.A.2d 144, 147, 274 P.2d 946, supra, §244 [holding gift adeemed, but emphasizing intention of testator]; 43 Cal. L. Rev. 151; 8 Stanf. L. Rev. 494; 29 So. Cal. L. Rev. 249; 3 U.C.L.A. L. Rev. 126; 74 Harv. L. Rev. 747; infra, §§259, 260.) This approach is consistent with *Prob.C. 21102*, which states that the rules of construction apply "where the intention of the transferor is not indicated by the instrument."

(2) *Illustrations*. In *Estate of McLaughlin* (1929) 97 C.A. 485, 275 P. 875, the court held that a gift of a mortgage on property was not adeemed when the testator accepted a deed in satisfaction of it, because "the purpose" of the testator was to convey the land to her husband (97 C.A. 492), and acceptance of the deed "furnishes no evidence of the intent" to adeem (97 C.A. 489). (See 43 Cal. L. Rev. 153.)

In *Estate of Stevens* (1945) 27 C.2d 108, 162 P.2d 918, the testator left "what cash I have" to two children, stating that "it is at the Bank of America in Santa Monica." Actually his money was found in another branch of that bank. Upholding the probate judge's finding against ademption (on a record that did not bring up the evidence), the court concluded that even if decedent had transferred the funds prior to his death, there was no proof that he thereby intended to destroy the bequest, and that "proof of such intent is necessary to establish an ademption" (citing *McLaughlin*). (27 C.2d 115.)

In *Estate of MacDonald* (1955) 133 C.A.2d 43, 283 P.2d 271, decedent's will gave "whatever car I may own at the time of my death" to her mother. She died after an accident in which the car was wrecked. The insurance company (under its option to pay money or repair or replace the car) paid \$ 2,850 and salvaged \$ 300 from the car. The residuary legatees contended that the mother was entitled only to the salvage value of the car. *Held*, she was properly awarded the

money. If the insurance company had exercised its option to repair the car, the mother would have received it; thus the residuary legatees were in effect insisting that a third party (insurer) might determine how the decedent's will should be carried out. "In view of the circumstances under which the testatrix died, there are no facts from which an intent can be inferred that she intended to leave to her mother \$ 300 worth of wreckage instead of a valuable means of transportation." (133 C.A.2d 48.) (See 8 *Stanf. L. Rev.* 494; 29 *So. Cal. L. Rev.* 249; 82 *A.L.R.3d* 1261 [disposition of insurance proceeds of specifically devised personal property].)

In *Estate of Moore, supra*, the testator in a holographic will left real property to L, described in affectionate terms. A first cousin not mentioned in the will claimed an ademption of a parcel on the ground that decedent had sold it and had taken a purchase money note and deed of trust for the balance of the price. *Held*, affirming the probate court, there was no ademption, for two reasons: (a) This was not the intention of the testator. (b) The testator, as an unpaid vendor with a mortgage or trust deed security, still retained a lien or other security interest in the property, and therefore the testator's interest was altered but not wholly divested (see *supra*, §254). (135 C.A.2d 131.) (See *Estate of Trainer* (1958) 161 C.A.2d 353, 354, 326 P.2d 520 [following *Moore* where will was drawn by attorney]; *Estate of Newsome* (1967) 248 C.A.2d 712, 714, 56 C.R. 874 [devise of real property to wife, sale and deposit of proceeds in savings and loan account; trial judge's finding of no intent to effect ademption sustained]; 3 *U.C.L.A. L. Rev.* 126.)

In *Estate of Worthy* (1988) 205 C.A.3d 760, 252 C.R. 462, the executor of an estate filed a petition to determine heirship, claiming ademption of a devise of real property. The testator had sold the property before her death, but the sale did not close until 3 days after her death. The judge denied the claim, and the residuary legatees appealed, contending that the judge erroneously rejected extrinsic evidence offered to show a change in testamentary intent. *Held*, judgment affirmed.

(a) "If the testator fails to anticipate future changes in the assets given to particular beneficiaries, and therefore fails to spell out in the will how such changes affect the gifts, the law will determine the result" by resort to the rules of construction, insofar as those rules apply to the facts of the case. (205 C.A.3d 768, 769.)

(b) Here, the judge "correctly concluded the incomplete sale did not cause an ademption since the will failed to so provide." Instead, former Prob.C. 6172 (now *Prob.C.* 21133; see *infra*, §258) and the executory contract statute (now repealed; see *supra*, §254), "specifically protecting the devisees' interest in the property, and right to the proceeds when and if received, applied." Evidence of the reasons for the sale was therefore irrelevant. (205 C.A.3d 769.)

(c) "We also add our view that the offered evidence was, in any event, of no consequence. It merely suggested a reason for the sale, not an intent to effect an ademption irrespective of how much of the proceeds would be received and used. Therefore, under either the application of the ademption statutes, or simple relevance rules, the rejection of the evidence was proper." (205 C.A.3d 769.)

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3. Change in Form of Securities.

14 Witkin Sum. Cal. Law Wills § 257

[§ 257] Change in Form of Securities.

(1) *Case Law Development.* The typical cases of change in form involve gifts of a number of shares of corporate stock where the shares are subsequently exchanged for other shares in the same corporation or are increased by a stock split. (See 1 *U.C.L.A. L. Rev.* 398; 61 *A.L.R.2d* 449 [ademption of specific legacy of securities]; 46 *A.L.R.3d* 7 [changes in stock or corporate structure as affecting bequest of stock]; *Rest.3d, Property (Wills and Other Donative Transfers)* §5.3 [effect of stock split, stock dividend, and other distributions on devise of specific number of shares].)

In *Estate of Helfman* (1961) 193 *C.A.2d* 652, 14 *C.R.* 482, the court followed the modern weight of authority, holding that the split is merely a change in form and that the devisee gets the increased number of shares. The opinion distinguishes cases dealing with stock dividends as based on different reasoning. (193 *C.A.2d* 659.) (See 50 *Cal. L. Rev.* 160 [arguing that no-ademption rule should be same where there are stock dividends].)

There is some authority holding that an exchange of stock for bonds, or for stock in a different corporation, is so substantial as to result in an ademption. But the opposite view has been expressed by dicta in several California cases. (See *Estate of Cooper* (1951) 107 *C.A.2d* 592, 596, 237 *P.2d* 699.)

(2) *Statutory Rule.* If a transferor executed an instrument that made an at-death transfer of securities and owned securities at that time that met the description in the instrument, the transfer includes additional securities owned at death to the extent that the additional securities were acquired by the transferor after the instrument was executed as the result of the ownership of the securities described in the instrument. This provision applies to the following additional securities:

(a) "Securities in the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring corporation, excluding any acquired by exercise of purchase options." (*Prob.C. 21132(a)(1).*)

(b) "Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring corporation." (*Prob.C. 21132(a)(2).*)

(c) "Securities of the same organization acquired as a result of a plan of investment." (*Prob.C. 21132(a)(3).*)

Cash distributions before death with respect to a security described in the instrument are not part of the transfer. (*Prob.C. 21132(b).*)

These rules apply in the absence of a contrary intention of the testator. (*Prob.C. 21102.*)

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4. Proceeds of Sale, Condemnation, Insurance, or Foreclosure.

14 Witkin Sum. Cal. Law Wills § 258

[§ 258] Proceeds of Sale, Condemnation, Insurance, or Foreclosure.

In a number of special situations, a specific gift should not be adeemed. (See *Rest.3d, Property (Wills and Other Donative Transfers)* §5.2 [ademption of specific devise by extinction].) These rules are consistent with prior California case law and apply in the absence of a contrary intention of the testator. (*Prob.C. 21102.*)

(1) *In General.* The recipient of an at-death transfer of a specific gift has the right to the property specifically given, to the extent the property is owned by the transferor at the time the gift takes effect in possession or enjoyment, and to all of the following:

(a) *Sale.* "Any balance of the purchase price (together with any security interest agreement) owing from a purchaser to the transferor at the time the gift takes effect in possession or enjoyment by reason of sale of the property." (*Prob.C. 21133(a).*)

(b) *Condemnation.* "Any amount of an eminent domain award for the taking of the property unpaid at the time the gift takes effect in possession or enjoyment." (*Prob.C. 21133(b).*)

(c) *Insurance.* "Any proceeds unpaid at the time the gift takes effect in possession or enjoyment on fire or casualty insurance on or other recovery for injury to the property." (*Prob.C. 21133(c).*)

(d) *Foreclosure.* "Property owned by the transferor at the time the gift takes effect in possession or enjoyment and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically given obligation." (*Prob.C. 21133(d).*)

(2) *Conservatorship and Power of Attorney Property.* *Prob.C. 21134* governs the rights of the transferee of a specific gift of property involved in a transaction by a conservator or an agent under a durable power of attorney for an incapacitated principal in the event of sale, condemnation, insured loss, or other recovery:

(a) Except as otherwise provided in *Prob.C. 21134*, if, after the execution of the instrument of gift, specifically given property is sold by the conservator or agent, the transferee of the specific gift has the right to a general pecuniary

gift equal to the net sale price of the property or the amount of the unpaid loan on the property. (*Prob.C. 21134(a).*)

(b) Except as otherwise provided in *Prob.C. 21134*, if an eminent domain award for the taking of specifically given property is paid to the conservator or agent, or if the proceeds on fire or casualty insurance or recovery for injury to the specifically gifted property are paid to the conservator or agent, the recipient of the specific gift has the right to a general pecuniary gift equal to the eminent domain award or the insurance proceeds or recovery. (*Prob.C. 21134(b).*)

(c) For purposes of references in the statute to a conservator, *Prob.C. 21134* does not apply if, after the sale, mortgage, condemnation, insured loss, or recovery the conservatorship is terminated and the transferor survives the termination by 1 year. (*Prob.C. 21134(c).*)

(d) For purposes of references in the statute to an agent under a durable power of attorney for an incapacitated principal, an adjudication of incapacity before death is not required, and the acts of the agent within the authority of the power are presumed to be for the principal. (*Prob.C. 21134(d).*)

(e) The right of the transferee of the specific gift under *Prob.C. 21134* is reduced by any right the transferee has under *Prob.C. 21133*. (*Prob.C. 21134(e).*)

(3) *Scope of Statutes.* The rules stated in *Prob.C. 21133* and *21134* are not exhaustive, and nothing in those sections is intended to increase the incidence of ademption under California law. (*Prob.C. 21139.*)

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d. Change in Substance.

1. Consumption of Proceeds by Guardian.

14 Witkin Sum. Cal. Law Wills § 259

[§ 259] Consumption of Proceeds by Guardian.

The theory of the cases cited in the preceding sections (*supra*, §255 et seq.) that a change in form will not work an ademption unless the transferor so intended, is not only firmly established, but has been extended to apply to substantial changes. (On controlling effect of transferor's intent, see *Prob.C. 21102*, *supra*, §256.)

In *Estate of Mason* (1965) 62 C.2d 213, 42 C.R. 13, 397 P.2d 1005, the testator devised her home to her nephew, then became incompetent. Her guardian with court approval sold the home, and used all but \$ 556.66 of the \$ 21,000 proceeds for her support until she died. The nephew claimed not only the \$ 556.66 balance but all of the residuary legacies, amounting to \$ 6,808.08. *Held*, he was entitled to the money; there was no ademption.

(a) A sale of real property by the guardian, with nothing more, would call for application of the change of form rule, and the devisee would be entitled to the proceeds. Otherwise a guardian would be able to determine distribution, with the incompetent ward unable to make a new will. (62 C.2d 216.)

(b) This case, involving a consumption of the proceeds, presented a special problem. The traditional ademption rule would allow a guardian to destroy his ward's testamentary plan even though acting to protect the ward's economic interests. To avoid this undesirable result, in the absence of express legislation, the court formulated a judicial rule, using as a model the statute on abatement of testamentary gifts when assets are insufficient to pay them in full. (See *infra*, §659.) Expenses during guardianship are similar to expenses of a decedent's estate, and the same rule should govern, "for it is no more the function of a guardian than it is of an executor to modify the decedent's testamentary plan." (62 C.2d 217.)

(c) Hence, the residuary legatees were required to contribute in full to satisfy the nephew's specific gift. (62 C.2d 217.) (See *Estate of Packham* (1965) 232 C.A.2d 847, 848, 43 C.R. 318 [following *Mason*]; *Estate of Ehrenfels* (1966) 241 C.A.2d 215, 226, 50 C.R. 358 [bequest of Standard Oil stock "as presently constituted"; stock was split, testator became incompetent, and guardian exchanged them for shares in mutual fund; legatees were entitled to fund stock adjusted for bequeathed shares]; 18 *Hastings L. J.* 461; 84 A.L.R.4th 462 [ademption or revocation of specific devise by guardian or conservator of incompetent testator].)

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In *Brown v. Labow* (2007) 157 C.A.4th 795, 69 C.R.3d 417, a settlor's revocable living trust provided for specific gifts of shares of stock in the settlor's closely held corporation to the settlor's two sons on the settlor's death. The settlor became incapacitated, a conservator was appointed, and the conservator was then named as the successor trustee. Because the shares were the principal trust asset, the probate court ordered that the shares could not be transferred without a court order. However, the assets of the company were sold and, with the approval of the conservator acting as the trustee, the corporation was dissolved. *Held*, the specific gifts were not adeemed.

(a) Under *Estate of Mason* (1965) 62 C.2d 213, 42 C.R. 13, 397 P.2d 1005, text, p. 338, and following cases, the guardian or conservator of an incompetent person cannot cause the ademption of a specific gift by means of a property transaction where the incapacitated person dies without regaining competency, unless there is substantial evidence that the conservatee intended that an ademption occur. (157 C.A.4th 808, 812.)

(b) The devisee or beneficiary of the specific gift is entitled to the proceeds of the transaction to the extent that the proceeds can be traced in the estate. (157 C.A.4th 810.) Here, although the shares were not sold, they were rendered worthless by the sale of the corporate assets, but that sale resulted in a payment to the trust equal to the value of the shares. That amount is traceable, and under these circumstances, the sale of assets was a change in the form of the shares. (157 C.A.4th 811, 812.)

(c) Under the doctrine of substituted judgment, the probate court may authorize or require a conservator to modify a conservatee's estate plan. However, the conservator here did not have the court's permission to revoke the specific gifts in the trust, and unilaterally disposed of valuable property belonging to the conservatorship estate. (157 C.A.4th 815, 816.)



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2. Special Circumstances of Sale.

14 Witkin Sum. Cal. Law Wills § 260

[§ 260] Special Circumstances of Sale.

(1) *Sale Procured by Undue Influence.* In *Estate of Holmes* (1965) 233 C.A.2d 464, 43 C.R. 693, the testator devised his home to Mr. and Mrs. J, and left the residue to his housekeeper, Mrs. D. During his last year, while he was senile, Mrs. D prevailed upon him to sell the house for \$ 15,000. At the testator's direction, the first \$ 5,000 of payments went to Mr. and Mrs. J and another, but after his death Mrs. D claimed the balance as part of the residue of his estate. The probate court found on sufficient evidence that Mrs. D was in a confidential relationship, that she derived an advantage from the sale, that she actively participated in the transaction, and that the presumption of undue influence was not overcome. The question then was whether this prevented the normal result of ademption of the specific devise. *Held*, the intent to adeem could not possibly be found in a deed procured by undue influence. (233 C.A.2d 468.) (See 18 *Hastings L. J.* 461.)

(2) *Sale Under Condemnation Proceedings.* In *Estate of Shubin* (1967) 252 C.A.2d 588, 60 C.R. 678, the testator had a home on C Street, which he devised to his children by reference to the address. It was sold to the State under a condemnation proceeding. Nine days later the testator took the proceeds, added \$ 2,000, and purchased another home on A Avenue in the same general locality. He then wrote on the will, next to the paragraph devising the home, the address of the new home. *Held*, the circumstances (forced sale of home, prompt replacement, notation on will) justified an inference that he had no intention to adeem. (252 C.A.2d 590.)

(3) *Transfer for Tax Purposes.* In *Estate of Creed* (1967) 255 C.A.2d 80, 63 C.R. 80, the testator devised specific real property to his daughter in trust for her children. Then, to minimize estate and inheritance taxes, he formed a corporation to which he conveyed the property, intending later to transfer its stock to the children by inter vivos gifts. He transferred some shares, then died. The trial judge found that, after the conveyance to the corporation, decedent managed the property as if there had been no change in ownership, and intended that the property should go to the trust as originally provided. *Held*, there was no ademption, and the remaining shares were properly awarded to the daughter in trust, rather than to the widow who was residuary legatee. (255 C.A.2d 83.)

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 E. Lapsed Gifts and Anti-Lapse Statute.
 1. Effect of Lapsed Gift.

14 Witkin Sum. Cal. Law Wills § 261

[§ 261] Effect of Lapsed Gift.

(1) *In General.* If a devisee dies before the testator, and the will contains no substitutional provision covering that event, what happens to the gift? In the absence of an anti-lapse statute (*infra*, §263), and in situations to which the statute does not apply, the gift lapses. (See *Rest.3d, Property (Wills and Other Donative Transfers)* §1.2 [requirement of survival], §5.5 [anti-lapse statutes]; Cal. Transactions Forms, 1 Estate Planning §6:105 et seq.; C.E.B., 1 Will Drafting 3d, §12.16 et seq.)

(2) *Rules Governing Lapsed Gifts.* In the event of a lapsed gift, the following rules apply:

(a) Except as provided by *Prob.C. 21111(b)* (transfer to two or more persons; *supra*, §214) and subject to *Prob.C. 21110* (anti-lapse statute; *infra*, §263), if a transfer fails for any reason, the property is transferred as follows:

(1) If the instrument provides for an alternate disposition, the property is transferred according to the terms of the instrument. (*Prob.C. 21111(a)(1)*.) (See *Estate of Lawrence (1941)* 17 C.2d 1, 11, 108 P.2d 893.) However, the mere addition of the conventional phrase "and to his heirs" does not indicate an intention to substitute another beneficiary in case the original beneficiary predeceases the testator. (*Estate of Sessions (1915)* 171 C. 346, 349, 153 P. 231; *Estate of Minor (1922)* 59 C.A. 616, 619, 211 P. 807; but see *Estate of Brunet (1949)* 34 C.2d 105, 106, 109, 207 P.2d 567, *supra*, §197 [devise to O "or his Estate" created valid substitutional gift; *Sessions* distinguished]; 11 A.L.R.2d 1387 [lapse of devise to individual "or his children," "or his estate," etc.])

(2) If the instrument does not provide for an alternate disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument. (*Prob.C. 21111(a)(2)*.)

(3) If the instrument does not provide for an alternate disposition or for the transfer of a residue, or if the transfer is itself a residuary gift, the property is transferred to the decedent's estate. (*Prob.C. 21111(a)(3)*.) The testator dies intestate as to that gift, and it goes to the heirs. (*Estate of Kunkler (1912)* 163 C. 797, 800, 127 P. 43; *Estate of Fritze (1927)* 85 C.A. 500, 505, 259 P. 992 [despite disinheritance clause]; *Estate of Dunn (1953)* 120 C.A.2d 294, 295, 260 P.2d 964 [same]; *Estate of Pence (1931)* 117 C.A. 323, 331, 4 P.2d 202; see 1 So. Cal. L. Rev. 98; 8 Hastings L. J. 337; 41 Cal. L. Rev. 758; 36 A.L.R.2d 1117 [devolution of lapsed portion of residuary gift].) (On intestate succession, see *supra*, §74 et seq.)

(b) A transfer of "all my estate" or words of similar import is a residuary gift for purposes of *Prob.C. 21111*. (*Prob.C. 21111(c)*.)

(c) If failure of a future interest results in an intestacy, the property passes to the heirs of the transferor under *Prob.C. 21114* (class gifts to heirs; *supra*, §233). (*Prob.C. 21111(d)*.)

In *Estate of Begley* (1988) 201 C.A.3d 791, 247 C.R. 632, the testator, in a holographic will, left all her property in four equal shares to her two sisters, Lulu and Lena, her brother, John, and the heirs of her late sister, Viola. All these intended beneficiaries predeceased her, Lulu and John dying without issue. The judge ruled that the one-half interest devised to Lulu and John should be distributed under the anti-lapse statute, in the manner prescribed by *Prob.C. 240*. *Held*, this distribution was erroneous.

(a) The anti-lapse statute (see *infra*, §263) by its terms does not apply to predeceased devisees without issue. (201 C.A.3d 795.)

(b) The applicable statute (now *Prob.C. 21111*) governs lapsed devises except as provided in the anti-lapse statute or in the will, and states that such devises pass to the other devisees in proportion to those devisees' other interests in the estate. (201 C.A.3d 796.)

(c) Respondents contended that distribution in the manner prescribed by *Prob.C. 240* was appropriate because it was consistent with the testator's probable intent. But speculation as to the testator's probable intent was irrelevant; the statutory rules for construction of wills are applicable if the testator's intent is not indicated in the will, and the will here contained no indication of the intent of the testator in the event her siblings predeceased her. (201 C.A.3d 796.)

(d) The devises to Lulu and John lapsed because they predeceased the testator without issue, and their shares passed to Lena's and Viola's descendants in proportion to their other interests in the estate. (201 C.A.3d 794, 797.)

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2. General Law and Former California Statute.

14 Witkin Sum. Cal. Law Wills § 262

[§ 262] General Law and Former California Statute.

The anti-lapse statutes are based on the presumed desire of the testator to have gifts intended for certain persons go to their children or other descendants in lieu of disposition as lapsed gifts. Former Prob.C. 92 provided that where the devisee or legatee is "kindred of the testator," and the devisee or legatee leaves "lineal descendants," the descendants take in the same manner as the devisee or legatee would have done had he or she survived the testator. (See *Estate of Murphy* (1935) 9 C.A.2d 712, 713, 50 P.2d 828 [testator left legacy to mother, expressly omitting provision for brother; mother died first, brother took her share]; *Estate of Pew* (1935) 10 C.A.2d 41, 43, 50 P.2d 1045 [legatee indebted to estate died leaving son; son took, but estate was entitled to set off debt against legacy]; *Estate of Monticelli* (1951) 107 C.A.2d 90, 91, 236 P.2d 661 [gift to mother of decedent does not lapse, goes to children]; *Estate of Pfadenhauer* (1958) 159 C.A.2d 686, 688, 324 P.2d 693; *Estate of Friedman* (1961) 198 C.A.2d 434, 437, 18 C.R. 252, quoting the text; 80 Am.Jur.2d (2002 ed.), Wills §1431 et seq.; C.E.B., 1 Will Drafting 3d, §12.17; 25 Cal. L. Rev. 81; 37 Hastings L. J. 335; 47 A.L.R.3d 358 [application of anti-lapse statute to interest of beneficiary under inter vivos trust].)

The California statute applied not only to lapsed gifts (where the devisee dies after the will is executed), but also to void gifts (where the devisee is already dead when the will is made). It also applied to residuary devises (*Estate of Walker* (1925) 196 C. 323, 332, 237 P. 1070) and to class gifts (*Estate of Steidl* (1948) 89 C.A.2d 488, 492, 201 P.2d 58).

The statute was not automatically applied; the intention of the testator, as derived from the will, had to be considered. (See *Estate of Carroll* (1956) 138 C.A.2d 363, 365, 291 P.2d 976; 63 A.L.R.2d 1172 [testator's intention as defeating operation of anti-lapse statute].) And where the testator expressed a contrary intention, the statute was not applied. (See *Estate of Salisbury* (1978) 76 C.A.3d 635, 639, 143 C.R. 81.) Thus, the testator could make a substitutional gift to another. (*Estate of Bennett* (1901) 134 C. 320, 324, 66 P. 370.) However, the contrary intention had to be expressed in the will. Extrinsic evidence could not be offered to show that the testator would have made a different provision had the testator anticipated that the named devisee would predecease. (*Estate of Casey* (1982) 128 C.A.3d 867, 873, 198 C.R. 170 [despite proffered evidence that testator during her lifetime maintained equality in gifts to two daughters and their children, testamentary gift to one daughter was properly awarded to her children alone].)

Because the descendants took by virtue of the anti-lapse statute and not the statutes of succession, their claim was not necessarily defeated by an express disinheritance clause in the will. (*Larrabee v. Tracy* (1940) 39 C.A.2d 593, 600,

104 P.2d 61; *Larrabee v. Tracy* (1943) 21 C.2d 645, 649, 134 P.2d 265 [clause disinherited any persons not mentioned "claiming to be ... my heirs at law"].)

In *Estate of Carroll, supra*, the testator in an illiterate holographic will left all her estate to her sister, with \$ 1 each to her nephews. The sister died leaving a son (nephew of testator). The court recognized that the bequest of a nominal sum is generally considered the equivalent of express disinheritance, but held that it does not have this effect where conditions change after the will is made. There being no clear intent in the will to deprive the nephew of his mother's share in the event of her death, the statute applied. (138 C.A.2d 366.)

In *Estate of Roberts* (1970) 9 C.A.3d 747, 88 C.R. 396, the testator left the residue of her estate to her son, who had three children. About 7 years later, the testator was declared incompetent and was never restored to capacity. The son died in 1964, the testator died in 1968, and the three children claimed under the statute. Opposing claimants argued that it was inapplicable because the underlying theory is that the testator could have changed his will after death of a devisee, and that this could not be done by an incompetent testator. *Held*, the statute applied, for other events could also prevent a change; e.g., lack of knowledge of the legatee's death, illness, or forgetfulness of the terms of the will. (9 C.A.3d 752.)

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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
VII. TESTAMENTARY INTERESTS
E. Lapsed Gifts and Anti-Lapse Statute.
3. Revised Statute.

14 Witkin Sum. Cal. Law Wills § 263

[§ 263] Revised Statute.

The anti-lapse provisions of former Prob.C. 92 (supra, §262) were superseded by former Prob.C. 6147 in 1985, which was in turn superseded by *Prob.C. 21110* in 1995.

(1) *Scope of Provision.* For purposes of the anti-lapse statute, "transferee" means a person who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor. (*Prob.C. 21110(c)*.) (See *Rest.3d, Property (Wills and Other Donative Transfers)* §5.5 [anti-lapse statutes].) The term does not apply to the transferor's spouse. (See *Estate of Sowash (1923)* 62 C.A. 512, 516, 217 P. 123; *Estate of Dye (2001)* 92 C.A.4th 966, 982, 112 C.R.2d 362 [because "kindred" calls for blood relationship, transferor's spouse is not "transferee" for purposes of anti-lapse statute].)

(2) *General Rule.* If a transferee is (a) dead when the instrument is executed or fails or is treated as failing to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place in the manner provided in *Prob.C. 240* (see supra, §75). A transferee under a class gift is a transferee for this purpose unless the transferee's death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed. (*Prob.C. 21110(a)*.)

(3) *Exception.* "The issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention or a substitute disposition. A requirement that the initial transferee survive the transferor or survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention." (*Prob.C. 21110(b)*); see 37 *Hastings L. J.* 335.) (See *Burkett v. Capovilla (2003)* 112 C.A.4th 1444, 1450, 5 C.R.3d 817 [contrary intention was shown by survivorship requirement; survivorship period commenced on date of settlor's death, not on date trust instrument was executed].)

(4) *Definitions.* Except as otherwise provided, half bloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of these persons when appropriate to the class, are included in determining the meaning of "kindred" and "issue" under *Prob.C. 21110*. (*Prob.C. 21115(c)*; see *Prob.C. 21115(b)* [exceptions applicable to adopted and out of wedlock persons]; supra, §228 et seq.) (See *Prob.C. 50*, supra, §49 ["issue" means "lineal descendants"]; 63 *A.L.R.2d* 1195 [meaning of "descendant," "child," etc., in anti-lapse statute].)

An adopted child is regarded as the kindred of his or her adopting parent. In *Estate of Goulart* (1963) 222 C.A.2d 808, 819, 35 C.R. 465, the testator was adopted as an adult in 1952, and drew her will after the 1955 revision of the adoption statutes (see *supra*, §89). She left nearly her entire estate to a natural brother and two sisters. The brother and one sister predeceased her, and their lineal descendants claimed under the anti-lapse statute. *Held*, they were not entitled, for the natural brother and sister were no longer kindred of the testator. The kindred of an adopted person are his adopted relatives. The amendment of the adoption statutes "was intended to accomplish a complete severance of the former relationship of the adoptee with his natural, or biological, relatives, and to make them no longer 'kindred' in the eyes of the law, and on the other hand, to create a new kinship." (222 C.A.2d 820.) (See 25 Cal. L. Rev. 81, 83.)

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CHAPTER XXI - Wills and Probate

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VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION
A. Community and Quasi-Community Property Rights.
1. Definitions.

14 Witkin Sum. Cal. Law Wills § 264

[§ 264] Definitions.

(1) *Community Property Defined.* For purposes of the Probate Code, "community property" means the following property:

(a) "Community property heretofore or hereafter acquired during marriage by a married person while domiciled in this state." (*Prob.C. 28(a).*)

(b) "All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person while domiciled elsewhere, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition." (*Prob.C. 28(b).*)

(c) "All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person in exchange for real or personal property, wherever situated, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time the property so exchanged was acquired." (*Prob.C. 28(c).*)

(2) *Quasi-Community Property Defined.* For purposes of the Probate Code, "quasi-community property" means the following property other than community property:

(a) "All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired by a decedent while domiciled elsewhere that would have been community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition." (*Prob.C. 66(a).*)

(b) "All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, that would have been community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired." (*Prob.C. 66(b).*)

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14 Witkin Sum. Cal. Law Wills § 265

[§ 265] Disposition.

(1) *General Rule.* "Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent." (*Prob.C. 100(a)*.) "Upon the death of a married person domiciled in this state, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent." (*Prob.C. 101(a)*.) (On testamentary disposition, see *Prob.C. 6101*, supra, §103; on intestate succession, see *Prob.C. 6401*, supra, §§76, 78.)

(2) *Written Agreement Governing Division.* Spouses may agree in writing to divide community and quasi-community property "on the basis of a non pro rata division of the aggregate value" or "on the basis of a division of each individual item or asset" or partly on each basis. However, a written agreement is not required in order to permit or recognize a non pro rata division of quasi-community property. (*Prob.C. 100(b)* [community], *Prob.C. 101(b)* [quasi-community].)

(3) *Community Property in Revocable Trust.* If community property is held in a revocable trust described in *Family C. 761* (see 13 *Summary* (10th), *Trusts*, §198), a provision in the trust governing disposition in the event of death is controlling. (*Prob.C. 104*.) Where community and quasi-community property assets are transferred to a revocable trust, it is presumed that those assets "retain their character in the aggregate for purposes of any division provided by the trust." (*Prob.C. 104.5*.)

(4) *Effect of Simultaneous Death.* Except as provided by *Prob.C. 224* (disposition of insurance proceeds where survivorship is uncertain; see *infra*, §290), when a husband and wife die leaving community or quasi-community property and it cannot be established by clear and convincing evidence that one spouse survived the other, one half of the community and quasi-community property is administered, distributed, or otherwise dealt with as if the husband had survived and that half belonged to the husband. The other half is administered, distributed, or otherwise dealt with as if the wife had survived and that half belonged to the wife. (*Prob.C. 103*.) The Law Revision Commission Comment points out that *Prob.C. 103* extends to quasi-community property the rule formerly applicable only to community property. (On former law, see *Estate of Hudson* (1958) 158 C.A.2d 385, 389, 322 P.2d 987; *Estate of Sugino* (1968) 267 C.A.2d 591, 73 C.R. 150.)

(5) *Nonprobate Transfer to Third Person.* A nonprobate transfer to a third person of one spouse's community

property interest by the other spouse requires the written consent of the spouse whose interest is transferred. (*Prob.C.* 5010 et seq.; *infra*, §310.)

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A. Community and Quasi-Community Property Rights.
3. Community Property With Right of Survivorship.

14 Witkin Sum. Cal. Law Wills § 266

[§ 266] Community Property With Right of Survivorship.

C.C. 682.1 authorizes community property with right of survivorship. The statute provides as follows:

(1) *Creation.* Community property with right of survivorship is created by an express declaration on a transfer document that the property is community property with right of survivorship. The property may be accepted in writing on the face of the document by a statement signed or initialed by the grantees. (C.C. 682.1(a).)

(2) *Termination.* Prior to the death of either spouse, the right of survivorship may be terminated under the same procedures by which a joint tenancy may be severed. (C.C. 682.1(a).)

(3) *Distribution on Death.* On the death of one of the spouses, the property passes to the survivor "without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy." (C.C. 682.1(a).) The following statutes are applicable: *Prob.C. 5000* et seq. (nonprobate transfers; *infra*, §305 et seq.), *Prob.C. 13540* et seq. (right of surviving spouse to dispose of community property; *infra*, §§821, 822), *Prob.C. 13550* et seq. (liability for debts of deceased spouse; *infra*, §823), and *Prob.C. 13560* et seq. (liability for decedent's community property; *infra*, §824). (C.C. 682.1(a).)

(4) *Joint Accounts Are Not Covered.* C.C. 682.1 does not apply to a joint account in a financial institution governed by *Prob.C. 5100* et seq., the Multiple-Party Accounts Law (see 4 *Summary* (10th), *Negotiable Instruments*, §77 et seq.). (C.C. 682.1(b).)

(5) *Effective Date.* C.C. 682.1 applies to instruments created on or after July 1, 2001. (C.C. 682.1(c).)

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14 Witkin Sum. Cal. Law Wills § 267

[§ 267] Restoration of Quasi-Community Property.

(1) *In General.* In specified circumstances, *Prob.C. 102* allows a surviving spouse to require the transferee of quasi-community property transferred by the decedent to restore to the estate half the property (or the proceeds or value of half the property). (*Prob.C. 102(a)*.) The Law Revision Commission Comment points out that because the property is restored to the estate, it is available to the decedent's creditors "to the extent that it would have been available to them if no inter vivos transfer had been made."

(2) *Ownership of Restored Property.* The restored property belongs to the surviving spouse under *Prob.C. 101* "as though the transfer had not been made." (*Prob.C. 102(c)*.) The Comment states: "Such property is, in effect, the one-half which the surviving spouse could have claimed against the decedent's will. The one-half which the transferee is permitted to retain is, in effect, the one-half which the decedent could have given the transferee by will. The surviving spouse is entitled to all of the first half."

(3) *Conditions.* Restoration is available if all the following requirements are satisfied:

(a) The surviving spouse has "an expectancy" in the property under *Prob.C. 101* at the time of the transfer. (*Prob.C. 102(a)*.) The Comment points out that an "expectancy" occurs when the transferor is domiciled in California at the time of the transfer.

(b) The property is not life insurance, accident insurance, a joint annuity, or a pension payable to another. (*Prob.C. 102(b)*, based on *Unif.Prob.C., §2-202*.)

(c) The decedent died domiciled in California. (*Prob.C. 102(a)(1)*.)

(d) The decedent made the transfer "without receiving in exchange a consideration of substantial value and without the written consent or joinder of the surviving spouse." (*Prob.C. 102(a)(2)*, based on *Unif.Prob.C., §2-202*.) The Comment states: "Where the consideration is not substantial and the transfer is set aside, no provision is made for return of the insubstantial consideration given by the transferee when property transferred is required to be restored. It is not expected that a transfer will be set aside under this statute if the transferee gave a consideration equal to one-half or more of the value of the property received. Thus, in cases in which the transfer is set aside the one-half which the

transferor keeps will be at least equal in value to any consideration given."

(e) The transfer is not one of the following:

(1) "A transfer under which the decedent retained at the time of death the possession or enjoyment of, or the right to income from, the property." (*Prob.C. 102(a)(3)(A).*)

(2) "A transfer to the extent that the decedent retained at the time of death a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for the decedent's own benefit." (*Prob.C. 102(a)(3)(B).*)

(3) "A transfer whereby property is held at the time of the decedent's death by the decedent and another with right of survivorship." (*Prob.C. 102(a)(3)(C).*)

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14 Witkin Sum. Cal. Law Wills § 268

[§ 268] In General.

A surviving spouse who does not make an advance agreement waiving community and quasi-community property rights (see *infra*, §321 et seq.), and who is dissatisfied with the disposition made by the testator's will, may renounce his or her rights under the will and elect to take his or her share of the community and quasi-community property. (See *Estate of King* (1942) 19 C.2d 354, 364, 121 P.2d 716; *Estate of Murphy* (1976) 15 C.3d 907, 126 C.R. 820, 544 P.2d 956, *infra*, §271; *Estate of Richter* (1993) 12 C.A.4th 1361, 1368, 16 C.R.2d 108, *infra*, §572, citing the text; *Unif.Prob.C.*, §2-201 et seq.; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1411 et seq.; 61 *Harv. L. Rev.* 850 [salvaging will after widow renounces]; 71 *Harv. L. Rev.* 1269 [estate planning and spouse's election]; 89 *A.L.R.3d* 315 [liability for administration expenses of spouse electing against will]; 7 *A.L.R.4th* 989 [rights of spouse who elects to take against will in profits or increase in value of estate accruing after testator's death]; 48 *A.L.R.4th* 972 [statutes denying or qualifying spouse's right to elect against will]; 63 *A.L.R.4th* 1173 [election to take against augmented estate under *Unif.Prob.C.*, §2-202].)

The same principle applies to any other kind of property right. Thus, where the testator held property in joint tenancy with his wife, and attempted to dispose of it by will to his wife and daughter, the wife had to elect to take either as the surviving joint tenant or under the will. (*Estate of Waters* (1972) 24 C.A.3d 81, 85, 100 C.R. 775; see 60 *A.L.R.2d* 789 [election where will purports to give property devisee already owns].)

However, the spouse is put to an election of community and quasi-community property rights only if the will discloses the testator's intention to dispose of the spouse's share of the property, i.e., to make a testamentary disposition to the spouse in lieu of the spouse's right to take half of the community property. If this intention does not appear, the spouse may take both. (*Estate of Prager* (1913) 166 C. 450, 453, 137 P. 37; see 6 *U.C.L.A. L. Rev.* 178; 47 *Cal. L. Rev.* 218; 60 *A.L.R.2d* 736 [determining whether testator intended to dispose of devisee's property so as to require election].)

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14 Witkin Sum. Cal. Law Wills § 269

[§ 269] Election Required.

(1) *Election Expressly Required.* The testator may make his or her intention clear by expressly stating that the gift by will is in lieu of community property rights, or that an election is necessary. (See *Estate of Klingenberg* (1949) 94 C.A.2d 240, 244, 210 P.2d 514 [will provided that "my wife shall and must elect as a condition precedent whether she shall take ... under this will or all laws in her favor"].)

(2) *Election Impliedly Required.* "If the testator purported to dispose of both his and his spouse's share of the community property, and it appears that the intent of the testator will be thwarted by giving literal effect to the will while recognizing the community property rights of the surviving spouse, an election should be required." (*Estate of Wolfe* (1957) 48 C.2d 570, 574, 311 P.2d 476; see *Burch v. George* (1994) 7 C.4th 246, 257, 27 C.R.2d 165, 866 P.2d 92, quoting the text.) Hence, whether an election is required often calls for construction of uncertain language in the will.

Thus, if the testator refers to the property bequeathed or devised in general terms without identifying it as separate or community, it may be inferred that the testator intended only to dispose of his or her own interest (testator's separate property and one-half the community property), and no election is necessary, no matter how liberal the provision is for the spouse. (*Estate of Prager* (1913) 166 C. 450, 453, 137 P. 37 ["all of the real property owned by me"].)

But if the testator declares that all the property is the testator's separate property, thus clearly indicating a belief that he or she is disposing of the entire estate, election is required. (*Estate of Vogt* (1908) 154 C. 508, 512, 98 P. 265; *Estate of Wolfe*, *supra*; *Estate of Roach* (1959) 176 C.A.2d 547, 553, 1 C.R. 454 [following *Wolfe* and *Vogt*; will declared all property separate, no intention to provide for wife except by will]; *Estate of Orwitz* (1964) 229 C.A.2d 767, 769, 40 C.R. 545.) "It is of no concern that he was mistaken in his belief that the wife had no community interest in the property devised. His manifest intention to devise the estate as an entirety, and irrespective of any right which might be asserted on behalf of the marital community, is the controlling factor." (*Estate of Emerson* (1947) 82 C.A.2d 510, 514, 186 P.2d 734.)

In *Estate of Kennedy* (1982) 135 C.A.3d 676, 185 C.R. 540, the testator's will declared that "all property standing in the name of my husband alone and all property standing in my name and my husband's name as joint tenants is our community property." The testator further stated that most of the property had been placed in joint tenancy by the

husband as manager of the community estate, and that to avoid "unhappy differences," she had refrained from any attempt to change it to its "true nature." Then, after making specific bequests to her husband and daughter, she gave her daughter "the entire residue of my estate, which shall include my undivided half interest in all community assets of my husband." The trial judge determined that the husband was put to an election to take the property bequeathed by the will or to assert his claim as surviving joint tenant to certain joint tenant property bequeathed to the daughter. *Held*, affirmed.

(a) The testator could not legally bequeath half of any joint tenancy property to her daughter; but if she believed that she could and clearly intended to do so, she could force her husband to an election. He must accept the will in its entirety; and if he asserts his claim to all the joint tenancy property, he must give up the other benefits to him in the will. (135 C.A.3d 681.)

(b) Although the will does not *expressly* require an election, that requirement may be implied; i.e., the court could determine from all the circumstances that the intent of the testator would be thwarted by recognizing the husband's right of survivorship to all the joint tenancy property. (135 C.A.3d 683, citing *Estate of Wolfe* and other cases.)

(3) *Property Not Disposed of by Will*. In *Estate of Ettlinger* (1946) 73 C.A.2d 967, 167 P.2d 738, the surviving spouse received separate property under the decedent's will, and also asserted her community interest in life insurance policies paid for with community funds. The will declared that all property owned by or under the control of the testator was separate, and "I make this my will to operate upon the whole thereof so far as existing at my death." *Held*, the spouse was not compelled to elect, for the quoted language referred only to property *disposed of by the will*, and the will did not dispose of the life insurance policies. "If she is put to an election here then every widow to whom a husband left any separate property by will, where he also left a life insurance policy paid for in whole or in part with community funds with someone other than the wife named as beneficiary, would be put to a similar election." (73 C.A.2d 971.)

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14 Witkin Sum. Cal. Law Wills § 270

[§ 270] Manner and Time of Election.

(1) *Manner*. Ordinarily, the surviving spouse files a statement with the probate court either (a) claiming his or her share of the community property, or (b) waiving community property rights and consenting to the disposition made by the will. (See *Estate of Dunphy* (1905) 147 C. 95, 103, 81 P. 315 [spouse was not bound by statement claiming one half of estate as community property; she had until time of distribution to make final election]; *Estate of Vogt* (1908) 154 C. 508, 512, 98 P. 265 [on appeal from order making final distribution, where record did not indicate whether spouse made any election, it was presumed that she elected to take under will]; 71 A.L.R.2d 942 [revocation or withdrawal of election]; 83 A.L.R.2d 1077 [election exercisable by agent or personal representative]; 3 A.L.R.3d 6 [factors in making election for incompetent]; 21 A.L.R.3d 320 [who may make election for incompetent]; 7 Proof of Facts 2d, Election To Take Under Will, §1 et seq.)

(2) *Time*. The spouse is manifestly in a poor position to act unless he or she knows how much of the estate is community property and which is the better choice. Accordingly, it is held that the spouse need not elect until the time for *distribution*, when full information about what constitutes community property is available. (*Estate of McCarthy* (1932) 127 C.A. 80, 85, 15 P.2d 223; see *Colden v. Costello* (1942) 50 C.A.2d 363, 372, 122 P.2d 959 [spouse is only entitled to information available in probate proceeding, and cannot hold up distribution pending final judgment in separate equitable actions brought to determine rights in the property]; 31 Cal. L. Rev. 329; 3 A.L.R.3d 119 [time to make election for incompetent]; 59 A.L.R.3d 767 [extension of time within which spouse may elect].) Nevertheless, it is proper for the court to determine in an heirship proceeding, long before final distribution, that the will does not put the surviving spouse to an election. (*Estate of Roberts* (1945) 27 C.2d 70, 75, 162 P.2d 461.)

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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION B. Surviving Spouse's Election To Take Against Will. 4. Election by Successor of Spouse.

14 Witkin Sum. Cal. Law Wills § 271

[§ 271] Election by Successor of Spouse.

In *Estate of Kelley* (1953) 122 C.A.2d 42, 264 P.2d 210, the testator's will left his widow a life interest in a trust in lieu of her community interest. She died while his estate was still pending, and her executor filed an election to take half the community property. The testator's representative argued that the right to elect was personal and did not survive the widow's death. *Held*, it survived because the widow's right to half the community property was a vested interest, which, on the death of the testator, belonged to her. Because the widow did not have to make the election to give up that interest until distribution of the testator's estate, the widow's executor still had the right to elect. (122 C.A.2d 44.) A concurring opinion points out that the right of election was actually illusory: At the time her executor made the claim, the possible life interest in the trust had ended by the widow's death, so that her estate would receive nothing by an election to take under the will. (122 C.A.2d 45.)

In *Estate of Murphy* (1976) 15 C.3d 907, 126 C.R. 820, 544 P.2d 956, M made a will leaving all of the community property and his separate property in two trusts. R, his wife, had life interests and a general power of appointment in the trust that included her community property interest. The will also declared that "[i]f my wife elects to take the rights given her by law, she shall nevertheless be entitled to the benefits given her by this Will with respect to all property remaining subject to it." R died 8 months after M's death, while M's estate was still in probate. R's executor and sole legatee filed a declination to take under the will, and the probate judge awarded her a half interest in the community property. M's legatees appealed, contending that R had failed to make an election and that the right to elect was personal to her. *Held*, judgment affirmed.

(a) The surviving wife is entitled to one-half of the community property on the husband's death. Hence, where his will describes the property it gives to his wife and others in general terms (e.g., "all my property"), she is entitled to both her one-half of the community property and any interest in his half given her by the will. (15 C.3d 912.)

(b) If the will expressly requires the widow to elect between provisions for her benefit and her community property rights, or if the testator purports to dispose of his wife's half of the community property and the will shows that satisfying her community property rights and also giving effect of the remaining property provisions would thwart the testamentary intent, she must elect between her rights. The same election is required where the wife is the testator and the husband survives. (15 C.3d 913.)

(c) In *Estate of Kelley*, *supra*, the will expressly required an election; this will does not. But if R permitted her half to become part of the corpus of the testamentary trust, she could not also claim the same property outright. "The choice between acceptance or refusal of testamentary provisions for the widow's share of the community property, where refusal would not require relinquishment of rights or benefits in other property, is sometimes referred to as a 'voluntary' widow's election, as distinct from a 'forced' widow's election in cases such as *Kelley* where such relinquishment is a necessary consequence of claiming community property rights." (15 C.3d 914.) But survival of the right of election after the widow's death is not affected by whether the election is forced or voluntary. (15 C.3d 914.)

(d) M's legatees argue, contrary to *Kelley*, that the will provisions controlled here unless R affirmatively elected to take against them, and that her right to elect was personal and could not be exercised by her representative. This is the usual rule in noncommunity property states, where the purpose of election is to assure the surviving spouse of a statutory share in the deceased spouse's general testamentary power. But in California, the surviving spouse's half belongs to that spouse and is not subject to the decedent's disposition in the absence of an affirmative election that relinquishes the right. (15 C.3d 915.)

(e) The circumstances requiring election between community property rights and benefits under the will are essentially the same as those calling for an election whenever an instrument purports to dispose of property owned by another and also gives that owner benefits in other property; e.g., the surviving joint tenant's election. (15 C.3d 915.) "Thus the effectiveness of a testamentary disposition of the surviving spouse's community property interest to third persons depends upon the survivor's voluntary and affirmative acceptance of the will's provisions and cannot stem from the decedent's testamentary act alone." (15 C.3d 915.) The survivor's decision to accept or reject the will's provisions may be made as late as the time for distribution (see *supra*, §270), and the survivor's death cannot be considered the equivalent of an election to accept the will's provisions. (15 C.3d 915.)

(f) The surviving wife's claim to half the community property stems from the survivor's interest arising on death irrespective of whether the interest was considered vested (after 1927). *Kelley* language suggesting that survival of her right depends on the vested nature of her interest during the marriage "is disapproved." (15 C.3d 916.)

(g) Other language in *Kelley*, to the effect that the widow's executor "was in duty bound" to elect against the will, and that the widow's death eliminated any problem of election, is too broad. There may be circumstances, not present here or in *Kelley*, under which it would be in the best interest of a surviving spouse's estate to elect to accept the provisions of the will, and death of the surviving spouse does not necessarily terminate the right of the spouse's successor to do so. (15 C.3d 916.)

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B. Surviving Spouse's Election To Take Against Will.
5. Surviving Spouse of Nondomiciliary Decedent.

14 Witkin Sum. Cal. Law Wills § 272

[§ 272] Surviving Spouse of Nondomiciliary Decedent.

If a married person dies domiciled outside California and leaves a valid will disposing of California real property that is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in that property against the will of the decedent as though the property were located in the decedent's domicile at death. (*Prob.C. 120.*) (See 11 *Summary* (10th), *Community Property*, §254.)

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14 Witkin Sum. Cal. Law Wills § 273

[§ 273] In General.

(1) *Effect and Purpose of Rule.* It is an established policy, both at common law and by statute, that a will should ordinarily be revoked upon the subsequent marriage of the testator. The common law rule was based upon the implied intention of the testator to change his or her will upon a change in domestic relations. The statute operates to revoke the will irrespective of the actual intention of the decedent unless the spouse is mentioned or otherwise provided for. (See generally *Estate of Duke* (1953) 41 C.2d 509, 512, 261 P.2d 235 ["The policy of law which underlies this section has been declared to be the social disfavor toward a testator's failure to provide for a surviving spouse"]; *Estate of Turney* (1951) 101 C.A.2d 720, 722, 226 P.2d 80; *Estate of Paul* (1972) 29 C.A.3d 690, 693, 105 C.R. 742.)

(2) *Scope of Revocation.* Originally the will was wholly revoked if the omitted spouse statute was applicable. (See *Estate of Ryan* (1923) 191 C. 307, 309, 216 P. 366; *Estate of Meyer* (1919) 44 C.A. 289, 290, 186 P. 393.)

The rule was changed in 1931 to provide for revocation only as to the spouse, who took the share the spouse would have taken in the event of intestacy. (See *Estate of Derruau* (1933) 133 C.A. 769, 770, 24 P.2d 865; *Estate of Piatt* (1947) 81 C.A.2d 348, 350, 183 P.2d 919 [complete revocation where estate consisted solely of community property and spouse survived]; *Estate of Challman* (1954) 127 C.A.2d 736, 740, 274 P.2d 439; *Estate of Tassi* (1961) 196 C.A.2d 494, 502, 16 C.R. 616, citing the text; *Estate of Shimun* (1977) 67 C.A.3d 436, 441, 136 C.R. 668, citing the text; on effect of republication of will, see *Estate of Riddel* (1951) 104 C.A.2d 162, 164, 230 P.2d 863; *supra*, §161.)

The rest of the will remained operative. (See *Estate of Haselbud* (1938) 26 C.A.2d 375, 379, 79 P.2d 443 [debts and expenses borne ratably by all parts of estate, not just surviving spouse's share]; *Estate of Russell* (1941) 43 C.A.2d 319, 323, 110 C.R. 718 [named executor entitled to letters, rather than surviving spouse]; *Estate of Piatt* (1943) 57 C.A.2d 211, 213, 134 P.2d 321 [same].)

(3) *Statutory Development.* California has had three omitted spouse statutes. Former Prob.C. 70 applied to testators dying before January 1, 1985. Former Prob.C. 6560 et seq. applied to testators dying between January 1, 1985, and January 1, 1998. Prob.C. 21610 et seq. apply to decedents dying on or after January 1, 1998. (Former Prob.C. 6580; Prob.C. 21630.) The omitted child statute is comparable. (See *infra*, §280 et seq.)

(4) *Statute Is Applicable to Wills and Trusts.* The former statutes applied only to property passing by will. The

current statutes apply to property passing by will through a decedent's estate or by a trust "that becomes irrevocable only on the death of the settlor." (*Prob.C.* 21600.)

(5) *Time for Making Claim.* Although claims under the omitted spouse statute have sometimes been made without challenge in the proceeding to probate the will, this is improper. The surviving spouse takes independently of the will, and his or her claim has no place in the proceeding to establish its due execution and validity. Hence, the failure to assert the spouse's claim in that proceeding is in no sense a waiver, and it may be raised in a later heirship proceeding. (*Estate of Tassi* (1961) 196 C.A.2d 494, 504, 16 C.R. 616.)

(6) *Effect of Surviving Spouse's Death.* The will is not merely revocable at the election of the surviving spouse; it is revoked. Hence, the failure of the surviving spouse to make a claim before death is immaterial; the spouse's estate takes the share. (*Estate of Basore* (1971) 19 C.A.3d 623, 629, 96 C.R. 874.)

(7) *Commentary and Practice Works.* The omitted spouse statute has been the subject of significant discussion. (See 42 Cal. L. Rev. 710; 99 A.L.R.3d 1020 [validity of statute providing that marriage revokes prior will]; 38 A.L.R.4th 117 [sufficiency of provision for or reference to prospective spouse to avoid revocation of will by subsequent marriage]; Cal. Transactions Forms, 1 Estate Planning §§6:27 et seq., 6:96 et seq.; Cal. Civil Practice, 1 Probate and Trust Proceedings, §3:24 et seq.; C.E.B., 3 Will Drafting 3d, §35.3; Rest.3d, *Property (Wills and Other Donative Transfers)* §2.7 [express disinheritance], §9.5 [omitted spouse].)

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14 Witkin Sum. Cal. Law Wills § 274

[§ 274] Nature and Scope of Statute.

(1) *General Rule.* If a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of *all* the decedent's testamentary instruments, the spouse is entitled to a share of the decedent's estate. The spouse's share consists of one-half of the decedent's community and quasi-community property and a share of the decedent's separate property (up to one-half the value of separate property in the estate) equal in value to what the spouse would have received if the decedent had died without having executed a testamentary instrument. (*Prob.C. 21610.*)

(2) *Definitions.* For purposes of the omitted spouse statute, "decedent's testamentary instruments" means the decedent's will or revocable trust (*Prob.C. 21601(a)*) and "estate" includes the decedent's probate estate and property held in a revocable trust that becomes irrevocable on the decedent's death (*Prob.C. 21601(b)*).

(3) *Putative Spouse as Surviving Spouse.* In *Estate of Sax* (1989) 214 C.A.3d 1300, 263 C.R. 190, the decedent's 1942 will left his estate to his then wife. One day before their 1957 divorce became effective, decedent married his second wife. On decedent's death both the former spouse and the putative spouse from the invalid second marriage claimed the estate, consisting of community and quasi-community property of decedent and the putative spouse. *Held*, the putative spouse was a "surviving spouse" under the omitted spouse statute and was entitled to one-half the community and quasi-community assets.

(a) In the absence of case law interpreting the meaning of "surviving spouse" in the omitted spouse statute or legislative history revealing legislative intent, the court must turn to the principles of statutory construction. The Legislature is presumed "to be aware of the judicial interpretation of words dealing with the same or analogous topics," and "to intend the same well-settled meaning of those words unless it expressly states otherwise." (214 C.A.3d 1304.)

(b) Here, case law has given "surviving spouse" a well-settled meaning. The term encompasses "putative spouse" for purposes of statutes governing (1) intestate succession to community and separate property, (2) appointment of an administrator, (3) actions for wrongful death, and (4) death benefits for the survivors of police officers. (214 C.A.3d 1304, 1305.) Thus, a surviving putative spouse is a "surviving spouse" for purposes of the omitted spouse statute. (214 C.A.3d 1306.)

(4) *Totten Trust Is Not Covered.* In *Estate of Allen* (1993) 12 C.A.4th 1762, 16 C.R.2d 352, the decedent, while single, executed a will leaving property to her church. She also opened Totten trust accounts naming the church as the beneficiary. She later married, but died without revising her will. Her surviving husband sought half her separate property as an omitted spouse, including half the balance in the trust accounts. *Held*, the trust accounts were not part of the decedent's estate and thus not subject to the omitted spouse's claim.

(a) The comprehensive statutory scheme governing Totten trusts provides that the beneficiary of a trust account may not be changed by will (*Prob.C. 5302(e)*) and that funds in a trust account belong to the named beneficiary when the trustee dies (*Prob.C. 5302(c)*). Clearly, the Legislature did not intend a trust account to be included in the decedent's estate for purposes of either intestate succession or distribution by will. (12 C.A.4th 1767.)

(b) Under former Prob.C. 6560, an omitted spouse is entitled to the testator's separate property equal in value to that which the spouse would have received if the testator had died intestate, up to one-half the value of the separate property *in the estate*. Here, had the decedent died intestate, the funds in the trust accounts would have belonged to the beneficiary, not to the trustee's estate, and the spouse would have received nothing. As an omitted spouse under a will he was entitled to no greater amount. (12 C.A.4th 1767.)

The result in *Estate of Allen* remains the same under the revised statute. Under *Prob.C. 21600*, "trust" is defined by *Prob.C. 82*, which excludes a Totten trust account.

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3. Effect of Testator's Contract To Make Will.

14 Witkin Sum. Cal. Law Wills § 275

[§ 275] Effect of Testator's Contract To Make Will.

In *Estate of Stewart* (1968) 69 C.2d 296, 70 C.R. 545, 444 P.2d 337, John Stewart, Walter Stewart, and Walter's first wife Jennie Stewart owned land as tenants in common. They made a contract to will their one-third interests to the survivors for life, and on death of the last survivor to their respective children. Wills were executed accordingly. John died without beneficiaries, and Walter and Jennie held the property as cotenants for life. Jennie died, and Walter acquired all the life interests, together with John's one-third in fee simple. Walter married Viola, then died. He was survived by his widow Viola, his brother Sankey Stewart, and six stepchildren of his first marriage with Jennie. His estate consisted of the one-third interest he owned and the one-third interest he inherited from John. *Held:*

(a) Because Walter's will did not mention Viola, it was revoked as to any interest she would have taken had he died intestate. But if Walter had died intestate this would have breached the contract, and quasi-specific performance would have been available to the stepchildren as third-party beneficiaries. (69 C.2d 298.)

(b) Hence, Viola's rights attached only to property both equitably and legally owned by Walter, i.e., the part of the estate not subject to the contract, and sharing that with Sankey, Walter's other heir, half of that. Specifically, Viola was entitled to half of half the estate that Walter willed to the stepchildren independently of his obligation under the contract. The stepchildren were entitled to the other half of that half as devisees under the will (if intestate, it would have gone to his brother Sankey, not Viola). (69 C.2d 299.) (See 85 A.L.R.4th 418 [surviving spouse's right to marital share as affected by valid contract to convey by will].)

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4. Satisfaction of Share.

14 Witkin Sum. Cal. Law Wills § 276

[§ 276] Satisfaction of Share.

Generally, the spouse's share is satisfied first from estate property not disposed of by will or trust and then as necessary from all beneficiaries of the testamentary instruments in proportion to the value of their shares, based on the date of death value. (*Prob.C. 21612(a)*.) However, if the decedent's "obvious intention" with respect to a specific gift, devise, or provision would be defeated by apportionment, "a different apportionment, consistent with the intention of the decedent, may be adopted." (*Prob.C. 21612(b)*.) The statute is comparable to *Prob.C. 21623* (*infra*, §282), providing for abatement in the case of an omitted child.

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C. Omitted Spouse.

5. Permissible Omission.

a. In General.

14 Witkin Sum. Cal. Law Wills § 277

[§ 277] In General.

An omitted spouse is not entitled to a share of the decedent's estate in the following circumstances:

(1) *Intentional Omission*. The decedent's intentional failure to provide for the spouse appears from the testamentary instruments. (*Prob.C. 21611(a)*.) (See C.E.B., 3 Will Drafting 3d, §35.6.)

(2) *Nontestamentary Transfer*. The decedent provided for the spouse by transfer outside the testamentary instruments, and the intention that the transfer be in lieu of the testamentary instruments "is shown by statements of the decedent or from the amount of the transfer or by other evidence." (*Prob.C. 21611(b)*.) (See *11 A.L.R.4th 1213* [transfer outside will precluding spouse from electing statutory share].) (On exception applicable to contract or conveyance settling property rights in contemplation of marriage under former statute, see *Estate of Smith (1936) 15 C.A.2d 548, 550, 59 P.2d 854* [exception was not shown where evidence to show intent was limited to instrument itself].)

(3) *Waiver*. The spouse waived the right to share in the decedent's estate. (*Prob.C. 21611(c)*.) (See *Prob.C. 140, 141(a)(8)* [right to take statutory share of omitted spouse may be waived in whole or in part before or during marriage]; *Estate of Sheldon (1977) 75 C.A.3d 364, 374, 142 C.R. 119* [statute was not avoided by conduct that normally would give rise to estoppel, e.g., decedent's reliance on spouse's oral promise not to claim share in estate]; *Estate of Butler (1988) 205 C.A.3d 311, 314, 316, 318, 252 C.R. 210* ["Attorney's Representation" document, self-serving statement by attorney, was insufficient to constitute waiver of spouse's right]; *Estate of Gagnier (1993) 21 C.A.4th 124, 26 C.R.2d 128, infra, §324* [waiver in premarital agreement]; Cal. Civil Practice, 1 Probate and Trust Proceedings, §3:98; *infra, §321 et seq.*)

The former statute stated the only conditions under which the will was saved (mention or provision in will or marriage contract). Hence, proof that the surviving wife knew of the decedent's intention to leave her out of the will, that she led him to believe that his substitute arrangements would be agreeable, and that, in reliance thereon, he did not make a new will or republish the old, did not bar her claim. (*Estate of Tassi (1961) 196 C.A.2d 494, 505, 16 C.R. 616.*)

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C. Omitted Spouse.

5. Permissible Omission.

b. Language Sufficient To Omit Spouse.

14 Witkin Sum. Cal. Law Wills § 278

[§ 278] Language Sufficient To Omit Spouse.

The policy of the omitted spouse statute can be nullified by formal clauses in an instrument, provided that they are aptly chosen to express the proper "intention" of the testator to disinherit.

In *Estate of Kurtz* (1922) 190 C. 146, 210 P. 959, the testator, while engaged to be married, made a will, and married the next day. *Held*, a provision giving \$ 1 to "any person whomsoever, who if I died intestate would be entitled to any part of my estate," was sufficient mention to exclude his widow. (190 C. 148.)

In *Estate of Duke* (1953) 41 C.2d 509, 261 P.2d 235, the will stated that the testator had intentionally omitted to provide for any "heirs ... including any person or persons who may, after the date of this will, become my heir or heirs by reason or marriage or otherwise." *Held*, her husband, whom she married about a year later, was sufficiently mentioned. The opinion makes three points: (a) Even though the clause is broad enough to include a spouse, it will not be effective to disinherit where it does not indicate that the testator at the time of execution contemplated the possibility of a later marriage. (41 C.2d 513.) (b) If, however, the clause does so indicate, it is sufficient even though it does not show that the testator contemplated marriage to a specific person. It may be enough to declare an intention not to provide for a class of persons that would necessarily include a future spouse; here this was done, and, in addition, the reference to "marriage" could only mean her marriage. (41 C.2d 513, 514.) (c) It was error to admit extrinsic evidence to show that the testator and her husband had been acquainted and planned marriage some time before the will was made. Such words as "heirs" are not ambiguous but merely noncommittal on the issue of contemplation of a future marriage. They do not indicate either the presence or absence of such a mental state. (41 C.2d 515.) (See 42 Cal. L. Rev. 710; 1 U.C.L.A. L. Rev. 400.)

Estate of Lunn (1961) 197 C.A.2d 848, 17 C.R. 705, upheld sufficiency of the mention on unusual facts. The testator's will declared that he was "unmarried," but a later clause read: "In the event that I am a married man at the time of my death and there is no divorce, annulment or separate maintenance proceeding pending, ... I give, devise and bequeath all of my estate to my wife." He married 3 months later and died shortly afterwards. The surviving spouse did not invoke the omitted spouse statute, for she would take far more under the will than by partial revocation; but a child of the testator did make the attack. *Held*, the general clause was sufficient to save the will. It is not necessary that the decedent have contemplated marriage to a specific person, and he could make provision for a future spouse in general

terms or as a member of a class. (197 C.A.2d 852, 853.)

In *Estate of Cooper* (1983) 142 C.A.3d 118, 190 C.R. 826, the decedent, in a codicil made in contemplation of subsequent marriage to Bernice, declared that the codicil (and the will republished) "shall not be revoked by the marriage." *Held*, "[n]o clearer showing of an intent not to make provision for Bernice could be made." (142 C.A.3d 121.) (See *Estate of Lapidus* (1954) 123 C.A.2d 289, 266 P.2d 803 [statements that "I intend to be married" to L and that "said marriage shall not revoke or affect" the will].)

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C. Omitted Spouse.

5. Permissible Omission.

c. Language Not Sufficient To Omit Spouse.

14 Witkin Sum. Cal. Law Wills § 279

[§ 279] Language Not Sufficient To Omit Spouse.

The intention to omit a spouse or future spouse must appear; mention is not enough. (See, e.g., *Estate of Shannon* (1990) 224 C.A.3d 1148, 1153, 274 C.R. 338 [insufficient evidence that testator intended to omit spouse in premarital will disinheriting "any legal heir of mine"].)

In *Estate of Rozen-Goldenberg* (1934) 1 C.A.2d 631, 37 P.2d 132, a clause referring to the testator's living heirs at the time of her death was held not to include her husband where the marriage took place nearly 3 years after the will. The testator could not have intended to refer to a person unknown to her at the time of the execution of the will. (1 C.A.2d 633.) This theory was followed in *Estate of Axcelrod* (1944) 23 C.2d 761, 767, 147 P.2d 1, where the marriage took place some months after execution of the will, and there was no showing that the testator and her surviving husband were even acquainted at the time the will was made. (See *Estate of Turney* (1951) 101 C.A.2d 720, 726, 226 P.2d 80 [following *Rozen-Goldenberg* and *Axcelrod* on similar facts]; *Estate of Green* (1981) 120 C.A.3d 589, 592, 174 C.R. 654 [following *Axcelrod*]; 32 Cal. L. Rev. 213.)

In *Estate of Challman* (1954) 127 C.A.2d 736, 740, 274 P.2d 439, the testator referred to his wife's right to have \$ 619.40 "deducted from estate." Construing this to be merely an acknowledgment of the testator's indebtedness to her, the court upheld the wife's right to recover under the statute. (127 C.A.2d 738.)

In *Estate of Poisl* (1955) 44 C.2d 147, 280 P.2d 789, the will contained a general disinheritance clause referring to heirs (held insufficient), and left a residence and personal property to E. About 7 months later, the testator married E. Held, the will was revoked as to her. "[M]erely naming or giving a legacy to a person by name, ... with no indication that she may be a prospective spouse, is not enough to prevent revocation. That indication must appear on the face of the will, and extrinsic evidence is not admissible to show the testator's intention, at least unless there is some ambiguity." (44 C.2d 150.) (See 29 So. Cal. L. Rev. 253; 44 Cal. L. Rev. 167.)

Estate of Paul (1972) 29 C.A.3d 690, 105 C.R. 742, on unusual facts, held the mention insufficient. A layman's will recited that the members of the testator's "immediate family, including my wife and children," were "Patty Sue Paul," "My son by previous marriage Robert Jay Paul," and "My daughter by previous marriage Barbara Sharon Gordon." The will gave half of the estate to the son and daughter, and nominated Patty Sue Paul as alternate executor. There was no

residuary clause. Seven days after executing the will the testator married Patty Sue Paul, and died about 21/2 years later. *Held*, she was entitled to community property and separate property under the omitted spouse statute. The court declared that "contemplation of marriage" is only a strong evidentiary factor, and not conclusive as to intent to disinherit. Thus, the evidence that the testator referred to Patty Sue Paul as his wife, and gave the name she was to have on her marriage, was not sufficient to meet the heavy burden on proof of facts to overcome the public policy presumption of the omitted spouse statute. "[I]t is not unreasonable to infer that the unlearned testator assumed that the undisposed half would be the community property of himself and his after-acquired spouse, over which he had no power of testamentary disposition, and that it would pass to her by operation of law." (29 C.A.3d 696.)

In *Estate of Murray* (1983) 145 C.A.3d 324, 193 C.R. 355, Bonnie signed a petition to dissolve her marriage to Paul, and on the same day, made a will naming her three sons as sole beneficiaries. The parties lived apart for a short time, then reconciled and remarried. She died 3 days after the remarriage without making any change in the will. *Held*, Paul was entitled to a one-third share of the estate. The general exclusion clause was insufficient. (145 C.A.3d 327, 328.) And although the will (made before dissolution) mentioned Paul as an existing spouse, there was no indication that he might become a future spouse. Bonnie may well have intended not to provide for Paul when she made the will, but the statute assumes that a decedent does not intend to disinherit an *after-acquired spouse*. "We perceive no reason for a different rule merely because the after-acquired is also a former spouse." (145 C.A.3d 329.)

In *Estate of Katleman* (1993) 13 C.A.4th 51, 16 C.R.2d 468, plaintiff and decedent were married in 1973 and divorced in 1975. Decedent's 1976 will left the bulk of his estate to defendant. The will disinherited decedent's daughter, grandchildren, and "heirs," and included a no contest clause. Plaintiff and decedent remarried in 1988, and decedent died in 1988 without revoking the 1976 will. Plaintiff filed a will contest alleging undue influence by defendant, and claimed an interest in the estate as an omitted spouse. The will contest was ultimately unsuccessful, but the trial judge granted plaintiff's petition to take as an omitted spouse. *Held*, affirmed.

(a) The disinheritance clause did not refer to plaintiff with adequate specificity to overcome her rights as an omitted spouse. Intention to disinherit is determined at the time of execution of the will, and a broad reference to "heirs," without language clearly demonstrating the possibility of a later marriage, is insufficient to include a future spouse. (13 C.A.4th 60, citing the text.)

(b) A no contest clause can effectively disinherit an heir not mentioned elsewhere only if the heir is mentioned in the no contest clause with the same level of specificity that would be required for a general disinheritance clause. Here, plaintiff was not sufficiently described by the no contest clause, which referred to "any devisee, legatee or beneficiary under this Will" and to "any legal heir of mine," and the act of contesting the will did not bring her within the group of persons described in the clause. (13 C.A.4th 62, 63.)

(c) An omitted spouse's right to a share in the estate under the omitted spouse statute is essentially a right to take an intestate share. It is not impaired by a no contest clause, which only reaches devisees under a will. Thus, the portion of the no contest clause stating that a contestant "shall receive nothing from my estate," cannot reach beyond the will to defeat plaintiff's right under the statute to share in the estate independent of the will. (13 C.A.4th 64, 65.)

West's Key Number Digest, Wills k.191

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION
D. Omitted Child.
1. In General.

Witkin Sum. Cal. Law Wills § 280

[§ 280] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Commentary and Practice Works*. See 96 Proof of Facts 3d 107 [Intentional Omission of Child From Will; superseding 6 Proof of Facts 2d 95, text, p. 365].



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Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION D. Omitted Child. 1. In General.

14 Witkin Sum. Cal. Law Wills § 280

[§ 280] In General.

(1) *Effect and Purpose of Rule.* An omitted child statute (also called a *pretermitted heir* statute) has the effect of revoking a testator's will to the extent that the statute preserves an interest in the testator's estate for a child not provided for in the will. The statute is not intended as a limitation on the testator's power; the testator may intentionally disinherit any child. The purpose is to protect against the testator's forgetfulness, as well as to take care of children born after the will is made. (*Estate of Callaghan* (1898) 119 C. 571, 574, 51 P. 860.) (See *Estate of Trickett* (1925) 197 C. 20, 22, 239 P. 406; *Estate of Todd* (1941) 17 C.2d 270, 273, 109 P.2d 913; *Estate of Frinchaboy* (1951) 108 C.A.2d 235, 237, 238 P.2d 592; *Estate of Torregano* (1960) 54 C.2d 234, 243, 5 C.R. 137, 352 P.2d 505, *infra*, §286.)

(2) *Statutory Development.* California has had three omitted child statutes. Former Prob.C. 90 applied to testators dying before January 1, 1985. Former Prob.C. 6570 et seq. applied to testators dying between January 1, 1985, and January 1, 1998. Prob.C. 21620 et seq. apply to decedents dying on or after January 1, 1998. (Former Prob.C. 6580; Prob.C. 21630.) The omitted spouse statute is comparable. (See *supra*, §274.)

(3) *Statute Is Applicable to Wills and Trusts.* The former statutes applied only to property passing by will. The current statutes apply to property passing by will through a decedent's estate or by a trust "that becomes irrevocable only on the death of the settlor." (Prob.C. 21600.)

(4) *Where Entire Estate Is Taken.* The fact that the entire estate will pass to omitted children neither prevents probate of a will, nor allows the omitted children to contest probate. Their rights are to be asserted at the time of distribution, or by an independent action. (*Estate of Philippi* (1945) 71 C.A.2d 127, 133, 161 P.2d 1006, *supra*, §104; see *infra*, §559.)

(5) *Disinherited Child May Take Intestate Property.* Despite a disinheritance clause (see *infra*, §284), the excluded child may take his or her proper share of any property as to which the testator dies intestate. (See *Estate of Fritze* (1927) 85 C.A. 500, 506, 259 P. 992; *Estate of Dunn* (1953) 120 C.A.2d 294, 295, 260 P.2d 964; 100 A.L.R.2d 325.)

(6) *Disinherited Child May Receive Exempt Property.* Though unable to claim as an omitted child, a child may be eligible to receive exempt property (see *infra*, §766), a probate homestead (see *infra*, §767 et seq.), or a family allowance (see *infra*, §774 et seq.).

(7) *Commentary and Practice Works*. Discussion of the omitted child statute is extensive. (See 29 *Cal. L. Rev.* 661; 31 *Cal. L. Rev.* 263; 45 *Cal. L. Rev.* 220; 8 *U.C.L.A. L. Rev.* 476; 13 *Stanf. L. Rev.* 663; 13 *Stanf. L. Rev.* 80 [discussing need for clarification of rights in community property]; 18 *Hastings L. J.* 333 [criticizing state of the law]; 41 *Hastings L. J.* 1197 [protecting children from disinheritance]; 97 *A.L.R.2d* 1044 [statutory revocation of will by birth or adoption of child]; 83 *A.L.R.4th* 779 [what constitutes sufficient reference to heir to render statute inapplicable]; *Cal. Transactions Forms*, 1 Estate Planning §§6:31 et seq., 6:101 et seq.; *Cal. Civil Practice*, 1 Probate and Trust Proceedings, §3:28 et seq.; *C.E.B.*, 3 Will Drafting 3d, §35.4; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1529 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §2.7 [express disinheritance], §9.6 [omitted child]; 6 *Proof of Facts* 2d, *Intentional Omission of Child From Will* §1 et seq.)

West's Key Number Digest, Descent and Distribution k.47(1)

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Commentary and Practice Works*. See 96 *Proof of Facts* 3d 107 [Intentional Omission of Child From Will; superseding 6 *Proof of Facts* 2d 95, text, p. 365].



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D. Omitted Child. 2. Nature and Scope of Statute.

14 Witkin Sum. Cal. Law Wills § 281

[§ 281] Nature and Scope of Statute.

(1) *General Rule.* If a decedent fails to provide in a testamentary instrument for the decedent's child who was born or adopted after the execution of *all* the decedent's testamentary instruments, the child is entitled to a share of the decedent's estate equal in value to what the child would have received if the decedent had died without having executed any testamentary instrument. (*Prob.C. 21620.*) If at the time of execution of all decedent's effective testamentary instruments, "the decedent failed to provide for a living child solely because the decedent believed the child to be dead or was unaware of the birth of the child," the child is entitled to a share of the decedent's estate equal in value to what the child would have received if the decedent had died without having executed any testamentary instrument. (*Prob.C. 21622.*)

(2) *Definitions.* For purposes of the omitted child statute, "decedent's testamentary instruments" means the decedent's will or revocable trust (*Prob.C. 21601(a)*) and "estate" includes the decedent's probate estate and property held in a revocable trust that becomes irrevocable on the decedent's death (*Prob.C. 21601(b)*).

(3) *Grandchildren or More Remote Issue Are Not Protected.* The omitted child statute originally protected grandchildren or more remote issue. It no longer does so. "If the testator's child is deceased at the time the will is made and the testator omits to provide for a child of that child (the testator's grandchild), the omission would seem to be intentional in the usual case. If the testator's child is living when the will is made and is a named beneficiary under the will and dies before the testator leaving a child surviving, the testator's grandchild will be protected by the antilapse statute." (Legislative Committee Comment to former *Prob.C. 6570.*)

(4) *Adopted Child.* An adopted child may be an omitted child of his adopting parents but not of his natural parents. (See *Estate of Hunsicker* (1923) 65 C.A. 114, 119, 223 P. 411; *Estate of Turkington* (1983) 147 C.A.3d 590, 592, 195 C.R. 178, *infra*, §284; 25 Cal. L. Rev. 81, 88; 43 A.L.R.4th 947 [application of omitted child statute to adopted child].)

(5) *Child Born Out of Wedlock.* Under the former California law of illegitimacy, an illegitimate child, acknowledged in writing by the testator, could be an omitted child. (*Estate of Loyd* (1915) 170 C. 85, 88, 148 P. 522; see 6 Cal. L. Rev. 158.) The same was true of an illegitimate child legitimated by reception into the family of the testator. (*Estate of Flood* (1933) 217 C. 763, 767, 21 P.2d 579.) The result is the same under the Uniform Parentage Act (*Family C. 7600 et seq.*), which abolishes the distinction between legitimate and illegitimate children. (See 10 *Summary*

(10th), *Parent and Child*, §17 et seq.) (On parent and child relationship for purposes of intestacy, see *Prob.C. 6450*, supra, §94.)

(6) *Burden of Proof*. The presumption of *Prob.C. 21622* is that the decedent's omission of a child is not a mistake. Thus, the omitted child has the burden of proving a mistake, e.g., that the decedent believed the child to be dead at the time of execution. (*Estate of Della Sala* (1999) 73 C.A.4th 463, 467, 86 C.R.2d 569.)

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3. Satisfaction of Share.

14 Witkin Sum. Cal. Law Wills § 282

[§ 282] Satisfaction of Share.

Generally, the child's share is satisfied first from estate property not disposed of by will or trust and then as necessary from all beneficiaries of the testamentary instruments in proportion to the value of their shares, based on the date of death value. (*Prob.C. 21623(a)*.) However, if the decedent's "obvious intention" with respect to a specific gift, devise, or provision would be defeated by apportionment, "a different apportionment, consistent with the intention of the decedent, may be adopted." (*Prob.C. 21623(b)*.) The statute is comparable to *Prob.C. 21612* (*supra*, §276), providing for abatement in the case of an omitted spouse.

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D. Omitted Child.

4. Permissible Omission.

a. In General.

14 Witkin Sum. Cal. Law Wills § 283

[§ 283] In General.

An omitted child is not entitled to a share of the decedent's estate in the following circumstances:

(1) *Intentional Omission*. The decedent's intentional failure to provide for the child appears from the testamentary instruments. (*Prob.C. 21621(a)*.) (See C.E.B., 3 Will Drafting 3d, §35.7.)

The intention must appear from the will. (See *Estate of Cochran (1953) 116 C.A.2d 98, 99, 253 P.2d 41*; *Estate of Falcone (1962) 211 C.A.2d 40, 47, 27 C.R. 38* [extrinsic writing, conclusively showing that testator had children in mind, was not admissible]; *Estate of Kretschmer (1965) 232 C.A.2d 789, 793, 43 C.R. 121*; *88 A.L.R.2d 616* [admission of extrinsic evidence to show intention to omit child]; cf. *Estate of Mowry (2003) 107 C.A.4th 338, 341, 131 C.R.2d 855* [child adopted by testator before execution of will was not entitled to share in estate as omitted child even though intent not to provide for her did not appear from testator's will; showing of intentional failure to provide for child under *Prob.C. 21621(a)* is required only if child meets threshold requirement of *Prob.C. 21620*, i.e., if child is born or adopted after execution].)

(2) *Transfer to Other Parent*. The decedent directed the disposition of substantially all the estate to the other parent of the omitted child. (*Prob.C. 21621(b)*.)

(3) *Nontestamentary Transfer*. The decedent provided for the child by transfer outside the testamentary instruments, and the intention that the transfer be in lieu of the testamentary instruments "is shown by statements of the decedent or from the amount of the transfer or by other evidence." (*Prob.C. 21621(c)*.) (See *Estate of Hale (1946) 75 C.A.2d 227, 233, 170 P.2d 961* [holding under former statute that trust providing residuary gift to issue was "settlement" precluding claim as omitted issue]; *Estate of Kretschmer (1965) 232 C.A.2d 789, 795, 43 C.R. 121* [insufficient evidence that life insurance was "settlement" under former statute].)

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D. Omitted Child.

4. Permissible Omission.

b. Express Language.

14 Witkin Sum. Cal. Law Wills § 284

[§ 284] Express Language.

Cases decided under the omitted child statute deal with various kinds of express mention. (See *Estate of Fanning* (1937) 8 C.2d 229, 230, 64 P.2d 951 ["[h]aving in mind my children" (naming them) evidences intentional omission]; *Estate of Eggleston* (1954) 129 C.A.2d 601, 607, 277 P.2d 469 [mention by conditional gift which did not become effective]; *Estate of Torregano* (1960) 54 C.2d 234, 247, 5 C.R. 137, 352 P.2d 505 [extrinsic evidence admitted to show that testator's statement "I have no children, issue of my marriage" arose from mistaken belief that daughter of former marriage was dead, not from intent to disinherit her].)

But express language of *disinheritance* is not required. Thus, in *Estate of Labrie* (1955) 130 C.A.2d 235, 278 P.2d 760, the testator mentioned her daughter by a previous marriage, then left all her property to her husband, or, if he predeceased her, to her nephew. *Held*, the daughter could not claim under the statute. "[I]t clearly and convincingly appears from the will itself that the testatrix not only had this daughter in mind, but, having her in mind, intentionally omitted any provision for her." (130 C.A.2d 238.) (See *Estate of Gramespacher* (1961) 189 C.A.2d 805, 807, 11 C.R. 437 [sons named, reference made to insurance policies for them; and "I am pleased that they are doing well and are not in need of further help from me"]; *Estate of Sawyer* (1961) 193 C.A.2d 471, 474, 14 C.R. 450 [printed form "for Married Man Having Child or Grandchild" with printed Note warning of pretermisison rule, filled in with child's name]; *Estate of Foxworth* (1966) 240 C.A.2d 784, 790, 50 C.R. 237, *supra*, §165 [witnessed will named children and interests; then holographic will incorporated witnessed will by reference, changed scheme, mentioned M as "the only son"; held that other sons were intentionally omitted]; *Estate of Moore* (1967) 253 C.A.2d 945, 951, 61 C.R. 722 [mention in sentence precatory in nature did not create trust for the heir mentioned].)

In *Estate of Turkington* (1983) 147 C.A.3d 590, 195 C.R. 178, the court, on peculiar facts, found the mention insufficient. Robert Turkington raised his two nieces, Jane and Joan. He made a will leaving his estate to his sister with a direction that the estate be used for the support of these two children; and the will further provided that if his sister predeceased him, the estate should go to the children. Four years later, Robert adopted Joan, who was then an adult, and Robert died thereafter without changing his will. Joan claimed the entire estate as an omitted child (the sole surviving child of the testator). Jane contended that Joan was not an omitted child because she was sufficiently provided for in the will. *Held*, Joan was entitled to the estate.

(a) The testator left everything he owned to the two children in equal shares, identifying them by true name and relationship (nieces). He did not anticipate that one niece would become his child by adoption, but the court cannot speculate on why only one niece was adopted. (147 C.A.3d 592.)

(b) There is no indication that the testator contemplated adopting Joan. "Although she was mentioned by name in the will, the language is 'noncommittal' language. Like marriage, adoption results in 'serious domestic changes,' as adoption establishes a new parent-child relationship and substitutes the adoptive family relationships for those of the natural family. ... Obviously, since Joan was provided for as a niece, she was not intentionally disinherited. As the niece relationship was the one declared in the will, the future status of the child was not influencing the testator, even if foreseen. Therefore, we hold that Joan was not provided for as the testator's child and was a pretermitted heir." (147 C.A.3d 594.) (See 43 A.L.R.4th 947 [application of omitted child statute to adopted child].)

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D. Omitted Child.

4. Permissible Omission.

c. General Language Sufficient To Omit Child.

14 Witkin Sum. Cal. Law Wills § 285

[§ 285] General Language Sufficient To Omit Child.

It is not necessary that a child be named. The statute merely requires that the omission appear from the will to be intentional, and a long line of cases (many dealing with claims of grandchildren under the former statute) has established the sufficiency of mention by such general terms as "heirs" or "relatives." (See *18 Hastings L. J.* 333.) The following decisions are illustrative:

Estate of Lindsay (1917) 176 C. 238, 240, 168 P. 113 [provision leaving \$ 5 to any persons "claiming to be heirs of mine" was sufficient to exclude illegitimate children].

Estate of Trickett (1925) 197 C. 20, 24, 239 P. 406 [provision excluding "any other relatives" covered grandchildren].

Estate of Lombard (1936) 16 C.A.2d 526, 528, 60 P.2d 1000 [statement that "I have ... intentionally and with full knowledge omitted to provide for my heirs" was sufficient]; *Estate of Doell* (1952) 113 C.A.2d 37, 38, 247 P.2d 580 [similar].

Estate of Allmaras (1938) 24 C.A.2d 457, 461, 75 P.2d 557 [declaration that the testator was "a single man," with "no living issue," that he had "purposely made no provision ... for any other person, whether claiming to be an heir of mine or not," and giving \$ 1 to any person contesting the will, was sufficient to show that the testator had intentionally omitted his two sons].

Estate of Dixon (1938) 28 C.A.2d 598, 601, 83 P.2d 98 [devise of \$ 1 to "any other person who, if I died ... intestate, would be entitled to share in my estate," if such person should contest the will or should "endeavor to succeed to any part of my estate otherwise than through this will," was sufficient mention of testator's grandchild].

Estate of Talmage (1952) 114 C.A.2d 18, 21, 249 P.2d 345 [clause excluding "any other person whether claiming to be an heir of mine or not," was sufficient to exclude grandchild].

Van Strien v. Jones (1956) 46 C.2d 705, 707, 299 P.2d 1 ["If any person who is, or claims under or through, a devisee, legatee, or beneficiary under this Will, or any person who if I died intestate would be entitled to share in my

estate, shall, in any manner whatsoever, directly or indirectly contest this Will ... then I hereby bequeath to each such person the sum of One Dollar (\$ 1.00) only"].

Estate of Fernstrom (1958) 157 C.A.2d 380, 385, 321 P.2d 25 [declaration that testator was divorced, had no children, and intentionally omitted to provide for any living heirs]; *Estate of Brown* (1958) 164 C.A.2d 160, 162, 330 P.2d 232 [similar].

Estate of McClure (1963) 214 C.A.2d 590, 595, 29 C.R. 569 [\$ 1 to "any person" who might "contest this will and claim to be an heir to any part of my estate and be able to establish such fact"; grandchild excluded].

Estate of Groscup (1964) 231 C.A.2d 535, 537, 42 C.R. 21 [estate devised to testator's living children with declaration that "except as otherwise provided, ... I have intentionally omitted to provide for any of my heirs"; children of deceased child excluded].

Estate of Lipovsky (1965) 238 C.A.2d 604, 610, 48 C.R. 41 ["I have intentionally and with full knowledge omitted to provide for my heirs, including my son, Gareth Desmond Winton"; daughter excluded by "heirs" provision]; *Estate of Szekely* (1980) 104 C.A.3d 236, 241, 163 C.R. 506 ["I have intentionally with full knowledge omitted to provide for my heirs"].

Estate of Bank (1967) 248 C.A.2d 429, 433, 56 C.R. 559 [\$ 1 for any person establishing a right as "an heir-at-law, through marriage, or relationship"; legitimate son excluded].

Estate of Hirschi (1980) 113 C.A.3d 681, 683, 685, 170 C.R. 186 ["If any person shall claim any portion of my Estate by reason of relationship" and "if any person who, if I died intestate, would be entitled to any part of my Estate," "I give ... the sum of One Dollar"].

Estate of Leonetti (1981) 115 C.A.3d 378, 383, 171 C.R. 303 [statement "I have personally made no other provision herein for any other person or persons, whether claiming to be an heir of mine or not" followed by no contest clause was sufficient to exclude grandchildren].

An examination of the foregoing cases makes it clear that the statute no longer fulfills its purpose. Its effect is nullified by the standard form of disinheritance clause, which every careful attorney uses. In *Estate of Cochems* (1952) 112 C.A.2d 634, 247 P.2d 131, the court recognizes this defeat of the statutory policy in the following language: "[T]hese general clauses ... do not in fact constitute evidence that omitted children or grandchildren were intentionally omitted ... quite the contrary is true, for had they not been forgotten, they would generally have been referred to at least by a class." (112 C.A.2d 637.)

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D. Omitted Child.

4. Permissible Omission.

d. General Language Not Sufficient To Omit Child.

14 Witkin Sum. Cal. Law Wills § 286

[§ 286] General Language Not Sufficient To Omit Child.

Slight variations in language may render a disinheritance clause ineffective and allow the omitted child (or the pretermitted heir) to take. Two cases illustrate the capricious and uncertain application of the statute.

In *Estate of Price* (1942) 56 C.A.2d 335, 339, 132 P.2d 485, the statement that the testator purposely omitted to provide for "any other person or persons" was held insufficient to exclude grandchildren. (See 31 Cal. L. Rev. 263.) Although the theory of the holding is not entirely clear, its effect would seem to be that although a general reference to a class of persons such as "heirs" or "relatives" is sufficient, "persons" is too broad to be considered a mention of grandchildren. (See *Estate of Gardner* (1978) 21 C.3d 620, 623, 147 C.R. 184, 580 P.2d 684 [following *Price*].)

In *Estate of Cochran* (1953) 116 C.A.2d 98, 253 P.2d 41, the testator left his estate to strangers. The will made no mention of his four daughters, but contained the clause: "To anyone who may contest this will I give the sum of \$ 1.00." *Held*, this reference to "anyone," like a reference to "persons," was not enough to avoid the statute. (116 C.A.2d 100.)

Disinheritance and no contest clauses were the subject of an exhaustive reexamination in *Estate of Torregano* (1960) 54 C.2d 234, 5 C.R. 137, 352 P.2d 505. The court held that the general language of the will, referring to a large class of persons, did not as a matter of law include plaintiff child, mistakenly believed dead.

(a) The Legislature has followed a continuing policy of guarding against omission of lineal descendants by oversight, accident, mistake, or unexpected change of condition. (54 C.2d 248.) The decisions have accordingly established the practice of looking at the facts of each case instead of mechanically relying on previous interpretation of similar words or phrases. (54 C.2d 250.)

(b) Following this approach, plaintiff is not in the named class of persons who contest the will, for a pretermitted heir is not a contestant of the will. (54 C.2d 251.) Nor is she necessarily within the class of persons claiming "by virtue of relationship." Although previous cases have found "relation" or "relationship" to include a testator's child, words of kinship should not be interpreted solely on the basis of a previous definition under another set of facts. And here, if the testator believed plaintiff dead, it cannot be said with finality that he intended the phrase to apply to her. "One does not disinherit a deceased person." (54 C.2d 252.)

(c) A disinheritance clause may be interpreted to exclude a child by general words without naming him. But the will "contains no direct or indirect language of disinheritance, and no inference that testator would adhere to his testamentary scheme in the event that he had a daughter whose existence was unknown to him." (54 C.2d 253.)

(d) Disregarding dicta, no case resulted in judgment against the pretermitted heir "unless the will included: (1) a specific clause of disinheritance, (2) a general clause expressing an intention to disinherit all those not named, (3) a clause affecting all persons who might have taken in the event that testator died intestate, (4) a clause expressing some doubt regarding the identity of testator's heirs and providing for disinheritance or nominal sums to such persons who may prove to be his heirs, (5) reasons for leaving the entire estate to the named beneficiaries, which reasons exclude the intent to leave anything to other presumptive heirs, or (6) a complete testamentary plan from which the court was bound to find that testator would have left nothing to any other person even though there were presumptive heirs of whose existence he was unaware." (54 C.2d 253.) But a footnote hedged: This does not mean that some such language is always essential to a determination as a matter of law. If the language of a will creates an inference of intent to omit provision for a presumptive heir, and the claimant fails to allege or offer evidence of absence of intent to omit, he would not raise a factual issue. (54 C.2d 254, footnote 9.)

The three dissenting justices argued that (a) the will provision was not a simple no contest clause but a clear disinheritance clause; (b) The testator's statement that he had no issue of a second marriage and lack of reference to a prior marriage or issue tends to defeat rather than support plaintiff. "If a testator's erroneous statement in his will that he has no children does not vitiate the effect of a general disinheritance clause, *a fortiori*, a correct statement, such as made by the testator here, that he has no children by a particular marriage should not do so. Moreover, the very limitation by the testator of clause 'Second' to a denial of issue of his second marriage clearly indicates the testator's recognition of the possible existence of issue of a prior marriage to whom the disinheritance clause was particularly intended to apply." (54 C.2d 256.) (See 13 Stanf. L. Rev. 663; 8 U.C.L.A. L. Rev. 476.)

Estate of Smith (1973) 9 C.3d 74, 106 C.R. 774, 507 P.2d 78, applies the *Torregano* rules in an unusual setting. Decedent Dale Smith married Mary in 1931 in Kansas, Dulcie May in 1948 in Australia, and Victoria Jo in 1955 in Nevada. Dulcie May bore his daughter, Deidre, in 1950, in Australia. Dale's will declared that he was divorced from Victoria Jo and had no children "by my marriage" and "leave nothing" to Victoria Jo. Specific gifts were made to a sister, grandniece, and niece-in-law, with the residue to a nephew, and the no contest clause provided a gift of \$ 1 if "any of my friends or relatives challenge" the will. Deidre objected to distribution. The trial judge found that Deidre was not a pretermitted heir. *Held*, this conclusion was erroneous.

(a) A no contest clause does not show an intent to disinherit, and cannot be construed to include a pretermitted heir who claims despite the will and does not contest it. (9 C.3d 79.)

(b) Extrinsic evidence is admissible to establish lack of intent to exclude, but not to prove an intent to disinherit a natural heir; i.e., that intent must appear on the face of the will (see *supra*, §283). Hence, when extrinsic evidence is offered by a presumptive heir the judge may draw the inference of intent not to provide, but cannot draw the further inference that the omission was intentional. (9 C.3d 80.)

(c) The statement in the will that decedent had no children did not show an intent to disinherit; the no contest clause likewise did not; and therefore there was no competent evidence to support the judge's determination that Dale intentionally omitted to provide for his daughter. (9 C.3d 80.)

West's Key Number Digest, Descent and Distribution k.47(2)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Advancement to Heir.

Witkin Sum. Cal. Law Wills § 287

[§ 287] Advancement to Heir.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 83 Proof of Facts 3d, Proof of Decedent's Intent that Inter Vivos Gift to Heir Constitutes Advancement, §1 et seq. [superseding 35 Proof of Facts 2d, Decedent's Gift to Heir As Advancement, §1 et seq., text, p. 373].



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Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION E. Advancement to Heir.

14 Witkin Sum. Cal. Law Wills § 287

[§ 287] Advancement to Heir.

(1) *In General.* If an intestate, before death, gives real or personal property to a child (or, sometimes, to other heirs), it is generally presumed that the decedent intended this to be deducted from the donee's share in the estate, so that ultimately all the heirs receive their usual shares. (See 3 *Am.Jur.2d* (1986 ed.), *Advancements* §1 et seq.; 1 *Proof of Facts*, *Advancements*, *Proof* 1 et seq.; 35 *Proof of Facts* 2d, *Decedent's Gift to Heir As Advancement*, §1 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §2.6 [advancements].)

(2) *Former Statute.* In California, the doctrine was codified in modified form by former Prob.C. 1050 et seq. (a) The doctrine applied not only to children and descendants, but to any heir. (b) There was no presumption of intention; a writing was required. (See *Estate of Nielsen* (1959) 169 C.A.2d 297, 303, 337 P.2d 87; *Estate of Rawnsley* (1949) 94 C.A.2d 384, 387, 210 P.2d 888 [parol evidence inadmissible].) (c) The doctrine also applied in cases of testacy; i.e., the prior gift could be treated as an advancement or ademption of a bequest or devise in a will. (See *Estate of Hayne* (1913) 165 C. 568, 574, 133 P. 277; *Estate of Borba* (1930) 110 C.A. 150, 153, 293 P. 809; *Estate of Nielsen*, *supra*.) (d) For purposes of deduction, either the decedent's statement or the donee's acknowledgment determined the value of the property; otherwise it was estimated at the time when given.

(3) *Enactment of Revised Statute.* Former Prob.C. 1050 et seq. were repealed in 1985 and Prob.C. 6409, based on Unif.Prob.C., §2-110, was enacted to govern advancements. (See C.E.B., 3 *Decedent Estate Practice*, §24.24.)

(4) *Conditions for Advancement.* "If a person dies intestate as to all or part of his or her estate, property the decedent gave during lifetime to an heir is treated as an advancement against that heir's share of the intestate estate only if one of the following conditions is satisfied":

(a) "The decedent declares in a contemporaneous writing that the gift is an advancement against the heir's share of the estate or that its value is to be deducted from the value of the heir's share of the estate." (Prob.C. 6409(a)(1).)

(b) "The heir acknowledges in writing that the gift is to be so deducted or is an advancement or that its value is to be deducted from the value of the heir's share of the estate." (Prob.C. 6409(a)(2).)

(5) *Valuation.* If the value of the property is expressed in a contemporaneous writing of the decedent, or in an acknowledgment by the heir contemporaneous with the advancement, "that value is conclusive in the division and

distribution of the intestate estate." (*Prob.C. 6409(c)*.) Otherwise, the property is valued "as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever occurs first." (*Prob.C. 6409(b)*.) The provisions on valuation are consistent with the statutes relating to ademption by satisfaction (see *supra*, §252).

(6) *Failure of Recipient To Survive Decedent*. "If the recipient of the property advanced fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment provides otherwise." (*Prob.C. 6409(d)*.)

West's Key Number Digest, Descent and Distribution k.93 et seq., 102.5

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 83 Proof of Facts 3d, Proof of Decedent's Intent that Inter Vivos Gift to Heir Constitutes Advancement, §1 et seq. [superseding 35 Proof of Facts 2d, Decedent's Gift to Heir As Advancement, §1 et seq., text, p. 373].



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14 Witkin Sum. Cal. Law Wills § 288

[§ 288] Former Law and Uniform Act.

Former C.C.P. 1963(4) contained rebuttable presumptions to help determine the issue of survival when two persons died in the same calamity and there were no circumstances from which the order of death could be inferred. (See *Clarke v. Bryson* (1934) 136 C.A. 521, 522, 29 P.2d 275.) This provision was repealed in 1945 when the Uniform Simultaneous Death Act was adopted, eliminating the presumptions and substituting conclusive presumptions to govern the issue. (Former Prob.C. 296 et seq.; see 8B U.L.A. (Master Ed.), p. 141 [Act adopted in 50 jurisdictions]; 80 Am.Jur.2d (2002 ed.), *Wills* §1454 et seq.; 39 A.L.R.3d 1332 [construction, application, and effect of Uniform Act].)

"The purpose of the Uniform Simultaneous Death Act is to supplant the former arbitrary and complicated presumptions of survivorship with effective, workable, and equitable rules applicable to the ever-increasing number of cases where two or more persons have died under such circumstances that there is no sufficient evidence to indicate that they have died otherwise than simultaneously." (*Azvedo v. Benevolent Soc. of Calif.* (1954) 125 C.A.2d Supp. 894, 901, 270 P.2d 948.) "The theory of the present Act makes no effort whatever to resolve the un-resolvable. The formula is a simple one and easily applied. ... [A]s to the property of each person he is presumed to be the survivor and it is administered accordingly." (Note, 8B U.L.A. (Master Ed.), p. 160.) (See *Estate of Meade* (1964) 228 C.A.2d 169, 172, 39 C.R. 278.)

The Act deals only with the situation in which there is no sufficient evidence that either person survived. If there is evidence, survivorship must be determined in the manner of any other fact, by direct or circumstantial evidence. (*Estate of Rowley* (1967) 257 C.A.2d 324, 333, 65 C.R. 139 [circumstantial evidence was sufficient]; *Estate of Schmidt* (1968) 261 C.A.2d 262, 272, 67 C.R. 847 [evidence showed that wife survived husband by about 10 minutes].) (See 40 A.L.R.3d 359 [construction of will provision covering survivorship in simultaneous death].)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION F. Simultaneous Death. 2. Revised Statute.

14 Witkin Sum. Cal. Law Wills § 289

[§ 289] Revised Statute.

(1) *Law Revision Commission Report.* The California Law Revision Commission's 1983 Recommendation Relating to Simultaneous Deaths reads in part: "When two persons die in a common accident and there is evidence that one person survived the other for any amount of time, even a fraction of a second, property may pass to the survivor by will, intestate succession, or right of survivorship. In this type of case, where one person dies soon after another, a serious injustice may result. ... [A]s a matter of general policy, it is unfair to determine the recipients of property based on an instant of survival. The Commission recommends that the policy reflected in the Uniform Simultaneous Death Act, which generally divides property between the estates of the decedents, should be applied to situations of nearly simultaneous death. Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival." (17 Cal. Law Rev. Com. Reports, pp. 447, 448.)

Following the Uniform Probate Code rules for taking by intestate succession (Unif.Prob.C., §2-104) or, in the absence of a contrary provision, under a will (Unif.Prob.C., §2-601), the Law Revision Commission recommended a requirement of survivorship for 120 hours, for purposes of (a) intestate succession, (b) taking under a will, and (c) nonprobate transfers on death, e.g., taking as a surviving joint tenant or an insurance beneficiary. (17 Cal. Law Rev. Com. Reports, p. 448.)

(2) *Enactment of Revised Statute.* In 1983, former Prob.C. 296 et seq. were superseded by Prob.C. 220 et seq., effective January 1, 1985. The revised statute applies only where death occurs on or after the effective date. (Prob.C. 226.) (See generally Cal. Civil Practice, 1 Probate and Trust Proceedings, §3:61 et seq; C.E.B., 3 Decedent Estate Practice, §28.1 et seq.)

The Legislature did not adopt the Commission's survivorship recommendation when the simultaneous death statutes were revised in 1983. However, in 1989 it adopted the 120-hour requirement with respect to intestate succession. (See Prob.C. 6403, supra, §74.) In 1990, the Legislature extended the 120-hour requirement to statutory wills. (See Prob.C. 6211, supra, §117.)

(3) *General Rule.* Except as otherwise provided in Prob.C. 220 et seq., "if the title to property or the devolution of property depends upon priority of death and it cannot be established by clear and convincing evidence that one of the

persons survived the other, the property of each person shall be administered or distributed, or otherwise dealt with, as if that person had survived the other." (*Prob.C. 220*.) The requirement of clear and convincing evidence changes the former law which required only sufficient evidence. (See Legislative Com. Comment.)

(4) *Where Statute Does Not Apply.* *Prob.C. 220* et seq. are inapplicable where a contrary simultaneous death rule is expressly provided or a survivorship provision or presumption results in a different distribution. (*Prob.C. 221(b)*.) Under *Prob.C. 221(a)*, the statute is inapplicable where the following statutes apply:

(a) *Prob.C. 103* (community and quasi-community property; each spouse treated as surviving with respect to half). (See *supra*, §265.)

(b) *Prob.C. 6211* (statutory will; survival for 120 hours). (See *supra*, §117.)

(c) *Prob.C. 6403* (intestate succession; survival for 120 hours). (See *supra*, §74.)

West's Key Number Digest, Death k.17

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 290

[§ 290] Rules of Survival.

(1) *Successive and Multiple Beneficiaries.* If a beneficiary's right to succeed to an interest in property is conditional on surviving another person, and it cannot be established by clear and convincing evidence that the beneficiary survived, "the beneficiary is deemed not to have survived the other person." (*Prob.C. 222(a)*, based on Uniform Simultaneous Death Act §2.)

If one of two or more beneficiaries would have been entitled to the property on survival of the others, and it cannot be established by clear and convincing evidence that any one survived any other, "the property shall be divided into as many equal portions as there are beneficiaries and the portion of each beneficiary shall be administered or distributed, or otherwise dealt with, as if that beneficiary had survived the other beneficiaries." (*Prob.C. 222(b)*.)

(2) *Joint Tenants.* *Prob.C. 223*, dealing with "joint tenants," includes "owners of property held under circumstances that entitled one or more to the whole of the property on the death of the other or others." (*Prob.C. 223(a)*.) If both have died and it cannot be established by clear and convincing evidence that one survived the other, "the property held in joint tenancy shall be administered or distributed, or otherwise dealt with, one-half as if one joint tenant had survived and one-half as if the other joint tenant had survived." (*Prob.C. 223(b)*.)

If property is held by more than two and all have died, and it cannot be established by clear and convincing evidence that any survived the others, "the property held in joint tenancy shall be divided into as many portions as there are joint tenants and the share of each joint tenant shall be administered or distributed, or otherwise dealt with, as if that joint tenant had survived the other joint tenants." (*Prob.C. 223(c)*.)

(3) *Insured and Beneficiary.* If the insured and a beneficiary under a policy of life or accident insurance have died, and it cannot be established by clear and convincing evidence that the beneficiary survived the insured, "the proceeds of the policy shall be administered or distributed, or otherwise dealt with, as if the insured had survived the beneficiary." (*Prob.C. 224*; on predecessor statute, see *Estate of Wedemeyer* (1952) 109 C.A.2d 67, 71, 240 P.2d 8; *Estate of Hudson* (1958) 158 C.A.2d 385, 387, 322 P.2d 987; 25 So. Cal. L. Rev. 466.)

Prob.C. 224 states a special rule applicable where the policy is community or quasi-community property of the insured, and there is no alternative beneficiary except the estate or personal representative of the insured. In that case,

the proceeds are distributed as community property under *Prob.C. 103*, i.e., half as if one spouse had survived and as if that half belonged to that spouse, and half as if the other spouse had survived and as if that other half belonged to the other spouse. (See Law Rev. Com. Comment, noting that this special rule is based on the optional provision of §5 of the Uniform Act.) (On community insurance under former statutes, see *Estate of Wedemeyer, supra*, 109 C.A.2d 71; *Estate of Hudson, supra*, 158 C.A.2d 389; *Estate of Sugino (1968)* 267 C.A.2d 591, 595, 73 C.R. 150.)

West's Key Number Digest, Death k.17

SUPPLEMENT: [This section is current through the latest supplement]



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VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION

F. Simultaneous Death.
4. Proceeding To Determine Survival.
a. Authorized Purposes.

14 Witkin Sum. Cal. Law Wills § 291

[§ 291] Authorized Purposes.

A petition to determine survival may be filed for one or more of the following purposes:

(1) To determine for purposes of any provision of the Probate Code whether one person survived another. (*Prob.C. 230(a)*.) Typical situations include the following:

- (a) Simultaneous death statutes. (See *Prob.C. 220* et seq., supra, §290.)
- (b) Survivorship requirement for statutory will. (See *Prob.C. 6211*, supra, §117.)
- (c) Survivorship requirement for intestate succession. (See *Prob.C. 6403*, supra, §74.)
- (d) Survivorship of transferee under will, trust, deed, or other instrument. (See *Prob.C. 21109*, supra, §214.)
- (e) Survivorship under anti-lapse statute. (See *Prob.C. 21110*, supra, §263.)

(2) To determine whether a person has survived in order to receive benefits payable under the State Teachers' Retirement System. (*Prob.C. 230(c)*.) *Educ.C. 24611* makes the simultaneous death statutes applicable to the distribution of death benefits under the State Teachers' Retirement System.

(3) To determine whether a person has survived in order to receive money payable under the Public Employees Retirement System. (*Prob.C. 230(d)*.) *Govt.C. 21509* makes the simultaneous death statutes applicable to the distribution of benefits under the Public Employees Retirement System.

West's Key Number Digest, Death k.7 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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F. Simultaneous Death.

4. Proceeding To Determine Survival.

b. Procedure.

14 Witkin Sum. Cal. Law Wills § 292

[§ 292] Procedure.

(1) *Who May File Petition.* A petition to determine survival may be filed by the personal representative of any person "the priority of whose death is in issue" under the applicable provision of *Prob.C. 230* (supra, §291), or any person interested in the estate of that person. (*Prob.C. 231.*) (See Rutter Group, Cal. Practice Guide: Probate §14:150 et seq., Forms 14:F, 14:G; Cal. Civil Practice, 1 Probate and Trust Proceedings, §3:96 [petition to determine survivorship], §3:97 [response to petition]; C.E.B., 3 Decedent Estate Practice, §28.12 et seq.)

(2) *Venue and Jurisdiction.* The petition must be filed in the estate proceeding in which the petitioner has been appointed or in which the petitioner claims an interest. (*Prob.C. 232(a).*) The court that first acquires jurisdiction by reason of a filing has exclusive jurisdiction for purposes of a survival proceeding. (*Prob.C. 232(b).*)

(3) *Notice of Hearing.* Notice of the hearing must be given as provided in *Prob.C. 1220* (mailed notice; infra, §391) to all of the following:

(a) The personal representative of each person the priority of whose death is in issue if there is a personal representative for the person. (*Prob.C. 233(a).*)

(b) Each known devisee of each person the priority of whose death is in issue. (*Prob.C. 233(b).*)

(c) Each known heir of each person the priority of whose death is in issue. (*Prob.C. 233(c).*)

(d) All persons (or their attorneys if they have appeared by attorneys) who have requested special notice in the proceeding or who have given notice of appearance in person or by attorney. (*Prob.C. 233(d).*) (On special notice, see *Prob.C. 1250*, infra, §395.)

(4) *Order.* The following provisions govern the court's order:

(a) "If the court determines that the named persons are dead and that it has not been established by clear and convincing evidence that one person survived another, the court shall make an order to that effect." (*Prob.C. 234.*)

(b) "If the court determines that the named persons are dead and that there is clear and convincing evidence that one person survived another, the court shall make an order setting forth the order in which the persons died." (*Prob.C. 234.*)

(c) "The order, when it becomes final, is a binding determination of the facts set forth in the order and is conclusive as against the personal representatives of the deceased persons named in the order and against all persons claiming by, through, or under any of the deceased persons." (*Prob.C. 234.*)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Effect of Homicide.
1. Statutory Development.

Witkin Sum. Cal. Law Wills § 293

[§ 293] Statutory Development.

SUPPLEMENT: [This section is current through the latest supplement]
See 47 *Santa Clara L. Rev.* 379 [effect of insanity].



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14 Witkin Sum. Cal. Law Wills § 293

[§ 293] Statutory Development.

Since 1905, California statutes have provided that a person convicted of murdering a decedent cannot succeed to any portion of the decedent's estate. The original statute (former Prob.C. 258) was strictly construed as inapplicable to a conviction for manslaughter. (See *Estate of Kirby* (1912) 162 C. 91, 94, 121 P. 370; *Estate of Lysholm* (1947) 79 C.A.2d 467, 469, 179 P.2d 833; *Estate of Daniels* (1953) 120 C.A.2d 284, 292, 260 P.2d 991 [one convicted of manslaughter of deceased, though tried for murder, was not disqualified].) The statute was extended to voluntary manslaughter in 1955.

Amendments in 1963 referred to a person "who has unlawfully and intentionally caused the death of a decedent," or "who has caused the death of a decedent in the perpetration or attempt to perpetrate" designated offenses under the felony-murder doctrine. In addition, a conviction or acquittal on a charge of murder or voluntary manslaughter was a conclusive determination of the unlawfulness or lawfulness of causing the death. (See *Estate of McGowan* (1973) 35 C.A.3d 611, 618, 111 C.R. 39 [involuntary manslaughter conviction on plea bargain is not conclusive determination on lawfulness of death]; *Estate of Kramme* (1978) 20 C.3d 567, 571, 575, 143 C.R. 542, 573 P.2d 1369 [statute does not apply to unintentional killing]; *Wilson v. Wilson* (1978) 78 C.A.3d 226, 232, 144 C.R. 180 [conclusiveness of acquittal]; *Estate of Ladd* (1979) 91 C.A.3d 219, 223, 153 C.R. 888 [statute does not apply where killer is insane]; 49 Cal. L. Rev. 571.)

A revised statute, Prob.C. 250 et seq., based on Unif.Prob.C., §2-803, was adopted in 1984. (See 16 Cal. Law Rev. Com. Reports, p. 2301; 17 Cal. Law Rev. Com. Reports, p. 867; Prob.C. 257 [former law applies where decedent was killed before January 1, 1985].)

The Law Revision Commission Comment lists the three substantive changes made by the revised statute:

(1) The killer is disqualified only if the killing is felonious and intentional; under former Prob.C. 258, the killer was disqualified if the killing was accidental but within the felony murder rule.

(2) The civil standard of proof (preponderance of the evidence) is applied in the proceeding to disqualify the killer; under prior law, the criminal standard proof (beyond a reasonable doubt) was applied.

(3) An acquittal after a criminal trial has no effect in the proceeding; under former Prob.C. 258, it was given conclusive effect.

West's Key Number Digest, Husband and Wife k.279(4)

SUPPLEMENT: [This section is current through the latest supplement]
See 47 *Santa Clara L. Rev.* 379 [effect of insanity].



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14 Witkin Sum. Cal. Law Wills § 294

[§ 294] Nature and Scope of Statute.

(1) *In General.* Generally, *Prob.C.* 250 et seq. prohibit the acquisition of any property, interest, or benefit as the result of a decedent's death by a person who feloniously and intentionally kills the decedent. The killer is treated as predeceased and the prohibition extends to the killer's issue. The statute covers the following:

- (a) Property under a will, a trust, a gift in anticipation of death, or intestate succession. (*Prob.C.* 250, *infra*, §295.)
- (b) Joint tenancy property. (*Prob.C.* 251, *infra*, §296.)
- (c) The proceeds of life insurance and similar contracts. (*Prob.C.* 252, *infra*, §297 et seq.)
- (d) Wrongful death actions. (*Prob.C.* 258, *infra*, §300.)
- (e) Other property acquired as a result of the killing. (*Prob.C.* 253, *infra*, §301.)

(2) *Conviction, Burden, and Standard of Proof.* A final judgment of conviction of felonious and intentional killing is conclusive for purposes of *Prob.C.* 250 et seq. (*Prob.C.* 254(a).) In the absence of a final judgment of conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for this purpose. The burden of proof is on the party seeking to establish that the killing was felonious and intentional. (*Prob.C.* 254(b).)

(3) *Protection of Third Parties.* The statute does not affect the rights of persons who purchase property from the killer "for value and without notice" before rights under the statute have been adjudicated, "but the killer is liable for the amount of the proceeds or the value of the property." (*Prob.C.* 255.)

(4) *Nonliability of Obligor.* "An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation" is not liable by reason of the statute unless it has received written notice of a claim under the statute prior to payment. (*Prob.C.* 256.)

(5) *Commentary and Practice Works.* The rule has been the subject of commentary. (See *Cal. Civil Practice*, 1 Probate and Trust Proceedings, §3:87 et seq.; *C.E.B.*, 3 Decedent Estate Practice, §24.4; 23 *Am.Jur.2d* (1983 ed),

Descent and Distribution §101 et seq.; *Rest.3d, Property (Wills and Other Donative Transfers)* §8.4; *Unif.Prob.C.*, §2-803; 8 *Hastings L. J.* 330; 49 *Harv. L. Rev.* 715; 25 *A.L.R.4th* 787 [homicide as precluding taking under will or by intestacy]; on constructive trust arising from homicide, see 13 *Summary* (10th), *Trusts*, §321.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Conviction, Burden, and Standard of Proof.* For purposes of *Prob.C.* 254, the phrase "a final judgment of conviction" does not include a judgment of conviction from which an appeal is pending, but that judgment may constitute substantial evidence of a felonious and intentional killing for purposes of the statute. (*Principal Life Ins. Co. v. Peterson* (2007) 156 *C.A.4th* 676, 685, 687, 67 *C.R.3d* 584 [judgment of first degree murder was not rebutted by any evidence that appellant did not feloniously and intentionally kill decedent; thus, administrator of decedent's estate, not named beneficiary (appellant), was entitled to life insurance proceeds].)



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3. Wills, Trusts, and Intestate Succession.

14 Witkin Sum. Cal. Law Wills § 295

[§ 295] Wills, Trusts, and Intestate Succession.

(1) *Property and Interests Subject to Disqualification.* The killer's disqualification under *Prob.C. 250(a)* applies to the following:

(a) *Property or interest under will or trust.* "Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest" including (1) a power of appointment conferred on the killer by the will or trust, and (2) a nomination of the killer as executor, trustee, conservator, guardian, or custodian. (*Prob.C. 250(a)(1).*)

(b) *Intestate property.* Property of the decedent by intestate succession. (*Prob.C. 250(a)(2).*)

(c) *Quasi-community property.* The decedent's quasi-community property the killer would otherwise acquire under *Prob.C. 101* or *102*. (*Prob.C. 250(a)(3).*)

(d) *Gift in view of impending death.* Property of the decedent under *Prob.C. 5700* et seq. (gifts in view of impending death; see 13 *Summary* (10th), *Personal Property*, §§134, 153). (*Prob.C. 250(a)(4).*)

(e) *Family protection property.* Property of the decedent under the family protection provisions of *Prob.C. 6500* et seq. (infra, §765 et seq.). (*Prob.C. 250(a)(5).*)

The Law Revision Commission Comment points out that (1) under *Prob.C. 250(a)(3)*, the killer is not entitled to share in the decedent's quasi-community property, because for most purposes this is treated as the decedent's separate property during his or her lifetime; but (2) under *Prob.C. 250(a)(2)*, the killer's one-half ownership interest in the community property is not affected.

(2) *Killer Treated as Predeceased.* The killer is treated as having predeceased the decedent as follows:

(a) *Property under will or trust.* Property under a will or trust passes as if the killer had predeceased the decedent, and *Prob.C. 21110*, providing for transfer to a deceased transferee's issue, does not apply. (*Prob.C. 250(b)(1).*)

(b) *Power of appointment.* Property under a power of appointment passes as if the killer had predeceased the

decedent, and *Prob.C. 673* (death of appointee before appointment) does not apply. (*Prob.C. 250(b)(2).*)

(c) *Nomination*. A nomination of the killer as executor, trustee, etc., is interpreted as if the killer had predeceased the decedent. (*Prob.C. 250(b)(3).*)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Joint Tenancy.

14 Witkin Sum. Cal. Law Wills § 296

[§ 296] Joint Tenancy.

A joint tenant who feloniously and intentionally kills another joint tenant severs the interest of the decedent so that the decedent's share passes as the decedent's property and not to the killer by right of survivorship. This provision applies to joint tenancies in real and personal property, joint and multiple-party accounts in financial institutions, and "any other form of coownership with survivorship incidents." (*Prob.C. 251*, based on *Unif.Prob.C.*, §2-803(b).) (See *Abbey v. Lord* (1959) 168 C.A.2d 499, 506, 336 P.2d 226 [applying killer's disqualification to surviving joint tenant before codification]; *Estate of Hart* (1982) 135 C.A.3d 684, 687, 185 C.R. 544 [discussing conflicting authorities]; *Estate of Castiglioni* (1995) 40 C.A.4th 367, 47 C.R.2d 288 [principles of tracing and reimbursement apply in calculating decedent's share of joint tenancy property under *Prob.C. 251*]; 12 *Summary* (10th), *Real Property*, §34.)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Effect of Homicide.

5. Life Insurance or Similar Contract.

a. Case Law and Statutory Rule.

14 Witkin Sum. Cal. Law Wills § 297

[§ 297] Case Law and Statutory Rule.

(1) *Public Policy Basis of Decisions.* Where the killer of an insured claims as a beneficiary of insurance on the victim's life, the killer is denied the right to take on grounds of public policy, even without statutory prohibition. (See *Meyer v. Johnson* (1931) 115 C.A. 646, 647, 2 P.2d 456; *West Coast Life Ins. Co. v. Crawford* (1943) 58 C.A.2d 771, 786, 138 P.2d 384; *Beck v. West Coast Life Ins. Co.* (1952) 38 C.2d 643, 645, 241 P.2d 544; *Estate of McGowan* (1973) 35 C.A.3d 611, 615, 111 C.R. 39; *Unif.Prob.C.*, §2-803(c); *Rest., Restitution* §§187, 189; 37 Proof of Facts 3d 149 [insurer's liability where beneficiary murders or attempts to murder insured]; 15 *So. Cal. L. Rev.* 103; 8 *Hastings L. J.* 330; 26 *So. Cal. L. Rev.* 333; 49 *Harv. L. Rev.* 715; 20 *Cal. L. Rev.* 210; 49 *Cal. L. Rev.* 571 [problem of relitigation of issue of guilt]; 27 *A.L.R.3d* 794 [killing of insured by beneficiary as affecting life insurance or proceeds].)

(2) *Codification of Rule.* "A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent." (*Prob.C.* 252.) (See Law Rev. Com. Comment, approving cases holding that the killer's heirs are also disqualified and that the killer may not designate alternate beneficiary.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Life Insurance or Similar Contract.

b. Claim of Community Property Interest.

14 Witkin Sum. Cal. Law Wills § 298

[§ 298] Claim of Community Property Interest.

(1) *Claim by Killer.* In federal district court cases applying California law, surviving spouses, convicted of killing decedents and therefore barred from recovering as beneficiaries, nevertheless claimed part of the insurance proceeds as their shares of community property. These cases were discussed in *Aetna Life Ins. Co. v. Primofiore* (1978) 80 C.A.3d 920, 924, 145 C.R. 922. In order to carry out the public policy against the killer of an insured profiting from the death, the value of the killer's interest in community property "must be determined as of the moment before the wrongful act was committed." (80 C.A.3d 926.) Hence, where the premiums were paid with community funds:

(a) The killer is precluded from taking the *entire proceeds* as beneficiary.

(b) The killer is also precluded from taking *half the proceeds*, for this recovery also would allow the killer to profit by his or her own wrong.

(c) The killer is entitled at least to recover *one-half of the premiums paid* or, according to some authority, *one-half of the surrender value of the policy* immediately prior to the killing. (80 C.A.3d 925.)

The *Aetna Life* opinion did not decide which of these latter amounts was recoverable by the killer, for the insurance was a group policy of the decedent's employer; premiums were paid by the employer, and there was no surrender value at death. Hence, the trial judge properly determined that the killer-beneficiary took nothing. (80 C.A.3d 926.)

(2) *Claim by Beneficiary.* "There are no California cases dealing with devolution of the *community ownership interests* where one spouse has killed the other and then himself." (*Estate of Hart* (1982) 135 C.A.3d 684, 691, 185 C.R. 544.) In *Hart*, the insured husband killed his wife and then himself. His father was named the contingent beneficiary of the insurance policy purchased with community funds, and there was no evidence that the wife had consented in writing or received consideration for naming the father as the contingent beneficiary; thus the husband had no authority to make a gift of the wife's one-half interest in the policy. (See 11 *Summary* (10th), *Community Property*, §141.) Hence, the wife's estate was entitled to one-half of the proceeds, but the contingent beneficiary was entitled to the remaining one-half. (135 C.A.3d 693.)

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5. Life Insurance or Similar Contract.

c. Rights of Contingent Beneficiary.

14 Witkin Sum. Cal. Law Wills § 299

[§ 299] Rights of Contingent Beneficiary.

In *State Farm Life Ins. Co. v. Pearce* (1991) 234 C.A.3d 1685, 286 C.R. 267, Wayne was separated from Roberta. She filed for dissolution, and a temporary restraining order was issued, preventing the parties from changing the beneficiary designation on any policy of life insurance. Shortly afterwards Roberta was convicted of killing Wayne, and was sentenced to life imprisonment. At the time of his death Wayne was insured under three policies purchased with community funds. Each designated Roberta as primary beneficiary and her sister Charlotte as contingent beneficiary. After the murder, Roberta assigned her rights under the policies to Charlotte. Plaintiff insurer then filed this interpleader action to determine disposition of the proceeds, and both Charlotte and Wayne's estate made motions for summary judgment. The trial judge granted Charlotte's motion. *Held*, reversed; there were triable issues of fact.

(a) The estate contended that it was error for the trial judge to award the proceeds to Charlotte, because it was possible that Roberta had helped Wayne select Charlotte as a contingent beneficiary, and also because *Prob.C.* 252 disqualifies the killer's heirs (see *supra*, §297). (234 C.A.3d 1689.) The dispositive issue, however, is whether Wayne's designation of Charlotte as his contingent beneficiary actually represented his testamentary intent, in view of the restraining order in effect at the time of his death. (234 C.A.3d 1690.)

(b) *Estate of Hart* (1982) 135 C.A.3d 684, 185 C.R. 544, *supra*, §298, is not controlling, for in the present case the slayer-spouse had assigned all of her interests to the contingent beneficiary. And the Law Revision Commission Comment on disqualification of the killer's "heirs" was intended to address the potential situation of heirs of the killer obtaining insurance proceeds through inheritance from the killer, "solely by virtue of their family relationship with the killer (as opposed to a relationship with the deceased)." (234 C.A.3d 1691.) "Section 252 and the comment were not intended to impose a blanket prohibition, on moral or other grounds, that would prevent a relative of a killer from taking insurance proceeds as a contingent beneficiary where the primary beneficiary is ineligible as a result of the killing." (234 C.A.3d 1691.)

(c) *Beck v. West Coast Life Ins. Co.* (1952) 38 C.2d 643, 241 P.2d 544, is the guiding authority. The *Beck* court held that the rule preventing a killer from profiting by his own wrong cannot be invoked in such a way as to prejudice the rights of an alternative beneficiary. (234 C.A.3d 1692.) The *Beck* analysis inquires into the actual intent of the insured party in naming primary and contingent beneficiaries. "There is no evidence in the record about the nature of

Wayne's relationship with his sister-in-law ... , nor about whether his pending dissolution proceedings with Roberta affected his feelings for her. There was a domestic restraining order in effect at the time of Wayne's death which prevented him from changing his beneficiary designation of his life insurance policies." (234 C.A.3d 1694.)

(d) "Under these facts, we are unable to rule as a matter of law that Wayne's donative intent was clearly demonstrated by the terms of the policies purchased years before his death. Nor are we able to say that [Charlotte], by virtue of her relationship with Roberta, is disqualified as a matter of fact or law from receiving the proceeds of the policies as a contingent beneficiary." (234 C.A.3d 1694.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Wrongful Death Action.

14 Witkin Sum. Cal. Law Wills § 300

[§ 300] Wrongful Death Action.

One who feloniously and intentionally kills a decedent is not entitled to bring an action for wrongful death or to benefit from an action brought by the decedent's personal representative. Those who may bring and benefit from a wrongful death action are determined as if the killer predeceased the decedent. (*Prob.C.* 258.)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Other Acquisition of Property or Benefit.

14 Witkin Sum. Cal. Law Wills § 301

[§ 301] Other Acquisition of Property or Benefit.

In any case not described in *Prob.C. 250, 251, or 252*, "in which one person feloniously and intentionally kills another, any acquisition of property, interest, or benefit by the killer as a result of the killing of the decedent shall be treated in accordance with the principles" of *Prob.C. 250 et seq. (Prob.C. 253.)*

SUPPLEMENT: [This section is current through the latest supplement]



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H. Effect of Elder or Dependent Adult Abuse.

Witkin Sum. Cal. Law Wills § 302

[§ 302] Effect of Elder or Dependent Adult Abuse.

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 387, line 21, "P.C. 638" should be "P.C. 368".



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14 Witkin Sum. Cal. Law Wills § 302

[§ 302] Effect of Elder or Dependent Adult Abuse.

(1) *In General.* *Prob.C.* 259 restricts inheritance from a decedent by a person who has abused the decedent. The statute applies to *neglect* (defined in *Welf.C.* 15610.57), *physical abuse* (defined in *Welf.C.* 15610.63), and *fiduciary abuse* (defined in *Welf.C.* 15610.30) of an elder or dependent adult. (*Prob.C.* 259(d).) Abuse is shown by either civil liability under *Prob.C.* 259(a) or criminal liability under *Prob.C.* 259(b). (See generally 52 *Hastings L. J.* 537.) (On standing to bring action for elder abuse, see *Estate of Lowrie* (2004) 118 *C.A.4th* 220, 255, 12 *C.R.3d* 828.)

(2) *Scope of Restriction.* An abuser is subject to two restrictions:

(a) The abuser may not receive property, damages, or costs awarded to the decedent's estate in an action under *Prob.C.* 259(a) or 259(b), whether the abuser's entitlement is under a will or trust or by intestacy. (*Prob.C.* 259(c).)

(b) The abuser may not serve as a fiduciary, if the relevant instrument was executed while the decedent was "substantially unable to manage his or her financial resources or to resist fraud or undue influence." (*Prob.C.* 259(c).)

The statute does not apply to a decedent who, following the acts of abuse, was able to manage his or her financial resources and resist fraud or undue influence. (*Prob.C.* 259(c).)

(3) *Criminal Conviction.* An abuser is deemed to have predeceased the decedent for purposes of *Prob.C.* 259(c) if the abuser is convicted of a violation of *P.C.* 236 (false imprisonment) or *P.C.* 638 (various crimes against elders or dependent adults). (*Prob.C.* 259(b).)

(4) *Civil Liability.* An abuser is deemed to have predeceased the decedent for purposes of *Prob.C.* 259(c) if all of the following conditions apply:

(a) It is proven by "clear and convincing evidence" that the abuser is liable for neglect, physical abuse, or fiduciary abuse of a decedent who was an elder or dependent adult. (*Prob.C.* 259(a)(1).)

(b) The abuser acted in bad faith and was reckless, oppressive, fraudulent, or malicious in committing acts on the decedent. (*Prob.C.* 259(a)(2), (a)(3).)

(c) The decedent, at the time of the abuse and thereafter until death, was substantially unable to manage his or her

financial resources or to resist fraud or undue influence. (*Prob.C. 259(a)(4).*)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 387, line 21, "P.C. 638" should be "P.C. 368".



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Witkin Sum. Cal. Law Wills § 303

[§ 303] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature and Scope of Prohibition.* See *Osornio v. Weingarten* (2004) 124 C.A.4th 304, 329, 21 C.R.3d 246, 1 Cal. Proc. (4th), Attorneys, Supp., §322 [claim of malpractice liability to intended beneficiary of will for failing to advise testator that beneficiary would be presumptively disqualified under *Prob.C. 21350*].

(2) *Disqualified Persons.*

(f) *Care custodian:* See *Conservatorship of McDowell* (2004) 125 C.A.4th 659, 673, 23 C.R.3d 10 [following *Conservatorship of Davidson* (2003) 113 C.A.4th 1035, 6 C.R.3d 702, text, p. 389; "well-meaning friend" who provided meals and personal care to elderly woman was not "care custodian" for purposes of *Prob.C. 21350(a)(6)*; friend was not professional or occupational caregiver and did not generally offer care services as paid or volunteer provider, and relationship did not grow out of professional or occupational connection, even though it was of short duration]; 36 *Golden Gate L. Rev.* 269 [how legal interpretation of "care custodian" can frustrate testator's wish to make gift to friend].

In *Bernard v. Foley* (2006) 39 C.4th 794, 47 C.R.3d 248, 139 P.3d 1196, decedent, an elderly, childless widow, was close to her extended family and provided for them in a revocable living trust. For 2 months before death, she was cared for in the home of two friends, E and F; 3 days before death, she amended the trust to make E and F the remainder beneficiaries, entitled to the bulk of the trust assets. Plaintiff family members petitioned to invalidate the amendment, contending that E and F were care custodians subject to *Prob.C. 21350(a)(6)*. *Held*, E and F were disqualified.

(a) The statutory definition of "care custodian" in Welf.C. 15610.17 is broadly written to include any person providing health or social services to an elder or dependent adult. Here, E and F shopped, cleaned, prepared meals, administered medication, assisted with personal care, and handled financial affairs for the decedent, a dependent adult. (39 C.4th 805.) In performing these services, E and F were within the statutory language, which is not limited to those who provide compensated services on a professional or occupational basis. (39 C.4th 808.)

(b) Contrary to *Conservatorship of Davidson* and *Conservatorship of McDowell*, neither the legislative history, nor the statutory disqualification scheme, nor the definition of "care custodian" contains or implies an exception for

preexisting personal friends. To create an exception would be inconsistent with other portions of *Prob.C. 21350* in which the Legislature has expressly excepted specified classes of potential beneficiaries from disqualification. (39 C.4th 810, 811.) In addition, the other categories of disqualified persons might be expected to include those with preexisting personal relationships, and there is no reason to imply a personal friendship exception for care custodians but not for those other categories. (39 C.4th 812.)

(c) This case involves care custodians who became testamentary beneficiaries while they were providing services, not testamentary beneficiaries who later became care custodians. The rebuttable presumption of undue influence in *Prob.C. 21351(d)* (text, §304) is not a ban on gifts to care custodians; it is a protection against them obtaining gifts by fraud, menace, duress, or undue influence. Those who rebut the presumption remain eligible to receive donative transfers. (39 C.4th 815.)

Three justices dissented. (39 C.4th 821.)

See *Estate of Odian* (2006) 145 C.A.4th 152, 162, 51 C.R.3d 390 [following *Bernard*; paid live-in caregiver who provides personal services provides "social services" under Welf.C. 15610.17 and is "care custodian" within meaning of *Prob.C. 21350(a)(6)*].



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14 Witkin Sum. Cal. Law Wills § 303

[§ 303] In General.

Prob.C. 21350 et seq. limit transfers made to a person who drafts a donative instrument and to specified persons with a business or personal relationship to the drafter. (See 25 *Pacific L. J.* 388; 26 *Pacific L. J.* 272; Cal. Transactions Forms, 1 Estate Planning §2:25 et seq.) (See *Graham v. Lenzi* (1995) 37 *C.A.4th* 248, 255, 43 *C.R.2d* 407, *infra*, §569 [invoking protection of *Prob.C. 21350* did not constitute "contest" for purposes of trust's no contest clause].)

(1) *Nature and Scope of Prohibition.* *Prob.C. 21350* et seq. invalidate donative transfers to disqualified persons (*Prob.C. 21350(a)*) regardless of a contrary provision in the instrument (*Prob.C. 21354*). The transfer is treated as though the disqualified person predeceased the transferor without spouse or issue, to the extent the value of the transfer exceeds the disqualified person's intestate interest. (*Prob.C. 21353*.) Under *Prob.C. 45*, "instrument" means a will, trust, deed, or "other writing that designates a beneficiary or makes a donative transfer of property."

(2) *Disqualified Persons.* The following persons are disqualified:

(a) The person who drafted the instrument (*Prob.C. 21350(a)(1)*), unless the transferor is related to the transferee or the drafter by blood or marriage or is the transferee's cohabitant or registered domestic partner or the drafter's cohabitant or registered domestic partner (*Prob.C. 21351(a)*). The exception provided by *Prob.C. 21351(a)* applies retroactively to instruments that become irrevocable on or after July 1, 1993. (*Prob.C. 21351(a)*.) For purposes of the exception, "related by blood or marriage" includes persons within the fifth degree and heirs of the transferor. (*Prob.C. 21351(g)*.)

(b) A person related to the drafter by blood or marriage, or the drafter's domestic partner, cohabitant, or employee. (*Prob.C. 21350(a)(2)*.) For purposes of *Prob.C. 21350*, "domestic partner" means a domestic partner under *Family C. 297* (see 11 *Summary* (10th), *Husband and Wife*, §25 et seq.). (*Prob.C. 21350(d)*.)

(c) A partner, shareholder, or employee of a law partnership or corporation in which the drafter has an ownership interest. (*Prob.C. 21350(a)(3)*.)

(d) A person who has a fiduciary relationship with the transferor, including a conservator or trustee, who transcribes the instrument or causes it to be transcribed. (*Prob.C. 21350(a)(4)*.)

(e) A person related to the fiduciary by blood or marriage, or the fiduciary's domestic partner, cohabitant, or

employee. (*Prob.C. 21350(a)(5).*)

(f) A care custodian of a dependent adult who is the transferor. (*Prob.C. 21350(a)(6).*) (For definitions of "dependent adult" and "care custodian," see *Prob.C. 21350(c).*) (See *Estate of Shinkle (2002) 97 C.A.4th 990, 1006, 1007, 119 C.R.2d 42* [ombudsman for long-term care facility was "care custodian" of elderly patient for purposes of *Prob.C. 21350(a)(6)* and continued to be so after patient left facility; as result of fiduciary relationship with patient, ombudsman developed personal relationship, acquired personal and financial information, and assisted in arranging estate planning]; *Conservatorship of Davidson (2003) 113 C.A.4th 1035, 1046, 1052, 6 C.R.3d 702* [long-time close personal friend who provided cooking, shopping, gardening, transportation, and similar services for decedent was not "care custodian" for purposes of *Prob.C. 21350(a)(6)*, even though he was reimbursed for expenses of doing so; statute bars donative transfers to one who assumes role of care custodian incidental to professional or occupational provision of health or social services, not to one who does so as result of "preexisting genuinely personal" relationship].)

(g) A person related to the care custodian by blood or marriage, or the care custodian's domestic partner, cohabitant, or employee. (*Prob.C. 21350(a)(7).*)

For purposes of prohibited transfers, the term "related by blood or marriage" to a person includes (1) the person's spouse or predeceased spouse, and (2) relatives within the third degree of the person or the person's spouse, and their spouses. In determining a relationship, the following statutes are applicable: *Prob.C. 6406* (relatives of half blood; *supra*, §86), *Prob.C. 6407* (afterborn heirs; *supra*, §87), and *Prob.C. 6450 et seq.* (parent and child relationship; *supra*, §94 et seq.). (*Prob.C. 21350(b).*)

For purposes of *Prob.C. 21350 et seq.*, "disqualified person" means a person described in *Prob.C. 21350(a)* only where *Prob.C. 21351* does not apply. (*Prob.C. 21350.5.*)

Estate of Swetmann (2000) 85 C.A.4th 807, 102 C.R.2d 457, a case of first impression, considered the meaning of "transcribed" in *Prob.C. 21350(a)(4)*. The testator left the bulk of his estate to C, his neighbor, conservator, and agent under a power of attorney. Other devisees sought to disqualify C based on his role in the preparation of the will. Although C contacted the company that produced the testator's will, introduced the company's representative to the testator, and paid for the company's services from conservatorship funds, he had nothing to do with the content of the will or its physical preparation. *Held*, C did not cause the will to be transcribed within the meaning of *Prob.C. 21350(a)(4)*. The statute makes a distinction between drafting and transcribing, and a person who causes a document to be drafted is not the same as a person who causes it to be transcribed. Causing a document to be transcribed means directing a drafted document to be written out in final form. Here, the drafting attorney, not C, caused the document to be transcribed. (*85 C.A.4th 819, 820.*) (See *Rice v. Clark (2002) 28 C.4th 89, 105, 120 C.R.2d 522, 47 P.3d 300* [following *Swetmann*; disqualification statute did not apply to beneficiary who did not directly participate in transcription of documents even though he facilitated preparation by arranging and attending meetings, providing list of assets, and encouraging transferor to execute documents].)

(3) *Statute of Limitations.* An action to establish the invalidity of a transfer must be commenced within the following periods:

(a) If a transfer is by will, at any time after letters of administration are issued to a general representative and before the order for final distribution. (*Prob.C. 21356(a).*)

(b) If a transfer is other than by will, within 3 years after the transfer becomes irrevocable, or 3 years after the person bringing the action discovers or should have discovered the facts material to the transfer, whichever is later. (*Prob.C. 21356(b).*)

(4) *Effective Date.* *Prob.C. 21350 et seq.* apply to instruments that become irrevocable on or after September 1, 1993. An instrument, even though otherwise revocable, is considered irrevocable for this purpose if the transferor by reason of incapacity on that date was unable to change the disposition of the property and did not regain capacity before

death. (*Prob.C. 21355.*) (See *Bank of America v. Angel View Crippled Children's Foundation* (1999) 72 C.A.4th 451, 456, 85 C.R.2d 117 [*Prob.C. 21350* and *21351* are retroactive]; *Rice v. Clark, supra*, 28 C.4th 101 [1995 amendment to *Prob.C. 21350*, eliminating prohibition with respect to person who caused instrument to be drafted, applied to instrument executed before effective date of amendment].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature and Scope of Prohibition.* See *Osornio v. Weingarten* (2004) 124 C.A.4th 304, 329, 21 C.R.3d 246, 1 Cal. Proc. (5th), Attorneys, §300 [claim of malpractice liability to intended beneficiary of will for failing to advise testator that beneficiary would be presumptively disqualified under *Prob.C. 21350*].

(2) *Disqualified Persons.*

(f) *Care custodian:* See *Conservatorship of McDowell* (2004) 125 C.A.4th 659, 673, 23 C.R.3d 10 [following *Conservatorship of Davidson* (2003) 113 C.A.4th 1035, 6 C.R.3d 702, text, p. 389; "well-meaning friend" who provided meals and personal care to elderly woman was not "care custodian" for purposes of *Prob.C. 21350(a)(6)*; friend was not professional or occupational caregiver and did not generally offer care services as paid or volunteer provider, and relationship did not grow out of professional or occupational connection, even though it was of short duration]; 36 *Golden Gate L. Rev.* 269 [how legal interpretation of "care custodian" can frustrate testator's wish to make gift to friend].

In *Bernard v. Foley* (2006) 39 C.4th 794, 47 C.R.3d 248, 139 P.3d 1196, decedent, an elderly, childless widow, was close to her extended family and provided for them in a revocable living trust. For 2 months before death, she was cared for in the home of two friends, E and F; 3 days before death, she amended the trust to make E and F the remainder beneficiaries, entitled to the bulk of the trust assets. Plaintiff family members petitioned to invalidate the amendment, contending that E and F were care custodians subject to *Prob.C. 21350(a)(6)*. *Held*, E and F were disqualified.

(a) The statutory definition of "care custodian" in Welf.C. 15610.17 is broadly written to include any person providing health or social services to an elder or dependent adult. Here, E and F shopped, cleaned, prepared meals, administered medication, assisted with personal care, and handled financial affairs for the decedent, a dependent adult. (39 C.4th 805.) In performing these services, E and F were within the statutory language, which is not limited to those who provide compensated services on a professional or occupational basis. (39 C.4th 808.)

(b) Contrary to *Conservatorship of Davidson* and *Conservatorship of McDowell*, neither the legislative history, nor the statutory disqualification scheme, nor the definition of "care custodian" contains or implies an exception for preexisting personal friends. To create an exception would be inconsistent with other portions of *Prob.C. 21350* in which the Legislature has expressly excepted specified classes of potential beneficiaries from disqualification. (39 C.4th 810, 811.) In addition, the other categories of disqualified persons might be expected to include those with preexisting personal relationships, and there is no reason to imply a personal friendship exception for care custodians but not for those other categories. (39 C.4th 812.)

(c) This case involves care custodians who became testamentary beneficiaries while they were providing services, not testamentary beneficiaries who later became care custodians. The rebuttable presumption of undue influence in *Prob.C. 21351(d)* (text, §304) is not a ban on gifts to care custodians; it is a protection against them obtaining gifts by fraud, menace, duress, or undue influence. Those who rebut the presumption remain eligible to receive donative transfers. (39 C.4th 815.)

Three justices dissented. (39 C.4th 821.)

See *Estate of Odian* (2006) 145 C.A.4th 152, 162, 51 C.R.3d 390 [following *Bernard*; paid live-in caregiver who provides personal services provides "social services" under Welf.C. 15610.17 and is "care custodian" within meaning of *Prob.C. 21350(a)(6)*].



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CHAPTER XXI - Wills and Probate

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I. Transfers to Drafter or Related Persons. 2. When Prohibition Does Not Apply.

14 Witkin Sum. Cal. Law Wills § 304

[§ 304] When Prohibition Does Not Apply.

(1) *Independent Review.* The prohibition does not apply if the instrument is reviewed by an independent attorney who (a) counsels the transferor about the nature and consequences of the intended transfer, (b) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (c) signs and delivers an original certificate of independent review to the transferor with a copy to the drafter. "Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client." (*Prob.C. 21351(b)*, setting forth statutory form for certificate.)

(2) *Substituted Judgment of Conservator.* The prohibition does not apply if, after full disclosure of the relationships of the persons involved, the instrument is approved under *Prob.C. 2580* et seq. (conservator's petition to authorize proposed action; see *infra*, §1025 et seq.). (*Prob.C. 21351(c)*.)

(3) *Charitable Transfers.* Under *Prob.C. 21351(f)*, the prohibition does not apply if the transferee is one of the following:

- (a) A federal, state, or local public entity.
- (b) A tax exempt entity under specified provisions of the Internal Revenue Code.
- (c) A trust holding an interest for a public or tax exempt entity, to the extent of the interest of the entity, or the trustee of the trust.

The exception provided by *Prob.C. 21351(f)* applies retroactively to instruments that become irrevocable on or after July 1, 1993. (*Prob.C. 21351(f)*.)

(4) *Out-of-State Transfers.* The prohibition does not apply to a transfer made in an instrument executed out of state by a person who was not a California resident at the time of execution. (*Prob.C. 21351(i)*.)

(5) *Transfers Under \$ 3,000.* Generally, the prohibition does not apply to a transfer under \$ 3,000. (*Prob.C. 21351(h)*.)

(6) *Presumption of Disqualification.* The prohibition of *Prob.C. 21350* does not apply if the court determines that the transfer was not the product of fraud, menace, duress, or undue influence. The court's determination must be made on the basis of clear and convincing evidence, and may not be based solely on the testimony of a disqualified person. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person bears all costs, including reasonable attorneys' fees. (*Prob.C. 21351(d)*.) (See *Prob.C. 21351(e)* [*Prob.C. 21351(d)* does not apply to instrument that makes transfer to the drafter].)

Prob.C. 21350 creates a presumption of disqualification. *Prob.C. 21351(d)* makes the presumption conclusive as to a drafter-transferee and rebuttable as to other transferees. The transferee bears the burden of rebutting the presumption and justifying the transfer by clear and convincing evidence. (See *Rice v. Clark* (2002) 28 C.4th 89, 98, 120 C.R.2d 522, 47 P.3d 300; *Estate of Shinkle* (2002) 97 C.A.4th 990, 1004, 119 C.R.2d 42; *Conservatorship of Davidson* (2003) 113 C.A.4th 1035, 1056, 6 C.R.3d 702 [testimony of medical experts, friends, and neighbors of decedent supported finding that decision to leave bulk of estate to close personal friend rather than to cousin was based on long-standing affection, not undue influence].)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Out-of-State Transfers.* See *Estate of Clementi* (2008) 166 C.A.4th 375, 381, 82 C.R.3d 685, citing the text [out-of-state exception applied to out-of-state will executed by nonresident even though testator was California resident at time of death].



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Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION J. Nonprobate Transfers. 1. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 305

[§ 305] Recommendation and Enactment.

(1) *Law Revision Commission Recommendations.* In a series of recommendations beginning in 1989, the California Law Revision Commission proposed the enactment of integrated statutes governing nonprobate transfers:

(a) Recommendation Relating to Multiple Party Accounts in Financial Institutions. (20 Cal. Law Rev. Com. Reports, p. 95.)

(b) Recommendation Relating to Gifts in View of Impending Death. (20 Cal. Law Rev. Com. Reports, p. 2869.)

(c) Recommendation Relating to TOD [Transfer on Death] Beneficiary Designation for Vehicles and Certain Other State-Registered Property. (20 Cal. Law Rev. Com. Reports, p. 2883.)

(d) Recommendation Relating to Nonprobate Transfers of Community Property. (21 Cal. Law Rev. Com. Reports, p. 63.)

(e) Uniform TOD [Transfer on Death] Security Registration Act. (28 Cal. Law Rev. Com. Reports, p. 577.)

(2) *Enactment.* Over a number of years, the Legislature followed the Commission's recommendations in enacting portions of Division 5 of the Probate Code, which consists of the following:

(a) *Prob.C. 5000* et seq. (general provisions relating to effect of death). (See *infra*, §§306, 307.)

(b) *Prob.C. 5010* et seq. (nonprobate transfers of community property). (See *infra*, §308 et seq.)

(c) *Prob.C. 5100* et seq. (multiple party accounts). (See 4 *Summary* (10th), *Negotiable Instruments*, §77 et seq.)

(d) *Prob.C. 5500* et seq. (transfer on death security registration). (See *infra*, §313 et seq.)

(e) *Prob.C. 5700* et seq. (gifts in view of impending death). (See 13 *Summary* (10th), *Personal Property*, §§134, 153.)

The Legislature also added provisions to the Vehicle Code and the Health and Safety Code governing the

nonprobate transfer of motor vehicles, vessels, and manufactured homes. (See *infra*, §312.) In addition, the Legislature expanded the scope of nonprobate transfers that may pass to the trustee of a testamentary trust without administration. (See *infra*, §360 et seq.) (See generally 24 *Pacific L. J.* 612.)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION J. Nonprobate Transfers. 2. Authorized Transfers.

14 Witkin Sum. Cal. Law Wills § 306

[§ 306] Authorized Transfers.

(1) *In General.* Under *Prob.C. 5000*, based on *Unif.Prob.C., §6-201*, specified nonprobate transfers are valid even though not in compliance with the requirements for the execution of wills, and are not invalidated by the Probate Code. (*Prob.C. 5000(a).*) However, nothing in *Prob.C. 5000* limits the rights of creditors under any other law. (*Prob.C. 5000(c).*) (See *Rest.3d, Property (Wills and Other Donative Transfers) §7.1* [definition and validity of "will substitute"], §7.2 [rules applicable to testamentary dispositions apply to will substitutes "to the extent appropriate"]; *81 A.L.R.4th 1122* [*Unif.Prob.C., §6-201*].)

(2) *Statutory List.* *Prob.C. 5000* applies to "a nonprobate transfer 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." (*Prob.C. 5000(a).*)

(3) *Other Transactions.* The Law Revision Commission Comment points out that the statutory list is not exclusive and that the statute extends to a partnership agreement, stock redemption plan, buy-sell agreement, and power of appointment. The statute also includes the following:

(a) A written provision that money or other benefits due, controlled, or owned by the decedent be paid after death to a person designated by the decedent in the instrument or in a separate writing (including a will) executed before or after the designating instrument. (*Prob.C. 5000(b)(1).*)

(b) A written provision that money due or to become due under the instrument will cease to be payable in the event of the death of the promisor or promisee before payment or demand. (*Prob.C. 5000(b)(2).*)

(c) A written provision that property controlled or owned by the decedent that is the subject of the instrument will pass to a person designated by the decedent in the instrument or in a separate writing (including a will) executed before or after the designating instrument. (*Prob.C. 5000(b)(3).*)

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J. Nonprobate Transfers. 3. Rights and Liabilities of Holder.

14 Witkin Sum. Cal. Law Wills § 307

[§ 307] Rights and Liabilities of Holder.

(1) *In General.* The holder of property subject to a nonprobate transfer instrument may transfer the property under the terms of the instrument whether or not the transfer is consistent with the beneficial ownership of the property as between the person executing the instrument and others having an interest in the property, and whether or not the transfer is consistent with the rights of the person named as the beneficiary. (*Prob.C. 5003(a).*) However, this protection does not extend to a transfer after the holder has been served with (a) a contrary court order, or (b) written notice of an adverse interest. (*Prob.C. 5003(b).*) If the court in an action related to the rights of the parties determines that the notice of an adverse interest is served in bad faith, it must award damages and costs, including reasonable attorneys' fees, against the person serving the notice. (*Prob.C. 5003(e).*) The protection provided by *Prob.C. 5003* is in addition to any other protection afforded the holder by any other provision of law. (*Prob.C. 5003(d).*) The Law Revision Commission Comment points out that the statute frees the holder of the property from any obligation to ascertain separate, community, and quasi-community interests in the property. (See Cal. Transactions Forms, 2 Estate Planning §10:17 et seq.)

(2) *When Compliance Is Not Required.* Notwithstanding *Prob.C. 5000* et seq., the holder of property subject to a nonprobate transfer instrument is not required to receive, hold, or transfer the property in compliance with the instrument if (a) the person executing the provision is not authorized by the instrument to execute a provision for transfer of the property, or (b) the provision for transfer does not otherwise satisfy the terms of the instrument. (*Prob.C. 5002.*)

The Law Revision Commission Comment states: "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."

(3) *Rights of Parties Among Themselves Are Not Affected.* The protection provided by *Prob.C. 5003* does not affect

the rights of the person executing the provision and others having an interest in the property among themselves. (*Prob.C. 5003(c)*.) Any adverse right must be asserted against the estate of the decedent or against the beneficiary, not against the holder. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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J. Nonprobate Transfers. 4. Community Property. a. Recommendation and Enactment.

14 Witkin Sum. Cal. Law Wills § 308

[§ 308] Recommendation and Enactment.

(1) *Law Revision Commission Recommendation.* In 1991, the California Law Revision Commission recommended the clarification and codification of the principles governing nonprobate transfers of community property. (See Recommendation Relating to Nonprobate Transfers of Community Property, 21 Cal. Law Rev. Com. Reports, p. 63.) In its recommendation, the Commission adhered to the following general principles:

(a) "As an equal owner of community property, each spouse should have an equal right to control disposition of half the property at death." (21 Cal. Law Rev. Com. Reports, p. 170.)

(b) "A spouse's written expression of intent should control over contrary statutory default rules governing the disposition of a spouse's interest in community property at death." (21 Cal. Law Rev. Com. Reports, p. 170.)

(c) "A third person 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. ... Disputes should be resolved among the interested parties and should not involve the neutral stakeholder." (21 Cal. Law Rev. Com. Reports, p. 170.)

(2) *Enactment.* The Commission's recommendation was followed in 1992 by the enactment of *Prob.C. 5010* et seq., with the following significant features:

(a) A nonprobate transfer of community property at death is voidable without the written consent of the spouse, and the court has flexibility in fashioning a remedy for a transfer without consent. (See *infra*, §310.)

(b) Consent to a nonprobate transfer of community property at death is not ordinarily a transmutation of the property into the separate property of the other spouse. The property retains its community character. (See *infra*, §310.)

(c) A nonprobate transfer of community property remains revocable until death, provided the revocation is in writing and the other spouse is informed of the revocation before death. A deceased spouse's consent may no longer be revoked by his or her personal representative. (See *infra*, §311.)

(d) After the death of one spouse, the surviving spouse may not change the disposition of the decedent's share of the

community property unless the decedent's consent to do so is explicit. (See *infra*, §310.)

(3) *Problem of Federal Preemption.* Under federal case law, 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. (See 21 Cal. Law Rev. Com. Reports, p. 173.) (On ERISA preemption, see 7 *Summary* (10th), *Constitutional Law*, §14; 11 *Summary* (10th), *Community Property*, §§62, 63.)

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J. Nonprobate Transfers. 4. Community Property. b. Nature and Scope of Statute.

14 Witkin Sum. Cal. Law Wills § 309

[§ 309] Nature and Scope of Statute.

(1) *In General.* *Prob.C. 5010* et seq. authorize the execution of a provision for the nonprobate transfer of community property on death and govern the consent of one spouse to a provision for transfer executed by the other. The statutes apply regardless of when the provision for transfer is executed or when written consent is given, except that prior law applies to the revocation of consent by a spouse who died before January 1, 1993. (*Prob.C. 5014.*) (On revocation of consent, see *Prob.C. 5030*, *infra*, §311.)

(2) *Limitations on Rights of Parties.* Notwithstanding any other provision of *Prob.C. 5000* et seq. (see *supra*, §§306, 307), the rights of the parties to a nonprobate transfer of community property are subject to (a) the terms of the instrument under which the transfer is made, (b) a contrary state statute specifically applicable to the instrument, and (c) a written expression of intent in the provision for transfer or in a written consent. (*Prob.C. 5011.*) *Prob.C. 5011* establishes the principle that *Prob.C. 5010* et seq. only apply in the absence of other governing provisions and do not override preempting federal law. (Law Rev. Com. Comment.)

(3) *Waiver of Contractual Rights at Death.* Nothing in *Prob.C. 5010* et seq. limits the effect of a surviving spouse's waiver of rights in community property under *Prob.C. 140* et seq. (*infra*, §322 et seq.) or under an instrument or agreement that affects a married person's interest in community property. (*Prob.C. 5013.*)

(4) *Invalidating Causes Are Not Limited.* Nothing in *Prob.C. 5010* et seq. limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a written consent. (*Prob.C. 5015.*)

(5) *Holder of Property Is Protected.* The provisions of *Prob.C. 5010* et seq. concerning the rights of spouses to community property are relevant only to controversies between the spouses and their successors. They do not affect (a) the obligation of a holder of community property under an instrument of a type described in *Prob.C. 5000* (*supra*, §306) to hold, receive, or transfer the property in compliance with a provision for nonprobate transfer on death, or (b) the protection afforded the holder by *Prob.C. 5003* (*supra*, §307). (*Prob.C. 5012.*)

SUPPLEMENT: [This section is current through the latest supplement]



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J. Nonprobate Transfers.

4. Community Property.

c. Consent.

14 Witkin Sum. Cal. Law Wills § 310

[§ 310] Consent.

(1) *Written Consent Is Required.* A provision for a nonprobate transfer of community property executed by one spouse without the written consent of the other is not effective as to the nonconsenting spouse's interest in the property and does not affect that spouse's disposition of his or her interest on death by will, intestate succession, or nonprobate transfer. (*Prob.C. 5020.*) For purposes of *Prob.C. 5010* et seq., written consent to a provision for a nonprobate transfer includes a written joinder in the provision. (*Prob.C. 5010.*) The statute codifies the case law rule that statutory community property gift limitations apply to nonprobate transfers such as beneficiary designations in trusts and accounts. (Law Rev. Com. Comment to *Prob.C. 5020*, citing *Tyre v. Aetna Life Ins. Co.* (1960) 54 C.2d 399, 6 C.R. 13, 353 P.2d 725, 11 Summary (10th), *Community Property*, §141.)

(2) *Effect of Modification of Transfer After Consent.* Modification of a transfer after consent is governed by *Prob.C. 5023*. For this purpose, "modification" means revocation in whole or in part, designation of a different beneficiary, or election of a different benefit or payment option. "Modification" does not mean the exercise of a power of appointment under a trust. (*Prob.C. 5023(a).*) If one spouse executes a provision for a nonprobate transfer of community property with the consent of the other spouse but later modifies the provision for transfer without consent, the modification is effective as to the modifying spouse's interest. (*Prob.C. 5023(b).*) As to the other spouse's interest, the following rules apply:

(a) If the modification is executed during the other spouse's lifetime, it revokes the written consent. (*Prob.C. 5023(b)(1).*) This provision treats modification during the joint lives of the spouses as a new nonprobate transfer as to which the nonexecuting spouse may consent. In the absence of consent, that spouse's interest passes with his or her estate or as otherwise disposed of. (Law Rev. Com. Comment.)

(b) If the modification is executed after the other spouse's death, it does not affect the written consent, but the other spouse's interest is subject to the transfer "as consented to by the spouse." (*Prob.C. 5023(b)(2).*) This provision treats the original consent itself as a nonprobate transfer which becomes irrevocable at death. The deceased spouse's interest is transferred under the terms of the original consent. (Law Rev. Com. Comment.)

(c) If a written expression of intent in the provision for transfer or in the written consent authorizes modification

after the spouse's death, that spouse's interest is deemed transferred to the other spouse on death, and the modification is effective as to the interests of both spouses. (*Prob.C. 5023(b)(3)*.)

(3) *Proceeding To Set Aside Transfer Made Without Consent*. In a proceeding to set aside a nonprobate transfer of community property made under a provision executed by one spouse without the written consent of the other, the court must set aside the transfer of the nonconsenting spouse's interest "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." (*Prob.C. 5021(a)*.) However, nothing in this provision affects any additional remedy the nonconsenting spouse may have against the estate of the other spouse. (*Prob.C. 5021(b)*.) The Law Revision Commission Comment makes the following points:

(a) The statute "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."

(b) The court may fashion an appropriate order, e.g., one providing for the recovery of the value of the property rather than the property itself, or aggregating property received by a beneficiary instead of imposing a division by item.

(c) "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 of the value of the property transferred out of the share of the decedent, or to give the surviving spouse a right of reimbursement."

Estate of Miramontes-Najera (2004) 118 C.A.4th 750, 13 C.R.3d 240, holds that *Prob.C. 5021(a)* is mandatory, and that the court may not deny a petition under *Prob.C. 5021(a)* on equitable grounds. In enacting *Prob.C. 5021*, the Legislature intended to codify the holding of *Estate of Wilson* (1986) 183 C.A.3d 67, 227 C.R. 794, 11 Summary (10th), *Community Property*, §139. Thus, a spouse who did not consent to the transfer of community property into pay-on-death accounts was entitled to one-half the funds in each account even though she had already received more than one-half of the community estate. (118 C.A.4th 759.)

(4) *Transmutation of Community Property Distinguished*. A spouse's written consent to a provision for a nonprobate transfer of community property that satisfies *Family C. 852* (see 11 Summary (10th), *Community Property*, §152 et seq.) is a transmutation of community property and is governed by the law applicable to transmutation, not by *Prob.C. 5010* et seq. (*Prob.C. 5022(b)*.) However, except to the extent the consent satisfies *Family C. 852*, it is not a transmutation of the consenting spouse's interest. (*Prob.C. 5022(a)*.)

The Law Revision Commission Comment points out that the statute is consistent with *Estate of MacDonald* (1990) 51 C.3d 262, 272 C.R. 153, 794 P.2d 911, 11 Summary (10th), *Community Property*, §155. "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."

In *Estate of Petersen* (1994) 28 C.A.4th 1742, 34 C.R.2d 449, a husband and wife used community property funds to purchase two annuity contracts, payable, on the death of the first spouse, to the survivor. On the husband's death, his estate claimed a share of the annuities as the husband's community property. *Held*, the estate was not entitled to the property; the annuity agreements created valid nonprobate transfers.

(a) The annuity contracts were purchased with community funds and were community property, with a right of survivorship. Each spouse retained a community property interest while both were living. On the death of either, the contracts required the balance in the annuity accounts to be paid to the surviving spouse. The community character or ownership was not altered or transmuted when the annuities were purchased; the ownership changed as a result of the husband's death. (28 C.A.4th 1750, citing *Estate of MacDonald*, *supra*.)

(b) The nonprobate transfer statutes recognize a right of survivorship in community property. Under *Prob.C. 5203(a)(4)*, a joint account of spouses with right of survivorship is presumed to be community property, and, under *Prob.C. 5302(a)*, funds in a joint account with right of survivorship belong to the survivor "as against the estate." *Prob.C. 5000(a)* recognizes a nonprobate transfer on death in an "account agreement" and *Prob.C. 5011* recognizes a nonprobate transfer in community property at death. (28 C.A.4th 1750, 1751, 1752.)

(c) Under *Prob.C. 5122(a)*, an "account" is a contract of deposit of funds between a depositor and a financial institution, and under *Prob.C. 40*, a "financial institution" includes a bank, savings and loan association, credit union, or "like organization." Although the insurance company holding the annuity funds here was not a bank, savings and loan association, or credit union, "the funds were held on deposit in substantially the same manner and for the same purpose as funds deposited in such an institution." For purposes of determining whether the funds were deposited in a survivorship account subject to nonprobate transfer, the insurance company here is a "like organization." (28 C.A.4th 1751.)

(d) Whether the annuities are "joint accounts between husband and wife" under *Prob.C. 5302*, "written instruments for nonprobate transfer of property" under *Prob.C. 5000*, or "written instruments for nonprobate transfer of community property" under *Prob.C. 5011*, there was no transmutation of community property. The language in the annuity contracts providing for payment to the survivor on the death of the other spouse "is sufficient to establish a nonprobate transfer." (28 C.A.4th 1753.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Community Property.

d. Revocation of Consent.

14 Witkin Sum. Cal. Law Wills § 311

[§ 311] Revocation of Consent.

(1) *When Consent Is Revocable.* A spouse's written consent to a provision for a nonprobate transfer of community property is revocable during the marriage (*Prob.C. 5030(a)*) and revocable on termination of the marriage by dissolution or legal separation (*Prob.C. 5030(b)*). Written consent becomes irrevocable on the death of either spouse. (*Prob.C. 5030(c)*.) The Law Revision Commission Comment makes the following points:

(a) If the consent is part of a mutual estate plan, nothing in *Prob.C. 5030* precludes enforcement of the plan by appropriate remedies, including an injunction affecting revocation.

(b) To the extent *Prob.C. 5030(c)* relates to the death of the consenting spouse, it overrules the effect of *Estate of MacDonald (1990) 51 C.3d 262, 272 C.R. 153, 794 P.2d 911, 11 Summary (10th), Community Property*, §155, which allowed revocation of consent by the deceased spouse's personal representative.

(2) *Method of Revocation.* The spouse consenting to a provision for a nonprobate transfer of community property may revoke the consent by a writing (including a will) that identifies the provision for transfer of the property being revoked and is served on the spouse executing the provision for a nonprobate transfer before the executing spouse's death. (*Prob.C. 5031(b)*.) The Law Revision Commission Comment notes that (a) "any specific and served writing is sufficient, including a document purporting to be a will, whether or not admitted to probate," and (b) this provision changes existing law by allowing an express provision in a will to override a life insurance beneficiary designation.

(3) *Effect of Revocation.* On revocation of consent, the property passes "in the same manner as if the consent had not been given." (*Prob.C. 5032*.) Revocation does not affect the authority of the holder of property to transfer it in compliance with the provision for transfer to the extent provided by *Prob.C. 5003* (supra, §307). (*Prob.C. 5031(b)*.)

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14 Witkin Sum. Cal. Law Wills § 312

[§ 312] Vehicles, Vessels, and Manufactured Homes.

(1) *In General.* Vehicles, vessels, mobilehomes, and other kinds of registered property may be transferred on death outside the system of testamentary disposition. The transfer on death statutes apply to the following property:

(a) Vehicles. (*Veh.C. 4150.7, 5910.5, 5910.7.*)

(b) Vessels. (*Veh.C. 9852.7, 9916.5, 9916.7.*)

(c) Manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes subject to registration. (*Health & Saf.C. 18080.2, 18102.2, 18102.3.*)

(2) *Registration in Beneficiary Form.* Authorized property may be owned and registered in beneficiary form (with a direction to transfer on death to a designated beneficiary) provided that there is only one owner and one designated beneficiary. Certificates, registration, and title issued in beneficiary form must include the words "transfer on death to" or the abbreviation "TOD" followed by the name of the beneficiary. During the life of the owner, the signature or consent of the beneficiary is not required for transactions relating to the property. (*Health & Saf.C. 18080.2; Veh.C. 4150.7; Veh.C. 9852.7.*)

(3) *Revocation.* Before death, ownership in beneficiary form may be revoked, or the beneficiary may be changed, either by sale of the property or by an application for a change in the registration. It may not be revoked or changed by will, by any other instrument, or by change of circumstances. (*Health & Saf.C. 18102.2(b), (c); Veh.C. 5910.5(b), (c); Veh.C. 9916.5(b), (c).*)

(4) *Ownership on Death.* On the death of the owner, the property belongs to the surviving beneficiary. If there is no surviving beneficiary, the property belongs to the estate of the owner. (*Health & Saf.C. 18102.2(a); Veh.C. 5910.5(a); Veh.C. 9916.5(a).*) However, the beneficiary's interest is subject to any contract of sale, assignment, or security interest to which the owner was subject during life. (*Health & Saf.C. 18102.2(d); Veh.C. 5910.5(d); Veh.C. 9916.5(d).*) The transfer is also subject to *Prob.C. 9653* (recovery of property transferred in fraud on creditors; *infra*, §478). (*Health & Saf.C. 18102.2(h); Veh.C. 5910.5(h); Veh.C. 9916.5(h).*)

(5) *Procedure for Transferring Ownership.* The surviving beneficiary may secure transfer of ownership by

providing the registering agency with (a) the certificate of title, (b) the owner's death certificate, and (c) a certificate, under penalty of perjury, stating the date and place of death and the declarant's entitlement to the property as the surviving beneficiary. (*Health & Saf.C. 18102.2(e)*; *Veh.C. 5910.5(e)*; *Veh.C. 9916.5(e)*.) (On discharge of registering agency from liability for the transfer, see *Health & Saf.C. 18102.3*, *Veh.C. 5910.7*, and *Veh.C. 9916.7*; on procedure for acquiring certified copy of death certificate, see *Health & Saf.C. 103526*.)

(6) *Testamentary Requisites Are Not Necessary*. The transfer is not a testamentary disposition, and the right of the beneficiary to the property "shall not be denied, abridged, or affected" on the ground that the right was not created in a writing satisfying the requirements of a testamentary disposition. (*Health & Saf.C. 18102.2(g)*; *Veh.C. 5910.5(g)*; *Veh.C. 9916.5(g)*.)

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6. Security Registration.

a. In General.

14 Witkin Sum. Cal. Law Wills § 313

[§ 313] In General.

(1) *Uniform Law and Enactment.* The National Conference of Commissioners on Uniform State Law adopted the Uniform TOD [Transfer on Death] Security Registration Act in 1989. (See 8B U.L.A. (Master Ed.), p. 385 [Act adopted in 46 jurisdictions].) Following a recommendation of the California Law Revision Commission (see 28 Cal. Law Rev. Com. Reports, p. 577), the Legislature adopted the Uniform Act in 1998 as *Prob.C. 5500* et seq.

(2) *Purpose.* The purposes of the Act are to encourage the development of a form of title effective for transferring securities on the death of the owner without probate or estate administration and to protect issuers of securities using the new form of title. (*Prob.C. 5500(c)*.)

(3) *Construction.* The Act is to be liberally construed to promote its purposes. (*Prob.C. 5500(b)*.) Unless a particular provision provides otherwise, the principles of law and equity supplement the Act. (*Prob.C. 5500(d)*.)

(4) *Effective Date.* The Act applies to security registration in beneficiary form made at any time and to decedents regardless of date of death. (*Prob.C. 5512*.)

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b. Registration in Beneficiary Form.

14 Witkin Sum. Cal. Law Wills § 314

[§ 314] Registration in Beneficiary Form.

(1) *Definitions.* *Prob.C. 5501* defines various terms, including "security" (*Prob.C. 5501(d)*) and "security account" (*Prob.C. 5501(e)*). The following are of note:

(a) *Beneficiary Form.* "Beneficiary form" means registration of a security that indicates the present owner and his or her intention regarding the person who will become the owner on the death of the present owner. (*Prob.C. 5501(a)*.) The Law Revision Commission Comment to *Prob.C. 5502* notes that only natural persons may be owners for this purpose but that natural persons or entities may be beneficiaries.

(b) *Register.* For a certificated security, "register" means to issue a certificate showing ownership. For an uncertificated security, "register" means to initiate or transfer an account showing ownership. (*Prob.C. 5501(b)*.)

(c) *Registering Entity.* "Registering entity" means a person who originates or transfers a security title by registration, including a securities broker and a transfer agent. (*Prob.C. 5501(c)*.)

(2) *Form of Registration.* A security is registered in beneficiary form when the registration designates a beneficiary to take ownership on the death of the owner or the death of all multiple owners. (*Prob.C. 5504*.) The designation may be shown by the words "transfer on death," "TOD," "pay on death," or "POD" after the name of the registered owner and before the name of the beneficiary. (*Prob.C. 5505*.) (On effect of registration in form authorized by statute of another jurisdiction, see *Prob.C. 5503*.) *Prob.C. 5510(c)* illustrates the form of registrations that may be authorized, including sole owner with sole beneficiary, multiple owners with sole beneficiary, and multiple owners with primary and secondary beneficiaries.

(3) *Terms and Conditions of Registration.* A registering entity may establish the terms and conditions under which it will accept and implement registration in beneficiary form. (*Prob.C. 5510(a)*.) The terms and conditions may provide for proving death, resolving problems of fractional shares, designating primary and contingent beneficiaries, and authorizing a deceased beneficiary's descendants to take that beneficiary's place. (*Prob.C. 5510(b)*.)

(4) *Nature of Ownership.* Registration in beneficiary form is available only to one individual with sole ownership

or multiple individuals with right of survivorship. Tenants in common may not register in beneficiary form, and multiple owners hold as joint tenants with right of survivorship, tenants by the entirety, or owners of community property held in survivorship form. (*Prob.C. 5502.*) The Law Revision Commission Comment notes that the Act negates registration in beneficiary form for tenancy in common and community property other than in a survivorship setting. Coowners desiring independent death beneficiaries for their fractional interest in a coowned security will normally split their holdings into separate registrations each naming a death beneficiary.

(5) *Registration Is Revocable Before Death.* The designation of a transfer on death beneficiary has no effect on ownership until the death of the owner, and a registration "may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary." (*Prob.C. 5506.*) The Law Revision Commission Comment points out that the registering entity's terms and conditions govern how a registration is cancelled. If not specified, "cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary."

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c. Death of Owner.

14 Witkin Sum. Cal. Law Wills § 315

[§ 315] Death of Owner.

(1) *Ownership on Death of Owner.* On the death of the sole owner or the last surviving multiple owner, the ownership of a security registered in beneficiary form passes to the surviving beneficiary or beneficiaries as tenants in common. On proof of death, the security may be reregistered in the name of the surviving beneficiary or beneficiaries. If no beneficiary survives, the security belongs to the estate of the deceased sole owner or of the last surviving multiple owner. (*Prob.C. 5507.*) The Law Revision Commission Comment makes these points:

(a) In the event of multiple primary beneficiaries, the issue of fractional shares should be resolved by the terms and conditions of the registering entity.

(b) The circumstance that the beneficiary may not survive the owner does not prevent operation of the anti-lapse statute but indicates only "that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative."

(2) *Substituted Beneficiaries.* The designation LDPS, standing for "lineal descendants per stirpes," substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to survive the owner, determined by the law of intestacy of the beneficiary's domicile at the time of the owner's death. (*Prob.C. 5510(b).*) Descendants who take by virtue of this designation take as transfer on death beneficiaries rather than as intestate successors. If no descendants survive, the security passes as part of the owner's estate under *Prob.C. 5507.* (Law Rev. Com. Comment.)

(3) *Nature of Survival Requirement.* The Act does not define the term "survive." However, the Law Revision Commission Comment to *Prob.C. 5501* notes that the Act does not incorporate the 120 hours' requirement applicable to intestate succession and that "survive" is "used in its common law sense of outliving another for any time interval, no matter how brief."

(4) *Nature of Transfer.* The transfer on death of a security registered in beneficiary form is effective because of the Act and the contract between the owner and the registering entity. The transfer is not testamentary. (*Prob.C. 5509(a).*)

(5) *Rights of Claimants Are Preserved.* The Act does not limit the rights of a surviving spouse or creditors of a

security owner against beneficiaries or other transferees. (*Prob.C. 5509(b).*) Nor does the Act change the character of community property or community property rights. (*Prob.C. 5511.*) The Law Revision Commission Comment to *Prob.C. 5511* points out that property rights under the Act may be subject to other statutory qualifications, including *Prob.C. 220* et seq. (simultaneous death), *Prob.C. 250* et seq. (effect of homicide), *Prob.C. 260* et seq. (disclaimer), and *Prob.C. 20100* et seq. (apportionment of estate taxes).

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[§ 316] Protection of Registering Entity.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Entity Acting in Good Faith.* In 2006, the definition of "good faith" specified in U.C.C. 2103(1)(b) was restated in U.C.C. 1201(b)(20). The phrase "for fair dealing in the trade" was replaced with "of the trade."



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14 Witkin Sum. Cal. Law Wills § 316

[§ 316] Protection of Registering Entity.

(1) *Nature of Registration Agreement.* A registering entity is not required to offer or accept registration in beneficiary form. However, by requesting registration in beneficiary form, the owner assents to the protections given to the registering entity by *Prob.C. 5500* et seq. (*Prob.C. 5508(a)*.) By accepting registration in beneficiary form, the registering entity agrees that the registration will be implemented as provided by *Prob.C. 5500* et seq. (*Prob.C. 5508(b)*.)

(2) *Entity Acting in Good Faith.* When the entity registers a transfer on death under *Prob.C. 5507*, and does so in good faith reliance on the registration, the Act, and available information (including an affidavit of the personal representative of the deceased owner, the surviving beneficiary, or a representative of the surviving beneficiary), the entity is "discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner." These protections do not extend to a registration or payment after the entity receives written notice from a claimant objecting to implementation of a registration in beneficiary form. However, no other notice or information available to the entity affects its right to the protections. (*Prob.C. 5508(c)*.) The Law Revision Commission Comment notes that "good faith" means "honesty in fact and the observance of reasonable commercial standards for fair dealing in the trade" as specified in U.C.C. 2103(1)(b).

(3) *Rights of Third Parties Are Preserved.* The protections available to the registering entity do not affect the rights of beneficiaries in disputes with other claimants to ownership of the security or its value or proceeds. (*Prob.C. 5508(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Entity Acting in Good Faith.* In 2006, the definition of "good faith" specified in U.C.C. 2103(1)(b) was restated in U.C.C. 1201(b)(20). The phrase "for fair dealing in the trade" was replaced with "of the trade."



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J. Nonprobate Transfers. 7. Nonprobate Transfers to Former Spouse. a. In General.

14 Witkin Sum. Cal. Law Wills § 317

[§ 317] In General.

(1) *Nature of Enactment.* *Prob.C. 5600* et seq. generally invalidate nonprobate transfers at death to the transferor's former spouse. The statutes cover both transfers by instrument (*Prob.C. 5600*, infra, §318) and joint tenancy survivorship (*Prob.C. 5601*, infra, §319). Under existing law, transfers to a former spouse by will are generally invalid. (See *Prob.C. 6122*, supra, §177.) Thus, the effect of *Prob.C. 5600* et seq. is to treat nonprobate transfers to a former spouse like probate transfers to a former spouse.

The statutes were in response to two recommendations of the California Law Revision Commission:

- (a) Effect of Dissolution of Marriage on Nonprobate Transfers. (28 Cal. Law Rev. Com. Reports, p. 599.)
- (b) Estate Planning During Marital Dissolution. (30 Cal. Law Rev. Com. Reports, p. 603.)

(2) *Effective Date.* The statutes became effective January 1, 2002, and generally apply to an instrument making a nonprobate transfer or creating a joint tenancy executed before, on, or after that date. (*Prob.C. 5604*.)

(3) *Court's Authority Is Preserved.* Nothing in *Prob.C. 5600* et seq. limits the court's authority to order a party to a dissolution or annulment to maintain the former spouse as a beneficiary of a nonprobate transfer or to preserve a joint tenancy in favor of the former spouse. (*Prob.C. 5603*.)

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7. Nonprobate Transfers to Former Spouse.

b. Transfer to Former Spouse.

14 Witkin Sum. Cal. Law Wills § 318

[§ 318] Transfer to Former Spouse.

(1) *General Rule: Transfer to Former Spouse Fails.* Ordinarily, a nonprobate transfer to the transferor's former spouse in an instrument executed before or during marriage fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse because of the dissolution or annulment of the marriage. For this purpose, a judgment of legal separation that does not terminate the status of husband and wife is not a dissolution. The term "surviving spouse" is defined in *Prob.C. 78* (supra, §49). (*Prob.C. 5600(a).*) Where a transfer fails under *Prob.C. 5600*, the instrument making the transfer is treated as though the former spouse failed to survive the transferor. (*Prob.C. 5600(c).*)

(2) *Exceptions.* A nonprobate transfer does not fail under *Prob.C. 5600(a)* in any of the following circumstances:

(a) The transfer could not be revoked by the transferor at the time of death. (*Prob.C. 5600(b)(1).*)

(b) There is "clear and convincing evidence" that the transferor "intended to preserve" the transfer to the former spouse. (*Prob.C. 5600(b)(2).*)

(c) A court order that the transfer be maintained for the former spouse is in effect at the time of death. (*Prob.C. 5600(b)(3).*)

The Law Revision Commission Comment makes the following points:

(1) *Prob.C. 5600(a)* is not applicable where a nonprobate transfer is irrevocable on execution or later becomes irrevocable by the transferor for reasons other than the transferor's death or incapacity.

(2) A transferor's modification of the beneficiary terms of a trust after dissolution without changing the designation of the former spouse as primary beneficiary "might be sufficiently clear and convincing evidence of the transferor's intent to preserve the nonprobate transfer to the former spouse."

(3) *Covered and Excluded Transactions.* *Prob.C. 5600* applies to nonprobate transfers described in *Prob.C. 5000* (supra, §306) and to provisions conferring a power of appointment or naming a trustee in an instrument (other than a will) taking effect at death. However, provisions in life insurance policies are excluded. (*Prob.C. 5600(e).*)

(4) *Protection of Purchaser or Encumbrancer.* Nothing in *Prob.C. 5600* affects the rights of a subsequent purchaser or encumbrancer "for value in good faith" who relies on the apparent failure of a nonprobate transfer or lacks knowledge of the failure of a nonprobate transfer under *Prob.C. 5600*. (*Prob.C. 5600(d)*.)

The Law Revision Commission Comment makes the following points:

(a) For this purpose, knowledge of the failure of a nonprobate transfer includes both actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document.

(b) The remedy of a person injured by a transaction with the subsequent purchaser or encumbrancer is against the transacting former spouse.

(5) *Federal Preemption.* The Law Revision Commission Comment points out that *Prob.C. 5600* may be preempted by federal laws governing employer-provided benefits, citing *Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264, and notes that it is "especially important on dissolution or annulment of marriage to review beneficiary designations for employer-provided benefits."

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14 Witkin Sum. Cal. Law Wills § 319

[§ 319] Joint Tenancy With Former Spouse.

(1) *General Rule: Joint Tenancy With Former Spouse Is Severed.* Ordinarily, a joint tenancy between the decedent and the decedent's former spouse created before or during marriage is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the transferor's surviving spouse because of the dissolution or annulment of the marriage. For this purpose, a judgment of legal separation that does not terminate the status of husband and wife is not a dissolution. The term "surviving spouse" is defined in *Prob.C. 78* (supra, §49). (*Prob.C. 5601(a).*)

The Law Revision Commission Comment makes the following points:

(a) This provision reverses the common law rule that dissolution or annulment does not sever a joint tenancy between spouses.

(b) This provision does not change the presumption that property acquired during marriage in joint tenancy form is community property.

(c) This provision is not applicable to United States Savings Bonds, which are governed by federal law.

(d) When a joint tenancy involves three or more joint tenants, severance under this provision converts the decedent's interest into a tenancy in common, but does not sever the joint tenancy between the other joint tenants.

(2) *Exceptions.* A joint tenancy is not severed under *Prob.C. 5601(a)* in either of the following circumstances:

(a) The joint tenancy could not be severed by the decedent at the time of death. (*Prob.C. 5601(b)(1).*)

(b) There is "clear and convincing evidence" that the decedent "intended to preserve" the joint tenancy for the former spouse. (*Prob.C. 5601(b)(2).*)

(3) *Covered Transactions.* *Prob.C. 5601* applies to community property with right of survivorship under C.C. 682.1 (supra, §266). (*Prob.C. 5601(d).*)

(4) *Protection of Purchaser or Encumbrancer.* Nothing in *Prob.C. 5601* affects the rights of a subsequent purchaser or encumbrancer "for value in good faith" who relies on an apparent severance or lacks knowledge of a severance under *Prob.C. 5601*. (*Prob.C. 5601(c)*.)

The Law Revision Commission Comment makes the following points:

(a) For this purpose, knowledge of the severance of joint tenancy includes both actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document.

(b) The remedy of a person injured by a transaction with the subsequent purchaser or encumbrancer is against the transacting joint tenant.

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- d. Real Property Affidavit.

14 Witkin Sum. Cal. Law Wills § 320

[§ 320] Real Property Affidavit.

In conjunction with the adoption of statutes invalidating nonprobate transfers at death to the transferor's former spouse (supra, §317), the Legislature added an affidavit procedure designed to protect good faith purchasers and encumbrancers of real property who might be subject to the statutes. A person may sign an affidavit or declaration under penalty of perjury naming the decedent, stating the decedent's date and place of death, describing real property transferred to the person by an instrument making a nonprobate transfer or by the operation of joint tenancy survivorship, and stating either that (1) the person is the surviving spouse of the decedent, or (2) the person is not the surviving spouse but the person's right to the property is not affected by *Prob.C. 5600* (supra, §318) or *Prob.C. 5601* (supra, §319). Nothing in *Prob.C. 5600* et seq. affects the rights of a subsequent purchaser or encumbrancer of real property "for value who in good faith" relies on the affidavit or declaration. (*Prob.C. 5602(a)*.) The purchaser or encumbrancer need not inquire into the truth of the matters stated in the affidavit or declaration (*Prob.C. 5602(b)*), and the affidavit or declaration may be recorded (*Prob.C. 5602(c)*). (On recording evidence of death affecting title to real property, see *Prob.C. 210* et seq., supra, §15.)

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K. Contractual Rights at Death.

1. Surviving Spouse's Waiver.

a. Case Law Development.

14 Witkin Sum. Cal. Law Wills § 321

[§ 321] Case Law Development.

(1) *In General.* Upon the death of either spouse, one-half the community and quasi-community property belongs to the survivor; the other one-half is subject to testamentary disposition by the decedent. (*Prob.C. 100, 101*; *supra*, §76.) Case law has long recognized that this limitation on the power of disposition may be avoided by a spouse's written waiver. (See *Estate of Wyss* (1931) 112 C.A. 487, 494, 496, 297 P. 100 [where wife's waiver consisted of promise in consideration of husband's counterpromise to make testamentary disposition to her in his will, husband could not defeat her contractual right by subsequently revoking his will]; *Security-First Nat. Bank of Los Angeles v. Stack* (1939) 32 C.A.2d 586, 592, 90 P.2d 337; *Estate of Wiedemann* (1966) 239 C.A.2d 269, 272, 48 C.R. 558 [property agreement made 6 years after will, reciting provisions for wife in trust and life insurance, followed by explicit waiver of all property rights, including right to inherit]; 24 *Stanf. L. Rev.* 531 [planning considerations]; 7 *Proof of Facts* 2d, Waiver of Spousal Rights in Estate of Deceased Spouse, §1 et seq.)

(2) *Property Settlement Agreement.* Early cases dealing with waiver by the wife involved several problems. Where a husband and wife are living together without marital difficulties, their plan for the testamentary disposition of property may involve a waiver by the wife of her community property interests and an acceptance of the dispositions of her husband's will. On the other hand, parties contemplating separation or divorce may agree to a division of community property or some other settlement of property, in consideration for which the wife waives her right to take from her husband by will or succession. (See *Estate of Schwartz* (1947) 79 C.A.2d 301, 306, 179 P.2d 863.)

But an agreement of this sort will not be construed as a waiver unless the language is clear. In *Estate of Buchman* (1955) 132 C.A.2d 81, 281 P.2d 608, the property settlement agreement relinquished the rights to a homestead and family allowance, to insurance policies, to succession, and to act as personal representative. The husband's will, executed shortly before the agreement was signed, left one-fourth of the estate to his wife and three-fourths to his brother. *Held*, the wife was entitled to her share, for the agreement made no mention of a will. (132 C.A.2d 96.) (See *Estate of Crane* (1936) 6 C.2d 218, 220, 57 P.2d 476; *Estate of Murphy* (1979) 92 C.A.3d 413, 422, 154 C.R. 859 [agreement waiving right to inherit did not revoke existing will].)

In *Estate of Smith* (1966) 241 C.A.2d 205, 50 C.R. 374, the agreement provided that each party waived "all claims which each may now have, or might hereafter otherwise acquire against the other," and that all property now held or

acquired under the agreement should be the separate property of the person holding it, "free from any claim" of the other. *Held*, despite the lack of express reference to inheritance, this was a waiver by the wife of the right to succeed. Hence, when the husband died intestate before entry of the final decree, she was still his wife, but not entitled to the estate; his brother received it. (241 C.A.2d 211.)

(3) *Distinction: Abandonment.* Marital misconduct, though sometimes effective to deprive a spouse of such special rights as a probate homestead or family allowance (see *infra*, §787), is not, under California statutes, a bar to inheritance. Hence, a husband separated from his wife for 17 years and living with another woman was entitled to succeed to the wife's estate. (*Estate of Scott* (1949) 90 C.A.2d 21, 23, 202 P.2d 357.)

(4) *Distinction: Quiet Title Decree.* In *Estate of Rinker* (1962) 209 C.A.2d 601, 26 C.R. 1, R was the husband of a woman in a mental hospital. He induced her to sign quitclaim deeds to property, and also obtained a default divorce awarding him all their community property. Thereafter K, her brother, brought a quiet title action on her behalf against R, and a stipulated decree was entered in which R was "forever debarred ... from asserting any right, title, interest, or claim in or to or upon any of said property." Then she died, and her will, executed long before, left everything to R. The lower court held that the quiet title decree was a bar to his right to claim under the will. *Held*, reversed. (a) The right to inherit was not involved in the action and the decree was not res judicata on that issue. (209 C.A.2d 607.) (b) The recitals in the decree were too general in nature to be considered a waiver of the right to inherit, which must be manifested by unmistakable language. (209 C.A.2d 606.)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION

K. Contractual Rights at Death. 1. Surviving Spouse's Waiver. b. Nature and Scope of Statute.

14 Witkin Sum. Cal. Law Wills § 322

[§ 322] Nature and Scope of Statute.

(1) *Codification.* The waiver of spousal rights at death was codified by the enactment of *Prob.C. 140* et seq., effective January 1, 1985. (See 16 Cal. Law Rev. Com. Reports, p. 2301; Cal. Transactions Forms, 2 Estate Planning §11:49 et seq.) The validity and effect of waivers, agreements, and property settlements made before January 1, 1985, are governed by prior law. (*Prob.C. 147(b).*)

(2) *Statutory List.* Specified rights of a surviving spouse may be waived in whole or in part before or during marriage. (*Prob.C. 140.*) The following rights may be waived:

- (a) The right to property that would pass from the decedent by intestate succession. (*Prob.C. 141(a)(1).*)
- (b) The right to property that would pass from the decedent by testamentary disposition in a will executed before the waiver. (*Prob.C. 141(a)(2).*)
- (c) The right to a probate homestead. (*Prob.C. 141(a)(3).*)
- (d) The right to have exempt property set aside. (*Prob.C. 141(a)(4).*)
- (e) The right to a family allowance. (*Prob.C. 141(a)(5).*)
- (f) The right to have an estate set aside under *Prob.C. 6600* et seq. (*Prob.C. 141(a)(6).*)
- (g) The right to elect to take community or quasi-community property against the decedent's will. (*Prob.C. 141(a)(7).*)
- (h) The right to take the statutory share of an omitted spouse. (*Prob.C. 141(a)(8).*)
- (i) The right to be appointed as the personal representative of the decedent's estate. (*Prob.C. 141(a)(9).*)
- (j) An interest in property subject to a nonprobate transfer under *Prob.C. 5000* et seq. (*Prob.C. 141(a)(10).*)

(3) *Other Waivers Are Authorized.* Nothing in *Prob.C. 140* et seq. affects or limits the waiver or manner of waiver of rights other than those specified in *Prob.C. 141(a)*, including the right to property that would pass from the decedent to the surviving spouse by a nonprobate transfer on the death of the decedent, such as a survivorship interest under a joint tenancy, a Totten trust account, or a pay-on-death account. (*Prob.C. 141(b).*)

(4) *Waiver of All Rights.* The waiver of " 'all rights' (or equivalent language) in the property or estate of a present or prospective spouse" or a complete property settlement pursuant to separation, dissolution, or annulment constitutes a waiver of the rights set forth in *Prob.C. 141(a)*, unless the waiver or settlement agreement provides otherwise. (*Prob.C. 145.*)

(5) *Scope and Application of Statute.* Under *Prob.C. 147(a)*, waivers, agreements, and property settlements made on or after January 1, 1985, to the extent they affect the rights specified in *Prob.C. 141(a)*, must satisfy the requirements of *Prob.C. 140* et seq., with the following exceptions:

(a) The validity and effect of a premarital property agreement, whenever made, is "determined by the law otherwise applicable to the premarital property agreement." However, this provision does not limit the enforceability of a waiver by a person intending to marry that is otherwise enforceable under *Prob.C. 140* et seq. (*Prob.C. 147(c).*) (See *Estate of Gibson (1990) 219 C.A.3d 1486, 1492, 269 C.R. 48* [waiver of rights in spouse's estate incorporated into interlocutory judgment of dissolution was binding despite subsequent reconciliation; final determination of property rights could not be collaterally attacked under *Prob.C. 140* et seq.].)

(b) Nothing in *Prob.C. 140* et seq. "limits any right one spouse otherwise has to revoke a consent or election to disposition of his or her half of the community or quasi-community property under the will of the other spouse." (*Prob.C. 147(d).*)

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K. Contractual Rights at Death.

1. Surviving Spouse's Waiver.

c. Requisites and Defenses.

14 Witkin Sum. Cal. Law Wills § 323

[§ 323] Requisites and Defenses.

(1) *Writing Signed by Surviving Spouse.* The waiver must be in writing and signed by the surviving spouse. (*Prob.C. 142(a).*)

(2) *Contract Defenses.* Enforcement of the waiver against the surviving spouse is subject to the same defenses as enforcement of a contract, except that lack of consideration is not a defense. (*Prob.C. 142(b)(1).*) A waiver by a minor intending to marry is effective only upon the marriage. (*Prob.C. 142(b)(2).*)

(3) *Unconscionability Defense.* "If, after considering all relevant facts and circumstances, the court finds that enforcement of the waiver ... would be unconscionable under the circumstances existing at the time enforcement is sought, the court may refuse to enforce the waiver, enforce the remainder of the waiver without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result." (*Prob.C. 144(b).*) The Law Revision Commission Comment points out that the defense is available only in an "extraordinary case" and is not available if the conditions of *Prob.C. 143* (*infra*, §324) are met. (See *Estate of Mader (1970) 11 C.A.3d 409, 417, 89 C.R. 787* [waiver obtained by undue influence may be set aside].)

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1. Surviving Spouse's Waiver.

d. Enforcement.

14 Witkin Sum. Cal. Law Wills § 324

[§ 324] Enforcement.

(1) *Alternate Grounds for Enforcement.* Subject to the requirement of a signed writing and the contract defenses of *Prob.C. 142* (supra, §323), a waiver is enforceable under either *Prob.C. 143* or *Prob.C. 144*. (*Prob.C. 142(b)*.) The Law Revision Commission Comments to both sections state that a waiver unenforceable under *Prob.C. 143* may be enforceable under *Prob.C. 144*.

(2) *Adequate Disclosure and Independent Representation.* A waiver is enforceable unless the surviving spouse proves either of the following:

(a) The surviving spouse was not provided with a "fair and reasonable disclosure of the property or financial obligations of the decedent" prior to signing the waiver unless the surviving spouse waived disclosure after advice by independent legal counsel. (*Prob.C. 143(a)(1)*.)

(b) The surviving spouse was not represented by independent legal counsel at the time of the waiver. (*Prob.C. 143(a)(2)*.)

(3) *Fairness and Adequate Knowledge.* Subject to the unconscionability defense of *Prob.C. 144(b)* (supra, §323), a waiver is enforceable if the court determines either of the following:

(a) At the time of signing, the waiver made a "fair and reasonable disposition of the rights of the surviving spouse." (*Prob.C. 144(a)(1)*.)

(b) The surviving spouse had, or reasonably should have had, "adequate knowledge of the property and financial obligations of the decedent" and the decedent did not violate the duty imposed by *Family C. 721(b)* (fiduciary obligations in interspousal transactions; see 11 *Summary* (10th), *Husband and Wife*, §39). (*Prob.C. 144(a)(2)*.)

In *Estate of Gagnier* (1993) 21 C.A.4th 124, 26 C.R.2d 128, a man and woman each signed a premarital agreement waiving any right to a share in the other's estate. The woman was not represented by independent counsel. The couple later married. On the husband's death, the surviving wife claimed a share of his estate as an omitted spouse. *Held*, the waiver was valid under both the Civil Code and the Probate Code.

(a) *Waiver Valid Under Civil Code.* Under *Prob.C. 147(c)*, the validity of a waiver in a premarital property agreement is governed by the law otherwise applicable to the agreement, i.e., former C.C. 5300 et seq. (now *Family C. 1600* et seq.). Here, the waiver was in writing, it was signed voluntarily, the husband's property and financial obligations were fully disclosed, and the wife had adequate knowledge, as required by the Civil Code. Thus, the waiver was valid. (21 C.A.4th 129.)

(b) *Waiver Valid Under Probate Code.* Under *Prob.C. 142*, the waiver of an omitted spouse's statutory share is enforceable under either *Prob.C. 143* or *Prob.C. 144*. Here, because the wife was not represented by independent counsel, the waiver was not valid under *Prob.C. 143*. Nevertheless, the waiver satisfied the requirements of *Prob.C. 144*. Thus, the waiver was valid. (21 C.A.4th 130.)

(4) *Fiduciary Obligation of Spouses.* Except as provided by *Prob.C. 144(a)(2)*, *Family C. 721(b)* (fiduciary obligations in interspousal transactions; see 11 *Summary* (10th), *Husband and Wife*, §39) does not apply if a waiver is enforceable under *Prob.C. 143* or *144*. (*Prob.C. 143(b)*, *144(c)*.)

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e. Alteration or Revocation.

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[§ 325] Alteration or Revocation.

Prob.C. 146 governs the alteration, amendment, and revocation of waivers under *Prob.C. 140* et seq.

(1) *Written Agreement.* For purposes of *Prob.C. 146*, an agreement is "a written agreement signed by each spouse or prospective spouse altering, amending, or revoking a waiver." (*Prob.C. 146(a)*.) Generally, a waiver "may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse." However, the waiver may specifically provide otherwise. (*Prob.C. 146(b)*.) A waiver may expressly provide, for example, that it is revocable during the lifetime of the other spouse. (Law Revision Commission Comment.)

(2) *Defenses.* Enforcement of the agreement is subject to the same defenses available against enforcement of the waiver (*infra*, §328). (On contract defenses, see *Prob.C. 146(d)*; on unconscionability defense, see *Prob.C. 146(g)*.)

(3) *Alternate Grounds for Enforcement.* Subject to the requirement of a signed writing and the contract defenses of *Prob.C. 146(d)*, an agreement is enforceable under either *Prob.C. 146(e)* or *Prob.C. 146(f)*. (*Prob.C. 146(c)*.)

(4) *Adequate Disclosure and Independent Representation.* Under *Prob.C. 146(e)*, subject to the contract defenses, an agreement is enforceable unless the party against whom enforcement is sought proves either of the following:

(a) The spouse against whom enforcement is sought was not provided with a "fair and reasonable disclosure of the property or financial obligations of the other spouse" prior to signing the agreement, unless that spouse waived disclosure after advice by independent legal counsel. (*Prob.C. 146(e)(1)*.)

(b) The spouse against whom enforcement is sought was not represented by independent legal counsel at the time of the agreement. (*Prob.C. 146(e)(2)*.)

(5) *Fairness.* Subject to the contract and unconscionability defenses, an agreement is enforceable "if the court determines that the agreement at the time of signing made a fair and reasonable disposition of the rights of the spouses." (*Prob.C. 146(f)*.)

(6) *Fiduciary Obligation of Spouses.* *Family C. 721(b)* (fiduciary obligations in interspousal transactions; see 11

Summary (10th), *Husband and Wife*, §39) does not apply if an agreement is enforceable under *Prob.C. 146*. (*Prob.C. 146(h)*.)

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14 Witkin Sum. Cal. Law Wills § 326

[§ 326] Contracts Concerning Will or Succession.

(1) *Statutory Development.* California has had several statutes governing contracts concerning wills and succession. Successive revisions have tended to broaden the coverage of the statutes (e.g., to include instruments other than wills) and liberalize the requirements (e.g., to recognize oral contracts). Contracts made before 1985 are governed by former C.C. 1624(6). (Former Prob.C. 150(c).) Contracts made from 1985 to 2000 are governed by former Prob.C. 150. (Prob.C. 21700(c).) Contracts made after 2000 are governed by Prob.C. 21700.

(2) *Equitable Estoppel To Deny Oral Contract.* In *Juran v. Epstein* (1994) 23 C.A.4th 882, 28 C.R.2d 588, defendant and his wife executed mutual wills leaving their property to each other and giving equal shares on the death of the survivor to his daughter and to her daughter. After the wife's death, defendant executed a new will leaving all the property to his daughter. Plaintiff, the wife's daughter, sought to enforce an oral agreement not to revoke the mutual wills. *Held*, summary judgment for defendant reversed. Although the wills themselves and various letters from the wife were insufficient to satisfy the requirements of former Prob.C. 150, nothing in the language or legislative history of that code section shows "that the Legislature intended to abrogate long-standing rules that courts have the power to apply equitable principles to prevent a party from using the statute of frauds where such use would constitute fraud." (23 C.A.4th 895.) Here, defendant's deposition testimony was sufficient to raise triable issues of fact concerning the existence of the agreement and its enforceability under the doctrine of equitable estoppel. (23 C.A.4th 897.)

In *Estate of Housley* (1997) 56 C.A.4th 342, 65 C.R.2d 628, a father and son lived together for 30 years, and the son provided personal and financial support to the father. They eventually became estranged, the father removed the son as a devisee under his will and a beneficiary under his trust, and committed suicide shortly thereafter. The son petitioned to impose a constructive trust on the estate, alleging detrimental reliance on the father's oral agreement to leave the estate to the son. Defendant executor and trustee raised the statute of frauds as a defense. *Held*, summary judgment for defendant reversed. The son's evidence of an oral agreement raised a triable issue of fact concerning the application of equitable estoppel.

(a) Under *Juran*, the adoption of former Prob.C. 150 did not abrogate the application of equitable estoppel principles to make or not to revoke a will. (56 C.A.4th 354.) Here, unlike *Juran*, the alleged promisor is deceased, which raises the possibility that the oral agreement has been fabricated. Nevertheless, the "wholesale elimination of equitable estoppel in cases where the promisor is dead would result in many cases of injustice." (56 C.A.4th 355.) To interpret

former Prob.C. 150 as precluding equitable estoppel where the promisor is deceased would deprive most defrauded promisees of appropriate relief. The usual case arises only after the promisor has died without making the promised will or after revoking the promised will. Although a contract to make a will may be valid, it is not ordinarily enforceable until after the promisor's death. (56 C.A.4th 357.)

(b) To avoid summary judgment, the party alleging the oral agreement must submit sufficient evidence to raise a triable issue of fact on the elements required for equitable estoppel, either unjust enrichment or detrimental reliance coupled with unconscionable injury. Here, the son's declaration was sufficient to raise a triable issue. (56 C.A.4th 359.) (See 39 *Santa Clara L. Rev.* 1187 [California Oral Will Contracts: The Decline of Testator Intent in the Shadow of Equitable Estoppel].) (On equitable enforcement of contract to make will, see 13 *Summary* (10th), *Equity*, §31 et seq.)

(3) *Statutory Requirements.* A contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, may be established by one of the following:

(a) Provisions in the instrument stating the material provisions of the contract. (*Prob.C. 21700(a)(1).*)

(b) An expressed reference in the instrument to a contract and extrinsic evidence providing the terms of the contract. (*Prob.C. 21700(a)(2).*)

(c) A writing signed by the decedent evidencing the contract. (*Prob.C. 21700(a)(3).*)

(d) Clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant enforceable in equity. (*Prob.C. 21700(a)(4).*)

(e) Clear and convincing evidence of an agreement between the decedent and a third person for the benefit of the claimant or a promise by the decedent to a third person for the benefit of the claimant enforceable in equity. (*Prob.C. 21700(a)(5).*)

The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke. (*Prob.C. 21700(b).*) (See generally Cal. Civil Practice, 1 Probate and Trust Proceedings, §§3:94, 3:95; Cal. Transactions Forms, 2 Estate Planning §§11:1 et seq., 11:78 et seq.)

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K. Contractual Rights at Death.
3. Transfer or Release of Expectancy.

14 Witkin Sum. Cal. Law Wills § 327

[§ 327] Transfer or Release of Expectancy.

A devisee may sell or otherwise transfer his or her expectant interest for a fair consideration. (See *Anglo Calif. Nat. Bank of San Francisco v. Kidd* (1943) 58 C.A.2d 651, 655, 137 P.2d 460; 23 Am.Jur.2d (1983 ed.), Descent and Distribution §168 et seq.) Or the devisee may release his or her expectant share. (See *Estate of Garcelon* (1894) 104 C. 570, 587, 38 P. 414.) Similarly, an heir may sell or otherwise transfer his inheritance. (*United States Fidelity & Guaranty Co. v. Mathews* (1929) 207 C. 556, 559, 279 P. 655.) However, the probate court may investigate the reasonableness of a distribution to a person other than a beneficiary. (*Prob.C. 11604*, infra, §723 et seq.) (See *Rest., Property* §316.)

West's Key Number Digest, Descent and Distribution k.93 et seq., 106.5

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14 Witkin Sum. Cal. Law Wills § 328

[§ 328] Former Statute and Case Law.

(1) *General Principles.* A devisee need not accept the gift. He or she may renounce or disclaim, and the renunciation relates back so that no estate vests in the devisee. (See *Estate of Meyer (1951) 107 C.A.2d 799, 810, 238 P.2d 597; 47 A.L.R.3d 1277* [devolution of legacy or devise renounced during life of testator]; *80 Am.Jur.2d (2002 ed.), Wills §1359 et seq.; Unif.Prob.C., §2-801.*)

An heir may also "renounce" his or her expectant share but the effect, prior to enactment of the disclaimer statutes, was different: "The estate vests in the heir *eo instanti* upon the death of the ancestor; and no act of his is required to perfect title. ... He cannot, by any act, cause the estate to remain in the ancestor, for the latter is incapable of holding it after his death. He cannot, by any renunciation or disclaimer, prevent the passage of title to himself. Nor can he, by a renunciation or disclaimer, transfer the estate to any other person as the heir of the ancestor, for the object of a renunciation or disclaimer is not to transfer, but to prevent a transfer." (*Estate of Meyer, supra, 107 C.A.2d 810; see Unif.Prob.C., §2-801.*)

(2) *Disclaimer Statute of 1972.* Former Prob.C. 190 et seq., added in 1972, comprehensively covered the right, the procedure, and the effect of disclaimer. (See *4 Pacific L. J. 246.*) A revised statute was enacted in 1983. (See *infra, §329.*) (On retroactive effect, see *Estate of Koplin (1977) 70 C.A.3d 686, 694, 139 C.R. 129.*)

(3) *No Disclaimer of Estate Tax.* The amount of federal estate taxes to be paid from the residue of an estate is not an "interest" subject to disclaimer, for the purpose of avoiding inheritance taxes, because the amount would not be succeeded to by the beneficiary or otherwise descend to another on being disclaimed. Further, the contemplated enjoyment of the benefits of the payment of estate taxes from the residue constitutes an "acceptance," which bars disclaimer of the amount to be paid for that purpose. (*Estate of Sagal (1979) 89 C.A.3d 1003, 1012, 1014, 153 C.R. 128.*)

(4) *Effect of Marital Property Agreement.* Execution of a marital property settlement agreement does not bar taking under a preexisting will, and contingent beneficiaries thus may not rely on the disclaimer statute to satisfy the contingency that a former spouse survive the testator for 180 days. And a compromise between the former spouse and the testator's heirs by which the former spouse secures rights in the testator's estate is an acceptance, which precludes a subsequent disclaimer. (*Estate of Murphy (1979) 92 C.A.3d 413, 425, 426, 428, 154 C.R. 859.*)

(5) *Disclaimer Applicable to Intestate Interest.* In *Estate of Bryant* (1983) 149 C.A.3d 323, 196 C.R. 856, the children of an intestate decedent disclaimed their interest in favor of their mother, intending to reduce inheritance tax to the smaller rate applicable to property passing to a surviving spouse. *Held*, the disclaimer statutes apply to both testate and intestate matters. (149 C.A.3d 330.)

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14 Witkin Sum. Cal. Law Wills § 329

[§ 329] Revised Statute.

(1) *Law Revision Commission Recommendation.* The California Law Revision Commission's 1982 Recommendation Relating to Disclaimers of Testamentary and Other Interests (16 Cal. Law Rev. Com. Reports, p. 207) recommended the enactment of a new, comprehensive disclaimer statute "to improve the organization of the existing statute, to make clarifying and substantive changes in existing law, and to bring the California statute into closer conformity with federal law." (16 Cal. Law Rev. Com. Reports, p. 211.)

(2) *Enactment of Revised Statute.* The recommendation was followed by the enactment of *Prob.C.* 260 et seq., superseding former *Prob.C.* 190 et seq. (See *15 Pacific L. J.* 463; C.E.B., 1 Will Drafting 3d, §§12.19, 12.20; Cal. Transactions Forms, 1 Estate Planning §§6:40 et seq., 6:130 et seq.) Special rules apply to interests created before January 1, 1984. (See *Prob.C.* 287, 288.)

(3) *Principal Changes in Existing Law.* The Commission Report (p. 211 et seq.) lists the following significant clarifications or changes:

(a) A qualified disclaimer under federal law is also valid under the statute, facilitating the primary purpose of disclaimers to minimize taxes. (See *infra*, §338.)

(b) A disclaimer is not a fraudulent conveyance as against creditors of the person disclaiming; this adopts the majority rule and abrogates the California case law rule. (See *infra*, §333.)

(c) The requirements for filing disclaimers are liberalized. (See *infra*, §334 et seq.)

(d) Normal disclaimer rules apply to a devise conditioned on survival. (See *infra*, §339.)

(e) Common law disclaimers are no longer provided for.

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14 Witkin Sum. Cal. Law Wills § 330

[§ 330] Definitions.

Prob.C. 260 et seq. define a number of terms used in the construction of the disclaimer statutes.

(1) *Beneficiary* means "the person entitled, but for the person's disclaimer, to take an interest." (*Prob.C. 262.*)

(2) *Creator of interest* means "a person who establishes, declares, creates, or otherwise brings into existence an interest." (*Prob.C. 263(a)*; see *infra*, §332.)

(3) *Disclaimant* means "a beneficiary who executes a disclaimer on his or her own behalf or a person who executes a disclaimer on behalf of a beneficiary." (*Prob.C. 264.*)

(4) *Disclaimer* means "any writing which declines, refuses, renounces, or disclaims any interest that would otherwise be taken by a beneficiary." (*Prob.C. 265.*)

(5) *Employee benefit plan* includes, but is not limited to, "any pension, retirement, death benefit, stock bonus, or profit-sharing plan, system, or trust." (*Prob.C. 266.*)

(6) *Interest* includes "the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any such property, or any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to property." (*Prob.C. 267(a)*; see *infra*, §331.)

SUPPLEMENT: [This section is current through the latest supplement]



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L. Disclaimers of Testamentary and Other Interests.

4. Interests That May Be Disclaimed.

14 Witkin Sum. Cal. Law Wills § 331

[§ 331] Interests That May Be Disclaimed.

"Interest" includes "the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any such property, or any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to property." (*Prob.C. 267(a)*.) The term includes, but is not limited to, interests created in the following ways:

- (1) By intestate succession. (*Prob.C. 267(b)(1)*.)
- (2) Under a will. (*Prob.C. 267(b)(2)*.)
- (3) Under a trust. (*Prob.C. 267(b)(3)*.)
- (4) By succession to a disclaimed interest. (*Prob.C. 267(b)(4)*.)
- (5) By virtue of an election to take against a will. (*Prob.C. 267(b)(5)*.)
- (6) By creation of a power of appointment. (*Prob.C. 267(b)(6)*.)
- (7) By exercise or nonexercise of a power of appointment. (*Prob.C. 267(b)(7)*.)
- (8) By an inter vivos gift, whether outright or in trust. (*Prob.C. 267(b)(8)*.)
- (9) By surviving the death of a depositor of a Totten trust account or P.O.D. account. (*Prob.C. 267(b)(9)*.)
- (10) Under an insurance or annuity contract. (*Prob.C. 267(b)(10)*.)
- (11) By surviving the death of another joint tenant. (*Prob.C. 267(b)(11)*.)
- (12) Under an employee benefit plan. (*Prob.C. 267(b)(12)*.)
- (13) Under an individual retirement account, annuity, or bond. (*Prob.C. 267(b)(13)*.)

(14) By a testamentary or inter vivos instrument creating any other interest or by operation of law. (*Prob.C.* 267(b)(14).)

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14 Witkin Sum. Cal. Law Wills § 332

[§ 332] Creator of Interest.

"Creator of interest" means "a person who establishes, declares, creates, or otherwise brings into existence an interest." (*Prob.C. 263(a)*.) The term includes, but is not limited to, the following:

- (1) With respect to an interest created by intestate succession, the person dying intestate. (*Prob.C. 263(b)(1)*.)
- (2) With respect to an interest created under a will, the testator. (*Prob.C. 263(b)(2)*.)
- (3) With respect to an interest created under a trust, the settlor. (*Prob.C. 263(b)(3)*.)
- (4) With respect to an interest created by succession to a disclaimed interest, the disclaimant of the disclaimed interest. (*Prob.C. 263(b)(4)*.)
- (5) With respect to an interest created by virtue of an election to take against a will, the testator. (*Prob.C. 263(b)(5)*.)
- (6) With respect to an interest created by creation of a power of appointment, the donor. (*Prob.C. 263(b)(6)*.)
- (7) With respect to an interest created by exercise or nonexercise of a power of appointment, the donee. (*Prob.C. 263(b)(7)*.)
- (8) With respect to an interest created by an inter vivos gift, the donor. (*Prob.C. 263(b)(8)*.)
- (9) With respect to an interest created by surviving the death of a depositor of a Totten trust account or P.O.D. account, the deceased depositor. (*Prob.C. 263(b)(9)*.)
- (10) With respect to an interest created under an insurance or annuity contract, the owner, the insured, or the annuitant. (*Prob.C. 263(b)(10)*.)
- (11) With respect to an interest created by surviving the death of another joint tenant, the deceased joint tenant. (*Prob.C. 263(b)(11)*.)

(12) With respect to an interest created under an employee benefit plan, the employee or other owner of an interest in the plan. (*Prob.C. 263(b)(12).*)

(13) With respect to an interest created under an individual retirement account, annuity, or bond, the owner. (*Prob.C. 263(b)(13).*)

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14 Witkin Sum. Cal. Law Wills § 333

[§ 333] Right To Disclaim and Waiver.

(1) *In General.* A beneficiary may disclaim an interest, in whole or in part, by filing a disclaimer (see *infra*, §334). (*Prob.C. 275.*) Pursuant to a court order, a conservator may disclaim for a conservatee (*Prob.C. 276*), a guardian may disclaim for a minor (*Prob.C. 277*), and a personal representative may disclaim for a decedent (*Prob.C. 277*). (See *infra*, §336.)

(2) *Spendthrift Provision Is Not Applicable.* "The right to disclaim exists regardless of any limitation imposed on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or similar restriction." (*Prob.C. 286.*)

(3) *Disclaimer Is Not Fraudulent.* A disclaimer is not a fraudulent transfer by the beneficiary under C.C. 3439 et seq. (see 8 *Cal. Proc. (4th), Enforcement of Judgment*, §460 et seq.). (*Prob.C. 283.*) The Law Revision Commission Comment notes that the statute rejects a contrary holding in *Estate of Kalt (1940) 16 C.2d 807, 811, 108 P.2d 401*. (See 39 *A.L.R.4th* 633 [creditor's right to prevent debtor's renunciation of benefit under will].)

(4) *Waiver of Right.* A person authorized to file a disclaimer "may instead file a written waiver of the right to disclaim," specifying the interest waived. On filing, "the waiver is irrevocable and is binding upon the beneficiary and all persons claiming by, through, or under the beneficiary." (*Prob.C. 284.*) The Law Revision Commission (16 *Cal. Law Rev. Com. Reports*, p. 212) points out that a creditor may require waiver as a condition for advancing credit. (See *Cal. Civil Practice*, 1 Probate and Trust Proceedings, §3:100.)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Disclaimer Is Not Fraudulent.*

Fraudulent transfer:

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment*, §488 et seq.



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7. Procedure.

a. In General.

Witkin Sum. Cal. Law Wills § 334

[§ 334] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Filing.*

(New) No filing fee: The fees set forth in *Govt.C. 70657.5* and *70658* (Supp., infra, §380E) may not be charged for filing a disclaimer of an interest in a decedent's estate. (*Govt.C. 70657.5(b)(3)* and *70658(c)(2)*, added in 2007.)



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7. Procedure.

a. In General.

14 Witkin Sum. Cal. Law Wills § 334

[§ 334] In General.

(1) *Form and Content.* The disclaimer must be in writing, must be signed by the disclaimant, and must (a) identify the creator of the interest, (b) describe the interest to be disclaimed, and (c) state the disclaimer and the extent of it. (*Prob.C. 278.*) (See C.E.B., 2 Decedent Estate Practice, §14.26; C.E.B., 1 Probate Workflow Manual, §§7.30, 7.31 [notice of disclaimer right]; Cal. Civil Practice, 1 Probate and Trust Proceedings, §3:99.)

(2) *Filing.* A disclaimer may be filed with any of the following:

- (a) The superior court in the county in which the decedent's estate is or could be administered. (*Prob.C. 280(a)(1).*)
- (b) The trustee, personal representative, other fiduciary, or person responsible for distributing the interest to the beneficiary. (*Prob.C. 280(a)(2).*)
- (c) Any other person having custody or possession of or legal title to the interest. (*Prob.C. 280(a)(3).*)
- (d) The creator of the interest. (*Prob.C. 280(a)(4).*)

(3) *Recording.* If a disclaimer affecting real property or an obligation secured by real property has been acknowledged and proved, it may be recorded "with like effect as a grant of real property," and the recording statutes are applicable without regard to the date when the disclaimer was filed. (*Prob.C. 280(b).*) When a disclaimer is recorded, failure to file it "does not affect the validity of any transaction with respect to the real property or the obligation secured thereby, and the general laws on recording and its effect govern any such transaction." (*Prob.C. 280(b).*) The Law Revision Commission Comment points out that acknowledgment is not a prerequisite to effectiveness of the disclaimer, but is a prerequisite to recording.

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Filing.*

(New) No filing fee: The fees set forth in *Govt.C. 70657.5* and *70658* (Supp., infra, §380E) may not be charged for filing a disclaimer of an interest in a decedent's estate. (*Govt.C. 70657.5(c)*, as amended in 2008; *Govt.C. 70658(c)(2)*, added in 2007.)



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14 Witkin Sum. Cal. Law Wills § 335

[§ 335] Time for Filing.

(1) *Reasonable Time.* A disclaimer must be filed "within a reasonable time after the person able to disclaim acquires knowledge of the interest." (*Prob.C. 279(a).*) *Prob.C. 279(b)*, (c), (d) and (e) set forth conclusive presumptions of a reasonable time in specified instances. If the disclaimer is not filed within these times, "the disclaimant has the burden of establishing that the disclaimer was filed within a reasonable time after the disclaimant acquired knowledge of the interest." (*Prob.C. 279(f).*)

(2) *Conclusive Presumption: Particular Interests.* In the case of any of the following interests, a disclaimer is conclusively presumed to have been filed within a reasonable time if filed within 9 months after the death of the creator of the interest or within 9 months after the interest becomes indefeasibly vested, whichever occurs later:

- (a) An interest created under a will. (*Prob.C. 279(b)(1).*)
- (b) An interest created by intestate succession. (*Prob.C. 279(b)(2).*)
- (c) An interest created pursuant to the exercise or nonexercise of a testamentary power of appointment. (*Prob.C. 279(b)(3).*)
- (d) An interest created by surviving the death of a depositor of a Totten trust account or P.O.D. account. (*Prob.C. 279(b)(4).*)
- (e) An interest created under a life insurance or annuity contract. (*Prob.C. 279(b)(5).*)
- (f) An interest created by surviving the death of another joint tenant. (*Prob.C. 279(b)(6).*)
- (g) An interest created under an employee benefit plan. (*Prob.C. 279(b)(7).*)
- (h) An interest created under an individual retirement account, annuity, or bond. (*Prob.C. 279(b)(8).*)

(3) *Conclusive Presumption: Trust, Power of Appointment, or Gift.* In the case of an interest created by a living

trust, an interest created by the exercise of a presently exercisable power of appointment, an outright inter vivos gift, a power of appointment, or an interest created or increased by succession to a disclaimed interest, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within 9 months after whichever of the following times occurs latest:

(a) The time of the creation of the trust, the exercise of the power of appointment, the making of the gift, the creation of the power of appointment, or the disclaimer of the disclaimed property. (*Prob.C. 279(c)(1).*)

(b) The time the first knowledge of the interest is acquired by the person able to disclaim. (*Prob.C. 279(c)(2).*)

(c) The time the interest becomes indefeasibly vested. (*Prob.C. 279(c)(3).*)

(4) *Conclusive Presumption: Other Interests.* In case of an interest not described in *Prob.C. 279(b)* or (c), a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within 9 months after whichever of the following times occurs later:

(a) The time the first knowledge of the interest is acquired by the person able to disclaim. (*Prob.C. 279(d)(1).*)

(b) The time the interest becomes indefeasibly vested. (*Prob.C. 279(d)(2).*)

(5) *Conclusive Presumption: Future Estate.* In the case of a future estate, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within whichever of the following times occurs later:

(a) Nine months after the time the interest becomes an estate in possession. (*Prob.C. 279(e)(1).*)

(b) The time specified in *Prob.C. 279(b)*, (c), or (d), whichever is applicable. (*Prob.C. 279(e)(2).*)

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c. Disclaimer for Minor, Conservatee, or Decedent.

14 Witkin Sum. Cal. Law Wills § 336

[§ 336] Disclaimer for Minor, Conservatee, or Decedent.

(1) *Disclaimer on Behalf of Minor.* A disclaimer on behalf of a minor must be made by the guardian of the estate of the minor, or if none, by a guardian ad litem of the minor. A disclaimer by a guardian is not effective unless made pursuant to a court order. (*Prob.C. 277(a).*)

(2) *Disclaimer on Behalf of Conservatee.* A disclaimer on behalf of a conservatee must be made by the conservator of the estate of the conservatee pursuant to a court order under *Prob.C. 2580* et seq. (*infra*, §1025 et seq.). (*Prob.C. 276.*)

(3) *Disclaimer on Behalf of Decedent.* A disclaimer on behalf of a decedent must be made by the personal representative. Except as provided in *Prob.C. 10400* et seq. (Independent Administration of Estates Act, *infra*, §745 et seq.), a disclaimer by a personal representative is not effective unless made pursuant to a court order. (*Prob.C. 277(b).*)

(4) *Filing Petition.* A petition for an order authorizing or requiring a guardian or personal representative to execute and file a disclaimer must be filed in the superior court of the county in which the estate is administered or could be administered. It may be filed by the guardian, personal representative, or other interested person. (*Prob.C. 277(c).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §3:101.)

(5) *Contents of Petition.* The petition must do the following:

(a) Identify the creator of the interest. (*Prob.C. 277(d)(1).*)

(b) Describe the interest to be disclaimed. (*Prob.C. 277(d)(2).*)

(c) State the extent of the disclaimer. (*Prob.C. 277(d)(3).*)

(d) Identify the person or persons the petitioner believes would take the interest in the event of the disclaimer. (*Prob.C. 277(d)(4).*)

(6) *Notice of Hearing.* *Prob.C. 277(e)* provides as follows:

(a) *Order authorizing or requiring guardian of estate of minor to file disclaimer:* Notice must be given as provided in *Prob.C. 1460* et seq. (infra, §910 et seq.) to all of the persons required to be given notice under *Prob.C. 275* et seq. (*Prob.C. 277(e)(1).*)

(b) *Order authorizing or requiring guardian ad litem of minor to file disclaimer:* Notice must be given "to the persons and in the manner that the court shall by order direct." (*Prob.C. 277(e)(3).*)

(c) *Order authorizing or requiring personal representative of decedent to file disclaimer:* Notice must be given as provided in *Prob.C. 1220* (mailed notice; infra, §391). (*Prob.C. 277(e)(2).*)

(7) *Hearing and Order.* The court in its discretion may make the order "if the court determines, taking into consideration all of the relevant circumstances, that the minor or defendant as a prudent person would disclaim the interest if he or she had the capacity to do so." (*Prob.C. 277(f).*)

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14 Witkin Sum. Cal. Law Wills § 337

[§ 337] No Disclaimer After Acceptance.

(1) *General Rule.* A disclaimer may not be made after the beneficiary has accepted the interest. (*Prob.C. 285(a).*)

(2) *Acts Constituting Acceptance.* A beneficiary has accepted an interest if any of the following occurs before a disclaimer is filed with respect to that interest:

(a) The beneficiary, or someone acting on behalf of the beneficiary, makes a voluntary assignment, conveyance, encumbrance, pledge, or transfer of all or part of the interest, or contracts to do so. However, a beneficiary who "makes a gratuitous conveyance or transfer of the beneficiary's entire interest in property to the person or persons who would have received the property had the beneficiary made an otherwise qualified disclaimer" is not deemed to have accepted an interest. (*Prob.C. 285(b)(1).*)

(b) The beneficiary, or someone acting on behalf of the beneficiary, executes a written waiver of the right to disclaim the interest. (*Prob.C. 285(b)(2).*) (See *supra*, §333.)

(c) The beneficiary, or someone acting on behalf of the beneficiary, accepts all or part of the interest or benefit under it. (*Prob.C. 285(b)(3).*)

(d) All or part of the interest is sold at a judicial sale. (*Prob.C. 285(b)(4).*)

(3) *Acceptance of Joint Tenancy Interest.* "The acceptance by a joint tenant of the joint tenancy interest created when the joint tenancy is created is not an acceptance by the joint tenant of the interest created when the joint tenant survives the death of another joint tenant." (*Prob.C. 285(d).*)

(4) *Permissible Disclaimer After Acceptance.* An acceptance does not preclude a beneficiary from thereafter disclaiming all or part of an interest if both of the following requirements are met:

(a) The beneficiary became entitled to the interest because another person disclaimed an interest. (*Prob.C. 285(c)(1).*)

(b) The beneficiary or other person acting on behalf of the beneficiary at the time of the acceptance had no

knowledge of the interest to which the beneficiary so became entitled. (*Prob.C. 285(c)(2).*)

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9. Disclaimer Under Federal Law.

14 Witkin Sum. Cal. Law Wills § 338

[§ 338] Disclaimer Under Federal Law.

If as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated under the Internal Revenue Code as never having been transferred to the beneficiary, then the disclaimer or transfer is effective as a disclaimer under *Prob.C.* 260 et seq. (*Prob.C.* 295.)

Under 26 U.S.C., §2518, property disclaimed under a qualified disclaimer is treated as passing directly from the transferor to the recipient, bypassing the disclaiming party and avoiding the imposition of federal gift tax on the disclaiming party. (See C.E.B., 2 Decedent Estate Practice, §14.25; C.E.B., 3 Decedent Estate Practice, §29.43 et seq.)

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14 Witkin Sum. Cal. Law Wills § 339

[§ 339] Effect of Disclaimer.

(1) *Disclaimer Is Irrevocable and Binding.* "A disclaimer, when effective, is irrevocable and binding upon the beneficiary and all persons claiming by, through, or under the beneficiary, including creditors of the beneficiary." (*Prob.C. 281.*) (See *Prob.C. 283*, supra, §333 [not fraudulent conveyance].)

(2) *Disposition of Disclaimed Interest.* Unless the creator of the interest provides for a specific disposition of the interest, it "shall descend, go, be distributed, or continue to be held" as follows:

(a) *Present interest:* "as if the disclaimant had predeceased the creator of the interest." (*Prob.C. 282(a)(1).*)

(b) *Future interest:* "as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested." (*Prob.C. 282(a)(2).*)

The Law Revision Commission Comment notes that *Prob.C. 282(a)(2)* makes it clear that a disclaimer has the effect of accelerating the possession and enjoyment of subsequent interests. The statute is based on the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act and the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act.

The Commission's Comment quotes from the Comment to Section 3 of the first Uniform Act as follows: "If a life estate or other future interest is disclaimed, the problem is raised of whether succeeding interests or estates accelerate in possession or enjoyment or whether the disclaimed interest must be marshalled to await the actual happening of the contingency. Section 3 provides that remainder interests are accelerated, the second clause specifically stating that any future interest which is to take effect in possession or enjoyment after the termination of the estate or interest disclaimed, takes effect as if the disclaimant had predeceased the event which determines that the taker has become finally ascertained and his interest indefeasibly vested. Thus, unless the decedent or donor of the power has otherwise provided, if T leaves his estate in trust to pay the income to his son S for life, remainder to his son's children who survive him, and S disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive possession and enjoyment, even though the son may subsequently have other children or one or more of the living children may die during their father's lifetime. The will or instrument of transfer may be drafted to avoid acceleration if desired."

(3) *Relation Back*. "A disclaimer relates back for all purposes to the date of death of the creator of the disclaimed interest or the determining event, as the case may be." (*Prob.C. 282(a)*.)

(4) *Exceptions*. *Prob.C. 282(b)* states the following exceptions:

(a) The beneficiary is not treated as having predeceased the decedent for the purpose of determining the generation at which the division of the estate is to be made under *Prob.C. 240* et seq. or other provision of a will, trust, or other instrument. (*Prob.C. 282(b)(1)*.) (On *Prob.C. 240*, the representation statute, see supra, §75.) The purpose of this provision is "to prevent an heir from disclaiming property for the purpose of increasing the share of his or her line at the expense of other lines of the decedent's descendants." The statute changes the rule of distribution to the children of a disclaimant enunciated in *Estate of Bryant (1983) 149 C.A.3d 323, 196 C.R. 856*. (Law Rev. Com. Comment.)

(b) The beneficiary is not treated as having predeceased the decedent for purposes of applying *Prob.C. 6409(d)* (charging advancement against intestate share of recipient's heirs; see supra, §287) or *Prob.C. 6410(b)* (charging debt against intestate share of debtor's heirs; see infra, §734). (*Prob.C. 282(b)(2)*.)

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14 Witkin Sum. Cal. Law Wills § 340

[§ 340] Corporations and Associations.

(1) *Corporations.* Former Prob.C. 27 originally stated that a testamentary disposition could be made to corporations "formed for religious, scientific, literary, or solely educational ... purposes ... or for similar public purposes," and that "[n]o other corporation can take under a will, unless expressly authorized by statute." (See *Estate of Anderson (1960)* 179 C.A.2d 535, 538, 546, 3 C.R. 697 [liberal interpretation; testamentary gift to League of Women Voters upheld as one for "solely educational" purposes].) However, former Corp.C. 802(a), dealing with corporate powers, provided that "[e]very corporation may ... take real and personal property by will, gift, or bequest." Accordingly, former Prob.C. 27 was amended in 1961 to delete the restriction, with the result that under both statutes, any corporation could take by will.

(2) *Unincorporated Associations.* Former Prob.C. 27 originally provided that a testamentary disposition could be made to "unincorporated religious, benevolent or fraternal societies or associations," and former Corp.C. 21200 authorized "[a]ny unincorporated benevolent or fraternal society or association" to take by will. This language was broadly construed in *Estate of Holtermann (1962)* 206 C.A.2d 460, 469, 23 C.R. 685, holding that any unincorporated association could take, and that a testamentary gift to the Knights of Columbus was valid notwithstanding a finding that the association was not a charitable or benevolent organization. A contrary view was taken in *Estate of Carlson (1970)* 9 C.A.3d 479, 482, 88 C.R. 229, holding that the Socialist Labor Party of California, a political party, could not take a testamentary gift. (See 41 A.L.R.3d 833 [validity and construction of testamentary gift to political party].) The problem was settled in 1970. Former Prob.C. 27 was amended to eliminate the phrase "religious, benevolent or fraternal," and former Corp.C. 21200 was amended to eliminate the words "benevolent or fraternal."

(3) *Current Statute.* A will may make a disposition of property "to any person, including but not limited to" an individual, a corporation, and "an unincorporated association, society, lodge, or any branch thereof." (Prob.C. 6102.) A number of provisions authorize various entities to accept testamentary gifts. (See, e.g., Cal. Const., Art. IX, §9 [University of California]; Educ.C. 19174 [county libraries]; Pub.Res.C. 5158 [public parks].)

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M. Former Restrictions Eliminated.
2. Governments and Governmental Agencies.

14 Witkin Sum. Cal. Law Wills § 341

[§ 341] Governments and Governmental Agencies.

(1) *States and Subdivisions.* A testamentary disposition may be made to a city, county, city and county, municipal corporation, or state. (*Prob.C. 6102(d)*, (e), based on former *Prob.C. 27*.)

(2) *United States and Its Instrumentalities.* Former *Prob.C. 27* originally made no express mention of the United States. In *Estate of Hendrix* (1947) 77 C.A.2d 647, 651, 653, 176 P.2d 398, a bequest to "United States Veterans Administration" was upheld on the theory that an agency is an arm of the government; that in effect the gift was to the government; that the United States government is a "corporation" within the meaning of the statute; and that the Veterans Administration is expressly authorized by federal statute to take property by will. The clear implication of the decision was that if a federal statute authorized the United States government itself to take property by will, a gift to the government would be valid.

However, in *Estate of Burnison* (1949) 33 C.2d 638, 204 P.2d 330, this view was disapproved, and the *Hendrix* case was interpreted as resting on only one proper ground: that the gift was one for charitable purposes, and that it was therefore immaterial whether the recipient was incorporated or unincorporated. (33 C.2d 646.) *Burnison* and its companion, *Estate of Sanborn* (1949) 33 C.2d 647, 204 P.2d 335, involved gifts to "The United States Government." It was contended on behalf of the United States that (a) the government was a "corporation" and could take under the theory of the *Hendrix* case, and (b) the United States was a "state" within the meaning of the statute. *Held*, the gift was void. The federal Government is not a corporation "expressly authorized by statute," and the statutory reference to "the state" does not embrace every established government, but means only the State of California. Thus, although the federal Government may have implied or express power, under federal law, to take property by will, the right to make such a gift by will of California property is wholly subject to California statutory law. The United States Supreme Court affirmed in *United States v. Burnison* (1950) 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675.

Some criticism was directed at this restrictive interpretation. (See 23 So. Cal. L. Rev. 636; *Estate of Rive* (1950) 98 C.A.2d 104, 105, 219 P.2d 475.) And in 1951, the rule was changed by an amendment to former *Prob.C. 27* which added to those capable of taking by will "the United States" and "any instrumentality of the United States." The rule is now stated in *Prob.C. 6102(f)*.

(3) *Foreign Country.* A testamentary disposition may be made to a foreign country or "a governmental entity

therein." (*Prob.C. 6102(g).*)

SUPPLEMENT: [This section is current through the latest supplement]



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M. Former Restrictions Eliminated.
3. Convict.

14 Witkin Sum. Cal. Law Wills § 342

[§ 342] Convict.

Formerly, a person sentenced to imprisonment for life was deemed "civilly dead" and could not inherit. (*Estate of Donnelly* (1899) 125 C. 417, 419, 58 P. 61.) But a sentence for a term less than life merely suspended civil rights and did not prevent inheritance. (*Estate of Dickinson* (1942) 51 C.A.2d 638, 640, 125 P.2d 542.) Legislation in 1968 removed the restriction. P.C. 2601, dealing with suspension of civil rights of a person sentenced to imprisonment, preserves the rights (1) to inherit real or personal property, (2) to create a power of appointment, and (3) to make a will.

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION M. Former Restrictions Eliminated. 4. Charity.

14 Witkin Sum. Cal. Law Wills § 343

[§ 343] Charity.

Former Prob.C. 41, 42, and 43, limited the ability of a testator to leave property to a charity, mainly by specifying time periods prior to death that had to elapse after making the charitable gift. Unlike a "mortmain" statute, the sections were not designed to prevent these gifts but merely to discourage hasty decisions and "death bed wills" that exclude persons who would ordinarily be the objects of the testator's bounty. (See *Estate of Dwyer* (1911) 159 C. 680, 687, 115 P. 242; *Estate of Adams* (1958) 164 C.A.2d 698, 702, 331 P.2d 149; *Estate of Gutierrez* (1963) 220 C.A.2d 6, 33 C.R. 593; *Estate of Nicely* (1965) 235 C.A.2d 174, 184, 44 C.R. 804; *Estate of Reardon* (1966) 243 C.A.2d 221, 229, 52 C.R. 68; *Estate of Peterson* (1968) 259 C.A.2d 492, 497, 66 C.R. 629; 25 So. Cal. L. Rev. 419.) Certain public institutions (e.g., the state, political subdivisions, educational institutions exempt from taxation) were exempt. (See *Estate of Purington* (1926) 199 C. 661, 665, 250 P. 657; *Estate of Munson* (1942) 54 C.A.2d 590, 593, 129 P.2d 420; *Estate of Thomason* (1966) 245 C.A.2d 793, 800, 54 C.R. 229.)

The later decisions sanctioned an evasion of the statutory restrictions by means of a substitutional gift to a trusted friend in the event the charitable gift was held invalid. Because the failure of the gift would not benefit the heirs, they were not likely to attack it; and if they did, their attack would fail because they could show no right to succeed. (See *Estate of Davis* (1946) 74 C.A.2d 357, 361, 168 P.2d 789; *Estate of Haines* (1946) 76 C.A.2d 673, 676, 173 P.2d 693; *Estate of Leymel* (1951) 103 C.A.2d 778, 781, 230 P.2d 48; *Estate of Neubauer* (1958) 49 C.2d 740, 742, 321 P.2d 741; *Estate of Sanderson* (1962) 58 C.2d 522, 527, 25 C.R. 69, 375 P.2d 37; *Estate of Robison* (1966) 242 C.A.2d 19, 23, 51 C.R. 75; 25 So. Cal. L. Rev. 421.) This easy circumvention of the statutes made their operation capricious, and the statutes were repealed in 1971.

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Witkin Summary of California Law VIII. LIMITATIONS ON SUCCESSION AND TESTAMENTARY DISPOSITION M. Former Restrictions Eliminated. 5. Nonresident Alien.

14 Witkin Sum. Cal. Law Wills § 344

[§ 344] Nonresident Alien.

(1) *Former Law: Barred by Failure To Claim Within 5 Years.* Former Prob.C. 1026 provided that a nonresident alien who becomes entitled to property by succession had to appear and demand the property within 5 years or the property would be disposed of as escheated property. (See *Estate of Meyer* (1951) 107 C.A.2d 799, 802, 238 P.2d 597; *Estate of Caravas* (1952) 40 C.2d 33, 37, 250 P.2d 593; *Estate of Horman* (1971) 5 C.3d 62, 74, 95 C.R. 433, 485 P.2d 785; *Estate of Edwards* (1978) 82 C.A.3d 885, 891, 147 C.R. 458.)

(2) *Former Law: Lack of Reciprocal Rights.* In 1941, new restrictions were added by former Prob.C. 259, 259.1, and 259.2, to deny inheritance rights to nonresident aliens unless reciprocal rights were granted to Americans by their respective countries. The original statute provided that the nonresident alien was not entitled to the property unless American citizens could take property and its proceeds in the alien's country on the same conditions as residents and would be entitled to receive money originating from estates in the alien's country by payment to them in the United States; that the burden was on the nonresident alien to establish the existence of the reciprocal rights; and that if reciprocal rights were not found to exist, and if no heirs other than the alien were found eligible, the property would escheat. (See *Estate of Blak* (1944) 65 C.A.2d 232, 150 P.2d 567; *Estate of Michaud* (1942) 53 C.A.2d 835, 128 P.2d 595; 15 So. Cal. L. Rev. 469; 18 So. Cal. L. Rev. 299.) Briefly, the statutes were revised to add a presumption of reciprocal rights, which became conclusive in the absence of a petition by an interested party for the court to determine otherwise. However, these changes were repealed after 2 years. (See 21 So. Cal. L. Rev. 14; 25 So. Cal. L. Rev. 297, 329; 1 Hastings L. J. 128.) The constitutionality of the 1941 legislation was upheld in *Clark v. Allen* (1947) 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633. (See 21 So. Cal. L. Rev. 106; *Estate of Knutzen* (1948) 31 C.2d 573, 576, 191 P.2d 747.) And 1947 legislation, which placed the burden of proof on the nonresident to show the existence of reciprocal rights, was upheld in *Estate of Bevilacqua* (1948) 31 C.2d 580, 585, 191 P.2d 752. (See 19 So. Cal. L. Rev. 434; *Estate of Karban* (1953) 118 C.A.2d 240, 244, 257 P.2d 649 [in absence of any evidence on subject of reciprocity, finding against right will be sustained].)

These legislative efforts failed to produce a clear and workable statute. The existence of reciprocal rights presented a question of fact. Treaties, statutes, and writings were offered in evidence; opposing experts testified in great detail; and the lower court's finding on substantially conflicting evidence was uniformly sustained. Thus, in cases contemporaneously decided and dealing with the same foreign countries, reciprocity was found to exist and not to exist, and one set of alien heirs succeeded and another set similarly situated did not. (See *Estate of Miller* (1951) 104 C.A.2d

1, 19, 230 P.2d 667; *Estate of Arbulich* (1953) 41 C.2d 86, 257 P.2d 433 [Yugoslavia; no reciprocity found]; *Estate of Kennedy* (1951) 106 C.A.2d 621, 235 P.2d 837 [Romania; reciprocity found]; *Estate of Nepogodin* (1955) 134 C.A.2d 161, 285 P.2d 672 [China; reciprocity found]; *Estate of Schneider* (1956) 140 C.A.2d 710, 296 P.2d 45 [Germany; reciprocity found]; *Kolovrat v. Oregon* (1961) 366 U.S. 187, 81 S.Ct. 922, 6 L.Ed.2d 218 [reciprocal rights under treaty between United States and Yugoslavia; Yugoslav heirs of Oregon intestate were entitled to succeed]; *Estate of Eng* (1964) 228 C.A.2d 160, 39 C.R. 254 [People's Republic of China; no reciprocity found; *Nepogodin* distinguished]; *Estate of Larkin* (1966) 65 C.2d 60, 86, 52 C.R. 441, 416 P.2d 473 [law of U.S.S.R. elaborately examined and reciprocity found]; *Estate of Chichernea* (1967) 66 C.2d 83, 57 C.R. 135, 424 P.2d 687 [Rumania; reciprocity found]; 55 Cal. L. Rev. 592, 1171; 80 Harv. L. Rev. 675; 32 U.C.L.A. L. Rev. 643.)

(3) *Unconstitutionality and Repeal*. Criticism of the capricious operation of the reciprocal rights statute was continuous and severe. (See 25 So. Cal. L. Rev. 297, 329; 3 Pacific L. J. 551.) The issue was resolved by the United States Supreme Court in *Zschernig v. Miller* (1968) 389 U.S. 429, 88 S.Ct. 664, 670, 19 L.Ed.2d 683, 692, holding an Oregon statute unconstitutional as an impermissible interference with federal power over foreign affairs. (See 8 Summary (10th), *Constitutional Law*, §1340.) *Estate of Kraemer* (1969) 276 C.A.2d 715, 725, 81 C.R. 287, applied the *Zschernig* holding to the California statute. (See *Estate of Horman* (1971) 5 C.3d 62, 79, 95 C.R. 433, 485 P.2d 785 [dicta].) The 1974 Legislature repealed both the reciprocal rights restriction (former Prob.C. 259) and the escheat for failure to claim section (former Prob.C. 1026). (See 6 Pacific L. J. 136.)

(4) *Current Statute*. "No person is disqualified to take as an heir because that person or a person through whom he or she claims is or has been an alien." (Prob.C. 6411.) (See Rest.3d, *Property (Wills and Other Donative Transfers)* §1.3 [succession by noncitizen].)

SUPPLEMENT: [This section is current through the latest supplement]



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M. Former Restrictions Eliminated.
6. Subscribing Witness.

14 Witkin Sum. Cal. Law Wills § 345

[§ 345] Subscribing Witness.

(1) *Former Statute and Case Law.* Under former Prob.C. 51, a devise, bequest, or legacy to a subscribing witness was void unless there were two other disinterested witnesses. The invalidating effect of the statute was, however, relatively narrow:

(a) The interested witnesses were not disqualified from witnessing but only from taking under the will; the will itself was unaffected. (See *Estate of Lee* (1964) 225 C.A.2d 578, 580, 37 C.R. 572, citing the text.)

(b) If the witness was an heir of the testator, he or she could take the share to which he or she would have succeeded in case of intestacy, not exceeding the amount of the gift in the will.

(c) A gift to the spouse of a subscribing witness was valid. Where the gift was to a wife, and her husband was a subscribing witness, she took it as her separate property in which he had no interest; hence, he was a disinterested witness. (*Estate of Hartman* (1937) 21 C.A.2d 266, 269, 68 P.2d 744.)

(d) A gift to a church or charity was valid although the will was witnessed by its officer. (*Estate of Tkachuk* (1977) 73 C.A.3d 14, 19, 139 C.R. 55.)

(e) The statute did not apply to a holographic will, which requires no witnesses. (*Estate of Reynolds* (1949) 94 C.A.2d 851, 855, 211 P.2d 608.)

(2) *Revised Statute.* In 1985, former Prob.C. 51 was superseded by Prob.C. 6112 (see *supra*, §145), based in part on Unif.Prob.C., §2-505.

SUPPLEMENT: [This section is current through the latest supplement]



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IX. PROCEEDINGS UNDER THE PROBATE CODE
A. The Probate Court.
1. In General.

Witkin Sum. Cal. Law Wills § 346

[§ 346] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Department of Superior Court.* On continuing education requirements for judges and subordinate judicial officers assigned to hear probate proceedings, see C.R.C., Rule 10.468, adopted in 2007.



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Witkin Summary of California Law IX. PROCEEDINGS UNDER THE PROBATE CODE A. The Probate Court. 1. In General.

14 Witkin Sum. Cal. Law Wills § 346

[§ 346] In General.

(1) *Department of Superior Court.* Probate jurisdiction is in the superior court, and the "probate court" is merely a department of the superior court exercising that jurisdiction. (See *Prob.C. 7050* ["The superior court has jurisdiction of proceedings under this code concerning the administration of the decedent's estate"]; *Wood v. Roach* (1932) 125 C.A. 631, 634, 14 P.2d 170; *Fisher v. Superior Court* (1937) 23 C.A.2d 528, 531, 73 P.2d 892; *Schlyen v. Schlyen* (1954) 43 C.2d 361, 369, 273 P.2d 897; 2 *Cal. Proc.* (4th), *Courts*, §227.)

(2) *Exclusive and Concurrent Jurisdiction.* It has occasionally been declared that within its sphere the jurisdiction of the probate court is exclusive. (See *Estate of Roach* (1929) 208 C. 394, 396, 281 P. 607; *Colden v. Costello* (1942) 50 C.A.2d 363, 369, 122 P.2d 959; *Howard v. Bennett* (1942) 53 C.A.2d 546, 127 P.2d 1012; 5 *Cal. Proc.* (4th), *Pleading*, §826.) But this appears to be an overstatement, for (a) an area of concurrent jurisdiction exists, and (b) the probate court is not a distinct tribunal but a department of the superior court. (See *Schlyen v. Schlyen*, *supra*, 43 C.2d 368; 2 *Cal. Proc.* (4th), *Jurisdiction*, §431; 2 *Cal. Proc.* (4th), *Courts*, §225.)

(3) *Severance of Actions.* On its own motion or the motion of any interested party, the court may order that an action or proceeding not specifically provided for in the Probate Code be determined in a separate civil action. On payment of the appropriate filing fee, the court may order the transfer. (*Prob.C. 801.*)

(4) *Disposition of Body.* Under *Health & Saf.C. 7100* (see 13 *Summary* (10th), *Personal Property*, §5), the right to dispose of a dead body belongs to those designated by statute, not the executor of the decedent's estate. Thus, if the will is silent, a dispute among the decedent's heirs over the proper location for burial is not within the jurisdiction of the probate court, which extends to proceedings under the Probate Code. (*Estate of Jimenez* (1997) 56 C.A.4th 733, 740, 65 C.R.2d 710.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Department of Superior Court.* On continuing education requirements for judges and subordinate judicial officers assigned to hear probate proceedings, see C.R.C., Rule 10.468, adopted in 2007.

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §224.

(2) Exclusive and Concurrent Jurisdiction.

Exclusive jurisdiction:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §872.

Concurrent jurisdiction:

Cross-References: 2 Cal. Proc. (5th), *Jurisdiction*, §445; 2 Cal. Proc. (5th), *Courts*, §222.



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A. The Probate Court.

2. Former Law: Limited Jurisdiction.

14 Witkin Sum. Cal. Law Wills § 347

[§ 347] Former Law: Limited Jurisdiction.

(1) *Theory of Limited Statutory Jurisdiction.* Many cases held that the probate court was one of limited jurisdiction, which had to look to express statutes for its jurisdiction and procedure. (See *Estate of Davis* (1902) 136 C. 590, 597, 69 P. 412; *McPike v. Superior Court* (1934) 220 C. 254, 258, 30 P.2d 17; *Texas Co. v. Bank of America* (1935) 5 C.2d 35, 39, 53 P.2d 127; *Estate of Schloss* (1961) 56 C.2d 248, 253, 14 C.R. 643, 363 P.2d 875; *Auslen v. Superior Court* (1962) 58 C.2d 820, 823, 27 C.R. 8, 377 P.2d 72; *Estate of Boyd* (1963) 212 C.A.2d 634, 637, 28 C.R. 258; *Estate of Muhammad* (1971) 16 C.A.3d 726, 731, 94 C.R. 856.)

(2) *Exception: General Jurisdiction Within Its Sphere.* The notion of limited jurisdiction was misleading, for the only limitation was that its scope was statutory. The probate court was still the superior court, a constitutional court of general jurisdiction, and within its proper sphere its judgments and orders were protected by the same presumptions on collateral attack as those that apply to other orders or judgments of the superior court. (See *Wood v. Roach* (1932) 125 C.A. 631, 635, 14 P.2d 170; *Estate of Keet* (1940) 15 C.2d 328, 334, 100 P.2d 1045; *Fletcher v. Superior Court* (1926) 79 C.A. 468, 473, 250 P. 195.) Similarly, its decrees and orders were of the same dignity on appeal or review as other judgments of the superior court. (*Estate of Kay* (1947) 30 C.2d 215, 220, 181 P.2d 1, 2 Cal. Proc. (4th), *Jurisdiction*, §283 ["Although the procedure and jurisdiction of the superior court sitting in probate are limited by the provisions of the Probate Code, and in that sense 'limited and special' ... , that court is not an inferior tribunal of limited jurisdiction"].)

(3) *Exception: Incidental Powers.* The probate court had incidental jurisdiction where necessary to carry out its express powers. The following are examples:

(a) Although an action for declaratory relief could be brought in the superior court, even where the instrument to be interpreted was a will (*McCaughna v. Bilhorn* (1935) 10 C.A.2d 674, 682, 52 P.2d 1025), the probate court could also interpret a will in order to determine its validity or the disposition of the property. (*Colden v. Costello* (1942) 50 C.A.2d 363, 367, 122 P.2d 959.)

(b) The court had no general equity jurisdiction. (See *Security-First Nat. Bank of Los Angeles v. Superior Court* (1934) 1 C.2d 749, 757, 37 P.2d 69; *Estate of Shimun* (1977) 67 C.A.3d 436, 442, 136 C.R. 668; *Copley v. Copley* (1978) 80 C.A.3d 97, 108, 145 C.R. 437; *Estate of Mullins* (1988) 206 C.A.3d 924, 929, 255 C.R. 430.) However, in

matters over which the court had jurisdiction it could apply general equitable principles and give equitable remedies. (See *Estate of Barreiro* (1932) 125 C.A. 752, 764, 14 P.2d 786 [control over acts of representative outside state]; *Estate of Bell* (1914) 168 C. 253, 257, 141 P. 1179 [defense of setoff]; *Estate of Reade* (1948) 31 C.2d 669, 672, 191 P.2d 745 [award of attorneys' fee to heir with one-seventh interest who successfully objected to account of administrator, thereby preserving common fund for benefit of all heirs]; *Estate of Smith* (1954) 123 C.A.2d 844, 848, 268 P.2d 53 [cross-demands deemed compensated under statute]; *Estate of Heigho* (1960) 186 C.A.2d 360, 369, 9 C.R. 196, citing the text [petition to reopen probate denied on grounds of laches and estoppel]; *Hutchinson v. Gertsch* (1979) 97 C.A.3d 605, 615, 159 C.R. 40 [petition for extraordinary fees]; *Neubrand v. Superior Court* (1970) 9 C.A.3d 311, 322, 88 C.R. 586 [where proceeding is within court's statutory jurisdiction (e.g., petition to settle account), issue of extrinsic fraud may be raised and prior decree set aside because court may, in exercise of probate jurisdiction, invoke equitable principles and give equitable remedies; where no probate proceeding is pending, and relief is sought by motion to vacate, party is invoking general equitable power beyond probate court's jurisdiction].)

(c) It could determine the validity and effect of contracts where this was incidental to a probate proceeding; e.g., where the issue involved the rights of an heir or surviving spouse under an agreement relinquishing rights. (*Estate of Cover* (1922) 188 C. 133, 137, 204 P. 583; *Bennett v. Forrest* (1944) 24 C.2d 485, 491, 150 P.2d 416; see *Dobbins v. Title Guarantee & Trust Co.* (1943) 22 C.2d 64, 67, 136 P.2d 572 [agreement between corepresentatives to divide fees].)

(d) It had broad inherent power over representatives and attorneys guilty of misconduct in connection with administration. (See *Estate of De Barry* (1941) 43 C.A.2d 715, 726, 111 P.2d 728 [attorney summarily ordered to return extraordinary fees obtained without court order]; *Estate of Merrill* (1947) 81 C.A.2d 102, 108, 183 P.2d 300 [special administrator appointed without full disclosure of facts to judge; he and his attorney were required to return large fees taken without court order, where no beneficial services were rendered].)

(4) *Consent to Trial of Issue*. The strict limitation of jurisdiction, which renders a trial on the merits a nullity where the losing party objects below, was not a limitation at all where both parties proceeded to trial on the merits without objecting to jurisdiction. They could not by consent confer a nonexistent subject matter jurisdiction on the probate court, but their participation in the trial could, in aid of the judgment, be interpreted as an invocation of a superior court's general equity jurisdiction. (See *Estate of Gilmaker* (1962) 57 C.2d 627, 630, 21 C.R. 585, 371 P.2d 321.)

(5) *Jurisdiction Over Testamentary Trusts*. The cases concerning the scope of probate court jurisdiction over testamentary trusts were not consistent. (See *Estate of Smith* (1935) 4 C.A.2d 548, 552, 41 P.2d 565 [jurisdiction to determine interest of beneficiary on termination]; *Estate of McLellan* (1936) 8 C.2d 49, 55, 63 P.2d 1120 [no jurisdiction to render personal money judgment against trustee]; *Estate of McLennan* (1938) 29 C.A.2d 666, 85 P.2d 499 [jurisdiction concurrent with general equity power of superior court]; *Estate of Henshaw* (1945) 68 C.A.2d 627, 634, 157 P.2d 390 [jurisdiction to determine claim of beneficiary's assignee on termination]; *Wells Fargo Bank v. Superior Court* (1948) 32 C.2d 1, 8, 193 P.2d 721 [no jurisdiction over testamentary addition to inter vivos charitable trust]; *Copley v. Copley* (1978) 80 C.A.3d 97, 109, 145 C.R. 437 [in testamentary trust proceedings, superior court exercises limited probate jurisdiction, not general jurisdiction].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Exception: General Jurisdiction Within Its Sphere*.

Estate of Kay:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §292.



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A. The Probate Court.

3. Current Law: General Jurisdiction.

14 Witkin Sum. Cal. Law Wills § 348

[§ 348] Current Law: General Jurisdiction.

(1) *Recommendation.* The California Law Revision Commission recommended abandonment of the former rule that the superior court sitting in probate was a court of limited jurisdiction (see *supra*, §347). (See Law Rev. Com. Comment to *Prob.C. 7050*: "[W]hile preserving the division of business among different departments of the superior court, this section rejects the limitation on the powers of the probate court that has been cited in appellate decisions.")

(2) *Statutory Basis for General Jurisdiction.* The court in proceedings under the Probate Code is a court of general jurisdiction. The court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including matters authorized by *C.C.P. 128* (statutory powers of courts; see 2 *Cal. Proc.* (4th), *Courts*, §179). (*Prob.C. 800.*) A similar provision applies to proceedings under the Trust Law. (See *Prob.C. 17001*, 13 *Summary* (10th), *Trusts*, §220 et seq.)

In *Conservatorship of O'Connor* (1996) 48 *C.A.4th* 1076, 56 *C.R.2d* 386, shortly after a conservatee died, his conservator also died, and a successor conservator was appointed to settle the accounts of the conservatorship. The probate court failed to use the appropriate statutory procedure concerning notice of the petition for appointment and the issuance of the bond. In this proceeding to impose liability on the bond surety for embezzlement by the successor conservator, the trial judge, characterizing the probate court as a court of limited jurisdiction, held that the court lacked jurisdiction to appoint the successor and that the order of appointment was void. *Held*, reversed. The probate court is a court of general jurisdiction, and neither the death of the conservatee nor the failure of the court to comply with the statutory appointment procedure deprived the court of jurisdiction. (48 *C.A.4th* 1090, citing the text.) While the appointment may have been in excess of the court's jurisdiction, it was merely voidable, not void. (48 *C.A.4th* 1092.) (For discussion of attack on action in excess of court's jurisdiction, see 2 *Cal. Proc.* (4th), *Jurisdiction*, §323 et seq.)

(3) *Continuing Jurisdiction.* The probate court has continuing jurisdiction to determine questions involving the administration of estates, in order to prevent fraud and waste, and to enforce the terms of settlement agreements. (*Estate of Beard* (1999) 71 *C.A.4th* 753, 772, 84 *C.R.2d* 276 [orders obtained by extrinsic fraud and mistake were not entitled to conclusive effect].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Basis for General Jurisdiction.* See *Ferraro v. Camarlinghi* (2008) 161 *C.A.4th* 509, 546, 75 *C.R.3d* 19

[probate court's power over administration of decedent's estate is exercised by approving acts of personal representative vested with authority to act on behalf of estate; nothing in Probate Code authorizes court to extinguish claim of one claimant on mere stipulation of other claimants interested in estate]. *Statutory powers of courts:*

Cross-Reference: 2 Cal. Proc. (5th), Courts, §175.

Action in excess of court's jurisdiction:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §332 et seq.



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Witkin Summary of California Law IX. PROCEEDINGS UNDER THE PROBATE CODE A. The Probate Court.

4. Power To Restrict Public Access to Records.

14 Witkin Sum. Cal. Law Wills § 349

[§ 349] Power To Restrict Public Access to Records.

In *Estate of Hearst* (1977) 67 C.A.3d 777, 136 C.R. 821, trustees under the will of William Randolph Hearst sought orders from the probate court sealing the probate files. Their petition alleged that members of the Hearst family, including minors and others who had changed their surnames by marriage, would be in grave danger if their identities and the location of their homes and properties were discovered through the periodic accountings. Supporting evidence consisted of newspaper accounts of bombings, threats to the life of family members, and events related to the kidnaping of Patricia Hearst in 1976, suggesting that the family had become a target for lawless radical organizations. The petition was opposed by two members of the press who contended that to prevent reporters from viewing these public records would violate their First Amendment right to gather and publish information in the public domain. The trial court denied the petition on the ground that it had no statutory or inherent authority to prohibit public access to probate files. *Held*, on certiorari, order annulled.

(a) *Court records as public records.* Although the California Public Records Act (Govt.C. 6250 et seq.; see 2 Cal. Evidence (4th), Witnesses, §278 et seq.) does not apply to court records (Govt.C. 6252), these records are public records, available to the public, unless a specific exception makes them nonpublic. (67 C.A.3d 782, and footnote 2.)

(b) *Power to limit public inspection.* Govt.C. 6254 provides statutory exceptions. There are judicially created exceptions as well, generally temporary in nature; e.g., temporary sealing of a grand jury transcript during a criminal trial to protect a defendant's right to a fair trial free from adverse advance publicity. (67 C.A.3d 783, citing *Rosato v. Superior Court* (1975) 51 C.A.3d 190, 124 C.R. 427.) "Clearly, a court has inherent power to control its own records to protect rights of litigants before it, but 'where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed.'" (67 C.A.3d 783.)

(c) *Gag orders distinguished.* Orders preventing publication of truthful news media presentations of trial proceedings (see *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683, 7 Summary (10th), *Constitutional Law*, §415; *Sun Co. of San Bernardino v. Superior Court* (1973) 29 C.A.3d 815, 105 C.R. 873, 7 Summary (10th), *Constitutional Law*, §415) are not involved here. The petition did not seek a direct restraint on newsmen or publication of information, but only sealing records under the circumstances of the case. (67 C.A.3d 783.)

(d) *Reasons for allowing full inspection.* Two considerations are opposed to sealing:

(1) "[W]hen individuals employ the public powers of state courts to accomplish private ends, such as the establishment and supervision of long-term testamentary trusts, they do so in full knowledge of the possibly disadvantageous circumstance that the documents and records filed in the trust will be open to public inspection. To some extent they can protect against the disadvantage of publicity by arranging for the service of papers on individual beneficiaries through their attorneys or through post-office-box addresses. Alternatively, they can eschew court-regulated devices for transmission of inherited wealth and rely on private arrangements such as *inter vivos* gifts, joint tenancies, and so-called 'living' or grantor trusts. But when the parties perceive advantages in obtaining continuing court supervision over their affairs, thereby projecting their wishes beyond the span of their individual lives and securing court protection for the beneficiaries of their testamentary plans, in a sense they take the good with the bad, knowing that with public protection comes public knowledge of the activities, assets, and beneficiaries of the trust." (67 C.A.3d 783.)

(2) "[T]he public has a legitimate interest in access to public records, such as court documents, which establish and perpetuate long-term testamentary trusts. If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals. ... Absent strong countervailing reasons, the public has a legitimate interest and right of general access to court records, one of special importance when probate involves a large estate with on-going long-term trusts which reputedly administer and control a major publishing empire." (67 C.A.3d 784.)

(e) *Justification for limited and temporary sealing.* "If indeed it were established that beneficiaries of the Hearst trusts would be placed in serious danger of loss of life or property as a consequence of general public access to the Hearst probate files, then the court would have the power to protect the beneficiaries' interests by temporarily denying public access to those files, in that protection of beneficiaries is one of the justifications for court jurisdiction over a testamentary trust." (67 C.A.3d 784.) "A sensible solution might temporarily seal portions of the Hearst files containing such material as current names and addresses of little-known beneficiaries and the location of tangible trust properties vulnerable to attack. Such material should be withheld from public access only on a temporary basis, with the continuing burden resting on Trustees to periodically show that the Hearst family continued under clear and present danger of attack. Alternatively, the court, after reconsidering its decision in light of the principles herein expressed, may choose not to deny access to any portion of the files, in the belief that normal access to the files will not seriously endanger the lives or property of trust beneficiaries." (67 C.A.3d 785.)

(f) *First Amendment rights not involved.* The issue involves the right of public access to public court records, and members of the press have no greater rights or privileges than members of the general public. "The key factor here is the public nature of records, not freedom of the press, and not prior restraint of the press." (67 C.A.3d 786.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law IX. PROCEEDINGS UNDER THE PROBATE CODE A. The Probate Court. 5. Disqualification of Judge.

14 Witkin Sum. Cal. Law Wills § 350

[§ 350] Disqualification of Judge.

(1) *Grounds.* A judge is disqualified to act in proceedings under the Probate Code concerning the administration of a decedent's estate on any of the following grounds:

(a) The judge is interested as a beneficiary or creditor or is otherwise interested. (*Prob.C. 7060(a)(1), (a)(3).*)

(b) The judge is named as executor or trustee in the will. (*Prob.C. 7060(a)(2).*)

(c) Any other ground provided by law for disqualification of a judge. (*Prob.C. 7060(a).*) (On disqualification generally, see *C.C.P. 170* et seq.; 2 *Cal. Proc. (4th), Courts*, §100 et seq.)

"A judge who participates in any manner in the drafting or execution of a will, including acting as a witness to the will, is disqualified from acting in any proceeding prior to and including the admission of the will to probate or in any proceeding involving its validity or interpretation." (*Prob.C. 7060(b).*)

(2) *Transfer of Proceeding to Another County.* If there is no qualified judge of the court in which a proceeding under the Probate Code concerning the administration of the decedent's estate is pending, the court or judge must order the proceeding transferred to another county, unless a qualified judge is assigned by the Chair of the Judicial Council to hear the proceeding. (*Prob.C. 7070.*) A disqualified judge retains the authority to transfer. (*Prob.C. 7060(a).*) The proceeding is transferred to another county in which property of the decedent is located or, if there is no such county, to an adjoining county. (*Prob.C. 7071.*)

(3) *Return to Original Court.* On petition of the personal representative or another interested person before entry of the order for final distribution of the estate, a proceeding may be retransferred to the original court if (a) another person who is not disqualified has become a judge of the original court, and (b) retransfer would promote the convenience of interested parties. (*Prob.C. 7072.*)

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(1) *Grounds.*

Disqualification procedure:

Cross-Reference: 2 Cal. Proc. (5th), Courts, §101 et seq.



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B. Probate Jurisdiction.

1. Jurisdiction Over Decedents' Estates.

a. Death.

14 Witkin Sum. Cal. Law Wills § 351

[§ 351] Death.

Death is the essential jurisdictional requisite in a proceeding for the administration of the estate of a decedent. The court's power extends only to the property of deceased persons, and an attempt to take and distribute the property of a living person is a violation of due process. Hence, an erroneous finding as to a person's death can always be attacked, and a decree of distribution based on it is void and subject to annulment. (*Stevenson v. Superior Court* (1882) 62 C. 60, 62; *Scott v. McNeal* (1894) 154 U.S. 34, 14 S.Ct. 1108, 38 L.Ed. 896; *Prob.C. 8007(b)(2)* [final order admitting will to probate or appointing personal representative is conclusive determination of jurisdiction except where order "is based on the erroneous determination of the decedent's death"].) (On hearsay evidence of death, see 1 *Cal. Evidence* (4th), *Hearsay*, §277; on presumption of death from absence, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §92; on jurisdiction to distribute estate of missing person presumed dead, see *infra*, §366.)

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1. Jurisdiction Over Decedents' Estates.

b. Property To Be Administered.

14 Witkin Sum. Cal. Law Wills § 352

[§ 352] Property To Be Administered.

A probate proceeding is concerned with the administration of an estate, and, if there is no property, there is nothing to administer. Consequently property to be administered is said to be "jurisdictional." (See *Estate of Daughaday* (1914) 168 C. 63, 71, 141 P. 929 [wholly unsubstantial claim is not property]; *Rest.3d, Property (Wills and Other Donative Transfers) §1.1* [probate estate].) The property may consist of an *intangible*, such as a debt, or a cause of action for wrongful death of the decedent, where an administrator must be appointed to sue. (*Estate of Waits* (1944) 23 C.2d 676, 680, 146 P.2d 5; see 13 *Stanf. L. Rev.* 744 [*Waits*].) A prima facie showing of assets is enough. (*Estate of Helm* (1935) 6 C.A.2d 752, 755, 45 P.2d 250.) (On situs of assets as basis for administration, see *supra*, §59.)

In *Hecht v. Superior Court* (1993) 16 C.A.4th 836, 20 C.R.2d 275, 10 *Summary* (10th), *Parent and Child*, §45, a dispute over the disposition of a decedent's cryogenically frozen sperm, the court held that, at the time of death, decedent had an ownership interest in his sperm (to the extent he had decisionmaking authority about the use of the sperm for reproduction), and that that interest was sufficient to constitute property within the meaning of *Prob.C.* 62 (*supra*, §50). Thus, the probate court had jurisdiction over the disposition of the sperm. (16 C.A.4th 850; see 46 *Hastings L. J.* 875 [*Hecht*].)

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1. Jurisdiction Over Decedents' Estates.

c. Venue.

14 Witkin Sum. Cal. Law Wills § 353

[§ 353] Venue.

(1) *Domiciliary Decedent*. If the decedent was domiciled in California at the time of death, the proper county for proceedings concerning administration of the decedent's estate is the county in which the decedent was domiciled, regardless of where the decedent died. (*Prob.C. 7051*; see C.E.B., 1 Decedent Estate Practice, §6.6; *31 Am.Jur.2d* (2002 ed.), *Executors and Administrators* §99 et seq.)

(2) *Nondomiciliary Decedent*. If the decedent was not domiciled in California at the time of death, the proper county for proceedings concerning the administration of the decedent's estate is one of the following:

(a) "If property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died, the county in which the nondomiciliary decedent died." (*Prob.C. 7052(a)*.)

(b) "If no property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died or if the nondomiciliary decedent did not die in this state, any county in which property of the nondomiciliary decedent is located, regardless of where the nondomiciliary decedent died. If property of the nondomiciliary decedent is located in more than one county, the proper county is the county in which a petition for ancillary administration is first filed, and the court in that county has jurisdiction of the administration of the estate." (*Prob.C. 7052(b)*.)

If a nondomiciliary decedent leaves property in California, the court is not limited to ancillary administration (see *Prob.C. 12511* et seq., supra, §66), but may grant original probate of the will for the purpose of distributing that property, even though the will has not been probated in the decedent's domicile. (*Estate of Estrem* (1940) 16 C.2d 563, 566, 107 P.2d 36; see supra, §61.) (See C.E.B., 1 Decedent Estate Practice, §6.7.) (On statutes governing nondomiciliary decedents, see *Prob.C. 12500* et seq., supra, §65 et seq.)

(3) *Determination of Jurisdictional Facts*. Except as to the basic element of death (supra, §351), the court in which the proceeding is commenced may determine the jurisdictional facts. In the absence of extrinsic fraud in the procurement of the order, a final order admitting a will to probate or appointing a personal representative "is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked." (*Prob.C. 8007*.) (See *Estate of Sankey* (1926) 199 C. 391, 399, 249 P. 517; *Estate of Estrem*, supra, 16 C.2d 570 [determination that property

was left in county cannot be collaterally attacked]; *Estate of Robinson* (1942) 19 C.2d 534, 539, 121 P.2d 734 [issuance of letters is binding where all parties have notice and opportunity to appear even though it may later appear that no property was left in county or that probate proceeding is pending out of state]; *Holabird v. Superior Court* (1929) 101 C.A. 49, 281 P. 108 [erroneous determination of residence cannot be collaterally attacked]; *Jordan v. Clausen* (1936) 13 C.A.2d 16, 19, 56 P.2d 240 [first court to grant letters acquires jurisdiction, and later proceedings in another county are void]; 2 Cal. Proc. (4th), *Jurisdiction*, §330.)

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(3) *Determination of Jurisdictional Facts*.

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §339 et seq.



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2. Controversies Involving Title to Property.

a. Former Law: No Jurisdiction.

14 Witkin Sum. Cal. Law Wills § 354

[§ 354] Former Law: No Jurisdiction.

(1) *General Rule.* It was formerly the settled rule, with narrow exceptions, that the probate court had no jurisdiction to determine controversies between the representative of the estate and a third person who was "not in privity to the proceedings," e.g., a stranger who claimed title to the property. Even the decedent's child or surviving spouse could be deemed a stranger to the probate proceedings. (See *Estate of Inghilleri* (1938) 27 C.A.2d 664, 666, 81 P.2d 568; *Estate of Abdallah* (1947) 80 C.A.2d 634, 636, 182 P.2d 596 [person claiming property as surviving partner]; *Estate of Cropper* (1947) 83 C.A.2d 105, 107, 187 P.2d 780 [stranger claimed that decedent made agreement to leave will in his favor, and instead left property to others]; *Estate of Dalton* (1948) 87 C.A.2d 333, 335, 197 P.2d 62 [court set aside probate homestead for decedent's husband; decedent's son objected that decedent had conveyed the property to him before her death]; *Teeple v. Stanley* (1949) 93 C.A.2d 581, 583, 209 P.2d 628; *Estate of Kurt* (1948) 83 C.A.2d 681, 684, 189 P.2d 528; *Estate of Dabney* (1951) 37 C.2d 672, 676, 234 P.2d 962; *Merola v. Superior Court* (1954) 125 C.A.2d 1, 4, 269 P.2d 664 [surviving wife claiming some property as her separate property and other property as surviving joint tenant]; *Estate of Hart* (1959) 51 C.2d 819, 823, 337 P.2d 73 [wife died, then husband; husband's administrator claimed property in wife's estate as his separate property or as community property vesting in him]; *Central Bank v. Superior Court* (1955) 45 C.2d 10, 14, 285 P.2d 906 [same rule applied to guardianship proceeding]; *Estate of Schechtman* (1955) 45 C.2d 50, 53, 286 P.2d 345; *Estate of Stone* (1959) 170 C.A.2d 533, 535, 339 P.2d 220; *Estate of Boyd* (1963) 212 C.A.2d 634, 636, 28 C.R. 258; *Estate of Hagberg* (1969) 276 C.A.2d 622, 626, 81 C.R. 107.)

(2) *Exceptions.* Several exceptions to the *no jurisdiction rule* were recognized:

(a) *Dispute Between Representative and Estate.* (See *Estate of Roach* (1929) 208 C. 394, 396, 281 P. 607; *Estate of Helm* (1935) 6 C.A.2d 752, 754, 45 P.2d 250; *Bauer v. Bauer* (1927) 201 C. 267, 271, 256 P. 820 [representative claimed property by transfer from testator prior to death]; *Estate of Conkey* (1939) 35 C.A.2d 581, 586, 96 P.2d 383 [property claimed by California executor was distributed by court of another state]; *Estate of Howe* (1948) 31 C.2d 395, 397, 189 P.2d 5; *Schlyen v. Schlyen* (1954) 43 C.2d 361, 373, 273 P.2d 897; *Central Bank v. Superior Court* (1955) 45 C.2d 10, 15, 285 P.2d 906; *Waterland v. Superior Court* (1940) 15 C.2d 34, 38, 98 P.2d 211, 224; *Estate of Auslender* (1960) 53 C.2d 615, 624, 2 C.R. 769, 349 P.2d 537; *Estate of Pieper* (1964) 224 C.A.2d 670, 681, 37 C.R. 46; *Rupp v. Kahn* (1966) 246 C.A.2d 188, 193, 55 C.R. 108, citing the text.)

(b) *Property Acquired in Course of Probate Proceeding.* (See *Estate of De Barry* (1941) 43 C.A.2d 715, 726, 111 P.2d 728 [representative's attorney withheld assets of estate]; *Schechter v. Superior Court* (1957) 49 C.2d 3, 8, 314 P.2d 10 [guardianship proceeding].)

(c) *Determination of Additional Claims.* (See *Estate of Baglione* (1966) 65 C.2d 192, 196, 53 C.R. 139, 417 P.2d 683 [additional claims asserted against those in privity with estate in same property]; *Estate of Plum* (1967) 255 C.A.2d 357, 362, 63 C.R. 241; *Estate of Casella* (1967) 256 C.A.2d 312, 320, 64 C.R. 259; *Estate of Fincher* (1981) 119 C.A.3d 343, 349, 174 C.R. 18.)

(d) *Decedent Bound by Specifically Enforceable Contract.* (See *Estate of Bailey* (1941) 42 C.A.2d 509, 109 P.2d 356.)

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b. Rule Abrogated.

14 Witkin Sum. Cal. Law Wills § 355

[§ 355] Rule Abrogated.

(1) *1972 Statute.* The former limitation on probate court jurisdiction with its judicially created exceptions (supra, §354) was abrogated in 1972 by the amendment of former Prob.C. 851.5 to extend jurisdiction to situations in which the decedent had (a) title or possession of property claimed by another, or (b) a claim to property with title or possession held by another. (See *Estate of Howard* (1976) 58 C.A.3d 250, 261, 129 C.R. 836, citing the text; *Richer v. Superior Court* (1976) 63 C.A.3d 748, 756, 134 C.R. 52, citing the text; *Heiser v. Superior Court* (1979) 88 C.A.3d 276, 278, 151 C.R. 745; *Dixon v. Superior Court* (1987) 195 C.A.3d 758, 764, 240 C.R. 897 [probate court had jurisdiction to determine rival claims to deceased criminal defendant's restitution payments held by county treasurer]; *Estate of Blair* (1988) 199 C.A.3d 161, 166, 244 C.R. 627 [probate court had jurisdiction to determine executor's claim to proceeds of sale of property allegedly held by decedent and surviving spouse as community property]; *Estate of Baumann* (1988) 201 C.A.3d 927, 933, 247 C.R. 532 [probate court had jurisdiction to determine creditor's claim that property was fraudulently excluded from decedent's estate].) Former Prob.C. 851.5 did not extend jurisdiction to actions in which the claimant did not seek a declaration of title, ownership, or possession of property. (See *Estate of Sayles* (1982) 130 C.A.3d 275, 279, 280, 181 C.R. 543 [interest of beneficiary of deed of trust given to secure promissory note was too remote; on foreclosure, beneficiary would receive cash, not property itself]; *Estate of Linnick* (1985) 171 C.A.3d 752, 762, 217 C.R. 552 [claim of deceased attorney's estate to fee under incomplete contingent fee contract]; *Estate of Scott* (1987) 197 C.A.3d 913, 919, 243 C.R. 93 [title to surviving spouse's share of community property transferred by decedent to third person; title to decedent's property was not in issue].)

(2) *1987 Statute.* In 1987, former Prob.C. 851.5 was replaced by former Prob.C. 9860 et seq., which extended jurisdiction to the enforcement of binding written contracts to convey real property or transfer personal property made during the decedent's lifetime.

(3) *2001 Statute.* In 2001, separate statutory procedures for determining the ownership of property under the Probate Code were revised and consolidated in Prob.C. 850 et seq. The existing provisions applicable to estates (former Prob.C. 9860 et seq.), guardianships and conservatorships (former Prob.C. 2520 et seq.), and trusts (former Prob.C. 17200.1) were repealed. (See *infra*, §356 et seq.)

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[§ 356] Petition.

SUPPLEMENT: [This section is current through the latest supplement]

(New) Filing fee: The filing fee for a petition, application, or opposition to an order adjudicating the merits of a claim under *Prob.C. 850* et seq. is \$ 180. (*Govt.C. 70658(a)(9)*), added in 2007.)(2) *Estates.* See *Estate of Myers (2006) 139 C.A.4th 434, 440, 42 C.R.3d 753* [creditor of estate could petition under *Prob.C. 850* to recover profits from sale of property that had been fraudulently conveyed by decedent; creditor is "interested person" under *Prob.C. 48* (text, §49), *Prob.C. 850* does not require creditor to have ownership interest in disputed property, and creditor's right to require executor to pursue claim under *Prob.C. 9653* (text, §478) is not exclusive remedy].



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[§ 356] Petition.

Prob.C. 850 authorizes a petition to determine claims to property under the Probate Code, which must set forth the facts on which the claim is based. (*Prob.C. 850(b)*.) (On conveyance of real property, see Cal. Civil Practice, 2 Probate and Trust Proceedings, §14:41 [petition]; on delivery of personal property, see Cal. Civil Practice, 2 Probate and Trust Proceedings, §14:44 [petition]; Rutter Group, Cal. Practice Guide: Probate §15:338 et seq., Forms 15:F, 15:G.) Petitions are authorized in the following circumstances:

(1) *Guardianships and conservatorships*. A guardian, conservator, or "any claimant" may petition in the following cases:

(a) Where a conservatee is bound by a written contract to convey real property or transfer personal property, executed by the conservatee while competent or by the conservatee's predecessor in interest, and the contract is one that can be specifically enforced. (*Prob.C. 850(a)(1)(A)*.)

(b) Where a minor has succeeded to the interest of a person bound by a written contract to convey real property or transfer personal property and the contract is one that can be specifically enforced. (*Prob.C. 850(a)(1)(B)*.)

(c) Where a guardian, minor, conservator, or conservatee is in possession or holds title to property and the property or an interest in it is claimed to belong to another. (*Prob.C. 850(a)(1)(C)*.)

(d) Where a minor or conservatee has a claim to property and the title or possession is held by another. (*Prob.C. 850(a)(1)(D)*.)

(2) *Estates*. A personal representative or "any interested person" may petition in the following cases:

(a) Where the decedent while living was bound by a written contract to convey real property or transfer personal property and died before making the conveyance or transfer, and the decedent, if living, could have been compelled to make the conveyance or transfer. (*Prob.C. 850(a)(2)(A)*.)

(b) Where the decedent while living bound the decedent or the personal representative by a written contract to

convey real property or transfer personal property on or after death and the contract is one that can be specifically enforced. (*Prob.C. 850(a)(2)(B).*)

(c) Where the decedent died in possession or holding title to property and the property or an interest in it is claimed to belong to another. (*Prob.C. 850(a)(2)(C).*)

(d) Where the decedent died having a claim to property and the title or possession is held by another. (*Prob.C. 850(a)(2)(D).*)

(3) *Trusts.* A trustee or "any interested person" may petition in the following cases:

(a) Where the trustee is in possession or holds title to property and the property or an interest in it is claimed to belong to another. (*Prob.C. 850(a)(3)(A).*)

(b) Where the trustee has a claim to property and the title or possession is held by another. (*Prob.C. 850(a)(3)(B).*)

(c) Where property of the trust is claimed to be subject to a creditor of the settlor. (*Prob.C. 850(a)(3)(C).*)

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Filing fee:* The fee for filing a petition, application, or opposition concerning an order adjudicating the merits of a claim under *Prob.C. 850* et seq. is \$ 350. (*Govt.C. 70658(a)(9)*, added in 2007 and amended in 2008.)(2) *Estates.* See *Estate of Myers (2006) 139 C.A.4th 434, 440, 42 C.R.3d 753* [creditor of estate could petition under *Prob.C. 850* to recover profits from sale of property that had been fraudulently conveyed by decedent; creditor is "interested person" under *Prob.C. 48* (text, §49), *Prob.C. 850* does not require creditor to have ownership interest in disputed property, and creditor's right to require executor to pursue claim under *Prob.C. 9653* (text, §478) is not exclusive remedy].

(3) *Trusts.* See *Mota v. Superior Court (2007) 156 C.A.4th 351, 356, 67 C.R.3d 303* [beneficiary who filed objection to trustee's distribution petition, contending that shares to be paid to beneficiaries who stole trust assets should be reduced, did not seek a transfer of property and was not required to file *Prob.C. 850* petition].



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d. Notice.

14 Witkin Sum. Cal. Law Wills § 357

[§ 357] Notice.

(1) *General Service.* The petitioner must serve notice of the hearing on the petition and a copy of the petition as provided in *C.C.P. 413.10* et seq. (see 3 *Cal. Proc. (4th), Actions*, §919 et seq.) on the personal representative, conservator, guardian, or trustee "as appropriate" and on each person claiming an interest in the property or having title or possession. (*Prob.C. 851(a).*)

(2) *Additional Service for Guardianships and Conservatorships.* If the matter concerns a conservatorship or guardianship, notice of the hearing and a copy of the petition must also be served as provided in *Prob.C. 1460* (see infra, §910 et seq.) on each person listed in *Prob.C. 1460*. (*Prob.C. 851(b)(2).*)

(3) *Additional Service for Estates.* If the matter concerns a decedent's estate, notice of the hearing and a copy of the petition must also be served as provided in *Prob.C. 1220* (mailed notice; infra, §391) on each person listed in *Prob.C. 1220* along with any heir or devisee whose interest in the property might be affected by the petition. (*Prob.C. 851(b)(1).*)

(4) *Additional Service for Trusts.* If the matter concerns a trust, notice of the hearing and a copy of the petition must also be served as provided in *Prob.C. 17203* (see 13 *Summary (10th), Trusts*, §231) on each person listed in *Prob.C. 17203*. (*Prob.C. 851(b)(3).*)

(5) *Time for Service.* Notice must be served at least 30 days before the day of the hearing (*Prob.C. 851(a)*) and the time may not be shortened by the court (*Prob.C. 851(c)*).

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Service.*

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §1001 et seq.



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14 Witkin Sum. Cal. Law Wills § 358

[§ 358] Conduct of Proceeding.

(1) *Continuance*. An interested person may request time for filing a response to the petition, for discovery, or for other preparation for the hearing, and the court must grant a continuance for a "reasonable time" for any of these purposes. (*Prob.C. 852.*)

(2) *Objection to Venue*. A person having or claiming title to the property or an interest in it may object at or before the hearing if the petition is filed in a court that is not the proper court "under any other provision of law for the trial of a civil action seeking the same relief." If the objection is established, the court may not grant the petition. (*Prob.C. 853.*)

(3) *Abatement If Civil Action Is Pending*. If a civil action involving the same subject matter is pending and the court in that action obtained jurisdiction before the petition was filed, the court must, on the request of any party in the civil action, abate the petition until the conclusion of the civil action, unless the court finds that the civil action was filed for the purpose of delay. (*Prob.C. 854.*) In addition, the court may not grant the petition if it determines that the matter should be determined in a civil action. (*Prob.C. 856.5.*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §14:43.)

(4) *Related Claims*. An action under *Prob.C. 850 et seq.* may include claims, causes of action, and matters normally raised in a civil action "to the extent that the matters are related factually to the subject matter" of the petition. (*Prob.C. 855.*)

(5) *Death of Conservatee or Minor*. Where a petition is pending on behalf of a conservatee or a minor and the conservatee or minor dies, the personal representative of the estate or "other successor in interest" may proceed, and the proceeding is not dismissed. (*Prob.C. 858.*)

(6) *Statute of Limitations*. A proceeding to determine title to property under the Probate Code is an "action" for purposes of statutes of limitation, which are applicable to probate proceedings under *Prob.C. 1000* (rules of practice in civil actions apply to Probate Code proceedings unless provided otherwise; see *infra*, §371). (*Parker v. Walker* (1992) 5 C.A.4th 1173, 1185, 6 C.R.2d 908 [former statute; proceeding to determine claim based on oral agreement was barred by 2-year period of C.C.P. 339(1)].)

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f. Order.

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[§ 359] Order.

(1) *Nature of Order.* If the court is satisfied that a conveyance, transfer, or other order should be made, the court will order the appropriate party to execute a conveyance or transfer to the person entitled to the property, or will order other appropriate relief. (*Prob.C. 856.*) (On conveyance of real property, see Cal. Civil Practice, 2 Probate and Trust Proceedings, §14:42 [order]; on delivery of personal property, see Cal. Civil Practice, 2 Probate and Trust Proceedings, §14:45 [order].) This requirement is subject to three statutory exceptions:

- (a) *Prob.C. 853* (objection to venue). (See *supra*, §358.)
- (b) *Prob.C. 854* (civil action pending). (See *supra*, §358.)
- (c) *Prob.C. 856.5* (matter should be determined in civil action). (See *supra*, §358.)

(2) *Effect of Order.* The order has the following effect:

(a) The order is prima facie evidence of the correctness of the proceedings and of the authority of the appropriate person to make the conveyance or transfer. (*Prob.C. 857(a).*) (On statement that instrument is executed pursuant to court order, see *Prob.C. 7261*, *infra*, §412; on effect of transaction executed by personal representative under order, see *Prob.C. 7262*, *infra*, §412; on duty of personal representative to record certified copy of order affecting title to real property in estate, see *Prob.C. 7263*, *infra*, §412.)

(b) After the entry of an order for a conveyance or transfer, the person entitled to the property under the order has the right to possession and the right to hold the property "according to the terms of the order as if the property had been conveyed or transferred in accordance with the terms of the order." (*Prob.C. 857(b).*)

(3) *Double Damages for Bad Faith Disposition of Property.* If the court finds that a person has, in bad faith, "wrongfully taken, concealed, or disposed of property" belonging to the estate of a decedent, minor, conservatee, or trust, that person is liable for twice the value of the property recovered in an action under *Prob.C. 850 et seq.* This remedy is in addition to any other available remedies. (*Prob.C. 859.*) (For cases under former statute applicable to estates of decedents, see *Hill v. Superior Court* (1940) 16 C.2d 527, 531, 106 P.2d 876; *Hochwender v. Carter* (1941)

45 C.A.2d 435, 437, 114 P.2d 401 [statute was not applicable to personal representative's surety]; *Estate of Harvey* (1964) 224 C.A.2d 555, 560, 36 C.R. 788 [double penalty liability applies to executor but not surety].)

(4) *Appeal*. An order adjudicating the merits of a claim under *Prob.C. 850* et seq. is appealable. (*Prob.C. 1300(k)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Double Damages for Bad Faith Disposition of Property*. See *Estate of Young* (2008) 160 C.A.4th 62, 92, 72 C.R.3d 520, citing the text [in action for recovery of real property and for double damages under *Prob.C. 859*, appropriate procedure was to determine title in liability phase and determine value in accounting phase of proceeding; because double damages are punitive in nature, statute should be read to allow separate proof and determination after title is established].



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a. In General.

14 Witkin Sum. Cal. Law Wills § 360

[§ 360] In General.

(1) *Authority To Designate Trustee.* A person entitled to designate the beneficiary, payee, or owner of benefits in an instrument making a nonprobate transfer may designate a trustee named or to be named in that person's will. (*Prob.C. 6321.*)

(2) *Instrument.* For this purpose, "instrument" means any of the following:

(a) An insurance, annuity, or endowment contract (including underlying and supplemental agreements). (*Prob.C. 6320(b)(1).*)

(b) A pension, retirement benefit, death benefit, stock bonus, profit-sharing or employees' saving plan, employee benefit plan, or contract created or entered into by an employer for the benefit of employees. (*Prob.C. 6320(b)(2).*) For this purpose, "employee benefit plan" includes both employee welfare benefit plans and employee pension benefit plans. (Law Rev. Com. Comment.)

(c) A self-employed retirement plan or individual retirement annuity or account, established or held under the Internal Revenue Code. (*Prob.C. 6320(b)(3).*)

(d) A multiple-party account defined in *Prob.C. 5132* (see 4 *Summary* (10th), *Negotiable Instruments*, §78). (*Prob.C. 6320(b)(4).*)

(e) Any other written instrument of a type described in *Prob.C. 5000* (nonprobate transfers; see *supra*, §306). (*Prob.C. 6320(b)(5).*)

(3) *No Effect on Other Trusts.* The enactment of *Prob.C. 6320* et seq. does not invalidate otherwise validly created trusts. (*Prob.C. 6329.*)

(4) *Continuation of Former Law.* *Prob.C. 6320* et seq. are to be construed as a "restatement and continuation" of former *Prob.C. 175* et seq. (*Prob.C. 6330.*)

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b. Designation of Trustee.

14 Witkin Sum. Cal. Law Wills § 361

[§ 361] Designation of Trustee.

(1) *Manner of Designation.* "The designation shall be made in accordance with the provisions of the contract or plan 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, 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." (*Prob.C. 6321.*) (See *Prob.C. 6320(a)* ["designation" means designation under *Prob.C. 6321*].)

(2) *Designation Must Create Trust or Make Valid Disposition.* A designation is not effective unless the designator's will creates the trust or makes a valid disposition under *Prob.C. 6300* (testamentary addition to existing trust; see *supra*, §170). (*Prob.C. 6322.*)

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- c. Payment or Transfer to Trustee or Representative.

14 Witkin Sum. Cal. Law Wills § 362

[§ 362] Payment or Transfer to Trustee or Representative.

(1) *Payment or Transfer Without Administration.* Subject to the judicial powers set forth in *Prob.C.* 6325 (infra, §363), "the benefits or rights resulting from the designation are payable or transferable directly to the trustee, without becoming subject to administration, upon and at any time after admission of the designator's will to probate." (*Prob.C.* 6323.)

The designation does not have the effect of creating an inter vivos trust. When paid to the trustee, rights and benefits and their proceeds become part of the designator's testamentary trust or an existing trust to which the designator makes testamentary additions. (*Prob.C.* 6323.)

(2) *Liability for Debts.* "Except as otherwise provided in the designator's will, the rights and benefits and their proceeds paid or transferred to the trustee are not subject to the debts of the designator to any greater extent than if they were paid or transferred to a named beneficiary, payee, or owner other than the estate of the designator." (*Prob.C.* 6324.)

(3) *Where No Trustee Qualifies.* Unless the designator has provided otherwise, the obligor may pay or transfer benefits or rights or their proceeds to the designator's personal representative or "to those thereafter entitled" (a) if no qualified trustee makes a claim within 1 year of the designator's death, or (b) there is satisfactory evidence within that period that no trustee can qualify. (*Prob.C.* 6328.)

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d. Authority of Court.

14 Witkin Sum. Cal. Law Wills § 363

[§ 363] Authority of Court.

The court in which proceedings for administration of the decedent's estate are pending has jurisdiction, before or after payment or transfer to the trustee, to do the following:

- (1) Determine the validity and terms of the trust. (*Prob.C. 6325(a)(1), (a)(2).*)
- (2) Fill vacancies in the office of trustee. (*Prob.C. 6325(a)(3).*)
- (3) Require the trustee to post a bond, subject to *Fin.C. 1540* et seq. and *Prob.C. 15602* (trustee's bond; see 13 *Summary* (10th), *Trusts*, §48). (*Prob.C. 6325(a)(4).*)
- (4) Grant additional powers to the trustee, as provided in *Prob.C. 16201* (authority to relieve trustee from restrictions in trust instrument; see 13 *Summary* (10th), *Trusts*, §§93, 94). (*Prob.C. 6325(a)(5).*)
- (5) Instruct the trustee. (*Prob.C. 6325(a)(6).*)
- (6) Determine payment of the trustee's compensation under *Prob.C. 15680* et seq. (see 13 *Summary* (10th), *Trusts*, §55 et seq.). (*Prob.C. 6325(a)(7).*)
- (7) Hear and determine adverse claims to the trust property by the personal representative, surviving spouse, or other third person. (*Prob.C. 6325(a)(8).*)
- (8) "Determine the identity of the trustee and the trustee's acceptance or rejection of the office and, upon request, furnish evidence of trusteeship to a trustee." (*Prob.C. 6325(a)(9).*)
- (9) "Order postponement of the payment or transfer of the benefits and rights or their proceeds." (*Prob.C. 6325(a)(10).*)
- (10) Authorize removal of the trust or trust property to another jurisdiction under *Prob.C. 17400* et seq. (see 13 *Summary* (10th), *Trusts*, §239 et seq.). (*Prob.C. 6325(a)(11).*)

(11) Make an order "incident to the foregoing" or to accomplish the purposes of *Prob.C. 6320* et seq. (*Prob.C. 6325(a)(12)*.)

The Trust Law (*Prob.C. 15000* et seq.; see 13 *Summary* (10th), *Trusts*, §18 et seq.) applies to matters not specifically provided in *Prob.C. 6325*. (*Prob.C. 6326*.)

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e. Procedure.

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[§ 364] Procedure.

(1) *Petition.* The designator's personal representative, a trustee or successor named in the will or designation, or any person interested in the estate or trust may petition the court for an order under *Prob.C. 6325*. (*Prob.C. 6325(b).*)

(2) *Notice.* Except as the court may otherwise order, notice of the hearing on the petition is given in the manner provided in *Prob.C. 17203* (see 13 *Summary* (10th), *Trusts*, §231). (*Prob.C. 6325(b).*)

(3) *Appealable Orders.* The following orders are appealable:

(a) An order pursuant to *Prob.C. 1300* et seq. (appealable orders in Probate Code proceedings; see *infra*, §401) made under *Prob.C. 6320* et seq. (*Prob.C. 6327(a).*)

(b) An order determining or refusing to determine the terms or validity of the trust or adverse claims to the trust property. (*Prob.C. 6327(b).*)

(c) An order pursuant to *Prob.C. 6326* (*supra*, §363), to the extent appealable under *Prob.C. 1304* (appealable orders in trust proceedings; see 13 *Summary* (10th), *Trusts*, §232). (*Prob.C. 6327(c).*)

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a. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 365

[§ 365] Statutory Development.

(1) *Original Statute.* The original statute concerning missing persons provided for two procedures:

(a) Appointment of a trustee to take charge of property of a person missing for at least 90 days. The trustee preserved and managed the property, reported to the court, and distributed principal and income as the court ordered. (Former Prob.C. 260 et seq.; see *Day v. Metropolitan Life Ins. Co.* (1936) 11 C.A.2d 681, 54 P.2d 502; *Estate of Lowe* (1937) 19 C.A.2d 271, 274, 65 P.2d 113 [missing person's residence in county is jurisdictional element; petitioner must be missing person's relative or friend].)

(b) Administration of the estate of a person missing for 7 years and presumed dead, with distribution delayed for 1 to 3 years to allow the missing person to make a claim. (Former Prob.C. 280 et seq.; see *Sevier v. Bank of America* (1950) 101 C.A.2d 184, 187, 225 P.2d 3 [statute constitutional].)

(2) *1983 Revision.* In 1982, the California Law Revision Commission proposed new legislation to protect the property and administer the estates of missing persons. (See Report and Recommendation Relating to Missing Persons, 16 Cal. Law Rev. Com. Reports, p. 105.) The Commission recommended (a) appointment of a conservator to manage the property of a missing person, and (b) a modernized procedure for probate of the estate of a missing person presumed dead, lowering the presumption from 7 to 5 years and making the normal provisions for administration of estates applicable once the 5-year period has run. The 1983 Legislature implemented the changes by replacing the original statutes with (a) Prob.C. 1845 et seq. (conservatorship where proposed conservatee is missing person; infra, §949), and (b) former Prob.C. 1350 et seq. (administration of estate of missing person presumed dead). (See 15 *Pacific L. J.* 456.)

(3) *1987 Revision.* In 1987, the California Law Revision Commission proposed changes in the procedure to make the statute consistent with the general provisions on administration of estates. (See Recommendation Relating to Administration of Estates of Missing Persons, 19 Cal. Law. Rev. Com. Reports, p. 637.) The 1987 Legislature followed the Commission's recommendation by enacting Prob.C. 12400 et seq., effective July 1, 1988.

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b. Nature of Proceeding.

14 Witkin Sum. Cal. Law Wills § 366

[§ 366] Nature of Proceeding.

(1) *"Missing Person" Defined.* Unless the provision or context requires otherwise, "missing person" for purposes of *Prob.C. 12400* et seq. means a person presumed to be dead under *Prob.C. 12401* (infra, §369). (*Prob.C. 12400.*)

(2) *Administration of Missing Person's Estate.* A personal representative appointed to administer the estate of a missing person (see *Prob.C. 12407(a)*, infra, §369) does so "in the same general manner and method of procedure, and with the same force and effect, as provided for the administration of the estates of deceased persons," except as otherwise provided by *Prob.C. 12400* et seq. (*Prob.C. 12407(b).*) (See *Prob.C. 12402* [subject to *Prob.C. 12400* et seq., estate of missing person is administered "in the manner provided generally for the administration of estates of deceased persons"].)

(3) *Jurisdiction of Court.* If the missing person was a resident when last seen or heard from, the superior court in the county of residence has jurisdiction. If the missing person was a nonresident, the superior court in the county where real property is located or, if there is no real property, where personal property is located, has jurisdiction. (*Prob.C. 12403.*)

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c. Petition.

14 Witkin Sum. Cal. Law Wills § 367

[§ 367] Petition.

(1) *Filing.* A petition for administration of the estate of a missing person may be filed in the court having jurisdiction under *Prob.C. 12403* (supra, §366). (*Prob.C. 12404(a).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §23:1 et seq.) The petition may be filed by any person who may be appointed as a personal representative (see infra, §433 et seq.) except a person described in *Prob.C. 8461(r)* ("any other person"). (*Prob.C. 12404(b).*)

(2) *Contents.* In addition to the matters otherwise required in a petition for administration of the estate, the petition must state the following:

(a) "The last known place of residence and the last known address of the missing person." (*Prob.C. 12404(c)(1).*)

(b) "The time and circumstances when the missing person was last seen or heard from." (*Prob.C. 12404(c)(2).*)

(c) "That the missing person has not been seen or heard from for a continuous period of five years by the persons likely to have seen or heard from the missing person (naming them and their relationship to the missing person) and that the whereabouts of the missing person is unknown to those persons and the petitioner." (*Prob.C. 12404(c)(3).*)

(d) "A description of the search or the inquiry made concerning the whereabouts of the missing person." (*Prob.C. 12404(c)(4).*)

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d. Notice and Hearing.

14 Witkin Sum. Cal. Law Wills § 368

[§ 368] Notice and Hearing.

(1) *Notice of Hearing.* Service, publication, and proof of notice of the hearing on the petition are the same as in a proceeding to administer the estate of a decedent (see *Prob.C. 1200* et seq., infra, §385 et seq.), except that notice must also be sent by registered mail to the missing person at his or her last known address. (*Prob.C. 12405.*)

(2) *Hearing.* At the hearing, the court determines whether the alleged missing person is a person presumed dead under *Prob.C. 12401* (infra, §369). "The court may receive evidence and consider the affidavits and depositions of persons likely to have seen or heard from or know the whereabouts of the alleged missing person." (*Prob.C. 12406(a).*)

(3) *Search and Inquiry.* "If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a diligent search or inquiry and to report the results." (*Prob.C. 12406(b).*) The order may include any or all of the following methods of inquiry:

(a) Publishing notice requesting information from any person having knowledge of the whereabouts of the missing person. (*Prob.C. 12406(b)(1).*)

(b) "Notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the missing person." (*Prob.C. 12406(b)(2).*)

(c) Hiring an investigator. (*Prob.C. 12406(b)(3).*)

The costs of the search are paid by the estate of the missing person, but if there is no administration, the court may order the petitioner to pay the costs. (*Prob.C. 12406(c).*)

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e. Presumption and Order.

14 Witkin Sum. Cal. Law Wills § 369

[§ 369] Presumption and Order.

(1) *Presumption of Death*. "[A] person who has not been seen or heard from for a continuous period of five years by those who are likely to have seen or heard from that person, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that the death occurred earlier." (*Prob.C. 12401*.) (See *Conservatorship of Geiger* (1992) 3 C.A.4th 127, 136, 4 C.R.2d 252 [convicted drug dealer could not be presumed dead under *Prob.C. 12401* where his absence was explainable, i.e., evidence suggested that he had staged his death to avoid 7-year prison term]; *In re Starr* (2002) 104 C.A.4th 487, 495, 128 C.R.2d 282 [illegal drug manufacturer facing federal prosecution could not be presumed dead under *Prob.C. 12401* where his absence was explainable, i.e., evidence suggested that he might have fled to avoid imprisonment]; *Unif.Prob.C.*, §1-207(3); *Ev.C. 667* (general presumption of death); 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §92.)

(2) *Finding and Order*. If the court determines that the alleged missing person is a person presumed dead under *Prob.C. 12401*, the court (a) determines the date of death, and (b) appoints a personal representative for the estate of the missing person "in the manner provided for the estates of deceased persons." (*Prob.C. 12407(a)*.) (See *Cal. Civil Practice*, 2 Probate and Trust Proceedings, §23:18.)

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f. Recovery of Property by Missing Person.

14 Witkin Sum. Cal. Law Wills § 370

[§ 370] Recovery of Property by Missing Person.

(1) *Missing Person's Right To Recover Property.* A missing person who returns has the following remedies:

(a) "The missing person may recover property of the missing person's estate in possession of the personal representative, less fees, costs, and expenses thus far incurred." (*Prob.C. 12408(a)(1)*, based on *Unif.Prob.C.*, §3-412.)

(b) "The missing person may recover from distributees any property of the missing person's estate that is in their possession, or the value of distributions received by them, to the extent that recovery from distributees is equitable in view of all the circumstances." However, an action under this provision is "forever barred" 5 years after the distribution. (*Prob.C. 12408(a)(2)*.)

These remedies are exclusive, except for those available by reason of fraud or intentional wrongdoing. (*Prob.C. 12408(b)*.)

(2) *Order for Final Distribution Is Ordinarily Conclusive.* Except as provided in *Prob.C. 12408(a)* and (b), "the order for final distribution, when it becomes final, is conclusive as to the rights of the missing person, the rights of the beneficiaries of the missing person, and the rights of all other persons interested in the estate." (*Prob.C. 12408(c)*.)

The Law Revision Commission Comment notes that *Prob.C. 12408(c)* permits a distributee to convey good title to property of the missing person before the time an action by the missing person against the distributee would be barred under *Prob.C. 12408(a)(2)*. Because *Prob.C. 12408(a)(2)* is limited to property or proceeds in the hands of the distributee, it does not permit an action against a third-party transferee. Where the distributee has encumbered the property, the lender is protected under *Prob.C. 12408(c)*, but if an action is not barred under *Prob.C. 12408(a)(2)*, the missing person might recover the property subject to the encumbrance.

(3) *Petition To Determine Identity.* In the event of a dispute about the identity of a person claiming to be a reappearing missing person, the claimant or any interested person may petition under *Prob.C. 11700* (*infra*, §720) for a determination of the claimant's identity. (*Prob.C. 12408(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. General Provisions.
a. General Rules of Practice.

Witkin Sum. Cal. Law Wills § 371

[§ 371] General Rules of Practice.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Probate Examiners and Probate Attorneys.* A "probate examiner" is a person employed by the court to review filings in designated proceedings under the Probate Code "to assist the court and the parties to get the filed matters ready for consideration by the court." (C.R.C., Rule 10.776(2), adopted in 2007.) A "probate attorney" is a member of the State Bar employed by the court to act as a probate examiner and to provide legal analysis and other services to the court in probate proceedings. (C.R.C., Rule 10.776(3), adopted in 2007.) (On qualifications of probate examiners and probate attorneys, see C.R.C., Rule 10.777, adopted in 2007; on continuing education requirements, see C.R.C., Rule 10.478, adopted in 2007.)



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a. General Rules of Practice.

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[§ 371] General Rules of Practice.

(1) *Law Revision Commission Report.* In 1987, the California Law Revision Commission redrafted and reorganized the existing general rules of procedure in the Probate Code (former Prob.C. 300 et seq. and former Prob.C. 1280 et seq.). *Prob.C. 1000* et seq., entitled General Rules of a Procedural Nature, apply to the entire Probate Code. (See 19 Cal. Law. Rev. Com. Reports, p. 917.) The following topics are covered:

- (a) Rules of practice. (*Prob.C. 1000* et seq., *infra*, §372 et seq.)
- (b) Petitions and other papers. (*Prob.C. 1020* et seq., *infra*, §§376, 377.)
- (c) Hearings and orders. (*Prob.C. 1040* et seq., *infra*, §§378, 379.)
- (d) Accounts. (*Prob.C. 1060* et seq., *infra*, §381 et seq.)
- (e) Notices and citations. (*Prob.C. 1200* et seq., *infra*, §385 et seq.)
- (f) Appeals. (*Prob.C. 1300* et seq., *infra*, §401 et seq.)

(2) *Rules in Civil Actions Apply.* Except to the extent the Probate Code provides applicable rules, the rules of practice applicable in civil actions, including discovery proceedings and vexatious litigant proceedings, apply to proceedings under the Code. Issues of fact in probate proceedings are tried "in conformity with the rules of practice in civil actions." (*Prob.C. 1000*.) (See *Coberly v. Superior Court* (1965) 231 C.A.2d 685, 690, 42 C.R. 64 [discovery act applies in probate proceedings]; *Estate of Beard* (1999) 71 C.A.4th 753, 777, 84 C.R.2d 276 [factual question was properly referred to referee, pursuant to C.C.P. 639].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Probate Examiners and Probate Attorneys.* A "probate examiner" is a person employed by the court to review filings in designated proceedings under the Probate Code "to assist the court and the parties to get the filed matters ready for consideration by the court." (C.R.C., Rule 10.776(2), adopted in 2007.) A "probate attorney" is a member of the State Bar employed by the court to act as a probate examiner and to provide legal analysis and other services to the

court in probate proceedings. (C.R.C., Rule 10.776(3), adopted in 2007.) (On qualifications of probate examiners and probate attorneys, see C.R.C., Rule 10.777, adopted in 2007; on continuing education requirements, see C.R.C., Rule 10.478, adopted in 2007.)



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b. Probate Rules.

Witkin Sum. Cal. Law Wills § 372

[§ 372] Probate Rules.

SUPPLEMENT: [This section is current through the latest supplement]

In 2006, C.R.C., Rules 7.1, 7.2, and 7.3 were renumbered C.R.C., Rules 7.2, 7.3, and 7.4, respectively.



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[§ 372] Probate Rules.

The Judicial Council may adopt rules of practice and procedure under the Probate Code. Unless disapproved by the Judicial Council, a court may provide local rules as well. Both must be consistent with applicable statutes. (*Prob.C. 1001(a).*)

In 1999, the Judicial Council adopted Title Seven of the California Rules of Court (C.R.C., Rule 7.1 et seq.), entitled Probate Rules. The rules apply "to every action and proceeding to which the Probate Code applies" and do not apply to other actions and proceedings unless specifically made applicable. (C.R.C., Rule 7.1(a).) The rules are designed to promote "uniformity in practice and procedure." (C.R.C., Rule 7.1(b).) However, they are not intended to expand, limit, or restrict the jurisdiction of the court in Probate Code proceedings. (C.R.C., Rule 7.1(d).) (On construction of the rules, see C.R.C., Rule 7.1(c).) For good cause, the court may waive application of the rules in an individual case. (C.R.C., Rule 7.3.) (On definitions and use of terms, see C.R.C., Rule 7.2.) (For list of chapters and rules within Title Seven, see *supra*, §4.)

SUPPLEMENT: [This section is current through the latest supplement]

In 2006, C.R.C., Rules 7.1, 7.2, and 7.3 were renumbered C.R.C., Rules 7.2, 7.3, and 7.4, respectively.



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[§ 373] Judicial Council Forms.

SUPPLEMENT: [This section is current through the latest supplement]

The portion of C.R.C., Rule 7.101 discussed in the text is now C.R.C., Rule 7.101(a). It was amended in 2006 to add that, where the Judicial Council has adopted a mandatory form in alternative versions, one of the alternate versions must be used. (On alternative mandatory forms, see C.R.C., Rule 7.101(b); on electronic generation of mandatory Judicial Council Form orders under California Case Management System, see C.R.C., Rule 7.101.5.)



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[§ 373] Judicial Council Forms.

The Judicial Council may prescribe the form of "applications, notices, orders, and other documents" required by the Probate Code. Any form prescribed by the Judicial Council is deemed to comply with the Probate Code. (*Prob.C. 1001(b).*)

If a document to be submitted to the court is one for which the Judicial Council has adopted a form, the form must be used. If the form is "inadequate in a particular situation," an addendum may be attached. (C.R.C., Rule 7.101.)

The Council has adopted forms in two areas: Decedents' Estates (see *supra*, §5 and *infra*, §408) and Guardianship and Conservatorship Proceedings (see *supra*, §6 and *infra*, §915).

SUPPLEMENT: [This section is current through the latest supplement]

The portion of C.R.C., Rule 7.101 discussed in the text is now C.R.C., Rule 7.101(a). It was amended in 2006 to add that, where the Judicial Council has adopted a mandatory form in alternative versions, one of the alternate versions must be used. (On alternative mandatory forms, see C.R.C., Rule 7.101(b); on electronic generation of mandatory Judicial Council Form orders under California Case Management System, see C.R.C., Rule 7.101.5.)



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[§ 374] Guardian Ad Litem.

(1) *Appointment Authorized.* A guardian ad litem may be appointed at any stage of a proceeding under the Probate Code on the court's own motion or on the request of a personal representative, guardian, conservator, trustee, or other interested person. (*Prob.C. 1003(a)*.) The public guardian may not be appointed "unless the court, after reasonable notice and inquiry, finds that no other qualified person is willing to act." (*Prob.C. 1003.5*.)

(2) *Represented Persons.* Under *Prob.C. 1003(a)*, the appointment may be to represent the interest of any of the following persons, if the court determines that "representation of the interest otherwise would be inadequate":

- (a) A minor or an incapacitated person.
- (b) An unborn or unascertained person, or a "designated class of persons who are not ascertained or are not in being."
- (c) A person whose identity or address is unknown.

Prob.C. 1003 "is not intended to limit any power the court may have to appoint an attorney to represent the interests of an incapacitated person." (Law Rev. Com. Comment.)

(3) *Multiple Representation.* "If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests." (*Prob.C. 1003(b)*.)

(4) *Expenses.* "The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner or from such other source as the court orders." (*Prob.C. 1003(c)*.) "If a beneficiary has an interest in only part of an estate, the court may not charge expenses to the whole estate, but only to the beneficiary's interest." (Law Rev. Com. Comment, citing *Estate of Corotto* (1954) 125 C.A.2d 314, 325, 270 P.2d 498.)

(5) *Judicial Council Forms.* The Judicial Council has adopted the following forms for the appointment of a guardian ad litem in probate proceedings:

Form No. DE-350 [Petition for Appointment of Guardian Ad Litem--Probate].

Form No. DE-351 [Order Appointing Guardian Ad Litem--Probate].

Form No. GC-100 [Petition for Appointment of Guardian Ad Litem--Probate].

Form No. GC-101 [Order Appointing Guardian Ad Litem--Probate].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Appointment Authorized.* On appointment of guardian ad litem for minor or conservatee, see *C.C.P.* 372.



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[§ 375] Lis Pendens.

If a proceeding under the Probate Code "affects the title to or the right of possession of real property," notice of the pendency of the proceeding may be filed pursuant to *C.C.P. 405* et seq. (*Prob.C. 1004.*) (On lis pendens generally, see 3 *Cal. Proc. (4th), Actions, §346* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 3 *Cal. Proc. (5th), Actions, §371* et seq.



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f. Petitions and Other Papers.

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[§ 376] Petitions and Other Papers.

(1) *When Signed Writing Is Required.* Generally, a petition, objection, response, report, or account filed pursuant to the Probate Code must be in writing, signed by all the petitioners, objectors, or respondents or by all the persons making the report or account, and filed with the court clerk. (*Prob.C. 1020.*) (On oral responses and objections at hearing, see *Prob.C. 1043(b)*, *infra*, §378.) However, the attorney for a person who is not a fiduciary appointed in the proceeding may sign if the party is absent or unable to do so. (*Prob.C. 1023.*) Verification of a document constitutes a signature unless expressly provided to the contrary. (*Prob.C. 1020.*)

A pleading under the Probate Code must be in writing and must be signed by all persons joining in it. (C.R.C., Rule 7.103(a).) (On execution of amended and supplemental pleadings, see C.R.C., Rule 7.104, *infra*, §377.)

An attorney may sign a pleading if the person required to sign is absent from the county where the attorney's office is located or "for some other cause is unable to sign" unless the person is or is seeking to become a fiduciary appointed in the proceeding. (C.R.C., Rule 7.103(c).)

(2) *When Verification Is Required.* If filed pursuant to the Probate Code, petitions, reports, and accounts, and objections and responses to them, must be verified. (*Prob.C. 1021(a).*) Verification occurs as follows:

(a) A petition must be verified by the petitioner or, if there are two or more parties joining in the petition, by any of them. (*Prob.C. 1021(b)(1).*)

(b) A report or account must be verified by the person who has the duty to make the report or account or, if there are two or more persons with that duty, by any of them. (*Prob.C. 1021(b)(2).*)

(c) An objection or response must be verified by the objector or respondent or, if there are two or more parties joining in the objection or response, by any of them. (*Prob.C. 1021(b)(3).*)

(d) The attorney for a person who is not a fiduciary appointed in the proceeding may verify if the party is absent or unable to do so. (*Prob.C. 1023.*)

A pleading under the Probate Code must be verified. If two or more persons join in the pleading, it may be verified by any of them. (C.R.C., Rule 7.103(b).) (On verification of amended and supplemental pleadings, see C.R.C., Rule 7.104, *infra*, §377.)

An attorney may verify a pleading if the person required to verify is absent from the county where the attorney's office is located or "for some other cause is unable to ... verify" unless the person is or is seeking to become a fiduciary appointed in the proceeding. (C.R.C., Rule 7.103(c).)

(3) *Affidavit or Verified Petition as Evidence.* An affidavit or verified petition must be received as evidence when offered in an uncontested proceeding under the Probate Code. (*Prob.C. 1022.*)

(4) *Title Must Identify Nature of Relief.* "The title of each pleading and of each proposed order must clearly and completely identify the nature of the relief sought or granted." (C.R.C., Rule 7.102.)

West's Key Number Digest, Wills k.272 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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[§ 377] Amended and Supplemental Pleadings.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definitions.* C.R.C., Rule 7.2 was renumbered C.R.C., Rule 7.3 in 2006.

(a) *Pleading.* The definition is now in C.R.C., Rule 7.3(2).

(b) *Amended Pleading.* The definition is now in C.R.C., Rule 7.3(3).

(c) *Amendment to a Pleading.* The definition is now in C.R.C., Rule 7.3(4).

(d) *Supplement to a Pleading.* The definition is now in C.R.C., Rule 7.3(5).



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[§ 377] Amended and Supplemental Pleadings.

(1) *Definitions.* C.R.C., Rule 7.2 defines the following terms:

(a) *Pleading.* "Pleading" means a contest, answer, petition, application, objection, response, statement of interest, report, or account filed in a proceeding under the Probate Code. (C.R.C., Rule 7.2(a)(2).)

(b) *Amended Pleading.* "Amended pleading" means a pleading that "completely restates and supersedes the pleading it amends for all purposes." (C.R.C., Rule 7.2(a)(3).)

(c) *Amendment to a Pleading.* "Amendment to a pleading" means a pleading that modifies another pleading and alleges facts or requests relief "materially different" from the original. The amendment does not restate or supersede the original but must be read together with it. (C.R.C., Rule 7.2(a)(4).)

(d) *Supplement to a Pleading.* "Supplement to a pleading" means a pleading that modifies another pleading but does not allege facts or request relief "materially different" from the original. It may add information or correct omissions. (C.R.C., Rule 7.2(a)(5).)

(2) *Execution and Verification.* All persons required to sign a pleading must sign an amended pleading or an amendment to the pleading. One person required to verify the pleading must verify the amended pleading or the amendment to the pleading. (C.R.C., Rule 7.104(a).) A supplement to a pleading must be signed and verified by one of the persons required to sign and verify the original. However, the court may accept for filing and consider a supplement signed under penalty of perjury by an attorney for the party offering it "where the information contained in the supplement is particularly within the knowledge of the attorney." (C.R.C., Rule 7.104(b).)

(3) *Use of Judicial Council Forms.* A Judicial Council form may not be used for an amendment to a pleading or a supplement to a pleading. A Judicial Council form must be used for an amended pleading, with the word "amended" added to the caption, if the form was used for the original pleading. (C.R.C., Rule 7.104.)

(4) *Notice of Hearing.* "An amended pleading or an amendment to a pleading requires the same notice of hearing (including publication) as the pleading it amends." (C.R.C., Rule 7.53(a).) "A supplement to a pleading does not require

additional notice of hearing, but a copy of a supplement to a pleading must be served if service of a copy of the pleading was required, unless waived by the court." (C.R.C., Rule 7.53(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definitions.* C.R.C., Rule 7.2 was renumbered C.R.C., Rule 7.3 in 2006.

(a) *Pleading.* The definition is now in C.R.C., Rule 7.3(2).

(b) *Amended Pleading.* The definition is now in C.R.C., Rule 7.3(3).

(c) *Amendment to a Pleading.* The definition is now in C.R.C., Rule 7.3(4).

(d) *Supplement to a Pleading.* The definition is now in C.R.C., Rule 7.3(5).



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[§ 378] Hearings.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *(New) Ex Parte Communications. Prob.C. 1051*, added in 2006, and C.R.C., Rule 7.10, adopted in 2007, impose the following requirements on ex parte communications in Probate Code proceedings, effective January 1, 2008:

(a) Absent a stipulation to the contrary between parties who have filed pleadings, ex parte communications between a party or attorney and the court are not authorized, except as permitted or required by law. (*Prob.C. 1051(a)*; see C.R.C., Rule 7.10(b).)

(b) However, the court may refer an ex parte communication to the court investigator or take other "appropriate action" in two circumstances:

(1) The communication concerns a fiduciary's performance of his or her duties and responsibilities. (*Prob.C. 1051(b)*; see C.R.C., Rule 7.10(c)(2).)

(2) The communication concerns a person who is the subject of a conservatorship or guardianship under the Probate Code. (*Prob.C. 1051(b)*; see C.R.C., Rule 7.10(c)(2).)

(c) The court must disclose the communication to all parties and counsel unless the court, for good cause, dispenses with disclosure to protect a ward or conservatee from harm. (*Prob.C. 1051(b)*; see C.R.C., Rule 7.10(c)(3).)

The provisions of C.R.C., Rule 7.10 also apply to conservatorship proceedings under the Lanterman-Petris-Short Act.



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[§ 378] Hearings.

(1) *In General. Prob.C. 1040 et seq.* govern the hearing of matters under the Probate Code, "except where the statute that provides for the hearing of the matter prescribes a different procedure." (*Prob.C. 1040.*) For this purpose, the petitioner or other party affirming is the plaintiff and the party objecting or responding is the defendant. (*Prob.C. 1044.*)

(2) *Setting for Hearing.* When a petition, report, account, or other matter that requires a hearing is filed with the court clerk, the clerk must set the matter for hearing. (*Prob.C. 1041.*) Hearings under the Probate Code must be on notice, unless the statute that provides for the hearing dispenses with notice. (*Prob.C. 1042.*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §5:41 [petition for order specially setting hearing], §5:42 [order specially setting hearing].) The following statutes illustrate those that dispense with notice in specified circumstances:

- (a) *Prob.C. 203* (proceeding to establish fact of death). (See *supra*, §14.)
- (b) *Prob.C. 8541* (procedure for appointment of special administrator). (See *infra*, §426.)
- (c) *Prob.C. 9735* (purchase of securities or commodities sold short). (See *infra*, §484.)
- (d) *Prob.C. 10200* (sale or surrender for redemption or conversion of securities). (See *infra*, §700.)

(3) *Response or Objection.* An interested person may appear and make a response or objection in writing at or before the hearing (*Prob.C. 1043(a)*) or orally at the hearing (*Prob.C. 1043(b)*). The court may either hear and determine an oral response or objection at the hearing or grant a continuance to allow a written response or objection. (*Prob.C. 1043(b).*)

"A request for the continuance for the purpose of making a written response or objection shall not itself be considered as a response or objection, nor shall the failure to make a response or objection during the time allowed be considered as a response or objection." (*Prob.C. 1043(c).*) The Law Revision Commission Comment points out that, in a will contest, *Prob.C. 1043(c)* "means that a potential contestant is not deemed to have contested the will merely because of a request for a continuance for the purpose of determining whether to contest the will."

(4) *Continuance*. "The court may continue or postpone any hearing, from time to time, in the interest of justice." (*Prob.C. 1045*.) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §5:44 [notice of continuance of hearing].)

"If the court continues a matter to allow a written objection or response to be made, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived." (C.R.C., Rule 7.801.)

(5) *Determination*. "The court shall hear and determine any matter at issue and any response or objection presented, consider evidence presented, and make appropriate orders." (*Prob.C. 1046*.)

West's Key Number Digest, Wills k.307 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(6) (New) *Ex Parte Communications*. *Prob.C. 1051*, added in 2006, and C.R.C., Rule 7.10, adopted in 2007, impose the following requirements on ex parte communications in Probate Code proceedings, effective January 1, 2008:

(a) Absent a stipulation to the contrary between parties who have filed pleadings, ex parte communications between a party or attorney and the court are not authorized, except as permitted or required by law. (*Prob.C. 1051(a)*; see C.R.C., Rule 7.10(b).)

(b) However, the court may refer an ex parte communication to the court investigator or take other "appropriate action" in two circumstances:

(1) The communication concerns a fiduciary's performance of his or her duties and responsibilities. (*Prob.C. 1051(b)*; see C.R.C., Rule 7.10(c)(2).)

(2) The communication concerns a person who is the subject of a conservatorship or guardianship under the Probate Code. (*Prob.C. 1051(b)*; see C.R.C., Rule 7.10(c)(2).)

(c) The court must disclose the communication to all parties and counsel unless the court, for good cause, dispenses with disclosure to protect a ward or conservatee from harm. (*Prob.C. 1051(b)*; see C.R.C., Rule 7.10(c)(3).)

The provisions of C.R.C., Rule 7.10 also apply to conservatorship proceedings under the Lanterman-Petris-Short Act.



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i. Orders.

14 Witkin Sum. Cal. Law Wills § 379

[§ 379] Orders.

(1) *In General.* Under former law, decisions of the probate court were in the form of (a) decrees or judgments, and (b) orders. (See *Carroll v. Carroll* (1940) 16 C.2d 761, 769, 108 P.2d 420; *Estate of Jamison* (1951) 107 C.A.2d 483, 486, 237 P.2d 546.) The Probate Code now refers to "orders." (*Prob.C. 1046*, supra, §378.) (On judgments, orders, and decrees generally, see 7 *Cal. Proc.* (4th), *Judgment*, §1 et seq.)

(2) *Recital of Jurisdictional Facts Is Unnecessary.* Except as otherwise provided in the Probate Code, an order in a proceeding under the Probate Code need not state jurisdictional facts, "but need only contain the matters ordered." (*Prob.C. 1047*.) A statement of jurisdictional facts is required, e.g., in an order for administration of an estate. (See *Prob.C. 8006*, infra, §590.)

(3) *Entry and Filing.* An order for distribution must be entered at length in the judgment book or other permanent record of the court. Other orders must be entered at length in the minute book or signed by the judge and filed. (*Prob.C. 1048*.) (On entry under former statutes, see *Estate of Exterstein* (1934) 2 C.2d 13, 38 P.2d 151 [entry in minute book]; *Van Tiger v. Superior Court* (1936) 7 C.2d 377, 381, 60 P.2d 851 [decree of distribution]; *Carroll v. Carroll*, supra [signed decree filed]; *Mears v. Jeffry* (1947) 80 C.A.2d 610, 617, 182 P.2d 294 [decree of distribution]; *Wolfson v. Superior Court* (1976) 60 C.A.3d 153, 159, 131 C.R. 265 [order admitting will to probate].) (On recordation of order affecting title to real property, see *Prob.C. 7263*, infra, §412; on rendition and entry of judgments and orders generally, see 7 *Cal. Proc.* (4th), *Judgment*, §44 et seq.)

(4) *Enforcement.* An order may be enforced under *C.C.P. 680.010* et seq. (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §9 et seq.). (*Prob.C. 1049*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §1 et seq.

(3) *Entry and Filing.* *Cross-Reference:* 7 *Cal. Proc.* (5th), *Judgment*, §44 et seq.

(4) *Enforcement.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §18 et seq.



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j. United States as Interested Person.

14 Witkin Sum. Cal. Law Wills § 380

[§ 380] United States as Interested Person.

Where a department or agency of the United States Government makes or awards "compensation, pension, insurance, or other allowance" to a decedent's estate, the agency has the same right as an interested person to request special notice, commence and prosecute an action on the bond of a personal representative, and contest an account of a personal representative. (*Prob.C. 7280.*)

SUPPLEMENT: [This section is current through the latest supplement]



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k. (New) Fees in Probate Code Proceedings.

1. (New) In General.

14 Witkin Sum. Cal. Law Wills § 380A

[§ 380A] (New) In General.

(1) *Enactment.* As part of a comprehensive enactment of uniform civil filing fees in 2005, the fees for proceedings under the Probate Code, including proceedings involving decedents' estates, trusts, conservatorships, and guardianships, were restated in *Govt.C. 70650 et seq.* These provisions were extensively revised in 2007 and 2008. The fee statutes now cover the following topics:

- (a) First petition for letters in decedents' estates proceedings: \$ 350. (*Govt.C. 70650, Supp., infra, §380B.*)
- (b) Objection or opposition to first petition for letters in decedents' estates proceedings: \$ 350. (*Govt.C. 70651, Supp., infra, §380B.*)
- (c) First account of a trustee of a testamentary trust subject to probate court jurisdiction: \$ 350. (*Govt.C. 70652, Supp., infra, §380C.*)
- (d) Internal affairs of trusts: \$ 350. (*Govt.C. 70652, Supp., infra, §380C.*)
- (e) Appointment of a guardian of the estate or a conservator: \$ 350. (*Govt.C. 70653, Supp., infra, §380D.*)
- (f) Appointment of a guardian of the person only: \$ 200. (*Govt.C. 70654, Supp., infra, §380D.*)
- (g) Commencement or objection to specified proceedings: \$ 350. (*Govt.C. 70655, Supp., infra, §380E.*)
- (h) Small estate set aside: \$ 200. (*Govt.C. 70656, Supp., infra, §380B.*)
- (i) Motions or papers requiring hearing: \$ 40. (*Govt.C. 70657, Supp., infra, §380E.*)
- (j) Specified applications or oppositions: \$ 200. (*Govt.C. 70657.5, Supp., infra, §380E.*)
- (k) Applications or objections to specified orders: \$ 350. (*Govt.C. 70658, Supp., infra, §380E.*)

(l) Fees for combined requests. (*Govt.C. 70658.5.*)

(2) *Fees for Combined Requests.* If a petition, application, or opposition described in *Govt.C. 70650, 70651, 70652, 70653, 70654, 70655, 70656, 70657.5, or 70658* is filed, combining requests for relief or opposition to relief that could have been stated in separate petitions, applications, or oppositions, only one filing fee may be charged under *Govt.C. 70651 et seq.* If the filing combines petitions, applications, or oppositions that would be subject to different filing fees under *Govt.C. 70651 et seq.*, the higher of the applicable fees is charged. (*Govt.C. 70658.5.*) (On payment of both fees where petitions concern appointment of guardian or conservator and temporary guardian or conservator, see *Govt.C. 70653(d), 70654(d).*)

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2. (New) Decedents' Estates.

14 Witkin Sum. Cal. Law Wills § 380B

[§ 380B] (New) Decedents' Estates.

(1) *Petition for Letters and Opposition.* For a time, either a fixed fee or a graduated fee based on the value of the estate applied to filing the first petition for letters. The graduated fee was eliminated in 2008. Under *Govt.C. 70650(a)*, the uniform fee for filing the first petition for letters testamentary or for letters of administration or special administration in decedents' estates proceedings is \$ 350. Under *Govt.C. 70651(a)*, the fee for an objection or other paper in opposition is \$ 350. (See Supp., *infra*, §585.)

(2) *Small Estate Set-Aside.* If no estate proceeding is pending, the fee for filing a petition for an order setting aside a decedent's estate of small value under *Prob.C. 6602* (text, §781) or an objection or other paper in opposition to the petition is \$ 200. (*Govt.C. 70656(a)*, (b).) If a paper in opposition is filed with a petition for appointment of a personal representative described in *Govt.C. 70650*, only the fee provided in *Govt.C. 70650* may be charged. (*Govt.C. 70656(c)*.)

(3) *Disclaimer.* The fees set forth in *Govt.C. 70657.5* and *70658* (Supp., *infra*, §380E) may not be charged for filing a disclaimer of an interest in a decedent's estate. (*Govt.C. 70657.5(c)*, *70658(c)(2)*.)

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3. (New) Trusts.

14 Witkin Sum. Cal. Law Wills § 380C

[§ 380C] (New) Trusts.

(1) *Account of Trustee of Trust Subject to Probate Court Jurisdiction.* The fee for filing the first account of a trustee of a testamentary trust subject to continuing jurisdiction of the probate court or an objection or other paper in opposition to the account is \$ 350. (*Govt.C. 70652(a), (b).*)

(2) *Internal Affairs of Trust.* The fee for filing a petition concerning the internal affairs of a trust under *Prob.C. 17200* et seq. (see 13 *Summary* (10th), *Trusts*, §228 et seq.) or a paper in opposition to the petition is \$ 350. (*Govt.C. 70652(a), (b)*; on refund of fee for good cause, see *Govt.C. 70652(c).*) The fee does not apply to trusts created by court order pursuant to *Prob.C. 2580* et seq. (substituted judgment in guardianship and conservatorship proceedings; see text, §1025 et seq.), *Prob.C. 3100* et seq. (management of community property where spouse lacks capacity; see 11 *Summary* (10th), *Community Property*, §161 et seq.), or *Prob.C. 3600* et seq. (compromise or judgment for minor or incompetent; see text, §1070 et seq.). (*Govt.C. 70652(d).*) The fee for filing a petition, application, or opposition concerning the internal affairs of a trust that is not subject to the fees provided in *Govt.C. 70650, 70651, or 70652* is \$ 200. (*Govt.C. 70657.5(a)(1).*)

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4. (New) Guardianships and Conservatorships.

14 Witkin Sum. Cal. Law Wills § 380D

[§ 380D] (New) Guardianships and Conservatorships.

(1) *Appointment of Guardian of the Person Only.* The fee for filing a petition for the appointment of a guardian of the person only or an objection or other paper in opposition to the petition is \$ 200. (*Govt.C. 70654(a), (b).*) However, no fee may be charged for an objection or other paper in opposition filed on behalf of the minor who is the subject of the petition or a parent of the minor. (*Govt.C. 70654(e).*) If a paper in opposition is filed with a competing petition for appointment by the same person, only the fee for the competing petition may be charged. (*Govt.C. 70654(c).*) If a petition for appointment of a temporary guardian is filed with a petition for appointment of a guardian under *Govt.C. 70654(a)* or a competing petition under *Govt.C. 70654(c)* by the same person, only the fee for the petition or competing petition may be charged. (*Govt.C. 70654(d).*)

(2) *Appointment of Guardian of the Estate or Conservator.* The fee for filing a petition for the appointment of a guardian of the estate only, a guardian of the person and estate, or a conservator, or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70653(a), (b).*) However, no fee may be charged for an objection or other paper in opposition filed on behalf of the proposed conservatee or the minor who is the subject of the petition or a parent of the minor. (*Govt.C. 70653(f).*) If a paper in opposition is filed with a competing petition for appointment by the same person, only the fee for the competing petition may be charged. (*Govt.C. 70653(c).*) If a petition for appointment of a temporary guardian or conservator is filed with a petition for appointment of a guardian or conservator under *Govt.C. 70653(a)* or a competing petition under *Govt.C. 70653(c)* by the same person, the applicable fees for both petitions must be charged. (*Govt.C. 70653(d).*)

(3) *Appointment of Temporary Guardian or Conservator.* The fee for filing the first or subsequent petitions for temporary letters of guardianship or conservatorship is \$ 40. (*Govt.C. 70657(a)(4).*)

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5. (New) Specified Proceedings.

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[§ 380E] (New) Specified Proceedings.

(1) *Commencement of Specified Proceedings and Objection: \$ 350.* The fee for filing a petition to commence specified proceedings or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(a), (b).*) The fee applies to the following:

- (a) Petition to compromise a minor's claim under *Prob.C. 3600* (text, §1070). (*Govt.C. 70655(c)(1).*)
- (b) Petition to determine succession to real property under *Prob.C. 13151* (text, §813 et seq.). (*Govt.C. 70655(c)(2).*)
- (c) Spousal or domestic partner property petition under *Prob.C. 13650*, except as provided in *Prob.C. 13652* (text, §829 et seq.). (*Govt.C. 70655(c)(3).*)
- (d) Petition to establish the fact of death to determine title to real property under *Prob.C. 200* (text, §14). (*Govt.C. 70655(c)(4).*)
- (e) Petition for an order concerning a community property transaction under *Prob.C. 3100* (see 11 *Summary* (10th), *Community Property*, §161 et seq.). (*Govt.C. 70655(c)(5).*)
- (f) Petition concerning a capacity determination and health care decision for an adult without a conservator under *Prob.C. 3200* (text, §1063). (*Govt.C. 70655(c)(6).*)
- (g) Petition concerning an adult health care directive under *Prob.C. 4766* (text, §897 et seq.). (*Govt.C. 70655(c)(7).*)
- (h) Petition concerning a power of attorney under *Prob.C. 4541* (text, §874). (*Govt.C. 70655(c)(8).*)
- (i) Petition for approval, compromise, or settlement of claims against a deceased settlor, or for allocation of amounts due between trusts, under *Prob.C. 19020* (see 13 *Summary* (10th), *Trusts*, §278). (*Govt.C. 70655(c)(9).*)

(j) Any other petition that commences a proceeding under the Probate Code that is not otherwise provided for in *Govt.C. 70650 et seq. (Govt.C. 70655(c)(10).)*

(2) *Specified Orders After Letters are Issued: \$ 350.* Generally, a uniform fee of \$ 350 applies to filing a petition or application for specified orders after the issuance of letters testamentary, letters of administration or special administration, or letters of guardianship or conservatorship or temporary guardianship or conservatorship, or to filing objections or any other paper in opposition. (*Govt.C. 70658(a).*) The fee applies to a petition or application for the following or an opposition to the following:

(a) Order directing, authorizing, approving, or confirming the sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property. (*Govt.C. 70658(a)(1).*)

(b) Order settling the account of a fiduciary. (*Govt.C. 70658(a)(2).*)

(c) Order authorizing, instructing, or directing a fiduciary or approving or confirming the acts of a fiduciary. (*Govt.C. 70658(a)(3).*)

(d) Order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of an attorney. (*Govt.C. 70658(a)(4).*)

(e) Order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of a fiduciary. (*Govt.C. 70658(a)(5).*)

(f) Order surcharging or removing a fiduciary. (*Govt.C. 70658(a)(6).*)

(g) Order transferring or authorizing the transfer of estate property to a fiduciary in another jurisdiction. (*Govt.C. 70658(a)(7).*)

(h) Order allowing a fiduciary to resign. (*Govt.C. 70658(a)(8).*)

(i) Order adjudicating the merits of a claim under *Prob.C. 850 et seq.* (controversies involving title to property; see text, §356 et seq.). (*Govt.C. 70658(a)(9).*)

(j) Order granting permission to fix the residence of a ward or conservatee at a place outside California. (*Govt.C. 70658(a)(10).*)

(k) Order directing, authorizing, approving, or modifying payments for the support, maintenance, or education of a ward or conservatee or a person entitled to those payments from a ward or conservatee. (*Govt.C. 70658(a)(11).*)

(l) Order granting or denying a request concerning the payment of surplus income to relatives of a conservatee under *Prob.C. 2423* (text, §1009) or substituted judgment under *Prob.C. 2580* (text, §1025 et seq.). (*Govt.C. 70658(a)(12).*)

(m) Order affecting the legal capacity of a conservatee under *Prob.C. 1870 et seq.* (text, §953 et seq.). (*Govt.C. 70658(a)(13).*)

(n) Order adjudicating the merits of a claim under *Prob.C. 2500 et seq.* (compromise or settlement of claim or obligation by guardian or conservator; see text, §1012 et seq.). (*Govt.C. 70658(a)(14).*)

No additional fee may be charged for filing a paper under *Govt.C. 70658* in addition to the uniform fee. (*Govt.C. 70658(b).*)

The fee set forth in *Govt.C. 70658* does not apply to a petition, application, or opposition in a guardianship

proceeding under *Govt.C. 70654* (appointment of guardian of the person only; see Supp., supra, §380D). (*Govt.C. 70658(c)(1).*)

The fee set forth in *Govt.C. 70658* does not apply to a disclaimer of an interest in a decedent's estate. (*Govt.C. 70658(c)(2).*)

(3) *Specified Petitions, Applications, and Objections: \$ 200.* The fee for filing the following petitions or applications, and objections or other opposition, is \$ 200:

(a) A petition, application, or opposition concerning the internal affairs of a trust that is not subject to the filing fees provided in *Govt.C. 70650, 70651, or 70652* (see Supp., supra, §380C). (*Govt.C. 70657.5(a)(1).*)

(b) A petition, application, or opposition filed after the issuance of special letters of administration or letters testamentary or letters of administration in a decedent's estate proceeding that is not subject to the filing fee provided in *Govt.C. 70658(a)*. (*Govt.C. 70657.5(a)(2).*)

(c) A petition for special letters of administration without the powers of a general personal representative. (*Govt.C. 70657.5(a)(3).*)

The fee set forth in *Govt.C. 70657.5* does not apply to a disclaimer of an interest in a decedent's estate. (*Govt.C. 70657.5(c).*)

(4) *Motion or Other Paper Requiring Hearing: \$ 40.* The fee for filing a motion or other paper requiring a hearing after the first paper in a proceeding under the Probate Code, other than a petition, application, or opposition described in *Govt.C. 70657.5 or 70658*, is ordinarily \$ 40. (*Govt.C. 70657(a).*)

The fee applies to papers listed in *Govt.C. 70617(a)* (papers requiring a hearing after the first paper in civil actions generally) and excludes papers listed in *Govt.C. 70617(b)* (exceptions to the fee for papers requiring a hearing after the first paper in civil actions generally). (*Govt.C. 70657(a)(1), (b).*) (On *Govt.C. 70617*, see 4 *Cal. Proc.* (5th), *Pleading*, §25.)

The fee applies to application for ex parte relief, whether or not notice of the application to any person is required, except that no fee is charged on an ex parte petition for the discharge of a personal representative, conservator, or guardian on the completion of a court-ordered distribution or transfer. (*Govt.C. 70657(a)(2).*)

The fee applies to first or subsequent petitions for temporary letters of conservatorship or guardianship. (*Govt.C. 70657(a)(4).*) The fee also applies to petitions, applications, or objections filed after the issuance of temporary letters of conservatorship or guardianship or letters of conservatorship or guardianship that are not subject to the filing fee provided in *Govt.C. 70658(a)*. (*Govt.C. 70657(a)(3).*)

The fee required by *Govt.C. 70657(a)* applies separately to each motion or other paper filed, regardless of whether they are heard at a single hearing or at separate hearings. (*Govt.C. 70657(d).*)

(5) *Motion for Summary Judgment: \$ 200.* The summary judgment fee provided in *Govt.C. 70617(d)* (\$ 200) applies to summary judgment motions in Probate Code proceedings. (*Govt.C. 70657(c).*) The fee applies separately to each motion or other paper filed, regardless of whether they are heard at a single hearing or at separate hearings. (*Govt.C. 70657(d).*)

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14 Witkin Sum. Cal. Law Wills § 381

[§ 381] In General.

(1) *Comprehensive Statute.* A comprehensive statute governing accounts (*Prob.C. 1060 et seq.*) was adopted in 1996, effective July 1, 1997. (*Prob.C. 1060.5.*) It governs all accounts filed with the court. (*Prob.C. 1060.*) The statute specifies the following information in detail:

- (a) The content and format of the summary of account. (See *infra*, §382.)
- (b) The content of supporting schedules. (See *infra*, §383.)
- (c) The content of the petition or report accompanying the account. (See *infra*, §384.)

(2) *Additional Information Is Not Generally Required.* Except as specifically provided elsewhere in the Probate Code, or unless good cause is shown, information in addition to that required by *Prob.C. 1060 et seq.* need not be included in the account. (*Prob.C. 1060.*) (For illustration of provision requiring additional information, see *Prob.C. 10900*, *infra*, §714.)

(3) *Conforming Changes.* In conjunction with the enactment of the statute, the existing statutes governing accounts in particular proceedings were revised, including the following:

- (a) Account by personal representative. (See *Prob.C. 10900*, *infra*, §714.)
- (b) Account by guardian or conservator. (See *Prob.C. 2620*, *infra*, §1036.)
- (c) Account by trustee. (See *Prob.C. 16063*, 13 *Summary* (10th), *Trusts*, §§87, 88.)

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14 Witkin Sum. Cal. Law Wills § 382

[§ 382] Summary of Account.

The account must state the period covered by the account and must include a summary showing the following information, to the extent applicable:

(1) Property on hand at the beginning of the accounting period. For a first account, this means the value of property initially received by the fiduciary. For a subsequent account, this means property on hand at the end of the prior accounting period. (*Prob.C. 1061(a)(1).*)

(2) The value of assets received during the accounting period that are not assets on hand at the commencement of administration of an estate. (*Prob.C. 1061(a)(2).*)

(3) Receipts of income or principal, excluding items listed under *Prob.C. 1061(a)(1)*, (a)(2), or receipts from a trade or business. (*Prob.C. 1061(a)(3).*)

(4) Net income from a trade or business. (*Prob.C. 1061(a)(4).*)

(5) Gains on sales. (*Prob.C. 1061(a)(5).*)

(6) The amount of disbursements, excluding disbursements for a trade or business or distributions. (*Prob.C. 1061(a)(6).*)

(7) Loss on sales. (*Prob.C. 1061(a)(7).*)

(8) Net loss from a trade or business. (*Prob.C. 1061(a)(8).*)

(9) Distributions to beneficiaries, the ward, or the conservatee. (*Prob.C. 1061(a)(9).*)

(10) Property on hand at the end of the accounting period, stated at its "carry value." (*Prob.C. 1061(a)(10).*)

For purposes of the summary, "general accounting principles" govern net income and net loss. The summary need

not show net income and net loss as reflected on relevant tax returns. (*Prob.C. 1061(c)*.)

Prob.C. 1061(b) sets forth a format for the summary that must be substantially followed. It lists categories of charges, total charges, categories of credits, and total credits. Inapplicable categories need not be shown (*Prob.C. 1061(b)*) and total charges must equal total credits (*Prob.C. 1061(c)*).

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[§ 383] Schedules.

SUPPLEMENT: [This section is current through the latest supplement]

(14) *Graduated Fee Adjustments*. *Govt.C.* 26827 was amended and renumbered in 2005. The payment procedure was further revised in 2007. (See *Govt.C.* 70650(b), Supp., *infra*, §585.)



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[§ 383] Schedules.

Detailed schedules showing the following items are required:

(1) *Receipts*. The schedule must show the nature or purpose of each item, the source of the receipt, and the date. (*Prob.C. 1062(a).*)

(2) *Disbursements*. The schedule must show the nature or purpose of each item, the name of the payee, and the date. (*Prob.C. 1062(b).*)

(3) *Trade or Business*. The schedule must show net income or loss from a trade or business. The schedule is sufficient if it shows the information disclosed on Schedule C or F of the federal income tax return. (*Prob.C. 1062(c).*)

(4) *Sale or Other Disposition*. The schedule must show the calculation of gains or losses on sales or other disposition. (*Prob.C. 1062(d).*)

(5) *Distributions*. The schedule must show distributions of cash or property to beneficiaries, the ward, or the conservatee, the date and amount of each distribution, and the "carry value" of distributed property. (*Prob.C. 1062(e).*)

(6) *Property on Hand*. The schedule must describe each item of property on hand at its "carry value." (*Prob.C. 1062(f).*)

(7) *Market Value of Assets*. For all accounts, the schedule must show the estimated market value of assets on hand at the end of the accounting period. For accounts subsequent to an initial account, the schedule must also show the estimated market value of assets on hand at the beginning of the accounting period. The estimated market value of real estate, closely held businesses, and other assets without "a ready market" may be satisfied by a good faith estimate by the fiduciary. (*Prob.C. 1063(a).*)

(8) *Purchase or Change in Form of Assets*. If purchases or other changes in the form of assets occurred during the accounting period, a schedule must show these transactions. However, transfers between cash, accounts in financial institutions, and money market mutual funds need not be reported. (*Prob.C. 1063(b).*)

(9) *Allocation of Principal and Income*. If an estate or trust will be distributed to an income beneficiary, a schedule must show allocation of receipts and disbursements between principal and income. (*Prob.C. 1063(c)*.)

(10) *Devised Property*. If property is specifically devised, an additional schedule must show income, disbursements, and the proceeds of sale. (*Prob.C. 1063(d)*.)

(11) *Interest*. If interest has been paid or is to be paid, a schedule must show the calculation of interest. (*Prob.C. 1063(e)*.)

(12) *Proposed Distribution*. If the accounting contemplates a proposed distribution, a schedule must set forth the proposed distribution and show the allocation of income required by *Prob.C. 12006*. If the distribution requires an allocation between trusts, the allocation must be set forth unless the allocation is to be made by the trustee after receipt. If the distribution requires the valuation of assets as of the date of distribution, the fair market value of those assets must be set forth. (*Prob.C. 1063(f)*.)

(13) *Liabilities*. If there are liabilities at the end of the accounting period, except current or future periodic payments (including rent, salaries, utilities, or other recurring expenses), a schedule of liabilities must include (a) liabilities that are a lien on estate or trust assets, (b) taxes due but unpaid, (c) notes payable, (d) judgments for which the estate or trust is liable, and "any other material liability." (*Prob.C. 1063(g)*.)

(14) *Graduated Fee Adjustments*. A graduated filing fee, based on the value of the estate, applies to designated proceedings under the Probate Code. The petitioner must estimate the value of the estate in the petition and determine the fee based on the estimate. If the appraised value of the estate would result in a different fee than the fee actually paid, an adjustment is made at the time of the final account. (*Govt.C. 26827*.) The final account or report must contain a separate schedule of graduated fee information. C.R.C., Rule 7.552 specifies detailed requirements for graduated fee adjustments and includes a sample schedule of graduated fee information. (See *infra*, §585.)

SUPPLEMENT: [This section is current through the latest supplement]

(14) *Graduated Fee Adjustments*. *Govt.C. 26827* was amended and renumbered in 2005. The payment procedure was further revised in 2007. Graduated fees were eliminated in 2008. (See *Supp.*, *infra*, §585.)

(15) *(New) Out-of-State Real Property*. If a guardian or conservator knows of out-of-state real property of the estate, an additional schedule is required. It must identify the property, provide a good faith estimate of the fair market value, and state any action that will or has been taken to protect the property, including a recommendation whether an ancillary proceeding is necessary. (*Prob.C. 1063(h)*, added in 2008.) (On duty to identify and protect out-of-state real property, see *Prob.C. 2401.1*, added in 2008; *Supp.*, *infra*, §1001.)



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Witkin Sum. Cal. Law Wills § 384

[§ 384] Petition or Report.

SUPPLEMENT: [This section is current through the latest supplement]

(New) Filing fee: In estate administration, guardianship, and conservatorship proceedings, the filing fee for a petition, application, or opposition to an order settling the account of a fiduciary is \$ 180. (*Govt.C. 70658(a)(2).*) (See *Govt.C. 70658(c)(1)* [fee does not apply to guardianship of the person only]; *Govt.C. 70658(d)* [listing circumstances in which fee does not apply to personal representative of decedent's estate].)



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[§ 384] Petition or Report.

The following information must be included in the petition for approval of the account or the report accompanying the petition:

(1) *Unusual Transactions*. A description of sales, purchases, changes in form, or other transactions "not otherwise readily understandable from the schedule." (*Prob.C. 1064(a)(1).*)

(2) *Unusual Items*. An explanation of "unusual items" appearing in the account. (*Prob.C. 1064(a)(2).*)

(3) *Compensation*. A statement of compensation paid from the assets subject to the account to the fiduciary or attorney other than pursuant to a prior court order. (*Prob.C. 1064(a)(3).*)

(4) *Relationships*. A statement disclosing any family or affiliate relationship between the fiduciary and an agent. (*Prob.C. 1064(a)(4).*) For this purpose, "family" means a relationship created by blood or marriage, and "affiliate" means an entity controlled by, controlling, or in common control with the fiduciary. (*Prob.C. 1064(c).*)

(5) *Investment of Cash*. An allegation disclosing whether all cash has been invested and maintained in interest bearing accounts or authorized investments, except an amount "reasonably necessary for the orderly administration of the estate." (*Prob.C. 1064(a)(5).*)

Filing an account is deemed to include a petition requesting approval of the account. The account may include additional petitions for authorization, instructions, or confirmation authorized by the Probate Code, including a request for an order for compensation of the fiduciary and the attorney. (*Prob.C. 1064(b).*)

In an accounting, report, petition for preliminary distribution, or petition for final distribution, the petitioner must list and describe all actions taken without court approval under the Independent Administration of Estates Act if notice of the proposed action was required. (See C.R.C., Rule 7.250, *infra*, §730.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Filing fee*: In estate administration, guardianship, and conservatorship proceedings, the fee for filing a petition,

application, or opposition concerning an order settling the account of a fiduciary is \$ 350. (*Govt.C. 70658(a)(2)*, as amended in 2008.) (See *Govt.C. 70658(c)(1)* [fee does not apply to guardianship of the person only].)



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[§ 385] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(9) *Effect of Amended or Supplemented Pleadings.* C.R.C., Rule 7.2(a) was renumbered C.R.C., Rule 7.3 in 2006.



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[§ 385] In General.

(1) *Statutory Development.* Under former statutes, some probate proceedings were subject to particular notice requirements but most were governed by the general notice provisions of former Prob.C. 1200 et seq. The California Law Revision Commission, in its Recommendation on Notice in Probate Proceedings (19 Cal. Law Rev. Com. Reports, p. 360), recommended a consistent set of rules in one place in the Probate Code. The 1987 Legislature followed the Law Revision Commission's Recommendation, revising and restating the notice statutes in *Prob.C. 1200* et seq. The Commission's Comments to *Prob.C. 1200* et seq. indicate that a number of the statutes are drawn from notice provisions in the Guardianship-Conservatorship Law and the Trust Law. (On notice requirements generally, see C.E.B., 1 Decedent Estate Practice, §6.28 et seq.; for chart listing various statutory requirements, see C.E.B., 1 Decedent Estate Practice, §6.66.)

(2) *Scope and Application.* *Prob.C. 1200* et seq. govern notice required or permitted under the Probate Code except as otherwise provided in the code. (*Prob.C. 1200(a)*.) However, *Prob.C. 1200* et seq. do not apply to notice under a particular provision to the extent the provision is inconsistent. (*Prob.C. 1200(b)*.)

(3) *Methods of Giving Notice.* The following methods of giving notice are recognized:

(a) *Mailing.* (See *Prob.C. 1215*, *infra*, §392.)

(b) *Personal delivery.* (See *Prob.C. 1216*, *infra*, §393.)

(c) *Posting.* (See *Prob.C. 1230*, *infra*, §394.)

(d) *Publication.* Notice by publication may be required in specified circumstances. (See, e.g., *Prob.C. 8120* et seq. [publication of notice of petition to administer estate], *infra*, §589.)

(4) *Additional Notice on Court Order.* "Where the court determines that the notice otherwise required is insufficient in the particular circumstances, the court may require that further or additional notice, including a longer period of notice, be given." (*Prob.C. 1202*.)

(5) *Order Shortening Time for Notice.* For good cause, the court may shorten the time for giving notice of a hearing unless the particular provision governing the notice provides that the time may not be shortened. (*Prob.C. 1203(a).*) However, the court may not shorten the time for publication of notice of a hearing unless the particular provision governing the publication of notice authorizes a shorter time. (*Prob.C. 1203(b).*)

(6) *Waiver of Notice.* "A person, including a guardian ad litem, guardian, conservator, trustee, or other fiduciary, may waive notice by a writing signed by the person or person's attorney and filed in the proceeding." (*Prob.C. 1204*, based on *Unif.Prob.C., §1-402.*) (See *Cal. Civil Practice, Probate and Trust Proceedings*, §5:43.) (On authority of guardian or conservator to waive notice, see *Prob.C. 1210*, *infra*, §390.)

(7) *Notice of Continued or Postponed Hearing.* "If a hearing is continued or postponed, no further notice of the continued or postponed hearing is required unless ordered by the court." (*Prob.C. 1205.*) (On authority to continue or postpone hearing, see *Prob.C. 1045*, *supra*, §378.)

(8) *Interested Persons and Parties.* There is a distinction between persons interested in the estate, who are merely entitled to notice, and actual parties to the proceeding. Persons interested may elect to appear or not, and, if they do not, are not parties. (See *Estate of Kent* (1936) 6 C.2d 154, 160, 57 P.2d 901; *Estate of McDougald* (1904) 143 C. 476, 478, 77 P. 443.)

(9) *Effect of Amended or Supplemented Pleadings.* "An amended pleading or an amendment to a pleading requires the same notice of hearing (including publication) as the pleading it amends." (C.R.C., Rule 7.53(a).) "A supplement to a pleading does not require additional notice of hearing, but a copy of a supplement to a pleading must be served if service of a copy of the pleading was required, unless waived by the court." (C.R.C., Rule 7.53(b).) (For definitions of "amended pleading," "amendment to a pleading," and "supplement to a pleading," see C.R.C., Rule 7.2(a), *supra*, §377.)

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SUPPLEMENT: [This section is current through the latest supplement]

(9) *Effect of Amended or Supplemented Pleadings.* C.R.C., Rule 7.2(a) was renumbered C.R.C., Rule 7.3 in 2006.



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Witkin Sum. Cal. Law Wills § 386

[§ 386] General Form of Notice.

SUPPLEMENT: [This section is current through the latest supplement]
Judicial Council Form No. DE-121 has been renamed: Notice of Petition to Administer Estate (Probate--Decedents' Estates).



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[§ 386] General Form of Notice.

"The notice of a hearing on a pleading filed in a proceeding under the Probate Code must state the complete title of the pleading to which the notice relates." (C.R.C., Rule 7.50.)

Prob.C. 1211 sets forth a form for notice if no other type of notice is prescribed by law, by the Judicial Council, or by the court or judge.

The Judicial Council has approved the following mandatory forms for notice:

Form No. DE-120 [Notice of Hearing--Decedent's Estate or Trust (Probate--Decedents' Estates)].

Form No. DE-121 [Notice of Petition to Administer Estate].

Form No. DE-200 [Order Prescribing Notice].

SUPPLEMENT: [This section is current through the latest supplement]
Judicial Council Form No. DE-121 has been renamed: Notice of Petition to Administer Estate (Probate--Decedents' Estates).



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c. Notice Requirements Are Jurisdictional.

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[§ 387] Notice Requirements Are Jurisdictional.

A number of cases hold the notice requirements jurisdictional, with the result that failure to comply could render the resulting proceeding void. (See *Stiebel v. Roberts* (1941) 42 C.A.2d 434, 438, 109 P.2d 22 [jurisdiction established by posting]; *Estate of Loring* (1946) 29 C.2d 423, 429, 175 P.2d 524 [same]; *Estate of Poder* (1969) 274 C.A.2d 786, 789, 79 C.R. 484 [failure to give heirs notice of hearing on petition for probate; order admitting will to probate set aside]; *Estate of Lindsey* (1980) 108 C.A.3d 428, 432, 166 C.R. 511, citing the text; *Estate of Buckley* (1982) 132 C.A.3d 434, 448, 449, 183 C.R. 281 [order granting letters of administration showing failure to publish notice was subject to collateral attack].)

In *Estate of Jenanyan* (1982) 31 C.3d 703, 183 C.R. 525, 646 P.2d 196, citing the text, a will devised real property to W and made noncharitable and charitable bequests. The estate funds were insufficient to pay all the bequests. The administrator petitioned for abatement of the bequests and also requested distribution of the real property to W. W received notice of the hearing, but, because the petition did not seek abatement of the gift of the real property to her, did not attend. The trial judge ordered proportional abatement of all the gifts including the devise. *Held*, the order was in excess of jurisdiction. "Where notice is limited to the information that a particular petition will be heard by the court at a certain place and time, the court is without jurisdiction to decide issues beyond the scope of that petition unless all interested parties are before the court or otherwise waive their right to notice." (31 C.3d 710.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Persons Entitled to Notice.
1. Heirs and Devisees.

14 Witkin Sum. Cal. Law Wills § 388

[§ 388] Heirs and Devisees.

(1) *General Rule.* Where notice is required to be given to known heirs or devisees, notice must be given to the following persons:

(a) "If the estate is an intestate estate to the heirs named in the petition for letters of administration and to any additional heirs who become known to the person giving the notice prior to the giving of the notice." (*Prob.C. 1206(a)(1).*)

(b) "If the estate is a testate estate, to the devisees named in the petition for probate of the will and to any additional devisees who become known to the person giving the notice prior to the giving of the notice." (*Prob.C. 1206(a)(2).*)

(2) *No Notice Where Interest Is Satisfied.* Notice need not be given to a person "if the person's interest has been satisfied pursuant to court order or as evidenced by the person's written receipt." (*Prob.C. 1206(b).*)

(3) *No Notice for Unknown Step and Foster Relationships.* Notice need not be given to persons who might be heirs and devisees by reason of a step or foster relationship with the decedent in the absence of "actual knowledge of facts that a person would reasonably believe give rise to a parent-child relationship" under *Prob.C. 6450* et seq. (see supra, §93 et seq.). (*Prob.C. 1207.*) A stepchild or foster child not required to be notified may request special notice under *Prob.C. 1250* et seq. (infra, §395).

(4) *Effect of Death of Beneficiary Under Decedent's Will.* C.R.C., Rule 7.51(e) provides for notice where the beneficiary under a decedent's will is deceased:

(a) *Beneficiary survives decedent.* If a beneficiary who has survived for a period required by a decedent's will then dies, notice must be sent to the beneficiary's personal representative or, if no personal representative has been appointed, to those entitled to succeed to the beneficiary's interest in the decedent's estate. (C.R.C., Rule 7.51(e)(1).)

(b) *Beneficiary does not survive decedent.* If a beneficiary dies before the decedent or fails to survive for a period required by the decedent's will, notice must be sent to any substitute beneficiaries named in the decedent's will. In the

absence of substitute beneficiaries, notice must be sent to the beneficiary's issue, if the beneficiary is a transferee under *Prob.C. 21110(c)* (anti-lapse statute; *supra*, §263), and to the decedent's residuary beneficiaries (or heirs if the will does not provide for distribution of the residue). (C.R.C., Rule 7.51(e)(2).)

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SUPPLEMENT: [This section is current through the latest supplement]



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2. Trust Beneficiaries.

14 Witkin Sum. Cal. Law Wills § 389

[§ 389] Trust Beneficiaries.

(1) *General Rule: No Notice to Beneficiaries.* Generally, if notice is required to be given to a trust or trustee, notice to trust beneficiaries is not required. (*Prob.C. 1208(a).*)

(2) *Exceptions.* Where the personal representative and the trustee are the same person, or where no trustee has been appointed, notice must be given to "each person to whom income or principal would be required or authorized in the trustee's discretion to be currently distributed if the trust were in effect." If there are no such persons, notice must be given to "each person who, under the terms of the trust, would be entitled to any distribution if the trust were terminated at the time the notice is required to be given." (*Prob.C. 1208(b).*) However, notice to trust beneficiaries is not required under this provision where notice is given to a cotrustee who is not a personal representative. (*Prob.C. 1208(c).*) Notice to others than the trustee is required to avoid a potential conflict of interest where the personal representative and the trustee are the same person. (19 Cal. Law Rev. Com. Reports, p. 365.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Other Persons.

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[§ 390] Other Persons.

(1) *Attorney General*. Notice required to be given to the State of California must be given to the Attorney General. (*Prob.C. 1209(a)*.) Notice required to be given to the Attorney General must be mailed to the Attorney General's Sacramento office. (*Prob.C. 1209(b)*.) The statute applies where the state must be notified (e.g., where the state is a devisee), but does not apply where a specific officer must be notified (e.g., the Director of Health Services under *Prob.C. 9202*, *infra*, §622). (Law Rev. Com. Comment.)

(2) *Guardian or Conservator*. "If an interested person has a guardian or conservator of the estate who resides in this state, personal service on the guardian or conservator of any process, notice, or court order concerning a decedent's estate is equivalent to service on the ward or conservatee, and it is the duty of the guardian or conservator to attend to the interests of the ward or conservatee in the matter. The guardian or conservator may appear for the ward or conservatee and waive any process, notice, or order to show cause that a person not under legal disability might waive." (*Prob.C. 1210*.)

If a guardian or conservator has been appointed for a person entitled to notice, the notice must be sent to the guardian or conservator and, unless the court dispenses with notice, to the ward or conservatee. (C.R.C., Rule 7.51(c).)

(3) *Attorney of Record*. If a notice or other paper is required or permitted to be mailed, delivered, served, or given to a person represented by an attorney of record, a copy must be mailed to the attorney, unless otherwise specified in a request for special notice. (*Prob.C. 1214*.) (See C.R.C., Rule 7.51(b) [notice to person represented by attorney of record must be sent as provided by *Prob.C. 1214*].)

(4) *Minor and Custodian*. Generally, notice to a minor must be sent directly to the minor with a separate copy sent to the person with legal custody of the minor, with whom the minor resides. This requirement applies except as provided in *Prob.C. 1460.1* (*infra*, §910). (C.R.C., Rule 7.51(d).)

(5) *Party Giving Notice*. "If a person is required to give notice, the person required to give the notice need not give the notice to himself or herself or to any other person who joins in the petition." (*Prob.C. 1201*.)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Mailed Notice.
1. In General.

14 Witkin Sum. Cal. Law Wills § 391

[§ 391] In General.

(1) *Scope of Provision.* When notice of a hearing is required but no other period or manner is prescribed by statute, unless the period or manner of notice is ordered by the court or judge, notice must be given as provided in *Prob.C. 1220.* (*Prob.C. 1221.*)

(2) *Time for Notice.* "At least 15 days before the time set for the hearing, the petitioner or the person filing the report, account, or other paper shall cause notice of the time and place of the hearing to be mailed to the persons required to be given notice." (*Prob.C. 1220(a)(1).*) (On manner of mailing, see *Prob.C. 1215*, *infra*, §392; on personal delivery as alternative to mailing, see *Prob.C. 1216*, *infra*, §393.)

(3) *Who Receives Notice.* Unless the statute requiring notice specifies those who are to receive notice, notice must be mailed to the personal representative and to all persons who have requested special notice under *Prob.C. 1250* (*infra*, §395). (*Prob.C. 1220(a)(2).*) The Law Revision Commission Comment points out that, if the decedent is a citizen of a foreign nation, a treaty may require notice to the consul of that nation.

(4) *Address.* The notice must be addressed to the person required to be given notice at the person's place of business or place of residence. (*Prob.C. 1220(a)(3).*) However, if the address is not known and the court does not dispense with notice, notice must be given "as the court may require in the manner provided in" *C.C.P. 413.30* (see 3 *Cal. Proc.* (4th), *Actions*, §923). (*Prob.C. 1212.*)

(5) *Change in Notice Requirements by Court Order.* For good cause, the court may dispense with notice otherwise required to be given under *Prob.C. 1220.* (*Prob.C. 1220(c).*) (On order for additional notice, see *Prob.C. 1202*, *supra*, §385; on order shortening time for notice, see *Prob.C. 1203*, *supra*, §385.)

(6) *Request for Special Notice.* Subject to *Prob.C. 1220(c)*, nothing in *Prob.C. 1220* excuses compliance with the requirements for notice to one who has requested special notice under *Prob.C. 1250 et seq.* (*infra*, §395). (*Prob.C. 1220(b).*)

(7) *Requirement of Diligent Search Where Address Is Unknown.* C.R.C., Rule 7.52 governs service of notice where the recipient's address is unknown:

(a) If a person entitled to notice cannot be located after a diligent search, the court may dispense with notice or prescribe the manner of notice. (C.R.C., Rule 7.52(c).)

(b) Before the court does so, however, the petitioner must file a declaration describing the efforts made to locate the person entitled to notice. The declaration must state the person's name and last known address, the approximate date when the person was last known to reside there, the efforts made to locate the person, and any facts that explain why the address cannot be located. (C.R.C., Rule 7.52(a).)

(c) The declaration must describe attempts to learn the person's business and residence addresses by inquiry of relatives, friends, acquaintances, and employers of the person entitled to notice and the person who is the subject of the proceeding, review of telephone directories and assistance, and search of real and personal property records of the recorder and assessor in the county where the person was last known or believed to reside. (C.R.C., Rule 7.52(a).) (See Rutter Group, Cal. Practice Guide: Probate, Forms 3:D, 3:E.)

(d) Mailing notice to the person at the county seat is not a manner of giving notice reasonably calculated to give actual notice. (C.R.C., Rule 7.52(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Address.*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §1007.



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e. Mailed Notice.
2. Manner of Mailing.

14 Witkin Sum. Cal. Law Wills § 392

[§ 392] Manner of Mailing.

(1) *Statutory Requirements.* The requirements for mailing a notice or other paper are set forth in *Prob.C. 1215*, and are applicable "[u]nless otherwise expressly provided." However, a provision for mailed notice may be satisfied by personal delivery under *Prob.C. 1216* (*infra*, §393). (*Prob.C. 1215(a).*)

If a notice or other paper is required to be served or given and no manner of giving is specified by statute, service may be by mail or personal delivery as provided in *Prob.C. 1215 et seq.* (*Prob.C. 1217.*)

(2) *Address.* The notice or other paper must be addressed to the person at the person's place of business or place of residence. (*Prob.C. 1215(d).*) However, if the address is not known and the court does not dispense with notice, notice must be given "as the court may require in the manner provided in" *C.C.P. 413.30* (see 3 *Cal. Proc.* (4th), *Actions*, §923). (*Prob.C. 1212.*)

(3) *Deposit.* The notice or other paper must be "deposited for collection in the United States mail, in a sealed envelope, with postage paid, addressed to the person to whom it is mailed." (*Prob.C. 1215(c).*) "Deposit for collection in the United States mail includes deposit in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service." (Law Rev. Com. Comment.)

(4) *When Mailing Is Complete.* "When the notice or other paper is deposited in the mail, mailing is complete and the period of notice is not extended." (*Prob.C. 1215(e).*)

(5) *Class of Mail.* The notice or paper must be sent by airmail if the address is not within the United States and by first-class mail if the address is within the United States. First-class mail includes certified, registered, and express mail. (*Prob.C. 1215(b).*)

(6) *Direct Notice Requirement.* C.R.C., Rule 7.51 imposed the following direct notice requirements:

(a) A notice mailed under *Prob.C. 1220* must be mailed "individually and directly" to the person entitled to notice, except as otherwise permitted in the Probate Code. (C.R.C., Rule 7.51(a)(1).)

(b) A notice mailed to a person in care of another is insufficient unless the person entitled to notice is an adult and has directed the party giving notice in writing to send the notice in care of that person. (C.R.C., Rule 7.51(a)(2).)

(c) Notices mailed to more than one person in the same household must be sent separately to each person. (C.R.C., Rule 7.51(a)(3).)

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SUPPLEMENT: [This section is current through the latest supplement]
(2) *Address.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1007.



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f. Personal Delivery.

14 Witkin Sum. Cal. Law Wills § 393

[§ 393] Personal Delivery.

(1) *Mailing and Personal Delivery as Alternatives.* "If a notice or other paper is required or permitted to be mailed to a person, it may be delivered personally to that person. Personal delivery as provided in this section satisfies a provision that requires or permits a notice or other paper to be mailed." (*Prob.C. 1216(a).*) (See *Prob.C. 1215(a)* [notice or paper required or permitted to be mailed may be personally delivered under *Prob.C. 1216*].)

If a notice or other paper is required to be served or given and no manner of giving is specified by statute, service may be by mail or personal delivery as provided in *Prob.C. 1215 et seq.* (*Prob.C. 1217.*)

(2) *When Personal Delivery Is Complete.* Personal delivery under *Prob.C. 1216* is complete when the notice or paper is delivered personally to the person who is to receive it. (*Prob.C. 1216(b).*)

(3) *Where Address Is Not Known.* If the address of a person to whom notice is to be delivered is not known and the court does not dispense with notice, notice must be given "as the court may require in the manner provided in" *C.C.P. 413.30* (see 3 *Cal. Proc. (4th), Actions, §923*). (*Prob.C. 1212.*)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Where Address Is Not Known.*

Cross-Reference: 3 *Cal. Proc. (5th), Actions, §1007.*



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g. Posted Notice.

14 Witkin Sum. Cal. Law Wills § 394

[§ 394] Posted Notice.

(1) *Requirement of Posting.* A particular statute may require notice of a hearing to be posted as provided by *Prob.C. 1230*. The following statutes are illustrative of those requiring posting:

- (a) *Prob.C. 9944* (petition for authority to lease real property). (See *infra*, §503.)
- (b) *Prob.C. 9963* (petition for authority to grant option to purchase real property). (See *infra*, §497.)
- (c) *Prob.C. 10200* (petition for authority to sell or surrender securities for redemption). (See *infra*, §700.)
- (d) *Prob.C. 10258* (petition for authority to change terms of credit sale of personal property). (See *infra*, §687.)
- (e) *Prob.C. 10260* (petition to confirm sale of personal property). (See *infra*, §689.)
- (f) *Prob.C. 10308* (petition to confirm sale of real property). (See *infra*, §695.)

(2) *Time and Manner.* "At least 15 days before the time set for the hearing, the court clerk shall cause a notice of the time and place of the hearing to be posted at the courthouse of the county where the proceedings are pending. If court is held at a place other than the county seat, the notice may be posted either at the courthouse of the county where the proceedings are pending or at the building where the court is held." (*Prob.C. 1230(a)*.)

(3) *Contents of Notice.* Under *Prob.C. 1230(b)*, posted notice must state the following:

- (a) The name of the estate and of the petitioner.
- (b) The time and place of the hearing.
- (c) The nature of the petition, referring to the petition for further particulars.

SUPPLEMENT: [This section is current through the latest supplement]



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h. Request for Special Notice.

1. In General.

14 Witkin Sum. Cal. Law Wills § 395

[§ 395] In General.

(1) *Persons Who May Request Special Notice.* "At any time after the issuance of letters ... , any person interested in the estate, whether as devisee, heir, creditor, beneficiary under a trust, or as otherwise interested, may in person or by attorney, file with the court clerk, a written request for special notice." (*Prob.C. 1250(a)*.) (On authority of United States Government to request special notice as interested person, see *Prob.C. 7280*, *supra*, §380.)

(2) *Matters for Which Special Notice May Be Requested.* *Prob.C. 1250(c)* provides that special notice may be requested for one or more of the following matters:

- (a) Petitions filed in the estate administration proceeding.
- (b) Inventories and appraisals of property in the estate, including supplemental inventories and appraisals.
- (c) Objections to an appraisal.
- (d) Accounts of a personal representative.
- (e) Reports of status of administration.

(3) *Form of Request.* "The request for special notice shall be so entitled and shall set forth the name of the person and the address to which notices shall be sent." (*Prob.C. 1250(b)*.) The matters for which notice is requested may be individually described or generally referred to as the matters described in *Prob.C. 1250(c)*. (*Prob.C. 1250(d)*.) The Judicial Council has adopted a mandatory form for the request. (See Judicial Council Form No. DE-154 [Request for Special Notice].)

(4) *Service.* A copy of the request must be personally delivered or mailed to the personal representative or to the attorney for the personal representative. If personally delivered, the request is effective when delivered. If mailed, the request is effective when received. (*Prob.C. 1250(e)*.)

(5) *Proof of Service*. "When the original of the request is filed with the court clerk, it shall be accompanied by a written admission or proof of service." (*Prob.C. 1250(f)*.)

(6) *Modification or Withdrawal of Request*. A request for special notice may be modified or withdrawn "in the same manner as provided for the making of the initial request." (*Prob.C. 1251*.)

(7) *Ex Parte Application for Order*. An ex parte application for an order must allege whether special notice has been requested, must identify those who have requested special notice, must allege that special notice has been given to or waived by each person who has requested special notice, and must be accompanied by proof of service of special notice or written waivers of special notice. (C.R.C., Rule 7.55.)

SUPPLEMENT: [This section is current through the latest supplement]



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h. Request for Special Notice.
2. Manner of Giving Special Notice.

14 Witkin Sum. Cal. Law Wills § 396

[§ 396] Manner of Giving Special Notice.

(1) *Hearing*. Unless the court dispenses with the notice, if a request has been made for special notice of a hearing, "the person filing the petition, report, account, or other paper must give written notice of the filing, together with a copy of the petition, report, account, or other paper, and the time and place set for the hearing, by mail to the person named in the request at the address set forth in the request, at least 15 days before the time set for the hearing." (*Prob.C. 1252(a).*)

(2) *Other Matters*. If a request has been made for special notice of the filing of an inventory and appraisal of the estate or any other paper that does not require a hearing, the inventory and appraisal or other paper must be mailed not later than 15 days after the inventory and appraisal or other paper is filed with the court. (*Prob.C. 1252(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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i. Proof of Giving Notice.

14 Witkin Sum. Cal. Law Wills § 397

[§ 397] Proof of Giving Notice.

(1) *Requirement.* If notice of a hearing is required, proof of giving notice must be made "to the satisfaction of the court at or before the hearing." (*Prob.C. 1260(a).*)

(2) *Finding.* "If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court shall so find in its order." (*Prob.C. 1260(b).*) (On waiver of notice, see *Prob.C. 1204*, *supra*, §385.)

(3) *Effect.* When the order becomes final, the court's finding is conclusive "on all persons." (*Prob.C. 1260(c).*)

(4) *Methods of Proof.* Notice, however given, may be proved by evidence given at the hearing. (*Prob.C. 1265.*) In addition, the various kinds of notice may be proved as follows:

(a) *Mailing.* Proof of mailing may be made under *C.C.P. 1013a* (see 6 *Cal. Proc. (4th), Proceedings Without Trial*, §24). (*Prob.C. 1261.*)

(b) *Publication.* Proof of publication may be made by the "affidavit of the publisher or printer, or the foreman or principal clerk of the publisher or printer, showing the time and place of publication." (*Prob.C. 1262.*)

(c) *Posting.* Proof of posting may be made by the affidavit of the person who posted the notice. (*Prob.C. 1263.*)

(d) *Personal Delivery.* Proof of personal delivery may be made by the affidavit of the person making the delivery "showing the time and place of delivery and the name of the person to whom delivery was made." (*Prob.C. 1264.*)

(5) *Judicial Council Forms.* The Judicial Council has adopted the following forms for proof of service:

Form No. DE-120(MA) [Attachment to Notice of Hearing Proof of Service by Mail (Probate--Decedents' Estates and Guardianships and Conservatorships)].

Form No. DE-120(P) [Proof of Personal Service of Notice of Hearing--Decedent's Estate or Trust

(Probate--Decedents' Estates)].

Form No. DE-120(PA) [Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships)].

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Methods of Proof.*

(a) *Mailing.*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §23.



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Witkin Sum. Cal. Law Wills § 398

[§ 398] Citation.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Contents.* Judicial Council Form No. DE-122 has been renamed: Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships). Judicial Council Form No. GC-322 has been added: Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships).



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14 Witkin Sum. Cal. Law Wills § 398

[§ 398] Citation.

(1) *Issuance.* "Where use of a citation is authorized or required by statute, a citation may be issued by the court clerk on the application of any party, without a court order, except in cases where an order is expressly required by law." (*Prob.C. 1240.*) (On nature of probate citation, see *Horney v. Superior Court (1948) 83 C.A.2d 262, 267, 270, 188 P.2d 552; Sacks v. Superior Court (1948) 88 C.A.2d 808, 811, 199 P.2d 396.*)

(2) *Contents.* "The citation shall be directed to the person to be cited, signed by the court clerk, and issued under the seal of the court. The citation shall contain the title of the proceeding, a brief statement of the nature of the proceeding, and a direction that the person cited appear at a time and place specified." (*Prob.C. 1241.*) The Judicial Council has adopted a mandatory form for a citation. (See Judicial Council Form No. DE-122 [Citation (Probate) and Proof of Service].)

(3) *Service.* The citation is served as provided by *C.C.P. 413.10* et seq. (see 3 *Cal. Proc. (4th), Actions*, §919 et seq.). Except as otherwise provided by statute, the citation must be served at least 5 days before its return day. (*Prob.C. 1242.*)

West's Key Number Digest, Wills k.270

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Contents.* Judicial Council Form No. DE-122 has been renamed: Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships). Judicial Council Form No. GC-322 has been added: Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships).(3) *Service.*

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §1001 et seq.



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5. Trial.

14 Witkin Sum. Cal. Law Wills § 399

[§ 399] Trial.

(1) *In General.* Except to the extent that the Probate Code provides otherwise, the rules of practice applicable in civil actions are applicable to Probate Code proceedings. (*Prob.C. 1000*, supra, §371.) (See *Estate of Morrison* (1932) 125 C.A. 504, 507, 14 P.2d 102 [court may enter dismissal for failure to bring will contest to trial]; *O'Day v. Superior Court* (1941) 18 C.2d 540, 542, 116 P.2d 621 [court may enter dismissal for failure to appear at heirship proceeding]; *Horney v. Superior Court* (1948) 83 C.A.2d 262, 267, 188 P.2d 552 [because probate citation is basically different from summons, statute providing mandatory dismissal for delay in service is not applicable]; *Estate of Shaffer* (1968) 268 C.A.2d 522, 524, 74 C.R. 39 [findings are required to support order for family allowance in contested proceeding].)

(2) *Affidavits as Evidence.* Affidavits may be used as evidence in uncontested proceedings (*Prob.C. 1022*, supra, §376), but they are not a proper substitute for oral evidence in contested proceedings. (*Estate of Fraysher* (1956) 47 C.2d 131, 135, 301 P.2d 848 [holding, however, that objection of incompetency was waived by failure to raise it at trial]; *Estate of Wallace* (1977) 74 C.A.3d 196, 201, 141 C.R. 426; see 1 Cal. Evidence (4th), Hearsay, §297.)

(3) *Jury Trial.* Under former California law, a jury trial was not generally available in probate proceedings in the absence of express statutory authorization. (See *Estate of England* (1931) 214 C. 298, 300, 5 P.2d 428 [no jury trial in proceeding for settlement of accounts]; *Estate of Beach* (1975) 15 C.3d 623, 642, 125 C.R. 570, 542 P.2d 994 [same]; *Hutchinson v. Gertsch* (1979) 97 C.A.3d 605, 612, 617, 159 C.R. 40 [no jury trial at hearing on attorney's petition for extraordinary fees]; *Estate of Phelps* (1990) 223 C.A.3d 332, 340, 273 C.R. 2 [no jury trial in executor's action to recover real property transferred by decedent].) However, a jury trial was available where the Probate Code provided for triable issues of fact in the proceeding or specifically authorized a jury trial. (See *Estate of Green* (1944) 25 C.2d 535, 154 P.2d 692 [will contest]; *Mallarino v. Superior Court* (1953) 115 C.A.2d 781, 783, 252 P.2d 993 [petition to determine interest in estate]; *Heiser v. Superior Court* (1979) 88 C.A.3d 276, 280, 281, 151 C.R. 745.)

The Probate Code now rejects the line of cases finding that Probate Code provisions for framing factual issues are an independent statutory ground for a jury trial. (19 Cal. Law Rev. Com. Reports, pp. 923, 924.) Under *Prob.C. 825*, there is no right to a jury trial in proceedings under the Probate Code except as "expressly provided" otherwise in the Code. (See *Prob.C. 1452*, infra, §907 [no jury trial in guardianship and conservatorship proceedings except as specifically provided in *Prob.C. 1400* et seq.]; *Prob.C. 17006* [no right to jury trial in proceedings under the Trust Law (*Prob.C. 15000* et seq.) concerning the internal affairs of trusts].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Affidavits as Evidence*. See *Estate of Bennett* (2008) 163 C.A.4th 1303, 1308, 78 C.R.3d 435 [on party's request, evidentiary hearing was required in contested proceeding].



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Witkin Sum. Cal. Law Wills § 400

[§ 400] Costs.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Costs on Appeal*. The portion of C.R.C., Rule 26 quoted in the text was amended and renumbered in 2003 and renumbered in 2006 and 2007. C.R.C., Rule 8.278(a)(4) now reads: "In probate cases, the prevailing party must be awarded costs unless the Court of Appeal orders otherwise, but the superior court must decide who will pay the award."



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14 Witkin Sum. Cal. Law Wills § 400

[§ 400] Costs.

(1) *Special Cost Provisions.* A number of statutes contain special provisions relating to costs. The following are illustrative:

- (a) *Prob.C. 6544* (costs in proceedings for family allowance). (See *infra*, §779.)
- (b) *Prob.C. 9255* (costs where creditors contest amount of allowed claim). (See *infra*, §647.)
- (c) *Prob.C. 9653* (costs in action to recover fraudulently conveyed property). (See *infra*, §478.)
- (d) *Prob.C. 11624* (costs on preliminary distribution). (See *infra*, §729.)

(2) *Discretion To Award Costs.* Unless otherwise provided by the Probate Code or Judicial Council rules, "either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." (*Prob.C. 1002.*) (See *Estate of Selb (1949) 93 C.A.2d 788, 794, 210 P.2d 45* [decided under predecessor statute; abuse of discretion to allow costs to unsuccessful will contestant who lost interest in estate under forfeiture clause].)

(3) *When Fiduciary Is Personally Liable for Costs.* Costs recovered in an action by or against a fiduciary are chargeable against the estate, fund, or person represented unless the court directs the costs to be paid by the fiduciary personally for mismanagement or bad faith in the action or defense. (*C.C.P. 1026.*)

(4) *Attorneys' Fees Are Not Included.* The general rule that attorneys' fees are not part of costs, and cannot be awarded in the absence of express statutory authority, applies to probate proceedings. (See *Estate of Bevelle (1947) 81 C.A.2d 720, 722, 185 P.2d 90*; cf. *Estate of Filtzer (1949) 33 C.2d 776, 781, 205 P.2d 377* [attorneys' fees included in family allowance for minor child to protect his interest]; 7 *Cal. Proc. (4th), Judgment*, §145 et seq.)

(5) *Costs on Appeal.* "In probate cases, in the absence of an express direction for costs by the reviewing court, costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom the award shall be made." (C.R.C., Rule 26(a); see *Estate of Powers (1950) 97 C.A.2d 888, 218 P.2d 1007*; *Estate of Williams (1952) 110 C.A.2d 50, 242 P.2d 26*; *Estate of Hart (1953) 119 C.A.2d 310, 315, 259 P.2d 703*; 9 *Cal. Proc. (4th), Appeal*, §802 et

seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Attorneys' Fees Are Not Included.*

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §149 et seq.

(5) *Costs on Appeal.* The portion of C.R.C., Rule 26 quoted in the text was amended and renumbered in 2003 and renumbered in 2006 and 2007. C.R.C., Rule 8.278(a)(4) now reads: "In probate cases, the prevailing party must be awarded costs unless the Court of Appeal orders otherwise, but the superior court must decide who will pay the award."

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §953 et seq.



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a. Probate Code Appeals.

Witkin Sum. Cal. Law Wills § 401

[§ 401] *Probate Code Appeals.*

SUPPLEMENT: [This section is current through the latest supplement]

(3) *General Appeal Statute.* An order rejecting a creditor's claim is not an appealable order under *Prob.C. 1300(d)*. The exclusive method for enforcing a rejected claim is filing a separate action on the claim (see text, §645). (*McDonald v. Structured Asset Sales, LLC (2007) 154 C.A.4th 1068, 1074, 65 C.R.3d 366* [creditor's claim by personal representative].)



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a. Probate Code Appeals.

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[§ 401] Probate Code Appeals.

(1) *In General.* Appealable orders are set forth in the Probate Code. It has been said that appealable orders are strictly limited to those listed. (See *Estate of Schechtman* (1955) 45 C.2d 50, 54, 286 P.2d 345; *Estate of Cole* (1951) 106 C.A.2d 823, 236 P.2d 206; *Estate of Stoddart* (2004) 115 C.A.4th 1118, 1125, 9 C.R.3d 770 [order denying motion for reconsideration is not appealable].) But there is contrary authority. In *Estate of Miramontes-Najera* (2004) 118 C.A.4th 750, 755, 13 C.R.3d 240, the court said, "it is well established that a probate order's appealability is determined not from its form, but from its legal effect. ... An order is appealable, even if not mentioned in the Probate Code as appealable, if it has the same effect as an order the Probate Code expressly makes appealable." (On scope of review by prohibition or certiorari in probate cases, see 2 Cal. Proc. (4th), *Jurisdiction*, §314; 9 Cal. Proc. (4th), *Appeal*, §18.)

(2) *Statutory Framework.* Prob.C. 1300 et seq. govern appeals in proceedings under the Probate Code. A general statute applies to all proceedings, and additional specific statutes apply to particular proceedings.

(3) *General Appeal Statute.* In all proceedings under the Probate Code, an appeal may be taken from the grant or denial of the following orders:

(a) "Directing, authorizing, approving, or confirming the sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property." (Prob.C. 1300(a).) (See *Estate of Martin* (1999) 72 C.A.4th 1438, 1441, 86 C.R.2d 37, 9 Cal. Proc. (4th), *Appeal*, Supp., §162 [order declining to vacate unconfirmed sale of estate property was appealable under Prob.C. 1300(a), where order not only denied request to void sale, but effectively approved sale and limited remedy for improper sale to surcharge against executor].)

(b) Settling an account. (Prob.C. 1300(b).)

(c) Authorizing, instructing, or directing a fiduciary or approving or confirming his or her acts. (Prob.C. 1300(c).)

(d) "Directing or allowing payment of a debt, claim, or cost." (Prob.C. 1300(d).)

(e) "Fixing, directing, authorizing, or allowing payment" of an attorney's compensation or expenses. (Prob.C. 1300(e).)

(f) "Fixing, directing, authorizing, or allowing payment" of a fiduciary's compensation or expenses. (*Prob.C. 1300(f).*)

(g) "Surcharging, discharging, or removing a fiduciary." (*Prob.C. 1300(g).*)

(h) "Transferring the property of the estate to a fiduciary in another jurisdiction." (*Prob.C. 1300(h).*)

(i) Allowing or denying a fiduciary's petition to resign. (*Prob.C. 1300(i).*)

(j) Discharging a surety on a fiduciary's bond. (*Prob.C. 1300(j).*)

(k) Adjudicating the merits of a claim under *Prob.C. 850* et seq. (determining claims to property under Probate Code; see supra, §356 et seq.). (*Prob.C. 1300(k).*)

(4) *Particular Proceedings.* The following statutes govern appeals in particular proceedings:

(a) *Guardianship, conservatorship, and other protective proceedings: Prob.C. 1301.* (See infra, §988.)

(b) *Powers of attorney: Prob.C. 1302.* (See infra, §875.)

(c) *Health care directives: Prob.C. 1302.5.* (See infra, §899.)

(d) *Decedents' estates: Prob.C. 1303.* (See infra, §411.)

(e) *Trusts: Prob.C. 1304.* (See 13 Summary (10th), *Trusts*, §232.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

Scope of review in probate cases:

Cross-References: 2 *Cal. Proc.* (5th), *Jurisdiction*, §323; 9 *Cal. Proc.* (5th), *Appeal*, §91.

(3) *General Appeal Statute.* An order rejecting a creditor's claim is not an appealable order under *Prob.C. 1300(d)*. The exclusive method for enforcing a rejected claim is filing a separate action on the claim (see text, §645). (*McDonald v. Structured Asset Sales, LLC* (2007) 154 C.A.4th 1068, 1074, 65 C.R.3d 366 [creditor's claim by personal representative].) *Estate of Martin:*

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §208.



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b. Effect of Appeal.

14 Witkin Sum. Cal. Law Wills § 402

[§ 402] Effect of Appeal.

(1) *Stay and Limitations.* Generally, an appeal under *Prob.C. 1300* et seq. stays the operation and effect of the judgment. (*Prob.C. 1310(a)*.) However, the following limitations apply:

(a) *Direction by court to prevent injury or loss.* To prevent injury or loss to a person or property, the court may direct the exercise of a fiduciary's powers or appoint a temporary guardian, conservator, or special administrator to exercise powers as if no appeal were pending. All acts of the fiduciary under the court's direction are valid "irrespective of the result of the appeal." Further, an appeal of the directions made by the court does not stay the directions. (*Prob.C. 1310(b)*.) (See *Kane v. Superior Court* (1995) 37 C.A.4th 1577, 1584, 44 C.R.2d 578 [trial court erroneously permitted stay pending appeal of order directing delivery of frozen sperm to decedent's girlfriend, who was at imminent risk of loss if she had to wait out appellate process before attempting impregnation; rule codified in *Prob.C. 1310(b)*].)

(b) *Guardianship of the person.* C.C.P. 917.7 (see 9 Cal. Proc. (4th), *Appeal*, §231), governing stays in child custody and visitation cases, applies in proceedings for guardianship of the person. (*Prob.C. 1310(c)*.)

(c) *Failure to provide undertaking.* An appeal does not stay the operation and effect of a judgment or order if an undertaking required by the court pursuant to C.C.P. 917.9 (see 9 Cal. Proc. (4th), *Appeal*, §279) has not been given. (*Prob.C. 1310(d)*.)

(d) *Money judgment or order to pay money.* An appeal does not stay the operation and effect of a money judgment or an order directing the payment of money unless either (1) a bond is posted under C.C.P. 917.1, or (2) the payment is to be made from the estate of a decedent administered under *Prob.C. 7000* et seq. or the estate of a person subject to a conservatorship or guardianship. However, the court may require a bond. (*Prob.C. 1310(e)*.)

(2) *Effect of Appeal on Acts of Personal Representative.* An appeal from an order granting letters testamentary or of administration suspends the personal representative's powers; hence, where an administrator nevertheless proceeded to probate the estate, after reversal, he was properly denied fees. (*Estate of Gibson* (1965) 233 C.A.2d 125, 128, 43 C.R. 302.)

(3) *Effect of Reversal on Acts of Fiduciary.* If the appointment of a fiduciary is reversed on appeal, acts performed after issuance of letters and before reversal are valid. The appointed person is not liable for "any otherwise proper act done in good faith," nor is a transaction void "if entered into with a third person dealing in good faith and for value." (*Prob.C. 1311.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Stay and Limitations.*(b) *Guardianship of the person.*

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §225.

(c) *Failure to provide undertaking.*

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §273.



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C. Practice and Procedure in Probate Code Proceedings.
7. Appeal.
c. Judgment Roll.

14 Witkin Sum. Cal. Law Wills § 403

[§ 403] Judgment Roll.

Prob.C. 1050 sets forth the papers that comprise the judgment roll, when applicable, in proceedings under the Probate Code.

(1) *In General.* In all proceedings under the Probate Code, the judgment roll includes the following:

(a) The petition, application, report, or account that initiates the proceeding. (*Prob.C. 1050(a)(1).*)

(b) An order directing that notice of a hearing be given. (*Prob.C. 1050(a)(2).*)

(c) Notice of the hearing, and any order to show cause, with affidavits showing required publication, posting, mailing, or personal delivery of the notice and order. (*Prob.C. 1050(a)(3).*)

(d) A citation, in case no answer or written opposition is filed by a party entitled to notice of the proceeding by citation, with the affidavit or proof of service and, if service is by publication, the affidavit of publication and the order directing publication. (*Prob.C. 1050(a)(4).*)

(e) Any finding of the court or referee. (*Prob.C. 1050(a)(5).*)

(f) The order or statement of decision. (*Prob.C. 1050(a)(6).*)

(g) Any letters of a personal representative, guardian, or conservator. (*Prob.C. 1050(a)(7).*)

(2) *Contested Proceeding.* If an answer, demurrer, written opposition, or counter petition is filed, the judgment roll includes (a) pleadings and "papers in the nature of pleadings," (b) an order striking a pleading in whole or in part, (c) an order made on demurrer, (d) an order relating to a change of parties, and (e) a jury verdict. (*Prob.C. 1050(b).*)

(3) *Probate of Will.* In a proceeding for the probate of a will, the judgment roll includes the will. (*Prob.C. 1050(c).*)

(4) *Will Contest, Revocation of Probate, or Distribution Under Will.* In a will contest or a proceeding for revocation

of probate, or for preliminary or final distribution under a will, the judgment roll includes the will and the order admitting the will to probate. (*Prob.C. 1050(d).*)

(5) *Final Account and Distribution.* In a proceeding for the settlement of the final account of a personal representative or for the final distribution of an estate, the judgment roll includes the affidavit showing publication of notice to creditors. (*Prob.C. 1050(e).*)

SUPPLEMENT: [This section is current through the latest supplement]



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 - a. Title to Decedent's Property.

14 Witkin Sum. Cal. Law Wills § 404

[§ 404] Title to Decedent's Property.

Subject to *Prob.C. 7001* governing administration (*infra*, §405), "title to a decedent's property passes on the decedent's death to the person to whom it is devised in the decedent's last will, or in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession." (*Prob.C. 7000.*) In other words, title does not come from the decree of distribution, which merely declares the title that came from the will or through the death of the decedent intestate. (See *United States Fidelity & Guaranty Co. v. Mathews* (1929) 207 C. 556, 559, 279 P. 655; *Murphy v. Crouse* (1901) 135 C. 14, 17, 66 P. 971; *Reed v. Hayward* (1943) 23 C.2d 336, 342, 144 P.2d 561; *Unif.Prob.C.*, §3-101.)

In *Estate of Roulac* (1977) 68 C.A.3d 1026, 136 C.R. 492, the court said: "The basic principle ... should not be altered because the provisions (or lack of them) in a testamentary trust operate to postpone the date at which the fact or extent of the testacy can be ascertained. If the contingency which results in intestacy in fact comes about, title to the property which passes by intestacy vests in the testator's heirs as of the date of his death, and the property never becomes a part of the trust estate except for the limited purpose of providing income to the beneficiaries designated to receive that income during the life of the trust." (68 C.A.3d 1032.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 405

[§ 405] Probate and Administration.

(1) *Probate of Will.* The probate of a will is necessary before it can be given effect; e.g., an unprobated will is not admissible as evidence of title in a devisee. (See *Reed v. Hayward* (1943) 23 C.2d 336, 339, 144 P.2d 561; cf. Unif.Prob.C., §3-102 [permitting admission in some circumstances].) However, an unprobated will is admissible in an action to determine rights in property, where the validity or interpretation of a gift, devise, bequest, or trust under the will is involved. (*Estate of Jameson* (1949) 93 C.A.2d 35, 40, 208 P.2d 54.)

(2) *Administration of Estate.* Although title to the decedent's property vests in the heir or devisee (see supra, §404), the property "is subject to administration under this code, except as otherwise provided by law, and is subject to the rights of beneficiaries, creditors, and other persons as provided by law." (*Prob.C. 7001*; see *Luckhardt v. Mooradian* (1949) 92 C.A.2d 501, 516, 207 P.2d 579; *Carlson v. Lindauer* (1953) 119 C.A.2d 292, 308, 259 P.2d 925 [power of court to sell cannot be affected by agreements of devisee]; cf. Unif.Prob.C., §§3-101, 3-102.) Generally, proceedings in administration are necessary before the heirs or the devisees under the will can gain possession of the property and transfer title to it. (*Estate of Strong* (1898) 119 C. 663, 665, 51 P. 1078; see 79 Am.Jur.2d (2002 ed.), *Wills* §727 et seq.; 97 Harv. L. Rev. 1108.)

(3) *Statutory Alternatives to Administration.* Among the statutory exceptions to the requirement of administration are the following:

- (a) *Prob.C. 5000* et seq. (contract rights). (See supra, §306.)
- (b) *Prob.C. 5100* et seq. (multiple-party accounts). (See 4 *Summary* (10th), *Negotiable Instruments*, §77 et seq.)
- (c) *Prob.C. 13000* et seq. (collection or transfer of small estate without administration). (See infra, §793 et seq.)
- (d) *Prob.C. 13500* et seq. (passage of property to surviving spouse without administration). (See infra, §818 et seq.)
- (e) *Prob.C. 15000* et seq. (trusts). (See 13 *Summary* (10th), *Trusts*, §18 et seq.)
- (f) *Prob.C. 5500* et seq., *Health & Saf.C. 18102.2*, *Veh.C. 5910.5*, *Veh.C. 9916.5* (transfer of registered property

held in beneficiary form). (See *supra*, §312 et seq.)

West's Key Number Digest, Wills k.203, 205

SUPPLEMENT: [This section is current through the latest supplement]



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 c. Nature of Probate Proceeding.

14 Witkin Sum. Cal. Law Wills § 406

[§ 406] Nature of Probate Proceeding.

The term "probate proceeding" is often broadly used to include all proceedings under the Probate Code, including the probate of wills (*infra*, §543 et seq.); the administration of estates of decedents (*infra*, §583 et seq.), minors (*infra*, §1066) and missing persons (*supra*, §365 et seq.); and guardianship and conservatorship proceedings (*infra*, §903 et seq.).

The proceeding is said to be in rem, in that it conclusively determines, against all persons, such matters as the title to and distribution of the decedent's property. (*Estate of Hunter* (1929) 99 C.A. 191, 194, 278 P. 485; *Abels v. Frey* (1932) 126 C.A. 48, 53, 14 P.2d 594; *Estate of Wise* (1949) 34 C.2d 376, 382, 210 P.2d 497; *Estate of Hensel* (1956) 144 C.A.2d 429, 433, 301 P.2d 105; *Estate of Radovich* (1957) 48 C.2d 116, 120, 308 P.2d 14; *Bodine v. Superior Court* (1962) 209 C.A.2d 354, 359, 26 C.R. 260; *Estate of Clarke* (1967) 66 C.2d 142, 148, 56 C.R. 897, 424 P.2d 337; see *infra*, §§549, 726; 2 *Cal. Proc.* (4th), *Jurisdiction*, §234 et seq.)

It is a special proceeding, not an action. (See *Estate of Raymond* (1940) 38 C.A.2d 305, 307, 100 P.2d 1085; on nature of special proceeding, see 3 *Cal. Proc.* (4th), *Actions*, §13 et seq.) Thus, the principle of code pleading, that there is but one form of action, relates to legal and equitable actions, not to probate proceedings. Hence a complaint filed in the form of a general equitable action cannot be treated as a petition to contest a will. (*Fisher v. Superior Court* (1937) 23 C.A.2d 528, 534, 73 P.2d 892; see 2 *Cal. Proc.* (4th), *Courts*, §227.) Nevertheless, some probate matters, such as will contests and proceedings to determine distribution, resemble actions between adversary parties. (See *O'Day v. Superior Court* (1941) 18 C.2d 540, 543, 116 P.2d 621; *infra*, §719.)

The policy of the law favors the prompt administration and settlement of estates, and probate proceedings should be expeditiously conducted. (*Colden v. Costello* (1942) 50 C.A.2d 363, 372, 122 P.2d 959; *Estate of Dargie* (1939) 33 C.A.2d 148, 158, 91 P.2d 126.)

West's Key Number Digest, Wills k.203 et seq.

SUPPLEMENT: [This section is current through the latest supplement]
Proceeding in rem:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §243 et seq.

Nature of special proceeding:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §64 et seq.

Complaint in equitable action not treated as petition in will contest:

Cross-Reference: 2 Cal. Proc. (5th), *Courts*, §224.



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14 Witkin Sum. Cal. Law Wills § 407

[§ 407] Separate Proceedings Involving One Estate.

Although it is proper to speak of a probate proceeding, some of the intermediate or incidental steps are treated as separate proceedings, culminating in final, appealable orders, not subject to review or attack in later stages of the proceedings. (On Probate Code appeals, see *supra*, §401.) Common examples are an order approving a current account of a testamentary trustee (*Security-First Nat. Bank of Los Angeles v. Superior Court* (1934) 1 C.2d 749, 755, 37 P.2d 69), and an order authorizing the sale of property, not subject to attack on the later settlement of the account (*Estate of Keet* (1940) 15 C.2d 328, 333, 100 P.2d 1045). (See also *Estate of Werfel* (1953) 116 C.A.2d 167, 173, 253 P.2d 79 [order giving family allowance; not subject to attack by taxing authorities seeking to collect income taxes from insolvent estate]; cf. *Estate of Kennedy* (1948) 87 C.A.2d 795, 798, 197 P.2d 844 [appeal from order confirming sale by special administrator does not deprive court of jurisdiction to hear wholly independent will contest].)

The terms of a decree of final distribution, creating a testamentary trust, are not subject to later attack by beneficiaries. (*Estate of Loring* (1946) 29 C.2d 423, 428, 175 P.2d 524, *infra*, §726; see *Estate of Van Deusen* (1947) 30 C.2d 285, 290, 182 P.2d 565.) And in *Estate of Munson* (1948) 86 C.A.2d 67, 194 P.2d 70, on the 15th annual account of a testamentary trustee, the court ordered the question of charging off indebtedness of the beneficiary reserved for decision at the time of termination of the trust. *Held*, this order was *res judicata* and precluded a determination, before the end of the trust, on a petition for instructions to the trustee. (86 C.A.2d 72.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Judicial Council Forms.

Witkin Sum. Cal. Law Wills § 408

[§ 408] Judicial Council Forms.

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form Number	Title
DE-121	Notice of Petition to Administer Estate (Probate--Decedents' Estates) [renamed]
DE-121(MA)	Attachment to Notice of Petition to Administer Estate--Proof of Service by Mail (Probate--Decedents' Estates) [added]
DE-122	Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-260	Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-265	Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-295	Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships) [added]



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[§ 408] Judicial Council Forms.

The Judicial Council may prescribe the form of "applications, notices, orders, and other documents" required by the Probate Code. Any form prescribed by the Judicial Council is deemed to comply with the code. (*Prob.C. 1001(b)*, supra, §373.) The Council has adopted the following forms for proceedings involving decedents' estates:

\$

IForm Number

\$

ITitle

D

E-111

P

etition for Probate
 (Probate--Decedents Es-
 tates)

D

E-120

N

otice of Hearing--Decedent's
 Estate or Trust
 (Probate--Decedents' Es-
 tates)

D

E-120(MA)

A

ttachment to Notice of Hear-
 ing Proof of Service by Mail
 (Probate--Decedents' Estates
 and Guardianships and Con-

	servatorships)	
D		
	E-120(P)	P
	Proof of Personal Service of Notice of Hearing-- Decedent's Estate or Trust (Probate--Decedents' Es- tates)	
D		
	E-120(PA)	A
	Attachment to Notice of Hear- ing Proof of Personal Ser- vice (Probate--Decedents' Estates and Guardianships and Conservatorships)	
D		
	E-121	N
	Notice of Petition to Adminis- ter Estate	
D		
	E-122	C
	Initiation (Probate) and Proof of Service	
D		
	E-125	S
	Summons (Probate)	
D		
	E-131	P
	Proof of Subscribing Witness	
D		
	E-135	P
	Proof of Holographic Instru- ment	
D		
	E-140	O
	Order for Probate	
D		
	E-147	D
	Duties and Liabilities of Per- sonal Representative and Acknowledgement of Re-	

	ceipt	
D		
	E-147S	C
	onfidential Supplement to Duties and Liabilities of Personal Representative	
D		
	E-150	L
	etters	
D		
	E-154	R
	equst for Special Notice	
D		
	E-157	N
	otice of Administration to Creditors	
D		
	E-160	I
	nventory and Appraisal	
D		
	E-161	I
	nventory and Appraisal At- tachment	
D		
	E-165	N
	otice of Proposed Action (Objection--Consent)	
D		
	E-166	W
	aiver of Notice of Proposed Action	
D		
	E-172	C
	reditor's Claim	
D		
	E-174	A
	llowance or Rejection of Creditor's Claim	
D		
	E-200	O

	Order Prescribing Notice	
D		
	E-221	S
	Marital or Domestic Partner Property Petition (Probate--Decedents Es- tates)	
D		
	E-226	S
	Marital or Domestic Partner Property Order (Probate--Decedents Es- tates)	
D		
	E-260	R
	Report of Sale and Petition for Order Confirming Sale of Real Property	
D		
	E-265	O
	Order Confirming Sale of Real Property	
D		
	E-270	E
	Ex Parte Petition for Author- ity to Sell Securities and Or- der	
D		
	E-275	E
	Ex Parte Petition for Approv- al of Sale of Personal Prop- erty and Order	
D		
	E-305	A
	Affidavit re Real Property of Small Value (Probate)	
D		
	E-310	P
	Petition to Determine Succes- sion to Real Property (Probate)	
D		

D	E-315	O
	Order Determining Succession to Real Property (Probate)	
D	E-350	P
	Petition for Appointment of Guardian Ad Litem--Probate	
D	E-351	O
	Order Appointing Guardian Ad Litem--Probate	

SUPPLEMENT: [This section is current through the latest supplement]

The following Judicial Council forms have been added or renamed:

Form Number	Title
DE-121	Notice of Petition to Administer Estate (Probate--Decedents' Estates) [renamed]
DE-121(MA)	Attachment to Notice of Petition to Administer Estate--Proof of Service by Mail (Probate--Decedents' Estates) [added]
DE-122	Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-174	Allowance or Rejection of Creditor's Claim (Probate--Decedents' Estates) [renamed]
DE-260	Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-265	Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
DE-295	Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships) [added]



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14 Witkin Sum. Cal. Law Wills § 409

[§ 409] New Trial and Relief From Default.

(1) *New Trial*. In estate administration proceedings, a motion for a new trial may be made only in (a) a contest of a will or revocation of probate of a will, or (b) cases in which "a right to a jury trial is expressly granted, whether or not the case was tried to a jury." (*Prob.C.* 7220.) (On motion for new trial generally, see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §18 et seq.)

(2) *Relief From Default*. The statutory motion for relief from default (*C.C.P.* 473) is available in adversary proceedings in probate. (See *Kramer v. Superior Court* (1950) 36 *C.2d* 159, 161, 222 *P.2d* 874; 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152 et seq.)

West's Key Number Digest, Wills k.303 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *New Trial*.

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §18 et seq.

(2) *Relief From Default*.

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.



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c. Right To Appeal in Estate Administration Proceedings.

14 Witkin Sum. Cal. Law Wills § 410

[§ 410] Right To Appeal in Estate Administration Proceedings.

The general principle that only an aggrieved party may appeal (see 9 *Cal. Proc.* (4th), *Appeal*, §181 et seq.) applies to estate administration proceedings. Thus, ordinarily an executor or administrator as such is not aggrieved by a decree of distribution. (*Estate of Murphey* (1936) 7 C.2d 712, 717, 62 P.2d 374; on whether administrator may appeal from order awarding extraordinary fees on ground of their inadequacy, see *Estate of Lagersen* (1962) 210 C.A.2d 788, 792, 26 C.R. 783.) But in two situations, the personal representative may appeal:

(1) Where the personal representative is also a distributee. In *Estate of Strong* (1937) 10 C.2d 389, 74 P.2d 231, the notice of appeal read "Hattie Strong, executrix of the estate of Alice B. Strong." Appellant was the residuary legatee as well as the executrix. *Held*, the appeal would be considered as taken in her individual capacity. (See 9 *Cal. Proc.* (4th), *Appeal*, §461.)

(2) Where claims are made that might diminish the estate and adversely affect the interests of heirs or devisees under the will. (*Estate of Kessler* (1948) 32 C.2d 367, 369, 196 P.2d 559 [appeal by executor from large award of fees to attorney who represented beneficiary under testamentary trust in settlement of will contest]; see 9 *Cal. Proc.* (4th), *Appeal*, §461.)

West's Key Number Digest, Wills k.395

SUPPLEMENT: [This section is current through the latest supplement]

Only aggrieved party may appeal:

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §33 et seq.(1) *Personal representative is also distributee:*

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §562.

(2) *Claims may adversely affect heirs or devisees:*

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §562.



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d. Appealable Orders in Estate Administration Proceedings.

14 Witkin Sum. Cal. Law Wills § 411

[§ 411] Appealable Orders in Estate Administration Proceedings.

Prob.C. 1300 sets forth appealable orders in all proceedings under the Probate Code. (See *supra*, §401.) *Prob.C. 1303* governs decedents' estates. (On appealable orders in estate administration proceedings, see also 9 *Cal. Proc. (4th)*, *Appeal*, §159 et seq.) Granting or denying the following orders is appealable:

(1) Granting or revoking letters of a personal representative, except letters of special administration. (*Prob.C. 1303(a).*)

(2) Admitting a will to probate or revoking probate. (*Prob.C. 1303(b).*)

(3) Setting aside a small estate. (*Prob.C. 1303(c).*)

(4) Setting apart a probate homestead or property exempt from enforcement of a money judgment. (*Prob.C. 1303(d).*)

(5) Granting, modifying, or terminating a family allowance. (*Prob.C. 1303(e).*)

(6) Determining heirship, succession, entitlement, or the persons to whom distribution should be made. (*Prob.C. 1303(f).*)

(7) Directing distribution of property. (*Prob.C. 1303(g).*)

(8) Determining that property passes to or belongs to a surviving spouse. (*Prob.C. 1303(h).*)

(9) Authorizing a personal representative to invest or reinvest surplus money. (*Prob.C. 1303(i).*)

(10) Determining whether an action constitutes a contest. (*Prob.C. 1303(j).*)

(11) Determining the priority of debts allocated between the estate and the surviving spouse. (*Prob.C. 1303(k).*)

(12) A final order under *Prob.C. 20100* et seq. (proration of estate and generation skipping transfer taxes; see *infra*,

§662 et seq.). (*Prob.C. 1303(l).*)

West's Key Number Digest, Wills k.394

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 9 *Cal. Proc.* (5th), *Appeal*, §212 et seq.



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e. Transactions Affecting Property.

14 Witkin Sum. Cal. Law Wills § 412

[§ 412] Transactions Affecting Property.

(1) *Nature of Transaction.* For purposes of *Prob.C. 7260* et seq., "transaction" means a transaction affecting title to property in the estate. (*Prob.C. 7260.*) (See *Prob.C. 2111*, infra, §1020 [similar provision in Guardianship-Conservatorship Law].) "Transaction" includes, but is not limited to, the following:

(a) "In the case of real property, a conveyance (including a sale, option, or order confirming a sale or option), a lease, the creation of a mortgage, deed of trust, or other lien or encumbrance, the setting apart of a probate homestead, or the distribution of property." (*Prob.C. 7260(a).*)

(b) "In the case of personal property, a transfer of the property or the creation of a security interest or other lien on the property." (*Prob.C. 7260(b).*)

(2) *Execution of Instrument.* "If a transaction affecting real property in the estate is executed by the personal representative in accordance with the terms of a court order, the instrument shall include a statement that the transaction is made by authority of the order authorizing or directing the transaction and shall give the date of the order." (*Prob.C. 7261.*)

(3) *Effect of Transaction.* "A transaction executed by the personal representative in accordance with an order authorizing or directing the transaction has the same effect as if the decedent were living at the time of the transaction and had carried it out in person while having legal capacity to do so." (*Prob.C. 7262.*)

(4) *Recordation of Order.* "If an order is made setting apart a probate homestead, confirming a sale or making a distribution of real property, or determining any other matter affecting title to real property in the estate, the personal representative shall record a certified copy of the order in the office of the county recorder in each county in which any portion of the real property is located." (*Prob.C. 7263.*) (On recordation as receipt for distribution of property, see *Prob.C. 11751*, infra, §733.)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Summary of California Law IX. PROCEEDINGS UNDER THE PROBATE CODE

D. Estate Administration Proceedings. 3. Control of Decedent's Property. a. Delivery of Tangible Personal Property.

14 Witkin Sum. Cal. Law Wills § 413

[§ 413] Delivery of Tangible Personal Property.

(1) *In General.* A public administrator, government official, or law enforcement agency, the hospital or institution in which the decedent died, or the decedent's employer may, without the need to wait 40 days after death, deliver the decedent's tangible personal property (including keys to the decedent's residence) to the decedent's surviving spouse, relative, or conservator or guardian of the estate. (*Prob.C. 330(a).*) However, property may not be delivered "if the person knows or has reason to believe that there is a dispute over the right to possession of the property." (*Prob.C. 330(b).*) (On 40-day delay applicable to transfer of property without administration by affidavit under *Prob.C. 13100* et seq., see *infra*, §797 et seq.)

(2) *Proof of Identity.* A person who delivers property under *Prob.C. 330* must require "reasonable proof of the status and identity of the person to whom the property is delivered," and may rely on a document described in *Prob.C. 13104(d)* (collection of personal property by affidavit; *infra*, §800) as proof of identity. (*Prob.C. 330(c).*) The person must keep a record of the property delivered and the status and identity of the person to whom the property is delivered for 3 years after the date of delivery. (*Prob.C. 330(d).*)

(3) *Effect of Delivery.* Delivery of the property does not determine ownership of the property or confer any greater rights in the property than the recipient would otherwise have and does not preclude later proceedings for administration of the decedent's estate. If proceedings for administration of the decedent's estate are commenced, the person holding the property must deliver it to the personal representative on request. (*Prob.C. 330(e).*) (On right and duty of personal representative to take possession of decedent's property, see *infra*, §475.)

(4) *No Liability.* A person who delivers property under *Prob.C. 330* is not liable for loss or damage caused by the person to whom the property is delivered. (*Prob.C. 330(f).*)

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b. Access to Safe Deposit Box.

14 Witkin Sum. Cal. Law Wills § 414

[§ 414] Access to Safe Deposit Box.

(1) *Scope of Statute.* *Prob.C. 331* applies to a safe deposit box in a financial institution held in the decedent's name alone or by the decedent and others who are also deceased. It does not affect the rights of a surviving coholder. (*Prob.C. 331(a).*) (See *Prob.C. 40* ["financial institution" defined].)

(2) *Removal and Delivery of Documents.* Before letters have been issued, a person with the key to the decedent's safe deposit box may make an inventory of the contents and may remove wills, trust instruments, and instructions for the disposition of the decedent's remains. (*Prob.C. 331(b), (d).*) No other contents may be removed. (*Prob.C. 331(f).*) The person given access must deliver any wills to the clerk of the superior court and must mail or deliver a copy to the person named executor or beneficiary as provided in *Prob.C. 8200* (infra, §543). (*Prob.C. 331(e).*)

(3) *Proof of Death and Identity.* A person seeking access must provide proof of the decedent's death by a certified copy of the death certificate or a written statement of death from the coroner, treating physician, or hospital or institution in which the decedent died. (*Prob.C. 331(b)(1).*) That person must also provide "reasonable proof" of his or her identity, satisfying the requirements of *Prob.C. 13104* (collection of personal property by affidavit; infra, §800). (*Prob.C. 331(b)(2).*) The financial institution has no duty to inquire into the truth of any document offered as proof. (*Prob.C. 331(c).*)

(4) *Obligations of Financial Institution.* The financial institution must (a) keep a record of the person's identity, (b) supervise the person's examination of the safe deposit box, and (c) keep in the box photocopies of all wills and trust instruments that are removed. The institution may charge a reasonable fee for photocopying. (*Prob.C. 331(d).*)

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A. In General.

14 Witkin Sum. Cal. Law Wills § 415

[§ 415] In General.

(1) *Definitions.*

(a) *Personal Representative.* "Personal representative" means an executor, administrator, administrator with the will annexed, special administrator, successor personal representative, public administrator acting under *Prob.C. 7660* (infra, §§423, 424), or a person who performs "substantially the same function under the law of another jurisdiction governing the person's status." (*Prob.C. 58(a).*)

(b) *General Personal Representative.* "General personal representative" excludes a special administrator unless the special administrator has the powers, duties, and obligations of a general administrator under *Prob.C. 8545* (infra, §427). (*Prob.C. 58(b).*)

(c) *Executor and Administrator.* An "executor" is a person appointed by the decedent to carry out the terms of the decedent's will. An "administrator" is a person appointed by the court to manage the estate when the deceased dies intestate. Both executors and administrators are "personal representatives," and for brevity are frequently referred to as representatives. (See *31 Am.Jur.2d* (2002 ed.), *Executors and Administrators* §158.)

(d) *Administrator With Will Annexed.* When a will is made, but no executor is named, or the named executor dies, resigns, fails to petition or qualify, etc., the court appoints an "administrator with the will annexed" to carry out the provisions of the will. (See infra, §430.) The administrator is sometimes called an "administrator cum testamento annexo" or "administrator c.t.a."

(e) *Executor de Son Tort.* The common law concept of "executor de son tort" (*intermeddler* who took some possession or control over the decedent's goods and became subject to the liabilities but not the rights of a personal representative) does not apply in California. (*Bowden v. Pierce* (1887) 73 C. 459, 463, 14 P. 302; *Lamkin v. Vierra* (1961) 198 C.A.2d 123, 126, 17 C.R. 805.)

(2) *Necessity of Appointment.* "A person has no power to administer the estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters." (*Prob.C. 8400(a).*) The first page of the order appointing a personal representative must include the following language in capital letters: "Warning: This appointment is not effective until

letters have issued." (*Prob.C. 8400(c)*.) (On appointment, see *infra*, §433 et seq.)

(3) *Authority of Named Executor Before Appointment.* "[A] person named executor in the decedent's will may, before the appointment is made or becomes effective, pay funeral expenses and take necessary measures for the maintenance and preservation of the estate." (*Prob.C. 8400(b)*.)

(4) *Authority of Petitioner Before Appointment.* Notwithstanding *Prob.C. 8400*, a petitioner for appointment as personal representative may deliver property in the petitioner's possession to a financial institution, or allow the institution to retain on deposit property already in its possession, under *Prob.C. 9700* et seq. (*infra*, §480). (*Prob.C. 8401(a)*.) The petitioner must obtain and file with the court a written receipt including the agreement of the financial institution that the property and earnings may not be withdrawn except on order of the court. (*Prob.C. 8401(b)*.) In receiving and retaining the property, the financial institution is protected "to the same extent as though it had received the property from a person who had been appointed personal representative." (*Prob.C. 8401(c)*.)

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14 Witkin Sum. Cal. Law Wills § 416

[§ 416] Nature of Office.

The public administrator is a county officer who, under some circumstances, is authorized to take charge of property and administer estates. (See *Prob.C. 7600* et seq.; *Estate of Miller (1936) 5 C.2d 588, 593, 55 P.2d 491; 56 A.L.R.2d 1183* [powers and duties of public administrator]; *31 Am.Jur.2d (2002 ed.)*, *Executors and Administrators §1095* et seq.) (On appointment, see *Govt.C. 27440*; on expiration of term of office, see *Govt.C. 27444*; on powers and duties, see *infra*, §418.)

The capacity and powers of the public administrator were summarized in *Estate of McMillin (1956) 46 C.2d 121, 292 P.2d 881*, as follows: (a) The public administrator is primarily a public officer, performing a governmental function. (b) Because of this official character, the public administrator's powers and duties differ in some respects from those of other administrators. (c) But when appointed administrator of a private trust, with authority to administer the estate derived from issuance of letters of administration, and, where no statutory or charter provision specifically governs, the public administrator has the powers and duties that would apply to administrators generally. Accordingly, the court held that the public administrator had authority to contract for the extraordinary services of tax experts to be paid from funds of the estate, even though some civil service employees capable of performing the services were available. (*46 C.2d 129.*)

The public administrator and deputies, agents, and employees are subject to criminal liability (unless specifically authorized by court order) for: (a) purchasing property of or claims against an estate administered by the public administrator in his or her official capacity; or (b) acting on any transaction or expenditure in connection with the administration of an estate in an official capacity when the public administrator has a financial interest in the transaction or expenditure, or, "having knowledge of such interest, is associated in business with anyone who has such an interest." (*Govt.C. 27443, 27443.5*; see *2 Cal. Crim. Law (3d)*, *Crimes Against Governmental Authority, §102* et seq.)

The public administrator is, however, a public officer or employee, and therefore, under *Govt.C. 820.2* (see *5 Summary (10th)*, *Torts, §351* et seq.), immune from tort liability for discretionary acts. (*Saltares v. Kristovich (1970) 6 C.A.3d 504, 513, 85 C.R. 866.*)

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On educational requirements applicable to public administrator, see *Prob.C. 7605*, added in 2008.



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b. Temporary Possession or Control of Property.

1. Report to Public Administrator.

14 Witkin Sum. Cal. Law Wills § 417

[§ 417] Report to Public Administrator.

(1) *Report by Public Officer or Employee.* "If a public officer or employee knows of property of a decedent that is subject to loss, injury, waste, or misappropriation and that ought to be in the possession or control of the public administrator, the officer or employee shall inform the public administrator." (*Prob.C. 7600.*)

(2) *Notice of Death of Patient.* If a person dies in a hospital, convalescent hospital, or board and care facility without known next of kin, the person in charge must give the public administrator of the county notice of that fact. If the notice is not given, the hospital or facility is liable for (a) costs of interment incurred by the estate or the county as a result of the failure, and (b) loss to the estate or beneficiaries "caused by loss, injury, waste, or misappropriation of property of the decedent as a result of the failure." (*Prob.C. 7600.5.*) (On notice by funeral director in control of decedent's remains, see *Prob.C. 7600.6.*)

(3) *Duty To Provide Information and Access.* A financial institution, government or private agency, retirement fund administrator, insurance company, securities dealer, or other person, without the necessity of inquiring into the public administrator's authority (*infra*, §418), without requiring a death certificate, without charge, and without a court order or letters being issued, must do the following:

(a) Give the public administrator complete information about property held in the sole name of the decedent, including the names and addresses of beneficiaries. (*Prob.C. 7603(c)(1).*)

(b) Grant the public administrator access to a safe deposit box in the sole name of the decedent to inspect and remove a will or instructions for the disposition of the decedent's remains. Costs and expenses incurred in drilling or forcing a safe deposit box are borne by the estate of the decedent. (*Prob.C. 7603(c)(2).*)

(c) Surrender property that the public administrator deems is subject to loss, injury, waste, or misappropriation. (*Prob.C. 7603(c)(3).*)

(4) *Immunity of Persons Who Provide Information or Access.* Receipt of the public administrator's certificate of

authority (infra, §418) has the following effect:

(a) Receipt "[c]onstitutes sufficient acquittance for providing information or granting access to the safe deposit box, for removal of the decedent's will and instructions for the disposition of the decedent's remains, and for surrendering property of the decedent." (*Prob.C. 7603(d)(1).*)

(b) Receipt "fully discharges" the financial institution, etc., from liability for "any act or omission of the public administrator with respect to the property or the safe deposit box." (*Prob.C. 7603(d)(2).*)

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2. Duties of Public Administrator.

14 Witkin Sum. Cal. Law Wills § 418

[§ 418] Duties of Public Administrator.

(1) *Take Possession or Control.* If no personal representative has been appointed, the public administrator takes prompt possession or control of the decedent's property in the county that the administrator deems is subject to "loss, injury, waste, or misappropriation," or that the court orders into his or her possession or control. (*Prob.C. 7601(a).*) If the property "is beyond the ability of the public administrator to take possession or control," the administrator is not liable for failing to do so. (*Prob.C. 7601(b).*)

If the public administrator takes possession or control of property and a person other than the public administrator subsequently takes control or possession or is appointed personal representative, the public administrator is entitled to the costs incurred in preserving the estate and reasonable compensation. The costs and compensation are proper expenses of administration. (*Prob.C. 7604.*)

(2) *Search for Property, Will, and Instructions.* A public administrator authorized to take possession or control of a decedent's property must make a prompt search for other property, the decedent's will, and instructions for the disposition of the decedent's remains. (*Prob.C. 7602(a).*) The will must be delivered as provided in *Prob.C. 8200* (*infra*, §543). (*Prob.C. 7602(b).*) Instructions must be promptly delivered to the person with the right to control disposition of the decedent's remains under *Health & Saf.C. 7100* (see *13 Summary* (10th), *Personal Property*, §5). (*Prob.C. 7602(c).*) If other property is located, the administrator takes possession or control of property anywhere in California or subject to the laws of California that the administrator deems is subject to "loss, injury, waste, or misappropriation." The administrator is not liable for loss, etc., of property of which the administrator is unable to take possession or control. (*Prob.C. 7602(d).*)

(3) *Certificate of Authority.* A public administrator authorized to take possession or control of a decedent's property may issue a written certification of authority, which is effective 30 days after the date of issuance. (*Prob.C. 7603(a).*) The certificate may be recorded in any county in which the decedent's real property is located. (*Prob.C. 7603(b).*)

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c. Appointment as Personal Representative.
1. Procedure.

14 Witkin Sum. Cal. Law Wills § 419

[§ 419] Procedure.

(1) *Authority To Petition.* The public administrator of the county in which the estate of the decedent may be administered must promptly petition for appointment as personal representative (a) in any case in which no person having higher priority has petitioned (see *Prob.C. 8461*, *infra*, §437) and the total value of property in the decedent's estate exceeds \$ 100,000 (*Prob.C. 7620(a)*), and (b) in any other case the public administrator "deems proper" (*Prob.C. 7620(b)*). (On duty to proceed with summary disposition under *Prob.C. 7660* et seq. (*infra*, §§423, 424), see *Prob.C. 7620(d)*.)

(2) *Appointment and Removal.* Except as otherwise provided in *Prob.C. 7621*, the public administrator is appointed personal representative and letters are issued in the same manner and using the same procedure for the appointment of personal representatives generally. (*Prob.C. 7621(a)*.) However, letters may be issued to "the public administrator" without naming him or her. (*Prob.C. 7621(c)*.) The public administrator may be appointed on the court's own motion (*Prob.C. 7621(b)*) and must promptly accept appointment when so ordered (*Prob.C. 7620(c)*).

The Law Revision Commission Comment points out that removal of a public administrator is subject to the same procedures as removal of administrators generally, including removal at the request of a person having a higher priority for appointment under *Prob.C. 8503* (*infra*, §455).

(3) *Oath and Bond.* The public administrator's oath and official bond are in lieu of the personal representative's oath and bond. An estate administered by the public administrator is charged an annual bond fee as an expense of administration, which is deposited in the county treasury. The fee is \$ 25 plus one-fourth of one percent of the amount of the estate greater than \$ 10,000. If a successor personal representative is appointed, the bond is prorated. (*Prob.C. 7621(d)*.)

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14 Witkin Sum. Cal. Law Wills § 420

[§ 420] Administration of Estate.

(1) *General Rules Apply.* Except as otherwise provided in *Prob.C. 7600* et seq., the public administrator administers the estate in the same manner as a personal representative generally, and the provisions of the Probate Code concerning the administration of estates apply to administration by the public administrator. (*Prob.C. 7622(a).*)

(2) *Ordinary Compensation.* The public administrator and his or her attorney are entitled to the same compensation as a personal representative and his or her attorney generally. However, their compensation may not be less than the compensation in effect at the time the public administrator was appointed or the minimum amount provided in *Prob.C. 7666(b)* (\$ 1,000), whichever is less. (*Prob.C. 7622(b).*) (On compensation of personal representative and attorney, see *infra*, §528 et seq.)

(3) *Additional Compensation.* The public administrator may be awarded additional compensation if (a) a person having priority for appointment as personal representative has been notified of the public administrator's petition under *Prob.C. 8110* (*infra*, §588) and has not petitioned for appointment in preference to the public administrator, or (b) the public administrator has been appointed after the resignation or removal of a personal representative. (*Prob.C. 7623(b).*) For this purpose, "additional compensation" means "the difference between the reasonable compensation of the public administrator in administering the estate and the compensation awarded" under *Prob.C. 10800* et seq. (*infra*, §528 et seq.). (*Prob.C. 7623(a).*)

(4) *Liability for Nonpayment of Unclaimed Funds.* If estate funds that should be paid to the county treasurer under *Prob.C. 11850* et seq. (unclaimed and undistributed property; *infra*, §736) remain in the possession of the public administrator after final distribution, the court must order the public administrator to make the payment within 60 days. If the public administrator fails to do so, the district attorney must promptly institute proceedings against the public administrator and the sureties on the official bond for the amount required to be paid and costs. (*Prob.C. 7624.*)

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[§ 421] Deposit of Money of Estate.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Interest.* See *Conservatorship of Key (2005) 134 C.A.4th 254, 258, 35 C.R.3d 859 [Prob.C. 7642 does not violate Takings Clause or Due Process Clause; where conservatorship estate was credited with highest interest rate estate funds would have earned had they been separately invested, excess interest earned in pooled trust account was properly credited to general fund].*



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[§ 421] Deposit of Money of Estate.

(1) *Deposit and Withdrawal of Estate Funds.* On receipt, the public administrator must deposit estate funds in an insured account in a financial institution or with the county treasurer. (*Prob.C. 7640(a)*; see *Prob.C. 46* ["financial institution" defined].) Deposited funds may be withdrawn when required for purposes of administration. (*Prob.C. 7641.*) The public administrator is discharged from further responsibility for funds on deposit until withdrawn. (*Prob.C. 7640(b).*) The county treasurer keeps deposited funds safe and pays out money on the order of the public administrator when required for administration. The treasurer and the sureties on the official bond are responsible for safekeeping and payment. (*Prob.C. 7642(a).*)

(2) *Interest.* The public administrator credits "each estate with the highest rate of interest or dividends that the estate would have received if the funds available for deposit had been individually and separately deposited." (*Prob.C. 7642(a).*) Excess interest or dividends earned by the public administrator are deposited in the county general fund. (*Prob.C. 7642(b).*)

(3) *Transfer of Unclaimed Deposits to State Treasurer.* If no one is entitled to money on deposit with the county treasurer, or no one entitled to the money appears and makes a claim, the county treasurer must deliver the money to the State Treasurer or the Controller pursuant to *C.C.P. 1440* et seq. (unclaimed property of decedents). (*Prob.C. 7643(b).*)

Prob.C. 7644 governs unclaimed deposits in financial institutions as follows:

(a) Money unclaimed for 5 years after deposit, together with interest, is presumed abandoned if (1) "the deposit belongs to the estate of a known decedent for which a personal representative has never been appointed," or (2) "the deposit belongs to the estate of a known decedent for which a personal representative has been appointed but no order of distribution has been made due to the absence of interested persons or the failure of interested persons diligently to protect their interests by taking reasonable steps for the purpose of securing a distribution of the estate." (*Prob.C. 7644(a).*)

(b) Any time after expiration of the 5-year period, the Controller may petition the court for an order "declaring that the money is presumptively abandoned and directing the holder of the money to pay the money to the State Treasurer." (

Prob.C. 7644(b).)

(c) On presentation of a certified copy of the court order, the financial institution *forthwith* transmits the money to the State Treasurer for deposit. The deposit is governed by *C.C.P. 1300* et seq. (unclaimed property; see 13 *Summary* (10th), *Personal Property*, §39) and is deemed deposited under *C.C.P. 1440* et seq. (unclaimed property of decedents). (*Prob.C. 7644(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Interest.* See *Conservatorship of Key (2005) 134 C.A.4th 254, 258, 35 C.R.3d 859* [*Prob.C. 7642* does not violate Takings Clause or Due Process Clause; where conservatorship estate was credited with highest interest rate estate funds would have earned had they been separately invested, excess interest earned in pooled trust account was properly credited to general fund].



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e. Summary Disposition of Small Estate.

1. Law Revision Commission Report.

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[§ 422] Law Revision Commission Report.

The California Law Revision Commission, in its 1987 Recommendation Relating to Public Guardians and Administrators (19 Cal. Law Rev. Com. Reports, p. 715), explained its recommended changes as follows:

(1) "Most estates handled by the public administrator are small estates that are uneconomical to administer. Existing law seeks to cure this problem by providing summary proceedings for use by the public administrator in small estates."

(2) "Because no notice to creditors is given under summary proceedings, the proposed law includes two protections for creditors not found under existing law. First, the proposed law requires payment of claims made any time before distribution of the decedent's property is made, as opposed to the four-month claim period applicable in ordinary administration proceedings in which creditors receive published notice. To avoid precipitate distributions, the proposed law prohibits distribution until four months after commencement of summary proceedings. Second, the proposed law imposes liability on recipients of property distributed pursuant to summary proceedings for unpaid creditor claims. This is analogous to personal liability imposed on recipients of property that passes without probate administration."

(3) "Existing law provides no limit to the amount of time a public administrator must preserve files of summary disposition cases. The proposed law simplifies the record-keeping system by requiring the public administrator to file with the court a permanent statement of the decedent's estate and receipts for distributions in the case of an estate over \$ 10,000. Thereafter, the public administrator must preserve in the office of the public administrator a temporary file of all receipts and records of expenditures for a period of three years, after which the file may be destroyed."

(4) "Existing law provides that where the public administrator uses summary disposition proceedings, unclaimed property in estates under \$ 10,000 is paid to the county but unclaimed property in estates under \$ 60,000 is distributed to the state. The Law Revision Commission recommends that all unclaimed summary distribution funds be paid to the county. Typically the small estates summarily disposed of by the public administrator are the estates of elders living alone without family support who receive greater than usual county care and service during their lifetimes. For this reason it is appropriate that unclaimed property is paid to the county where the decedent resided."

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2. Authority, Records, and Compensation.

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[§ 423] Authority, Records, and Compensation.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Summary Disposition Is Authorized.*(a) *Estate under \$ 100,000.* The fee for filing the application for summary disposition is \$ 180. (*Prob.C. 7660(a)(1)*, as amended in 2005.)



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[§ 423] Authority, Records, and Compensation.

(1) *When Summary Disposition Is Authorized.* Under *Prob.C. 7660(a)*, a public administrator who takes possession or control of an estate may, acting as the personal representative, summarily dispose of the estate as provided in *Prob.C. 7660 et seq.* in the following circumstances:

(a) *Estate under \$ 100,000.* Where the total value of the property in the decedent's estate does not exceed the amount prescribed in *Prob.C. 13100* (\$ 100,000; *infra*, §797), the public administrator may summarily dispose of the estate on order of the court, which may be made *ex parte*. The authority to do so must be evidenced by a court order for summary disposition. (*Prob.C. 7660(a)(1).*)

(b) *Estate under \$ 30,000.* Where the total value of the property in the decedent's estate does not exceed \$ 30,000, the public administrator may summarily dispose of the estate without court authorization. (*Prob.C. 7660(a)(2).*) (On collection of decedent's property under public administrator's certificate of authority for summary administration, see *Prob.C. 7660(a)(2).*)

Summary disposition is authorized "notwithstanding the existence of the decedent's will, if the will does not name an executor or if the named executor refuses to act." (*Prob.C. 7660(b).*)

(2) *Other Proceedings Authorized.* Nothing in *Prob.C. 7660 et seq.* precludes the public administrator from filing any other petition concerning the administration of estates. (*Prob.C. 7660(c).*) The Law Revision Commission Comment gives two illustrations: (a) A petition for instructions under *Prob.C. 9611* (*infra*, §469), and (b) a petition to determine persons entitled to distribution under *Prob.C. 11700 et seq.* (*infra*, §720).

(3) *Maintenance of Records.* The public administrator must file a statement with the clerk showing the disposition of the property of the decedent, with receipts for distributions, except in proceedings under *Prob.C. 7660(a)(2)*. (*Prob.C. 7665(a).*) The public administrator must maintain records of receipts and expenditures for 3 years after disposition of the property. (*Prob.C. 7665(b).*)

(4) *Compensation of Public Administrator and Attorney.* For services under *Prob.C. 7600* et seq., the public administrator and his or her attorney are entitled to the compensation set out in *Prob.C. 10800* et seq. (infra, §528 et seq.) and any additional compensation under *Prob.C. 7623* (supra, §420), except that the public administrator is entitled to minimum compensation of \$ 1,000. (*Prob.C. 7666.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Summary Disposition Is Authorized.*(a) *Estate under \$ 100,000.* The fee for filing the application for summary disposition is \$ 200. (*Prob.C. 7660(a)(1)*, as amended in 2008.)



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e. Summary Disposition of Small Estate.
3. Procedure.

14 Witkin Sum. Cal. Law Wills § 424

[§ 424] Procedure.

(1) *Liquidation of Assets and Withdrawal of Funds.* A public administrator acting under the authority of *Prob.C. 7660* et seq. may (a) withdraw money or take possession of other property of a decedent in the possession or control of a financial institution, government or private agency, retirement fund administrator, insurance company, securities dealer, or other person, (b) collect debts owed to the decedent, including rents, issues, and profits from real and personal property until the estate is distributed, and (c) sell the decedent's real and personal property, including securities. (*Prob.C. 7661.*) A sale of personal property may be with or without notice, and title to the property passes without court confirmation. (*Prob.C. 7661(c).*) A sale of real property is conducted subject to *Prob.C. 10300* et seq. (infra, §691 et seq.), and title to the property passes with the public administrator's deed. (*Prob.C. 7661(d).*) (On procedure for sale of real property, see *Prob.C. 7661(d).*)

(2) *Payment of Debts.* The public administrator pays out the money of the estate in the order prescribed in *Prob.C. 11420* (infra, §649), for expenses of administration, charges against the estate, and claims presented before distribution of the decedent's property. A creditor whose claim is paid under this provision is not liable for contribution to a creditor whose claim is presented after the payment. (*Prob.C. 7662.*)

The Law Revision Commission Comment makes two points: (a) Because *Prob.C. 7660* et seq. make no provision for notice to creditors, the time for making claims is extended to the time of distribution, and recipients remain liable for creditor claims. (b) Tax and other claims of public entities are entitled to priority under *Prob.C. 11420* (infra, §649).

(3) *Distribution of Property.* After the payment of debts under *Prob.C. 7662*, "but in no case before four months after court authorization of the public administrator to act" or after the public administrator takes possession or control of the estate, the public administrator distributes money and other property of the decedent remaining in the possession of the public administrator to the decedent's beneficiaries. (*Prob.C. 7663(a).*) If there are no beneficiaries, the balance is deposited with the county treasurer for use in the general fund. The deposit is subject to *Govt.C. 50050* et seq. (escheat of unclaimed property in custody of local agency). If the deposit is over \$ 5,000, the public administrator must give the Controller written notice of the information specified in *C.C.P. 1311* (notice of deposit of unclaimed property). (*Prob.C. 7663(b).*) (On use of affidavit by relative of decedent to recover unclaimed money deposited with county treasurer, see

Govt.C. 50052.5.)

(4) *Liability of Distributee for Debts.* A person to whom property is distributed "is personally liable for the unsecured debts of the decedent," but aggregate personal liability may not exceed "the fair market value of the property distributed to the person, valued as of the date of the distribution, less the amount of any liens and encumbrances on the property on that date." A debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died, and the person may assert any defenses available to the decedent if the decedent had not died. *C.C.P. 366.2* (limitation of action against decedent; see *infra*, §517) applies in the action. (*Prob.C. 7664*, based on *Prob.C. 13109* and *13112*, *infra*, §804.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Special Administrator.
a. Grounds for Appointment.

14 Witkin Sum. Cal. Law Wills § 425

[§ 425] Grounds for Appointment.

(1) *Former Statute.* Former Prob.C. 460 et seq. authorized the appointment of a special administrator to take possession of an estate if the circumstances required the immediate appointment of a personal representative. (See *Miller v. Superior Court* (1921) 186 C. 453, 456, 199 P. 805; *Dominguez v. Galindo* (1953) 122 C.A.2d 76, 264 P.2d 213 [appointment where there was delay in issuing general letters, and statute of limitations was about to run on wrongful death action]; *Estate of Schwartz* (1948) 87 C.A.2d 569, 573, 197 P.2d 223 [when appeal is taken from order of appointment of ordinary administrator, court has duty to appoint special administrator]; *Estate of Buchman* (1955) 138 C.A.2d 228, 233, 291 P.2d 547 [appointment pending executor's appeal from order removing him].)

The California Law Revision Commission, in its 1987 Recommendation Relating to Opening Estate Administration, recommended less restrictive grounds for appointment and proposed changes to make it clear that a special administrator could be appointed for a specific purpose or with specific powers and duties, or could be granted general powers of a personal representative. (19 Cal. Law Rev. Com. Reports, p. 797.) The Commission's recommendations were adopted.

(2) *Current Statute.* "If the circumstances of the estate require the immediate appointment of a personal representative, the court may appoint a special administrator to exercise any powers that may be appropriate under the circumstances for the preservation of the estate." (*Prob.C. 8540(a)*.) The Law Revision Commission Comment lists the following grounds:

- (a) No one has applied for appointment as personal representative.
- (b) There is a delay in appointment.
- (c) A sufficient bond is not given.
- (d) Letters are granted irregularly.
- (e) A personal representative dies or resigns or is suspended or removed.

- (f) An appeal is taken from an order revoking probate.
- (g) A will contest is pending.
- (h) Appointment is necessary to maintain a lawsuit on the decedent's cause of action.
- (i) A personal representative is otherwise unable to act.

"The appointment may be for a specified term, to perform particular acts, or on any other terms specified in the court order." (*Prob.C. 8540(b)*, based on *Unif.Prob.C.*, §3-617.) "A special administrator appointed to perform a particular act has no duty to take any other action to protect the estate." (*Prob.C. 8544(d)*.)

West's Key Number Digest, Executors and Administrators k.22(1) et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Sum. Cal. Law Wills § 426

[§ 426] Procedure for Appointment.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition*. The fee for filing a petition for special letters of administration without the powers of a general personal representative is \$ 40. (*Govt.C. 70657.5(a)(4)*, added in 2007.)



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[§ 426] Procedure for Appointment.

(1) *In General.* A special administrator may be appointed at any time. (*Prob.C. 8541(a)*; see *Graybiel v. Burke* (1954) 124 C.A.2d 255, 261, 268 P.2d 551 [decendent died in 1939, no administration; special administrator was appointed in 1952].) The appointment may be made in chambers. (*C.C.P. 166(a)(1)*.) In the case of appointment to perform a particular act, approval of the act may be made at the same time as the appointment. (*Prob.C. 8541(c)*.) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §8:1 et seq.; C.E.B., 1 Decedent Estate Practice, §7.25 et seq.)

(2) *Petition.* The Law Revision Commission Comment to *Prob.C. 8540* points out that the appointment may be on the court's own motion or on the petition of an interested person. In the case of an appointment to perform a particular act, request for approval of the act may be included in the petition for appointment. (*Prob.C. 8541(c)*.) (On filing fee, see *infra*, §585.)

(3) *Preference.* In making the appointment, the court ordinarily gives preference to the person entitled to appointment as personal representative. (*Prob.C. 8541(b)*; see *O'Bryan v. Superior Court* (1941) 18 C.2d 490, 495, 116 P.2d 49 [will contest with rival claimants under separate wills; court could properly appoint neutral third party]; on preference in appointment, see *Prob.C. 8461*, *infra*, §437.) The court may appoint the public administrator (see *Prob.C. 7600* et seq., *supra*, §419). (*Prob.C. 8541(b)*.)

(4) *Notice.* Appointment may be "without notice or on such notice to interested persons as the court deems reasonable." (*Prob.C. 8541(a)*; see *Prob.C. 8541(c)* [in case of appointment to perform particular act, that act may be approved on same notice as appointment].) However, if the special administrator is granted the powers of a general personal representative (see *infra*, §427) and letters have not been previously issued to a general personal representative, notice under *Prob.C. 8003* (*infra*, §587) for appointment of a personal representative is required, unless the appointment is made at a hearing on a petition to appoint a general personal representative and notice under *Prob.C. 8003* was given on that petition. (*Prob.C. 8545(a)*.)

(5) *Oath and Bond.* Except where the public administrator is appointed, the special administrator is required to take the usual oath and give the bond required of administrators under *Prob.C. 8480* (*infra*, §448). (*Prob.C. 8542(a)*, (b).) However, subject to *Prob.C. 8481* (waiver of bond; see *infra*, §450), the court must direct that no bond be given (a) if

the will waives bond for the named executor and the named executor is appointed special administrator, or (b) if all the beneficiaries waive bond in writing and the will does not require a bond. (*Prob.C. 8543*.) If the special administrator is granted the powers of a general personal representative under *Prob.C. 8545* (infra, §427), the court may require "any additional bond that the court deems proper," subject to *Prob.C. 8543*. (*Prob.C. 8545(b)*.)

(6) *Issuance of Letters*. Except where the public administrator is appointed, once bond is given and the oath is taken, the clerk issues letters to the special administrator. (*Prob.C. 8542(a)*.) If the special administrator is appointed to perform a particular act, the letters must note that act. (*Prob.C. 8542(c)*.) If the special administrator is granted the powers of a general personal representative under *Prob.C. 8545* (infra, §427), the letters must recite that the special administrator has the powers, duties, and obligations of a general personal representative. (*Prob.C. 8545(c)*.)

(7) *Correction of Errors*. "The court may act, if necessary, to remedy any errors made in the appointment." (*Prob.C. 8541(d)*.) (See *Estate of Merrill (1947) 81 C.A.2d 102, 107, 183 P.2d 300* [revocation of appointment improperly obtained].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition*. The fee for filing a petition for special letters of administration without the powers of a general personal representative is \$ 200. (*Govt.C. 70657.5(a)(3)*, as amended in 2008.)



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14 Witkin Sum. Cal. Law Wills § 427

[§ 427] Powers.

(1) *Case Law Under Former Statutes.* Decisions under former California statutes illustrate the nature and scope of the special administrator's powers. (See *Off v. Russell* (1936) 16 C.A.2d 337, 340, 60 P.2d 331 [authority to collect or close out margin account did not authorize sale of stock without prior order or subsequent confirmation]; *Dodson v. Greuner* (1938) 28 C.A.2d 418, 421, 82 P.2d 741 [special administrator given powers of general administrator]; *Estate of Malgor* (1947) 77 C.A.2d 535, 537, 176 P.2d 66 [intestate decedent with nonresident heirs; court could authorize special administrator to make funeral arrangements and charge estate for reasonable expenses]; *Levy v. Cytron* (1948) 84 C.A.2d 827, 829, 191 P.2d 816 [powers while will contest is pending]; *Estate of Kennedy* (1948) 87 C.A.2d 795, 797, 197 P.2d 844 [same]; *Dominguez v. Galindo* (1953) 122 C.A.2d 76, 80, 264 P.2d 213 [statute liberally construed to authorize suit for wrongful death]; *Estate of Buchman* (1955) 132 C.A.2d 81, 105, 281 P.2d 608 [power to make distributions].)

(2) *Powers Without Court Order.* Except to the extent the order of appointment prescribes terms, a special administrator has the power to do the following without a court order:

(a) Take possession of the real and personal property of the estate of the decedent and preserve it from damage, waste, and injury. (*Prob.C. 8544(a)(1).*)

(b) Collect claims, rents, and other income belonging to the estate. (*Prob.C. 8544(a)(2).*)

(c) Commence or defend legal proceedings. (*Prob.C. 8544(a)(3).*)

(d) Sell perishable property. (*Prob.C. 8544(a)(4).*)

(3) *Powers With Court Order.* Except to the extent the order prescribes terms, a special administrator has the power to do the following pursuant to a court order:

(a) Borrow money, or lease, mortgage, or execute a deed of trust on real property, in the same manner as an administrator. (*Prob.C. 8544(b)(1).*)

(b) "Pay the interest due or all or any part of an obligation secured by a mortgage, lien, or deed of trust on property in the estate, where there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation. This power may be ordered only on petition of the special administrator or any interested person, with any notice that the court deems proper, and shall remain in effect until appointment of a successor personal representative. The order may also direct that interest not yet accrued be paid as it becomes due, and the order shall remain in effect and cover the future interest unless and until for good cause set aside or modified by the court in the same manner as for the original order." (*Prob.C. 8544(b)(2).*)

(c) Exercise other powers that are conferred by order of the court. (*Prob.C. 8544(b)(3).*)

(4) *Powers of General Personal Representative.* Notwithstanding *Prob.C. 8544*, the court may grant a special administrator the same powers, duties, and obligations as a general personal representative "when to do so appears proper." (*Prob.C. 8545(a).*) If that appointment is made, special requirements apply to notice, letters, and bond. (See *supra*, §426.) "From the time of approving and filing any required additional bond, the special administrator shall have the powers, duties, and obligations of a general personal representative." (*Prob.C. 8545(b).*)

The Law Revision Commission Comment lists instances in which a grant of general powers might be proper: (a) The special administrator is appointed pending determination of a will contest, or a will contest is instituted after appointment. (b) The special administrator is appointed pending appeal from an order appointing or removing a personal representative, or an appeal from an order revoking probate is taken.

(5) *Limited Liability to Creditors.* Except where the powers, duties, and obligations of a general personal representative are granted under *Prob.C. 8545*, the special administrator is not a proper party to an action on a claim against the decedent. (*Prob.C. 8544(c).*)

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d. Termination of Authority.

14 Witkin Sum. Cal. Law Wills § 428

[§ 428] Termination of Authority.

(1) *When Authority Terminates.* "The powers of a special administrator cease on issuance of letters to a general personal representative or as otherwise directed by the court." (*Prob.C. 8546(a).*)

(2) *Delivery of Property.* The special administrator must "promptly" deliver property in his or her possession to the personal representative. However, the court may authorize the special administrator to complete a sale or other transaction. (*Prob.C. 8546(b)(1).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §8:16 [petition for order requiring delivery by former administrator].)

(3) *List of Creditors.* The special administrator must "promptly" deliver a list of all known creditors' claims to the personal representative and file a copy with the court. The list must show the name and address of each creditor, the amount of the claim, and any action taken on the claim. (*Prob.C. 8546(b)(2).*)

(4) *Account.* "The special administrator must account in the same manner as a general personal representative. If the same person acts as both special administrator and general personal representative, the account of the special administrator may be combined with the first account of the general personal representative." (*Prob.C. 8546(c);* on account of personal representative, see *Prob.C. 10900* et seq., infra, §710 et seq.)

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14 Witkin Sum. Cal. Law Wills § 429

[§ 429] Compensation.

(1) *In General.* The court fixes the compensation of the special administrator and the attorney for the special administrator under *Prob.C. 8547*. (*Prob.C. 8547(a)*.)

(2) *Time for Allowance.* The compensation of the special administrator is not allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's compensation or the court "in its discretion so allows." Compensation for extraordinary services of the special administrator may be allowed on settlement of the special administrator's final account. (*Prob.C. 8547(b)*.)

(3) *Total Compensation of Fiduciaries.* The total compensation of the special administrator and the general personal representative together may not exceed the amount provided by *Prob.C. 10800* et seq. (infra, §528 et seq.) for compensation for ordinary and extraordinary services of a personal representative. If the same person does not act as both special administrator and general personal representative, the compensation is divided "in such proportions as the court deems just" or as agreed by the special administrator and the general personal representative. (*Prob.C. 8547(b)*.)

(4) *Total Compensation of Attorneys.* The total compensation of the attorneys for the special administrator and the general personal representative together may not exceed the amount provided by *Prob.C. 10800* et seq. (infra, §528 et seq.) for compensation for ordinary and extraordinary services of attorneys for personal representatives. If the same attorney does not act for both the special administrator and the general personal representative, the compensation is divided "in such proportions as the court deems just" or as agreed by the attorneys. (*Prob.C. 8547(c)*.)

(5) *Extraordinary Services of Attorney.* Compensation of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative. However, the award of compensation to the attorney may be made on settlement of the final account of the special administrator. (*Prob.C. 8547(d)*.) The Law Revision Commission Comment notes that extraordinary services include those performed by a paralegal under the supervision of an attorney. (On compensation for paralegal services, see *Prob.C. 10811(b)*, infra, §534.)

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3. Administrator With Will Annexed.

14 Witkin Sum. Cal. Law Wills § 430

[§ 430] Administrator With Will Annexed.

(1) *When Appointment Is Required.* An administrator with the will annexed must be appointed as personal representative if no executor is named in the will or if the sole executor or all executors named in the will have waived the right to appointment or are unwilling or unable to act. (*Prob.C. 8440.*)

(2) *Priority for Appointment.* "A person who takes under the will has priority over a person who does not, but the court in its discretion may give priority to a person who does not take under the will if the person is entitled to a statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will and the priority appears appropriate under the circumstances. A person who takes more than 50 percent of the value of the estate under the will or the person's nominee, or the nominee of several persons who together take more than 50 percent of the value of the estate under the will, has priority over other persons who take under the will." (*Prob.C. 8441(b).*) Except as provided in *Prob.C. 8441(b)*, persons and nominees are entitled to appointment as administrator with the will annexed in the same order of priority as for appointment of an administrator (see *Prob.C. 8461*, *infra*, §437). (*Prob.C. 8441(a).*) (On priority among nominees, see *Estate of Kaseroff (1977) 19 C.3d 272, 137 C.R. 644, 562 P.2d 325*, *infra*, §440; *infra*, §437.)

(3) *Authority.* An administrator with the will annexed "has the same authority over the decedent's estate as an executor named in the will would have." (*Prob.C. 8442(a).*) However, if the will confers a "discretionary power or authority on an executor that is not conferred by law and the will does not extend the power or authority to other personal representatives," the power or authority is not deemed conferred on an administrator with the will annexed, although the court in its discretion may authorize the exercise of the power or authority. (*Prob.C. 8442(b).*)

West's Key Number Digest, Executors and Administrators k.21(1). 21(2)

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B. Special Kinds of Representatives. 4. Nonresident Personal Representative. a. In General.

14 Witkin Sum. Cal. Law Wills § 431

[§ 431] In General.

(1) *Nonresident or Resident Who Removes.* For purposes of *Prob.C. 8570* et seq., a "nonresident personal representative" is a nonresident of California appointed as personal representative, or a resident of California appointed as personal representative who later "removes from and resides without" California. (*Prob.C. 8570.*)

(2) *Bond.* Notwithstanding any other provision of *Prob.C. 8400* et seq. and notwithstanding a waiver of bond, "the court in its discretion may require a nonresident personal representative to give a bond in an amount determined by the court." (*Prob.C. 8571.*)

(3) *Statement of Address.* A nonresident personal representative must sign and file with the court a statement of his or her permanent address. If the address is changed, a change of address statement must be filed promptly in the same manner. (*Prob.C. 8573.*) Failure to comply is cause for removal from office. (*Prob.C. 8577.*)

(4) *Appointment of Secretary of State as Attorney.* "Acceptance of appointment by a nonresident personal representative is equivalent to and constitutes an irrevocable and binding appointment by the nonresident personal representative of the Secretary of State to be the attorney of the personal representative" for the purpose of *Prob.C. 8570* et seq. The appointment also applies to any personal representative of a deceased nonresident personal representative. (*Prob.C. 8572(a).*)

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4. Nonresident Personal Representative.
b. Service of Process.

14 Witkin Sum. Cal. Law Wills § 432

[§ 432] Service of Process.

(1) *Service on Secretary of State.* In an action against a nonresident personal representative with respect to the estate or founded on or arising out of acts or omissions of the personal representative in that capacity, process and notice of a motion under *C.C.P. 377.41* (pending action against decedent; see *infra*, §520) may be served on the Secretary of State as attorney for the personal representative. (*Prob.C. 8572(b).*)

(2) *Manner of Service.* In an action against a nonresident personal representative, service is made by delivering to the Secretary of State (a) two copies of the summons and complaint or notice of motion, and (b) a copy of the nonresident personal representative's address statement under *Prob.C. 8573* (*supra*, §431) or, if no address statement is on file, a copy of the letters issued to the nonresident personal representative and a signed statement, setting forth an address for the Secretary of State to use. (*Prob.C. 8574(a).*) The Secretary of State promptly mails a copy of the summons and complaint or notice of motion to the nonresident personal representative, by registered mail, at the address shown on the statement. (*Prob.C. 8574(b).*) Personal service on the nonresident personal representative "wherever found" is equivalent to the service provided in *Prob.C. 8574*. (*Prob.C. 8574(c).*)

(3) *Proof of Service.* *Prob.C. 8575* sets forth the procedure for proof of service:

(a) For service by mail, proof of service is by a certificate of mailing, under the Secretary of State's official seal, filed with the court from which process issued. (*Prob.C. 8575(a).*)

(b) For personal service outside the state, proof of service is by a return showing that service has been made by a "duly constituted public officer qualified to serve like process" in the jurisdiction where the nonresident personal representative is found, attached to the original summons or notice of motion and filed with the court from which process issued. (*Prob.C. 8575(b).*)

(4) *Effect of Process.* Under *Prob.C. 8576(a)*, service under *Prob.C. 8574* "has the same legal force and validity as if made personally" within California except as follows:

(a) A nonresident personal representative may appear and answer a complaint within 30 days from the date of

service. (*Prob.C. 8576(b).*)

(b) A notice of motion must be served on a nonresident personal representative not less than 30 days before the date of the hearing. (*Prob.C. 8576(c).*)

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14 Witkin Sum. Cal. Law Wills § 433

[§ 433] Competency and Qualifications.

(1) *Former Statutes and Case Law.* Under former Prob.C. 401, an executor could not be a minor, a person convicted of an infamous crime, or a person adjudged incompetent because of drunkenness, improvidence, or want of understanding or integrity. (See *Estate of Johnson* (1920) 182 C. 642, 643, 189 P. 280 [administrator was elderly, forgetful, and suffering from hallucinations; finding of "want of understanding" upheld]; *Estate of Olcese* (1930) 210 C. 262, 268, 291 P. 193 [mere illiteracy or unfamiliarity with business does not constitute "want of understanding"]; *Estate of Nicoll* (1947) 79 C.A.2d 48, 52, 179 P.2d 95 [lack of business experience does not disqualify]; *Estate of Manischewitz* (1952) 113 C.A.2d 5, 6, 247 P.2d 572 [interpreting "integrity" requirement and holding person competent].) Under former Prob.C. 420, the qualifications for administrators were the same as for executors.

The statutory grounds were exclusive. (See *Estate of Shimon* (1977) 67 C.A.3d 436, 442, 136 C.R. 668 [showing of ill feeling toward decedent and spouse was insufficient to establish incompetency].) Thus, an adverse interest was not sufficient to disqualify, even though it might be the basis for an action to remove. (See *Estate of Meyers* (1955) 130 C.A.2d 145, 159, 278 P.2d 471 [surviving joint tenant was not disqualified for that reason alone from serving as administrator of estate of deceased joint tenant]; *Estate of Daigh* (1963) 59 C.2d 367, 368, 29 C.R. 273, 379 P.2d 761 [executor's conflict of interest was not disqualifying]; *Estate of Cummings* (1972) 23 C.A.3d 617, 622, 624, 100 C.R. 809 [technical adverse interest does not disqualify one enjoying priority of appointment]; *Estate of Backer* (1985) 164 C.A.3d 1159, 1163, 211 C.R. 163 [executor's conflict of interest was not disqualifying].)

(2) *Disqualifying Circumstances.* Prob.C. 8402 sets forth the following circumstances in which a person is not competent to act as a personal representative:

(a) *Minority.* "The person is under the age of majority." (Prob.C. 8402(a)(1).) (See 8 A.L.R.3d 590 [capacity of minor to act as personal representative].)

(b) *Incapacity.* "The person is subject to a conservatorship of the estate or is otherwise incapable of executing, or is otherwise unfit to execute, the duties of the office." (Prob.C. 8402(a)(2).) (See 73 A.L.R.2d 458 [integrity]; 71 A.L.R.3d 675 [physical condition].)

(c) *Grounds for removal from office.* "There are grounds for removal of the person from office" under Prob.C. 8502

(*infra*, §451 et seq.). (*Prob.C. 8402(a)(3)*.) The Law Revision Commission Comment points out that this provision reverses the result in *Estate of Backer, supra*, and allows the court to deny appointment of a person with a conflict of interest or other ground that is sufficient to require removal. (See *11 A.L.R.4th* 638 [adverse interest].)

(d) *Foreign residency*. "The person is not a resident of the United States." (*Prob.C. 8402(a)(4)*.) This provision does not apply to a person named as executor or successor executor in the decedent's will. (*Prob.C. 8402(b)*.) (See *9 A.L.R.4th* 1223 [who is resident within meaning of statute prohibiting appointment of nonresident].)

(e) *Partnership with decedent*. "The person is a surviving partner of the decedent and an interested person objects to the appointment." (*Prob.C. 8402(a)(5)*.) This provision does not apply to a person named as executor or successor executor in the decedent's will. (*Prob.C. 8402(b)*.) (See *Prob.C. 48* ["interested person" defined].)

(3) *Trust Company or Savings and Loan Association as Personal Representative*. A trust company or savings and loan association may be appointed to act as a personal representative. (*Prob.C. 300* [trust company]; *Fin.C. 6515* [savings and loan association].) If the named executor in a will is a trust company that has been sold to, consolidated or merged with, or otherwise succeeded by another trust company, the court may, and to the extent required by *Fin.C. 99* et seq., must, appoint the successor trust company as executor. (*Prob.C. 8423*.) (See *Prob.C. 83* ["trust company" defined].)

(4) *Waiver of Right to Appointment*. A named executor who fails to petition for appointment in a timely fashion may be deemed to have waived the right to appointment. (*Prob.C. 8001*, *infra*, §583.)

(5) *Practice Works*. A number of practice works deal with the appointment of executors and administrators. (See Cal. Transactions Forms, 4 Estate Planning §§19:71 et seq., 19:125 et seq.; C.E.B., 3 Will Drafting 3d, §32.1 et seq.; 31 Proof of Facts 3d 433 [proof of entitlement to or disqualification from appointment as personal representative].)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 434

[§ 434] Testator's Direction or Intention.

(1) *Executor Named in Will.* "The person named as executor in the decedent's will has the right to appointment as personal representative." (*Prob.C. 8420.*) The Law Revision Commission Comment points out that this provision does not apply if the person named is not qualified for appointment (see *Prob.C. 8402*, supra, §433) or has waived the right to appointment. "If the court does not appoint all the persons named in the will as executors, those appointed have the same authority to act in every respect as all would have if appointed." (*Prob.C. 8425.*)

(2) *Procedure Where Minor Is Named Executor.* *Prob.C. 8424* provides as follows, in the event the named executor is under the age of majority:

(a) If another person is also named as executor, that person may be appointed. On majority, the minor may be appointed coexecutor. (*Prob.C. 8424(a).*)

(b) If no other person is named as executor, another person may be appointed personal representative. On majority, that appointment may be revoked and the minor may be appointed executor. (*Prob.C. 8424(b).*)

(3) *Terms of Will Indicating Intention.* "If a person is not named as executor in a will but it appears by the terms of the will that the testator intended to commit the execution of the will and the administration of the estate to the person, the person is entitled to appointment as personal representative in the same manner as if named as executor." (*Prob.C. 8421.*) (For cases under former statute, see *Estate of Henderson* (1925) 196 C. 623, 638, 238 P. 938; *Estate of Clary* (1950) 98 C.A.2d 524, 526, 220 P.2d 754; *Estate of Dern* (1952) 114 C.A.2d 799, 800, 251 P.2d 28 [statement in holographic will that "I want Georgia to care for my funeral" held not to be appointment].)

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14 Witkin Sum. Cal. Law Wills § 435

[§ 435] Power To Designate Executor.

A testator may, by will, confer the power to designate an executor, coexecutor, or successor on another person, and may provide that the designated persons may serve without bond. (*Prob.C. 8422(a).*)

A designation must be in writing and must be filed with the court. Unless the will provides otherwise, if there are two or more holders of the power to designate, the designation must be unanimous. However, if one of the holders of the power is unable or unwilling to act, the remaining holder or holders may exercise the power. (*Prob.C. 8422(b).*)

Except as provided in *Prob.C. 8422*, an executor does not have authority to name a coexecutor or a successor. (*Prob.C. 8422(c).*)

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a. In General.

14 Witkin Sum. Cal. Law Wills § 436

[§ 436] In General.

(1) *Former Statute and Case Law.* Former Prob.C. 422, following the priority for intestate succession, set forth the priority for appointment of an administrator or administrator with the will annexed. (See *Estate of Rollins* (1922) 189 C. 392, 393, 208 P. 280 [son and daughter were equally entitled; son was appointed where circumstances indicated possible claim by daughter adverse to estate]; *Estate of Herriott* (1933) 219 C. 529, 531, 28 P.2d 355 [priority determined at time of granting letters]; *Estate of Martens* (1937) 10 C.2d 395, 399, 74 P.2d 238 [administrator with will annexed]; *Estate of Trissel* (1962) 208 C.A.2d 188, 193, 25 C.R. 205 [choice between persons equally qualified; preference for person likely to handle estate to advantage of those beneficially interested]; *Estate of Cummings* (1972) 23 C.A.3d 617, 622, 100 C.R. 809 [in absence of waiver or disqualification, appointment of person with highest priority is mandatory]; *Estate of Kaseroff* (1977) 19 C.3d 272, 137 C.R. 644, 562 P.2d 325 [administrator with will annexed].)

(2) *Law Revision Commission Report.* "The priority of persons for appointment as administrator of the estate of a decedent corresponds to their priority for inheriting the estate of the decedent under the laws governing intestate succession. Recent changes in the law governing intestate succession have rendered the appointment priority scheme inconsistent. The proposed law conforms the priority for appointment as administrator to the current law governing intestate succession. The proposed law also makes clear that the nominee of a person having priority also has priority for appointment, and that several persons may act together to make a nomination." (19 Cal. Law Rev. Com. Reports, p. 795.)

(3) *Appointment in Event of Intestacy.* If a decedent dies intestate, the court appoints one or more persons as administrator. (Prob.C. 8460.) The Law Revision Commission Comment points out that the person appointed must be legally competent under Prob.C. 8402 (supra, §433). The order of priority is set forth in Prob.C. 8461 (infra, §437). (See 84 A.L.R.3d 707 [propriety of appointment of stranger rather than person with statutory preference].)

(4) *Several People With Equal Priority.* "If several persons have equal priority for appointment as administrator, the court may appoint one or more of them, or if such persons are unable to agree, the court may appoint the public administrator or a disinterested person in the same or the next lower class of priority as the persons who are unable to agree." (Prob.C. 8467.)

West's Key Number Digest, Executors and Administrators k.17(1)

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b. Statutory Priority.

14 Witkin Sum. Cal. Law Wills § 437

[§ 437] Statutory Priority.

Under *Prob.C. 8461*, "a person in the following relation to the decedent is entitled to appointment as administrator" in the following order of priority:

- (1) Surviving spouse or domestic partner. (*Prob.C. 8461(a).*)
- (2) Children. (*Prob.C. 8461(b).*)
- (3) Grandchildren. (*Prob.C. 8461(c).*)
- (4) Other issue. (*Prob.C. 8461(d).*)
- (5) Parents. (*Prob.C. 8461(e).*)
- (6) Brothers and sisters. (*Prob.C. 8461(f).*)
- (7) Issue of brothers and sisters. (*Prob.C. 8461(g).*)
- (8) Grandparents. (*Prob.C. 8461(h).*)
- (9) Issue of grandparents. (*Prob.C. 8461(i).*)
- (10) Children of a predeceased spouse or domestic partner. (*Prob.C. 8461(j).*)
- (11) Other issue of a predeceased spouse or domestic partner. (*Prob.C. 8461(k).*)
- (12) Other next of kin. (*Prob.C. 8461(l).*)
- (13) Parents of a predeceased spouse or domestic partner. (*Prob.C. 8461(m).*)
- (14) Issue of parents of a predeceased spouse or domestic partner. (*Prob.C. 8461(n).*)

(15) "Conservator or guardian of the estate acting in that capacity at the time of death who has filed a first account and is not acting as conservator or guardian for any other person." (*Prob.C. 8461(o)*.) The court may, for good cause, allow the priority provided by *Prob.C. 8461* to a guardian or conservator who has not met the requirements of *Prob.C. 8461(o)*. (*Prob.C. 8469(a)*.) If the petition for appointment requests this priority, the petitioner must serve notice of the hearing by mail or personal delivery on the public administrator, in addition to notice otherwise required by statute. (*Prob.C. 8469(b)*.)

(16) Public administrator. (*Prob.C. 8461(p)*.)

(17) Creditors. (*Prob.C. 8461(q)*.)

(18) "Any other person." (*Prob.C. 8461(r)*.)

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c. Surviving Spouse or Domestic Partner.

14 Witkin Sum. Cal. Law Wills § 438

[§ 438] Surviving Spouse or Domestic Partner.

The surviving spouse or domestic partner of a decedent has first priority in appointment as administrator of the decedent's estate under *Prob.C. 8461(a)*. (See *Prob.C. 37* ["domestic partner" defined].) The following limitations apply:

(1) The surviving spouse or domestic partner has priority only if (a) the spouse or partner is entitled to succeed to all or part of the estate, or (b) the spouse or partner takes under the will or succeeds to all or part of the estate of another deceased person who is entitled to succeed to all or part of the decedent's estate. (*Prob.C. 8462*.)

(2) If the surviving spouse is a party to an action for separate maintenance, annulment, or dissolution of the marriage, and was living apart from the decedent on the date of the decedent's death, the surviving spouse has priority "next after brothers and sisters." (*Prob.C. 8463*.) The Law Revision Commission explains the purpose of this provision: "Any surviving spouse who was involved in a pending proceeding to dissolve the marriage and who was living apart from the decedent is likely to have a conflict of interest with the decedent's heirs and should have lower priority." (19 Cal. Law Rev. Com. Reports, p. 795.)

In *Estate of Hensgen* (1947) 80 C.A.2d 78, 82, 181 P.2d 69, 11 Summary (10th), *Husband and Wife*, §142, involving the former statute, a first wife was held entitled to nominate an administrator as against a second wife of a void marriage, even though the first wife might be estopped to claim her inheritance rights by reason of her remarriage in reliance on a void divorce decree. The court did not discuss the meaning of the phrase "entitled to succeed," but relied solely on the theory that the second wife was not the widow of decedent. But *Hensgen* was virtually disapproved in *Estate of Edgett* (1961) 188 C.A.2d 700, 10 C.R. 552. The husband obtained a void Mexican divorce and remarried. Then his first wife died, and he sought letters of administration. *Held*, he was not entitled. Having procured the decree and married again, he was estopped to challenge it for purposes of succession to his first wife's estate. This being so, he was not a person entitled to succeed. (188 C.A.2d 702.)

A putative spouse, entitled to succeed to the decedent's separate and community property, is a surviving spouse for purposes of priority in appointment. (*Estate of Leslie* (1984) 37 C.3d 186, 200, 207 C.R. 561, 689 P.2d 133, *supra*, §78.)

West's Key Number Digest, Executors and Administrators k.17(3)

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Garrett (2008) 159 C.A.4th 831, 836, 71 C.R.3d 864* [surviving spouse had priority in appointment as administrator even though spouse and decedent were separated; spouse was not "a party to an action" for purposes of *Prob.C. 8463* where her dissolution action had been dismissed long ago].



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d. Relatives.

14 Witkin Sum. Cal. Law Wills § 439

[§ 439] Relatives.

Prob.C. 8461 sets forth the following order of priority for appointment among relatives of the decedent and the decedent's predeceased spouse or domestic partner: (a) children, (b) grandchildren, (c) other issue, (d) parents, (e) brothers and sisters, (f) issue of brothers and sisters, (g) grandparents, (h) issue of grandparents, (i) children of a predeceased spouse or domestic partner, (j) other issue of a predeceased spouse or domestic partner, (k) other next of kin, (l) parents of a predeceased spouse or domestic partner, and (m) issue of parents of a predeceased spouse or domestic partner. The priority for relatives is subject to two limitations:

(1) A surviving spouse or domestic partner has greater priority. (See *supra*, §438.)

(2) A relative has priority only if (a) the relative is entitled to succeed to all or part of the estate, or (b) the relative takes under the will or succeeds to all or part of the estate of another deceased person who is entitled to succeed to all or part of the decedent's estate. (*Prob.C. 8462*.)

Cases decided under the former statute illustrate the scope of the limitation, which excludes those who would not inherit in the case of intestacy and those who would succeed but are precluded by an agreement or by the will. Thus, a relative normally entitled may be denied letters with the will annexed where the relative is excluded by the will and as a result takes no share of the estate. (*Estate of Winbigler* (1913) 166 C. 434, 435, 137 P. 1; *Estate of Crites* (1909) 155 C. 392, 393, 101 P. 316 [child beneficiary preferred over widow who took nothing under will]; *Estate of Sayers* (1928) 203 C. 753, 756, 265 P. 924; *Estate of Selb* (1949) 93 C.A.2d 788, 790, 210 P.2d 45 [daughter, who contested will and lost her right to take by reason of forfeiture clause, was not entitled to priority].) The same is true in case of intestacy; the public administrator is preferred over a relative not entitled to succeed. (*Estate of Way* (1938) 29 C.A.2d 669, 673, 85 P.2d 563; *Estate of Pascoe* (1966) 242 C.A.2d 85, 51 C.R. 91; *Estate of Locke* (1968) 258 C.A.2d 617, 620, 65 C.R. 884.)

The occasional necessity for a provisional construction of a will, in appointing an executor or administrator with the will annexed, is illustrated in *Estate of Nicoll* (1947) 79 C.A.2d 48, 179 P.2d 95. The testator made a holographic will leaving his property to his brother, "who will always take care and share same with my only son," and, "in case of" his brother's death, all was to go in trust for the son. The son's guardian (his mother who had by a property settlement

waived any rights of her own) sought letters, but the court appointed the brother. *Held*, this was proper, for, although a child is ordinarily entitled to a higher priority than a brother, it was not entirely clear whether the minor was entitled to take under the will, and the court, solely for the purpose of appointment of an administrator, could conclude that he was not. (79 C.A.2d 53.)

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SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Heath* (2008) 166 C.A.4th 396, 401, 82 C.R.3d 436 [for purposes of *Prob.C.* 8462, "succeed" means to take by will or intestacy; relative of decedent who had received partial assignment of foreign beneficiary's interest in estate did not "succeed" and thus was not entitled to priority for appointment over public administrator].



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e. Nominee of Person Entitled.

14 Witkin Sum. Cal. Law Wills § 440

[§ 440] Nominee of Person Entitled.

(1) *Former Statute and Case Law.* Former statutes authorized a person entitled to appointment as administrator to nominate another in his or her place. A number of amendments involved the rights of nonresidents (not then entitled to appointment) to nominate. (See *In re Stevenson* (1887) 72 C. 164, 166, 13 P. 404 [surviving spouse has paramount right to nominate even though not entitled to appointment because of nonresidency]; *Estate of Healy* (1898) 122 C. 162, 54 P. 736 [court has discretion to appoint qualified person in subsequent class]; *Estate of Olcese* (1930) 210 C. 262, 268, 291 P. 193 [nominee of sister cannot be appointed over another sister or brother]; *Estate of Somerville* (1936) 12 C.A.2d 430, 432, 55 P.2d 597 [sister excluded by will cannot nominate]; *Estate of De Brum* (1938) 26 C.A.2d 319, 322, 79 P.2d 414 [nominee subject to priority of others in same class as nominator]; *Estate of Hinds* (1947) 77 C.A.2d 645, 647, 176 P.2d 65 [nominee of sister takes priority over nephew]; *Estate of Wanamaker* (1977) 65 C.A.3d 587, 593, 135 C.R. 333 [discretion of court to appoint nominee of person most beneficially interested in estate]; *Estate of Lindsey* (1980) 108 C.A.3d 428, 435, 166 C.R. 511 [remarriage of surviving spouse on decedent's death does not affect right to letters].)

In *Estate of Kaseroff* (1977) 19 C.3d 272, 137 C.R. 644, 562 P.2d 325, the testator left a holographic will leaving his property to his children and sisters. The will, reciting desertion and other misconduct of his wife, left her "one dollar only. ... Nothing else," and added "Do not pay her anything." No executor was named, and the surviving wife and the children filed separate petitions seeking to nominate an administrator with the will annexed. The probate judge granted letters to the wife's nominee. *Held*, reversed.

(a) A person who takes under the will has priority over one who does not. However, the wife was not a taker within the meaning of the statute. The § 1 provision demonstrated an intent to disinherit, not to make a bequest; and this intention was emphasized by the testator's added remarks. (19 C.3d 275.) Hence the children had priority. (19 C.3d 275.)

(b) The issue here, however, is the priority of nominees. Under former Prob.C. 423 (now Prob.C. 8465), the children's nominee has the priority of the class next after the children. The wife's nominee would normally have priority, but in this case the wife does not succeed to any part of the estate. Because the position of the wife's nominee is commensurate with the position of the wife, her nominee's priority is negated by former Prob.C. 423. (19 C.3d 276.)

A party who nominates may be estopped from withdrawing the nomination and seeking his or her own appointment (see *Estate of Calhoun* (1938) 27 C.A.2d 706, 711, 81 P.2d 605); but if the elements of an estoppel are not present, the court may allow the assertion of the abandoned right. (*Estate of Clary* (1950) 98 C.A.2d 524, 528, 220 P.2d 754.)

A nominee does not gain a vested right but only a power to apply for letters. Hence on the death of the person who nominates, prior to the order granting letters, the power terminates and letters must issue to others. (*Estate of Henry* (1960) 181 C.A.2d 173, 178, 5 C.R. 582.)

(2) *Current Statute.* Prob.C. 8465 provides for nomination of an administrator as follows:

(a) "The court may appoint as administrator a person nominated by a person otherwise entitled to appointment or by the guardian or conservator of the estate of a person otherwise entitled to appointment." The nomination must be made in writing and filed with the court. (Prob.C. 8465(a).) (See *Estate of Damskog* (1991) 1 C.A.4th 78, 81, 1 C.R.2d 653 [nonresident heirs were not entitled to appointment under Prob.C. 8402(a)(4) (supra, §433), and thus lacked authority to nominate administrator under Prob.C. 8465].)

(b) If the person nominating another for appointment as administrator is the surviving spouse or domestic partner, child, grandchild, other issue, parent, brother or sister, or grandparent of the decedent, "the nominee has priority next after those in the class of the person making the nomination." (Prob.C. 8465(b).)

(c) If the person nominating another for appointment as administrator is other than a person described in Prob.C. 8465(b), the court has discretion to appoint either the nominee or a person of a class lower in priority than the person making the nomination, "but other persons of the class of the person making the nomination have priority over the nominee." (Prob.C. 8465(c).)

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f. Guardian or Conservator of Person Entitled.

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[§ 441] Guardian or Conservator of Person Entitled.

If a person otherwise entitled to appointment as an administrator is a minor or a person for whom a guardian or conservator of the estate has been appointed, the court has discretion to appoint the guardian or conservator or another person entitled to appointment. (*Prob.C. 8464.*) (See *Welf.C. 7284* [authority of Department of Mental Health serving as guardian or conservator of estate of incompetent person in state hospital to be appointed administrator].)

The statute is inapplicable to a guardian ad litem. In *Estate of Trego (1978) 81 C.A.3d 530, 146 C.R. 664*, construing the former statute, decedent was survived by two minor children and her parents. The parents, not entitled to succeed (because the entire estate would go to the children), were in the lowest class. Petitioner, decedent's former husband, had himself appointed guardian ad litem of the children, and then claimed preference under the statute. *Held*, the divorced husband was in the lowest class, and the probate judge had discretion to appoint the parents.

(a) The preference given by former *Prob.C. 426* was to a "guardian," which means a general guardian. (*81 C.A.3d 535.*) A guardian ad litem is a "special guardian," appointed with less formalities and not subject to the same regulations as a general guardian. (*81 C.A.3d 535.*) (See *4 Cal. Proc. (4th), Pleading, §60 et seq.*)

(b) The Legislature has specified the preference for appointment as general guardian but not as guardian ad litem. A stranger can be appointed guardian ad litem of a minor child; and, if the stranger were entitled to priority under the statute, he or she would have a higher priority than everyone except a surviving spouse. (*81 C.A.3d 536.*)

West's Key Number Digest, Executors and Administrators k.17(4)

SUPPLEMENT: [This section is current through the latest supplement]
Guardian ad litem:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §70 et seq.



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g. Public Administrator.

14 Witkin Sum. Cal. Law Wills § 442

[§ 442] Public Administrator.

The public administrator in the county in which a decedent's estate may be administered may be appointed to administer the estate. (*Prob.C. 7620*, supra, §419.)

(1) *Persons With Higher Priority.* The public administrator's priority for appointment is inferior to the following:

(a) The surviving spouse or domestic partner, relatives of the decedent, and relatives of the decedent's predeceased spouse or domestic partner, where those persons are competent to serve and entitled to a share of the estate. (*Prob.C. 8461(a)-(n)*, supra, §437; see *Estate of Jacobs (1950) 100 C.A.2d 452, 459, 223 P.2d 898.*)

(b) A qualifying conservator or guardian of the estate of the decedent. (*Prob.C. 8461(o).*)

(c) Any competent person who takes under the will. (*Prob.C. 8441(b)*, supra, §430; see *Estate of Mullane (1967) 253 C.A.2d 441, 442, 61 C.R. 366.*)

(2) *Persons With Lower Priority.* The public administrator's priority for appointment is superior to the following:

(a) A creditor. (*Prob.C. 8461(q)*; infra, §443.)

(b) "Any other person." (*Prob.C. 8461(r)*; infra, §444.)

(c) A relative excluded by the will. (See supra, §439.)

(d) A guardian ad litem. (See *Estate of Trego (1978) 81 C.A.3d 530, 535, 146 C.R. 664*, supra, §441 [guardian ad litem has lowest priority, not priority of guardian or conservator of minor or incompetent].)

(e) The Department of Mental Health. (See *Estate of Henry (1944) 64 C.A.2d 76, 81, 148 P.2d 396* [although Welf.C. 7284 authorizes State Department of Mental Health to apply for letters when patient dies with estate but without in-state relatives, department has no preference and ranks below public administrator].)

(f) The consul of a foreign country who seeks to represent an alien nonresident heir. (See *Estate of Servas* (1915) 169 C. 240, 249, 146 P. 651.)

Where out-of-state domiciliary executors fail to apply for ancillary letters, and the public administrator alone petitions, the public administrator is entitled to appointment. (*Estate of Glassford* (1952) 114 C.A.2d 181, 191, 249 P.2d 908.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Appointment of Executors and Administrators.
3. Priority in Appointment of Administrator.
h. Creditor.

14 Witkin Sum. Cal. Law Wills § 443

[§ 443] Creditor.

(1) *Priority.* A creditor of the decedent may be appointed to administer the estate, but the creditor's priority is lower than the surviving spouse or domestic partner, relatives of the decedent and the decedent's predeceased spouse or domestic partner, a qualifying conservator or guardian of the decedent's estate, and the public administrator. A creditor has priority over "any other person." (*Prob.C. 8461*, *supra*, §437.)

(2) *Discretion in Appointment.* "If a person whose only priority is that of a creditor claims appointment as administrator, the court in its discretion may deny the appointment and appoint another person." (*Prob.C. 8466.*)

The California Law Revision Commission Report observes: "If no person entitled to higher priority seeks appointment as personal representative, a creditor may be appointed personal representative, but if another creditor objects the court may appoint a third person instead. The proposed law broadens court discretion to allow appointment of a neutral party whether or not a creditor objects. This may be important for the protection of the estate or other interested parties, as well as for the protection of creditors who may not have received notice of the pendency of the administration proceedings." (19 Cal. Law Rev. Com. Reports, p. 796.)

West's Key Number Digest, Executors and Administrators k.17(6)

SUPPLEMENT: [This section is current through the latest supplement]



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i. Any Other Person.

14 Witkin Sum. Cal. Law Wills § 444

[§ 444] Any Other Person.

The lowest priority for appointment is "any other person." (*Prob.C. 8461(r)*.) In addition, if persons with priority fail to claim appointment, the court may appoint "any person who claims appointment." (*Prob.C. 8468*.) The Law Revision Commission Comment points out that any person appointed under this provision must be legally competent under *Prob.C. 8402* (*supra*, §433). The former statute used the phrase "any person legally competent."

In *Estate of Selb* (1949) 93 C.A.2d 788, 210 P.2d 45, the claimants were decedent's daughter, who had forfeited her right to take by contesting the will, and the child of decedent's son, who did not take directly under the will but would receive the entire estate through his father. The probate judge appointed the daughter administrator with the will annexed. *Held*, reversed. (a) Neither claimant had priority, but, because the public administrator had not applied, either could be appointed as a person legally competent. (b) However, in view of the fact that the daughter would take no part of the estate, it was an abuse of discretion to appoint her instead of the child. (93 C.A.2d 793.) (See *supra*, §439; cf. *Estate of Knowlton* (1953) 118 C.A.2d 374, 377, 257 P.2d 1031 [distinguishing *Selb*].)

In *Estate of Trissel* (1962) 208 C.A.2d 188, 25 C.R. 205, the testator gave W, his son, \$ 500, and the residue (nearly \$ 90,000) to M. The will was admitted to probate, and W filed a petition for revocation, thereby bringing himself under the clause forfeiting the gift on contest of the will. Then the executor died, and W and M each sought appointment as administrator with the will annexed. *Held*, appointment of W could not be sustained on the record.

(a) W, originally a person entitled to take under the will (see *supra*, §439), lost that right when he filed his contest. However, the contest was still pending, and if he should win he might take the entire estate as an heir at law. But for purposes of the proceeding to appoint an administrator with the will annexed, after an order admitting it to probate, it must be assumed that there is a valid will; and this assumption will govern until a decree is entered setting aside the will. Thus, W, though originally in a prior class as the testator's son, lost his priority when he forfeited his right to succeed, and fell into the lowest class of "any person legally competent," with M. (208 C.A.2d 192.)

(b) Because both W and M were in the same class, the probate judge erred in giving W his lost statutory priority. The appointment should be an exercise of discretion, in accordance with the policy of selection of the person likely to handle the property to the advantage of those beneficially interested. And on the present record, with M entitled to the

entire estate under a will prima facie valid, it was an abuse of discretion to appoint W. (208 C.A.2d 193.)

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4. Procedure in Appointment.

14 Witkin Sum. Cal. Law Wills § 445

[§ 445] Procedure in Appointment.

Prob.C. 8000 et seq. set forth the procedure for appointment of a personal representative:

(1) *Petition*. At any time after the decedent's death, an interested person may petition for an order determining the date and place of the decedent's death and for appointment of a personal representative. (*Prob.C. 8000*, infra, §583.) (On failure of named executor to petition, see *Prob.C. 8001*, infra, §583; on contents of petition, see *Prob.C. 8002*, infra, §584; on filing fee, see infra, §585.)

(2) *Hearing and Contest*. The petition is set for hearing, and notice of the hearing is served and published. (*Prob.C. 8003*, infra, §587 et seq.) The appointment of the personal representative may be contested. (*Prob.C. 8004*, infra, §586.)

(3) *Order*. The court determines the time and place of the decedent's death and the jurisdiction of the court. When appropriate, it appoints a personal representative. (*Prob.C. 8006*, infra, §590.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 446

[§ 446] Letters and Oath.

(1) *Letters.* Letters testamentary and letters of administration must be signed by the clerk under the seal of the court. (*Prob.C. 8405.*) Letters must state the following:

(a) The county from which the letters are issued. (*Prob.C. 8405(a).*)

(b) The name of the person appointed personal representative and whether the appointment is as executor, administrator, administrator with the will annexed, or special administrator. (*Prob.C. 8405(b).*)

(c) Whether the personal representative is authorized to act under the Independent Administration of Estates Act (*Prob.C. 10400 et seq.; infra, §746 et seq.*), and whether that authority includes or excludes the power to sell or exchange real property, grant an option to purchase real property, or borrow money with a loan secured by an encumbrance on real property. (*Prob.C. 8405(c).*)

The Judicial Council form for letters is mandatory. (See Judicial Council Form No. DE-150.)

(2) *Oath.* Before letters are issued, the personal representative must "take and subscribe an oath to perform, according to law, the duties of the office." The oath may be taken and dated on or after the time the petition for appointment is signed, and may be filed at any time after the petition is granted. (*Prob.C. 8403(a).*) The oath constitutes acceptance of the office and must be attached to or endorsed on the letters. (*Prob.C. 8403(b).*) The oath of a nonresident executor may be taken before a foreign notary. (*Adams v. Sharp (1964) 61 C.2d 775, 778, 40 C.R. 255, 394 P.2d 943.*) In lieu of an oath, *C.C.P. 2015.6* authorizes an unsworn written affirmation.

A defective oath is not a ground for a collateral attack on the acts of the personal representative. (*Estate of Siberell (1955) 132 C.A.2d 332, 333, 282 P.2d 209.*)

West's Key Number Digest, Executors and Administrators k.27

SUPPLEMENT: [This section is current through the latest supplement]



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D. Letters, Oath, and Bond.
2. Statement of Duties and Liabilities.

14 Witkin Sum. Cal. Law Wills § 447

[§ 447] Statement of Duties and Liabilities.

Before letters are issued, a personal representative must acknowledge the receipt of a statement of the duties and liabilities of a personal representative. (*Prob.C. 8404(a)* [requirement does not apply to trust company or public administrator].) Judicial Council Form No. DE-147 [Duties and Liabilities of Personal Representative and Acknowledgement of Receipt] is mandatory. (See C.R.C., Rule 7.150 [before letters are issued, personal representative must execute and file Judicial Council Form No. DE-147].) The statement of duties and liabilities in the Judicial Council form do not supersede the law on which the statement is based. (*Prob.C. 8404(c)*.)

A local rule may require the acknowledgement to include the personal representative's birth date and driver's license number, but the court must ensure their confidentiality. (*Prob.C. 8404(b)*.) Judicial Council Form No. DE-147S [Confidential Supplement to Duties and Liabilities of Personal Representative] is used to report the personal representative's birth date and driver's license number where local rules require that information.

SUPPLEMENT: [This section is current through the latest supplement]



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D. Letters, Oath, and Bond.

3. Bond.

a. In General.

14 Witkin Sum. Cal. Law Wills § 448

[§ 448] In General.

(1) *Governing Law.* Except to the extent *Prob.C. 7000* et seq. provide otherwise, bonds given under *Prob.C. 7000* et seq. (administration of estates) are subject to the provisions of the Bond and Undertaking Law (*C.C.P. 995.010* et seq.; see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §9 et seq.). (*Prob.C. 8487.*)

(2) *Requirement.* Except as otherwise provided by statute, every person appointed as a personal representative must give a bond approved by the court before letters are issued. If two or more persons are appointed, the court may require either a separate bond from each or a joint bond. If a joint bond is furnished, the liability on the bond is joint and several. (*Prob.C. 8480(a).*) (See *Prob.C. 301(a)* [trust company acting as personal representative may not be required to give bond].) "The bond shall be for the benefit of interested persons and shall be conditioned on the personal representative's faithful execution of the duties of the office according to law." (*Prob.C. 8480(b)*; see *Cal. Civil Practice*, 1 Probate and Trust Proceedings, §§9:43 et seq., 9:58 et seq.; *C.E.B.*, 1 Decedent Estate Practice, §8.1 et seq.; *C.E.B.*, Probate Workflow Manual, §8.1 et seq.)

If the will names two or more persons to serve as executors, but not all serve and the will does not expressly waive bond if fewer than all the named persons serve, the court must require each to give a bond unless the court waives this requirement under *Prob.C. 8481(a)(2)* (waiver by all beneficiaries; see *infra*, §450). (*C.R.C.*, Rule 7.202.)

Because a corporate fiduciary "cannot assume responsibility for the acts of an individual cofiduciary," an individual cofiduciary required to give a bond must give a separate bond, except to the extent that the court orders the assets to be held solely by the corporate fiduciary. (*C.R.C.*, Rule 7.203.)

(3) *Failure To Give or Maintain Bond.* If the personal representative fails to give a bond, letters may not be issued. A personal representative who fails to give a new, additional, or supplemental bond, or to substitute a sufficient surety, under court order, may be removed from office. (*Prob.C. 8480(c).*)

(4) *Cost.* The personal representative is allowed the reasonable cost of the bond for every year it remains in force. (*Prob.C. 8486.*) The Law Revision Commission Comment notes that the statute leaves the reasonableness of the amount to be determined by market forces.

(5) *Substitution or Release of Sureties.* A personal representative who petitions for substitution or release of a surety must file with the petition an account in the form provided by *Prob.C. 10900* (infra, §714). The court may not order substitution or release unless the account is approved. (*Prob.C. 8485.*)

(6) *Limitation of Action Against Surety.* *Prob.C. 8488* governs actions against a surety as follows:

(a) An action against a surety based on a breach of a condition of the bond may be brought for the use and benefit of the decedent's estate or for any person interested in the estate. (*Prob.C. 8488(a).*)

(b) An action against a surety on a personal representative's bond must be commenced within 4 years of either (1) the date of discharge or removal of the personal representative, or (2) the date the order surcharging the personal representative becomes final, whichever is later. (*Prob.C. 8488(b).*)

(c) Notwithstanding *Prob.C. 7250(c)* (fraud, conspiracy, or misrepresentation in obtaining judgment; see infra, §469), an action against the sureties on the bond must be commenced within 6 years after the date the judgment under *Prob.C. 7250* becomes final or the latter of the orders under *Prob.C. 8488(b)* becomes final. (*Prob.C. 8488(c).*)

(7) *Circumstances Requiring Notice to Surety.* *Prob.C. 1213* provides for notice, in the form specified by *Prob.C. 1211* (general probate notice; see supra, §386), mailed to the surety on a bond at the address shown on the bond. If a petition, motion, or order relates to the personal representative to whom the bond applies, notice must be mailed by the following persons:

(a) A person who petitions to surcharge.

(b) A person who files an objection to an account.

(c) A person who petitions to suspend or remove a personal representative. Within 5 days of entry of a suspension or removal order, the petitioner must also notify the surety of the order.

(d) An attorney who moves to withdraw from representing a personal representative.

West's Key Number Digest, Executors and Administrators k.26(.5) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Governing Law.*

Bond and Undertaking Law:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §9 et seq.



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D. Letters, Oath, and Bond.

3. Bond.

b. Amount.

14 Witkin Sum. Cal. Law Wills § 449

[§ 449] Amount.

(1) *Statutory Conditions and Court's Discretion.* The court has discretion to fix the amount of the bond. (*Prob.C. 8482(a).*) Generally, it may not exceed the sum of (a) the estimated value of personal property, (b) the "probable annual gross income of the estate," and (c) the estimated value of the decedent's interest in real property (if independent administration is granted as to real property). (*Prob.C. 8482(a).*) However, if the bond is given by an admitted surety insurer, the court may establish a fixed minimum amount based on the minimum premium required by the admitted surety insurer. (*Prob.C. 8482(b).*) If the bond is given by personal sureties, the amount is twice the amount fixed by the court under *Prob.C. 8482(a).* (*Prob.C. 8482(c).*)

"If the personal representative requests or has been granted an independent power to sell or hypothecate real estate or to lease it for a term of more than one year, the personal representative must state in the request to fix the amount of the bond the value of the real property less encumbrances." (C.R.C., Rule 7.205.)

Before confirming a sale of real property the court must require "such additional bond as may be proper," not exceeding the maximum requirements of *Prob.C. 8482(d)*, treating the expected proceeds of the sale as personal property. (*Prob.C. 8482(d).*) If a bond is required in an order confirming the sale of real property, the court may not file the order until the bond is filed. (C.R.C., Rule 7.206.)

(2) *Reduction by Deposit of Assets.* A personal representative may deposit various estate property in financial institutions and trust companies. (*Prob.C. 9700 et seq., infra, §480.*) Where property is deposited under *Prob.C. 9700 et seq.*, the court may, in determining the amount of the personal representative's bond, order that the property and earnings not be withdrawn without court authorization, and, in its discretion, may either (a) exclude the property in determining the amount of the bond or reduce the amount of the bond to the amount the court determines is reasonable, or (b) if a bond has been given or the amount has been fixed, reduce the amount to an amount the court determines is reasonable. (*Prob.C. 8483.*) (See *Fin.C. 764* [court to reduce bond where estate property is ordered deposited].)

A petition to have the amount of the bond reduced must include an affidavit setting forth the condition of the estate. Notice of the hearing must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 8484.*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §14:40 [petition to reduce amount of bond].)

(3) *Petition To Increase Bond.* "Immediately upon the occurrence of facts making it necessary or appropriate to increase the amount of the bond," the personal representative must make an ex parte application for an order increasing the bond. (C.R.C., Rule 7.204(a).) If the personal representative does not make the application, the personal representative's attorney must do so "immediately upon becoming aware of the need to increase bond." (C.R.C., Rule 7.204(b).) The application must show the value of the estate's personal property and the probable annual gross income of the estate. If the personal representative has full authority under the Independent Administration of Estates Act, the application must also show the amount of equity in estate real property. (C.R.C., Rule 7.204(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Reduction by Deposit of Assets.* *Fin.C. 764* was repealed in 2008.



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3. Bond.
c. Waiver.

Witkin Sum. Cal. Law Wills § 450

[§ 450] Waiver.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Conditions for Waiver.*

(a) *Will waives bond:* C.R.C., Rule 7.201(a) was amended in 2006 to refer to the "Petition for Probate."



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3. Bond.

c. Waiver.

14 Witkin Sum. Cal. Law Wills § 450

[§ 450] Waiver.

(1) *Conditions for Waiver.* A bond is not required in two circumstances:

(a) The will waives bond. (*Prob.C. 8481(a)(1).*) If the will waives bond, the petition for letters must so state. (C.R.C., Rule 7.201(a).)

(b) All beneficiaries waive bond and the will does not require a bond. Written waivers must be attached to the personal representative's petition for appointment. (*Prob.C. 8481(a)(2).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §9:61.)

(2) *When Bond May Be Required Notwithstanding Waiver.* Notwithstanding waiver, the court may require a bond "for good cause," either before or after issuance of letters, on petition of any interested person or on its own motion. (*Prob.C. 8481(b).*) "The court may require bond if the proposed personal representative lives outside California or for other good cause, even if the will waives bond." (C.R.C., Rule 7.201(b).) (See *Prob.C. 8571*, supra, §431 [authority to require bond of nonresident personal representative despite waiver].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Conditions for Waiver.*

(a) *Will waives bond:* C.R.C., Rule 7.201(a) was amended in 2006 to refer to the "Petition for Probate."



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CHAPTER XXI - Wills and Probate

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E. Removal From Office.

1. Grounds for Removal.

a. In General.

14 Witkin Sum. Cal. Law Wills § 451

[§ 451] In General.

(1) *Former Statutes and Case Law.* Former statutes set forth a number of grounds for removal of a personal representative, e.g., waste, embezzlement, mismanagement, fraud, incompetency, neglect, permanent removal from the state (former Prob.C. 521); embezzlement, waste, or mismanagement appearing on settlement of the account (former Prob.C. 524); extended contempt (former Prob.C. 526); failure to give additional or sufficient security (former Prob.C. 549); failure to file a timely inventory (former Prob.C. 610); failure to render an account when required (former Prob.C. 921); absconding, concealment to avoid citation, failure to render an account (former Prob.C. 924); failure to comply with an order regarding timely closing of an estate (former Prob.C. 1025.5).

Despite a violation of express statutory duties by the representative, the court could, in its discretion, decline to remove where the violation was a result of excusable mistake, without fraud, gross negligence, or serious injury to the estate. This was particularly true of an executor, who was presumably named because he or she enjoyed the confidence of the testator. (See *In re Chadbourne* (1911) 15 C.A. 363, 368, 114 P. 1012 [failure to publish notice to creditors, due to secretary's oversight]; *Estate of Sherman* (1936) 5 C.2d 730, 744, 56 P.2d 230; *Estate of Atkins* (1932) 121 C.A. 251, 255, 8 P.2d 1052 [administrator; mistakes in inventory, sale without order of court]; *Estate of Buchman* (1954) 123 C.A.2d 546, 554, 267 P.2d 73; *infra*, §453.)

(2) *Law Revision Commission Report.* In recommending revision of the statutes governing removal (see 19 Cal. Law Rev. Com. Reports, p. 800), the California Law Revision Commission noted that the existing statute was obsolete in two respects: (a) nonresidents were authorized to serve as personal representatives, and (b) grounds developed by case law (e.g., having an adverse interest or engaging in hostile acts) were not reflected in the statute.

(3) *Current Statutes.* The following grounds for removal are specified:

(a) "The personal representative has wasted, embezzled, mismanaged, or committed a fraud on the estate, or is about to do so." (*Prob.C. 8502(a)*, *infra*, §452.)

(b) "The personal representative is incapable of properly executing the duties of the office or is otherwise not qualified for appointment as personal representative." (*Prob.C. 8502(b)*.)

(c) "The personal representative has wrongfully neglected the estate, or has long neglected to perform any act as personal representative." (*Prob.C. 8502(c)*, *infra*, §453.)

(d) "Removal is otherwise necessary for protection of the estate or interested persons." (*Prob.C. 8502(d)*, *infra*, §454.)

(e) Designated persons with higher priority of appointment petition for removal. (*Prob.C. 8503*, *infra*, §455.)

(f) The personal representative is in contempt for disobeying a court order. (*Prob.C. 8505*, *infra*, §456.)

(g) A will is admitted to probate (after appointment of an administrator on the ground of intestacy) or a later will is admitted to probate (after appointment of an executor or administrator with the will annexed). (*Prob.C. 8504*, *infra*, §457.)

(h) "Any other cause provided by statute." (*Prob.C. 8502(e)*.) The following are illustrative:

(1) *Prob.C. 8480*, *supra*, §448 [removal for failure to give bond].

(2) *Prob.C. 8941(c)(4)*, *infra*, §608 [removal for failure to deliver appraisal data to probate referee].

(3) *Prob.C. 8500(c)*, *infra*, §459 [removal for failure to attend or answer at hearing on petition for removal].

(4) *Prob.C. 8577*, *supra*, §431 [removal for failure of nonresident personal representative to provide statement of address].

(5) *Prob.C. 11051*, *infra*, §713 [removal for purposefully evading service of citation in proceeding to compel account].

(6) *Prob.C. 11052*, *infra*, §713 [removal for failure to appear and file required account after being duly cited].

(4) *Rules of Court*. A personal representative may be removed from office for paying or receiving statutory or extraordinary commissions or fees in advance of a court order authorizing payment. (C.R.C., Rule 7.700(b), *infra*, §541.) A similar provision applies to guardians and conservators. (See C.R.C., Rule 7.755(a), *infra*, §1044.)

West's Key Number Digest, Executors and Administrators k.35(1)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Removal From Office.

1. Grounds for Removal.

b. Mismanagement or Fraud.

14 Witkin Sum. Cal. Law Wills § 452

[§ 452] Mismanagement or Fraud.

A personal representative may be removed if he or she has "wasted, embezzled, mismanaged, or committed a fraud on the estate, or is about to do so." (*Prob.C. 8502(a)*.)

In *Estate of Tersip* (1948) 86 C.A.2d 43, 194 P.2d 66, construing the former statute, appellant was removed on a showing that she obtained letters of administration as decedent's widow even though she was actually married to another at the time of her purported marriage to decedent. The word "fraud" should be given its broadest meaning. "It would apply to the conduct of appellant in the capacity of administratrix. It is not necessary that actual fraud has been, or is about to be committed. ... An administrator who asserts false claims against the estate to the prejudice of others interested in the estate is guilty of constructive fraud. We cannot deny the power of the court to remove its representative whose self-interest stands in the way of a fair and impartial representation of the rights of all other claimants to an estate in probate." (86 C.A.2d 48.) (See *Estate of Gainfort* (1938) 11 C.2d 298, 300, 79 P.2d 97 [ancillary administrator sent estate funds out of jurisdiction to defraud local creditors of legatee]; *Estate of Kromrey* (1950) 98 C.A.2d 639, 645, 220 P.2d 805 [administrator, an attorney, took advantage of confidential relation to gain property for himself].)

West's Key Number Digest, Executors and Administrators k.35(3), 35(8)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Removal From Office.

1. Grounds for Removal.

c. Neglect of Estate or Duties.

14 Witkin Sum. Cal. Law Wills § 453

[§ 453] Neglect of Estate or Duties.

A personal representative may be removed if he or she has "wrongfully neglected the estate, or has long neglected to perform any act as personal representative." (*Prob.C. 8502(c)*.) (See *Estate of Richardson* (1946) 74 C.A.2d 350, 351, 168 P.2d 774 [unexcused failure to file inventory for nearly 2 years]; *Gross v. Needham* (1960) 184 C.A.2d 446, 462, 7 C.R. 664 [failure to render proper account]; 33 A.L.R.4th 708 [delay as ground for removal].)

Mere delay is not considered a proper ground of removal unless the delay is wilful or negligent and detrimental to the estate. The burden of proving these facts is on the petitioner; the executor can rely on the presumption of fair conduct and faithful performance of official duty. In *Estate of Buchman* (1954) 123 C.A.2d 546, 267 P.2d 73, the probate judge rejected an offer of proof that the executor had been under treatment for a nervous disorder and that the failure to file was entirely the fault of the appraiser. The order of removal was reversed. "Anyone with any knowledge of the probate of estates knows that in many cases the filing of the inventory is unavoidably delayed without the fault of the representative." (123 C.A.2d 554.) (See *Estate of Meyers* (1955) 130 C.A.2d 145, 150, 278 P.2d 471 [delay in hope of discovering additional assets was sufficient excuse in absence of loss to estate].)

Refusal to sell estate property, amounting only to a mistake in judgment, is likewise an insufficient ground for removal. In *Estate of Feeney* (1983) 139 C.A.3d 812, 189 C.R. 84, the principal asset of the estate was decedent's residence. A sale to Willard was confirmed, but he failed to perform, and the estate attorney prepared petitions to vacate the sale to Willard and to confirm a new sale to White. The executor, fearing potential personal liability, refused to sign the petitions. A beneficiary under the will then petitioned for (a) removal of the executor and (b) orders directing the estate attorney to petition to vacate the sale to Willard and confirm the new sale to White. At the hearing the trial judge found that the executor acted in her own personal interests and ordered her removal. *Held*, order of removal reversed.

(a) *Inherent power of removal independent of statute.* A mere potential conflict, unaccompanied by adverse actions, does not justify removal under the inherent power; and the findings did not show how the executor's potential personal liability conflicted with her duty to sell the property and close the estate with all due speed. (139 C.A.3d 818.)

(b) *Statutory power of removal.* The statute authorizes removal for mismanagement or neglect; and an administrator's neglect or refusal to sell estate property might under unusual circumstances rise to the level of

mismanagement. (139 C.A.3d 820, citing Illinois case on delay of over 14 years.) The statute is designed to deal with administrative malfeasance amounting to a moral wrong. Here the executor was guilty at most of an error of judgment; there was no showing of bad faith or cupidity. (139 C.A.3d 821.) Former Prob.C. 758 (now *Prob.C. 10001*; *infra*, §672) authorizes an order requiring the executor or administrator to sell estate property, and this is the appropriate remedy for refusal to do so due to a mistake in judgment. (139 C.A.3d 821.)

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SUPPLEMENT: [This section is current through the latest supplement]



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E. Removal From Office.

1. Grounds for Removal.

d. Protection of Estate or Interested Persons.

14 Witkin Sum. Cal. Law Wills § 454

[§ 454] Protection of Estate or Interested Persons.

The grounds for removal specified in the original statutes were not exclusive; cases recognized the court's inherent power to protect the estate by removing an executor or administrator possessing an adverse interest or engaging in hostile acts. (See *Luckey v. Superior Court* (1930) 209 C. 360, 370, 287 P. 450; *Estate of Palm* (1945) 68 C.A.2d 204, 210, 156 P.2d 62 [administrator with will annexed, holding allowed claim secured by trust deed on land that was chief asset of estate, performed hostile acts]; *Gross v. Needham* (1960) 184 C.A.2d 446, 462, 7 C.R. 664 [adverse claim to estate property].)

In *Estate of Guzzetta* (1950) 97 C.A.2d 169, 217 P.2d 460, an administrator with the will annexed contested the will in order to obtain the whole estate by inheritance. *Held*, order revoking letters and appointing the public administrator affirmed. In attacking the will while under a duty to protect interests of beneficiaries under it, the administrator was guilty of a violation of the fiduciary obligation of a trustee; and "[t]he court is not compelled to retain as its own officer one whom it would be required to remove from any other type of trusteeship." (97 C.A.2d 173.)

A representative acts properly, however, in resolving a conflict between beneficiaries. In *Estate of Cole* (1966) 240 C.A.2d 324, 49 C.R. 419, a bank was executor of the estates of Mr. and Mrs. C, who had concurrently executed wills. Mr. C died first and the bank was appointed. Before distribution Mrs. C died and the bank was appointed. The bank petitioned in each probate proceeding to determine heirship and for instructions on whether Mrs. C had waived community property rights and elected to take under the will. On petition of the residuary beneficiaries, the probate court ordered removal of the bank as executor of Mrs. C's estate. *Held*, reversed. The bank was a mere stakeholder, without personal interests, and it acted properly in seeking instructions on the widow's election. (240 C.A.2d 331.)

The rule articulated in the foregoing cases has now been codified. A personal representative may be removed if "[r]emoval is otherwise necessary for protection of the estate or interested persons." (*Prob.C. 8502(d)*.) However, the Law Revision Commission Comment points out that not every conflict necessarily requires removal for the protection of the estate. (See *Estate of Wemyss* (1975) 49 C.A.3d 53, 61, 122 C.R. 134 [mere potential conflict is insufficient to justify removal].)

In *Estate of Hammer* (1993) 19 C.A.4th 1621, 24 C.R.2d 190, the sole beneficiary of an estate sought to remove the

named executor, her estranged husband, on a variety of grounds. *Held*, failure to remove the executor was an abuse of discretion. The executor breached his fiduciary duty by failing to file an inventory and by improperly using estate assets for his personal travel expenses. (19 C.A.4th 1637.) He took advantage of the beneficiary and mismanaged the estate by causing or permitting the beneficiary to use personal assets to pay for litigation involving the estate. (19 C.A.4th 1638.) He asserted, in dissolution proceedings, an interest adverse to the beneficiary and the estate. (19 C.A.4th 1639, 1640.) By engaging in litigation against the beneficiary, he had "a serious conflict of interest" with the beneficiary and may have "exploited his position as executor" to benefit his personal interests. (19 C.A.4th 1642.)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Removal From Office.
1. Grounds for Removal.
e. Substitution of Person With Higher Priority.

14 Witkin Sum. Cal. Law Wills § 455

[§ 455] Substitution of Person With Higher Priority.

Statutes have long authorized revocation of letters on the petition of a person with a higher priority of appointment. (See *Estate of Martin* (1912) 163 C. 440, 442, 125 P. 1055; *Estate of Randall* (1918) 177 C. 363, 365, 170 P. 835; *Estate of Way* (1938) 29 C.A.2d 669, 676, 85 P.2d 563 [revocation of letters to heir not entitled to succeed, on petition of public administrator]; *Silva v. Superior Court* (1948) 83 C.A.2d 521, 524, 526, 189 P.2d 314 [acts of prior administrator, including approval of claims, remain valid despite revocation].)

An administrator may be removed from office on the petition of the surviving spouse or a relative of the decedent entitled to succeed to all or part of the estate (or the nominee of that person) if that person is higher in priority than the administrator. (*Prob.C. 8503(a)*.) However, the court may refuse to grant the petition in two circumstances:

(1) Where a petition is by a person (or nominee of a person) who had "actual notice of the proceeding in which the administrator was appointed and an opportunity to contest the appointment." (*Prob.C. 8503(b)(1)*.)

(2) Where removal would be "contrary to the sound administration of the estate." (*Prob.C. 8503(b)(2)*.)

The Law Revision Commission Comment makes two observations:

(a) *Prob.C. 8503(b)(2)* applies, e.g., "where administration is nearly complete or has otherwise progressed to a point where replacement of the administrator would be inappropriate."

(b) A petition under *Prob.C. 8503* should be accompanied by a petition to appoint a successor with a higher priority. (On priority of appointment, see *Prob.C. 8461*, supra, §437.) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §14:39 [petition to replace administrator with person of higher priority].)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Removal From Office.

1. Grounds for Removal.

f. Contempt of Court.

14 Witkin Sum. Cal. Law Wills § 456

[§ 456] Contempt of Court.

A personal representative may be removed from office if found in contempt for disobeying a court order. (*Prob.C. 8505(a)*.) (See *Prob.C. 11052*, *infra*, §713 [contempt or removal, or both, in court's discretion, for failure to appear and file required account].) Notwithstanding *Prob.C. 8500* et seq., removal for contempt may be "by a court order reciting the facts and without further showing or notice." (*Prob.C. 8505(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Grounds for Removal.

g. Probate of Will or Later Will.

14 Witkin Sum. Cal. Law Wills § 457

[§ 457] Probate of Will or Later Will.

After appointment of an administrator on the ground of intestacy, the personal representative must be removed from office on the later admission to probate of a will. (*Prob.C. 8504(a).*)

After appointment of an executor or administrator with the will annexed, the personal representative must be removed from office on admission to probate of a later will. (*Prob.C. 8504(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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- E. Removal From Office.
- 2. Procedure for Removal.
- a. Who May Seek Removal.

14 Witkin Sum. Cal. Law Wills § 458

[§ 458] Who May Seek Removal.

Under former Prob.C. 522, any person "interested in the estate" could seek removal of the personal representative. The quoted phrase was liberally construed: "[A]ny doubt as to the question of interest ought to be resolved in favor of the petitioner; and however remote or contingent his interest may be, or, in other words, if he has the appearance of an interest, his right to contest ought not to be denied." (*Estate of Kovacs* (1964) 227 C.A.2d 308, 312, 38 C.R. 612, quoting *Garwood v. Garwood* (1866) 29 C. 514, 520.) In *Kovacs*, the decedent's mother was held to have standing to seek removal of the widow-administrator, on the following showing: Decedent's life insurance policy, with the mother as beneficiary, was subject to a federal tax lien on the tax surrender value of \$ 7,402.92. If the administrator paid the federal taxes, the insurance money would be released to the mother; if the administrator wasted the estate and the taxes were left unpaid, the mother would lose the insurance money.

Under *Prob.C. 8500(a)*, any "interested person" may petition for removal of the personal representative. An "interested person" generally includes (a) an heir, devisee, child, spouse, creditor, beneficiary, or any other person having a property right in or claim against the estate, (b) a person having priority for appointment as personal representative, and (c) a fiduciary representing an interested person. (*Prob.C. 48*.) (On petition by person with higher priority for appointment, see *Prob.C. 8503*, *supra*, §455.)

West's Key Number Digest, Executors and Administrators k.35(11)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Procedure for Removal.
b. Petition, Citation, Hearing, and Determination.

Witkin Sum. Cal. Law Wills § 459

[§ 459] Petition, Citation, Hearing, and Determination.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition*. The filing fee for a petition, application, or opposition to an order removing a fiduciary is \$ 180. (*Govt.C.* 70658(a)(6), added in 2007.)



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14 Witkin Sum. Cal. Law Wills § 459

[§ 459] Petition, Citation, Hearing, and Determination.

(1) *Petition.* A petition for removal may be combined with a petition for appointment of a successor under *Prob.C. 8520 et seq.* (*infra*, §460). The petition must state facts showing cause for removal. (*Prob.C. 8500(a).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §9:65.)

(2) *Citation.* On a petition for removal, "or if the court otherwise has reason to believe from the court's own knowledge or from other credible information," that there are grounds for removal, the court issues a citation to the personal representative to appear and show cause why he or she should not be removed. The court may suspend the powers of the personal representative and make other orders necessary to deal with the property pending the hearing. (*Prob.C. 8500(b).*) (See *Estate of Palm (1945) 68 C.A.2d 204, 213, 156 P.2d 62* [failure to issue citation was waived by voluntary participation in proceedings]; *Estate of Buchman (1954) 123 C.A.2d 546, 557, 267 P.2d 73, 2 Cal. Proc. (4th), Jurisdiction*, §299 [executor could not be removed without citation and fair hearing].)

(3) *Hearing.* Any interested person may appear at the hearing and file a written declaration showing that the personal representative should be removed or retained. The personal representative may demur or answer the declaration. The court may compel the attendance of the personal representative and may compel the personal representative to answer questions, on oath, concerning the administration of the estate. Failure to attend or answer is cause for removal of the personal representative from office. (*Prob.C. 8500(c).*) (See *47 A.L.R.2d 307* [notice and hearing in proceeding for removal].) In cases of contempt, summary removal without a hearing is authorized. (See *Prob.C. 8505*, *supra*, §456.)

(4) *Determination.* The issue is heard and determined by the court. If the court is satisfied from the evidence that the citation has been duly served and cause for removal exists, the court removes the personal representative from office. (*Prob.C. 8500(d).*) On removal, the court must revoke letters issued to the personal representative, and the authority of the personal representative ceases. (*Prob.C. 8501.*)

West's Key Number Digest, Executors and Administrators k.35(16)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition*. The fee for filing a petition, application, or opposition concerning an order removing a fiduciary is \$ 350. (Govt.C. 70658(a)(6), added in 2007 and amended in 2008.)(2) *Citation*.

Estate of Buchman:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §308.



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F. Vacancy in Office.
1. Death, Resignation, Removal, or Other Termination.

Witkin Sum. Cal. Law Wills § 460

[§ 460] Death, Resignation, Removal, or Other Termination.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* The filing fee for a petition, application, or opposition to an order allowing a fiduciary to resign is \$ 180.
(Govt.C. 70658(a)(8), added in 2007.)



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F. Vacancy in Office.
1. Death, Resignation, Removal, or Other Termination.

14 Witkin Sum. Cal. Law Wills § 460

[§ 460] Death, Resignation, Removal, or Other Termination.

(1) *In General.* A vacancy occurs in the office of a personal representative who resigns, dies, or is removed from office under *Prob.C. 8500* et seq. (supra, §451 et seq.), or whose authority is "otherwise terminated." (*Prob.C. 8520.*) A resignation need not be accepted to be effective (*Estate of Grafmiller (1938) 27 C.A.2d 253, 255, 81 P.2d 181*) but liability continues until the personal representative's account is settled (*Prob.C. 8525*, infra, §463).

(2) *Fiduciaries' Wartime Substitution Law.* *Prob.C. 350* et seq., the Fiduciaries' Wartime Substitution Law, authorizes the court having jurisdiction over a decedent's estate, a trust, or a guardianship or conservatorship estate, on petition of a fiduciary or an interested person, to appoint a substitute fiduciary for a fiduciary "engaged in war service." (See *Prob.C. 354* ["interested person" defined]; *Prob.C. 356* ["engaged in war service" defined].) The court may also authorize a fiduciary who is or will be engaged in war service to delegate his or her powers to a fiduciary who is not engaged in war service. (*Prob.C. 380.*)

West's Key Number Digest, Executors and Administrators k.36

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* The fee for filing a petition, application, or opposition concerning an order allowing a fiduciary to resign is \$ 350. (*Govt.C. 70658(a)(8)*, added in 2007 and amended in 2008.)



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F. Vacancy in Office.
2. Vacancy of Fewer Than All Representatives.

14 Witkin Sum. Cal. Law Wills § 461

[§ 461] Vacancy of Fewer Than All Representatives.

If a vacancy occurs in the office of fewer than all personal representatives, the remaining representatives complete administration, unless the will provides otherwise or the court, in its discretion, orders otherwise. (*Prob.C. 8521(a).*) The court may order the clerk to issue amended letters to the remaining representatives. (*Prob.C. 8521(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Vacancy in Office.
3. Vacancy of All Representatives.

14 Witkin Sum. Cal. Law Wills § 462

[§ 462] Vacancy of All Representatives.

(1) *Appointment of Successor.* If a vacancy occurs and there are no other personal representatives, the court appoints a successor. (*Prob.C. 8522(a)*.) Appointment is made on petition and notice to interested parties as provided by *Prob.C. 8110* et seq. (*infra*, §588). Appointment is subject to the same priority as original appointment (see *Prob.C. 8461*). "The personal representative of a deceased personal representative is not, as such, entitled to appointment as successor personal representative." (*Prob.C. 8522(b)*.)

(2) *Powers and Duties of Successor.* *Prob.C. 8524*, based on *Unif.Prob.C.*, §3-613, sets forth the powers and duties of the successor:

(a) The successor is entitled to recover and collect the estate of the decedent remaining unadministered, and may prosecute to final judgment an action commenced by the former personal representative before the vacancy. (*Prob.C. 8524(a)*.)

(b) A notice, process, or claim given to or served on the former personal representative does not have to be given to or served on the successor in order to preserve a position or right the person giving the notice or filing the claim may have obtained or preserved with reference to the former personal representative. (*Prob.C. 8524(b)*.)

(c) Except as provided in *Prob.C. 8442(b)* (authority of administrator with will annexed; *supra*, §430) or as otherwise ordered by the court, the successor has the powers and duties that the former personal representative would have had. (*Prob.C. 8524(c)*.)

(3) *Interim Protection of Estate.* The court may make necessary orders to deal with the property during a vacancy, including the appointment of a special administrator (see *Prob.C. 8540* et seq., *supra*, §425 et seq.). (*Prob.C. 8523*.)

SUPPLEMENT: [This section is current through the latest supplement]



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F. Vacancy in Office.
4. Acts and Liability of Former Representative.

14 Witkin Sum. Cal. Law Wills § 463

[§ 463] Acts and Liability of Former Representative.

(1) *Validity of Acts.* "The acts of a personal representative before a vacancy occurs are valid to the same extent as if no vacancy had later occurred." (*Prob.C. 8525(a).*)

(2) *Liability.* "The liability of a personal representative whose office is vacant, or of the surety on the bond, is not discharged, released, or affected by the vacancy or by appointment of a successor, but continues until settlement of the accounts of the personal representative and delivery of all the estate to the successor personal representative or other person appointed by the court to receive it. The personal representative shall render an account of the administration within the time that the court directs." (*Prob.C. 8525(b).*) (See *Hill v. Superior Court (1940) 16 C.2d 527, 531, 106 P.2d 876* [successor may sue former representative for losses sustained by estate through his or her mismanagement].)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Powers and Duties.

1. In General.

a. Fiduciary Relationship.

Witkin Sum. Cal. Law Wills § 464

[§ 464] Fiduciary Relationship.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Personal Dealings*. See *Estate of Seifert (2005) 128 C.A.4th 64, 68, 26 C.R.3d 560* [executor could not acquire title to estate property by adverse possession; because of executor's fiduciary relationship to devisees, possession could not be adverse while administration was pending].



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G. Powers and Duties.

1. In General.

a. Fiduciary Relationship.

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[§ 464] Fiduciary Relationship.

(1) *Nature of Powers.* The powers of personal representatives are limited by statute and the will; they have no inherent powers. (See *Perry v. Superior Court* (1938) 29 C.A.2d 114, 116, 84 P.2d 250; *Estate of Palm* (1945) 68 C.A.2d 204, 211, 156 P.2d 62; 31 Am.Jur.2d (2002 ed.), *Executors and Administrators* §366 et seq.; Cal. Transactions Forms, 4 Estate Planning §§19:83 et seq., 19:130 et seq.)

The void acts of a person purporting to be the administrator of an estate are not validated by his or her subsequent appointment; i.e., California does not follow the relation-back doctrine. (*Lamkin v. Vierra* (1961) 198 C.A.2d 123, 126, 17 C.R. 805.) (See 2 A.L.R.3d 1105 [relation back of letters as validating prior sale of decedents' property].)

(2) *Obligations and Liabilities of Trustees.* Personal representatives are fiduciaries, with the usual obligations and liabilities of trustees in the broad sense of the term. (*Estate of Boggs* (1942) 19 C.2d 324, 333, 121 P.2d 678; *Larrabee v. Tracy* (1943) 21 C.2d 645, 650, 134 P.2d 265; *Estate of Palm, supra*, 68 C.A.2d 211 ["quasi-trustee"]; *Estate of Guzzetta* (1950) 97 C.A.2d 169, 173, 217 P.2d 460; see 11 *Hastings L. J.* 64; Unif.Prob.C., §§3-703(a), 3-712; 13 *Summary* (10th), *Trusts*, §63.) However, they are not strict trustees. (*Los Angeles v. Morrison* (1940) 15 C.2d 368, 370, 101 P.2d 470; *Rest.3d, Trusts* §5; see *Estate of Knox* (1942) 52 C.A.2d 338, 344, 126 P.2d 108 [difference between powers of administrator and testamentary trustee]; *Estate of McSweeney* (1954) 123 C.A.2d 787, 793, 268 P.2d 107, *infra*, §526.) (On personal representative as fiduciary, see Chodos, *Fiduciary Duties* §§1:5, 1:15, 2:23, 5:5.)

(3) *Personal Dealings.* A personal representative is limited in dealing personally with the estate. (See *Prob.C.* 9880 et seq. [restrictions on purchase of estate property; *infra*, §500]; *Estate of Boggs, supra* [representative cannot enter into personal transaction with estate]; *Estate of King* (1942) 19 C.2d 354, 361, 121 P.2d 716 [statute of limitations does not run in favor of representative on debt owed by him to estate as long as relationship is not repudiated]; *United States Fidelity & Guaranty Co. v. Postel* (1944) 64 C.A.2d 567, 573, 149 P.2d 183 [administrator may purchase claim after it has been approved]; *Estate of Kromrey* (1950) 98 C.A.2d 639, 220 P.2d 805; *Estate of Bonaccorsi* (1999) 69 C.A.4th 462, 467, 81 C.R.2d 604 [administrator of estate breached duty to vote corporate stock owned by estate in best interest of beneficiaries, where, without court approval or supervision, he voted shares to elect himself president, managed day-to-day affairs, and paid himself excessive fees and reimbursements, even though corporation did nothing more than own home and car].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Personal Dealings*. See *Estate of Seifert* (2005) 128 C.A.4th 64, 68, 26 C.R.3d 560 [executor could not acquire title to estate property by adverse possession; because of executor's fiduciary relationship to devisees, possession could not be adverse while administration was pending].



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G. Powers and Duties.

1. In General.

b. Standard of Care.

14 Witkin Sum. Cal. Law Wills § 465

[§ 465] Standard of Care.

(1) *Case Law.* In *Estate of Beach* (1975) 15 C.3d 623, 125 C.R. 570, 542 P.2d 994, a bank was the executor and the trustee under a testamentary trust. As executor it retained most of the estate's shares of common stock, then selling at \$ 16 per share, \$ 2 more than its appraised value. When they were delivered to the trustee 1 year later, they were worth only \$ 6 per share. Trust beneficiaries contested the executor's account, seeking damages on behalf of the estate for the executor's alleged negligence in not selling the stock while its market price was above the appraised value. In affirming a judgment for the executor, based on the trial judge's finding that it had exercised due care, the court made two observations concerning liability for, and tests of, negligence of an executor:

(a) The general standard of care of an executor is the degree of prudence and diligence expected of a person of ordinary judgment in his or her own affairs; but a bank engaged in the business of acting as a fiduciary for estates and trusts is held to the higher standard of skill and knowledge of professional fiduciaries. (15 C.3d 631, 635.)

(b) The fact that the executor bank was also to become the testamentary trustee did not call for application of the prudent investor rule. The duties of an executor and testamentary trustee are distinct, and the executor is not required to manage the estate assets as if they were already held under the terms of the trust. (15 C.3d 636.) (See *Lobro v. Watson* (1974) 42 C.A.3d 180, 189, 116 C.R. 533; *Estate of Gerber* (1977) 73 C.A.3d 96, 110, 140 C.R. 577 [executor was not liable for decline in value of estate assets where estate was sufficiently liquid to pay taxes and expenses]; 31 Am.Jur.2d (2002 ed.), *Executors and Administrators* §§502, 502.)

(2) *Codification.* "The personal representative has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes ordinary care and diligence is determined by the circumstances of the particular estate." (Prob.C. 9600(a).) In addition, a personal representative must exercise or not exercise powers to the extent ordinary care and diligence so requires. (Prob.C. 9600(b).)

The Law Revision Commission Comment makes the following observations:

(a) Prob.C. 9600 is comparable to Prob.C. 2401 (standard of care for guardians and conservators; infra, §1001) and consistent with prior case law.

(b) "In determining what constitutes ordinary care and diligence, a professional personal representative is held to a higher standard of care based on its presumed expertise than is a lay personal representative."

(c) The statute applies to all powers and duties of the personal representative, whether or not prior court authorization is required.

(d) In determining when a power must be exercised or may not be exercised under *Prob.C. 9600(b)*, a personal representative has some discretion. "For example, the personal representative has the duty to take all steps reasonably necessary for the protection and preservation of the estate property, and this duty requires that the personal representative obtain and maintain insurance on the estate property to the extent reasonably necessary. ... [T]he personal representative is not authorized to obtain and maintain more insurance on the estate property than is reasonably necessary. ... [T]he personal representative has discretion to determine the amount of insurance, and so long as the amount of insurance is not unreasonably high or unreasonably low under the circumstances, the personal representative has complied with the duty to use ordinary care and diligence."

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c. Decedent's Contracts and New Contracts.

14 Witkin Sum. Cal. Law Wills § 466

[§ 466] Decedent's Contracts and New Contracts.

(1) *Existing Contracts.* Where a contract entered into by a decedent has executory obligations to be performed by the decedent, should the personal representative undertake the performance? If the contract is of a personal character, it is discharged by death, and the personal representative need not attempt to perform. (See 1 *Summary* (10th), *Contracts*, §838.) But if the contract is one that survives death (see 1 *Summary* (10th), *Contracts*, §838), the representative is liable under the contract and must perform, or the estate is liable in damages. A personal representative who performs becomes personally liable for necessary labor and materials, but is entitled to reimbursement from the estate. (*Estate of Burke* (1926) 198 C. 163, 167, 244 P. 340; see *Estate of Fulmer* (1928) 203 C. 693, 699, 265 P. 920 [agreement by decedent to purchase real property; administrator was justified in making payments to complete purchase]; 14 *Cal. L. Rev.* 419; *Prob.C. 11004* [reimbursement for expenses of estate]; *infra*, §527.)

A personal representative may be ordered to convey real property or transfer personal property pursuant to the decedent's written contract under *Prob.C. 850* et seq. (See *supra*, §356 et seq.)

(2) *New Contracts.* A personal representative has no general authority to make new contracts binding the estate. The personal representative is personally liable to third persons on such contracts, even though they were made in the interests of the estate, except perhaps by special agreement with the creditor. (*Moss v. Boyle* (1941) 44 *C.A.2d* 410, 413, 112 *P.2d* 657.) However, where contracts are incidental to the administration of the estate, the personal representative is entitled to reimbursement from the estate. (See *Prob.C. 11004*, *infra*, §527.)

In addition, a personal representative has extensive statutory authority to enter into contracts in particular circumstances; e.g., to sell, exchange, lease, dedicate, and grant options to purchase estate property. (See *infra*, §495 et seq.) (See *Harm v. Frasher* (1960) 181 *C.A.2d* 405, 422, 5 *C.R.* 367 [estate was liable for breach of contract of sale, entered into by executors and approved by court, where executors failed to perform].)

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1. In General.

d. Employment of Attorney and Tax Advisors.

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[§ 467] Employment of Attorney and Tax Advisors.

(1) *Attorney.* The personal representative may, and usually does, employ an attorney. The attorney represents the personal representative, not the estate, which is not an entity. (*Estate of Ogier* (1894) 101 C. 381, 385, 35 P. 900; see *Estate of Kafitz* (1921) 51 C.A. 325, 330, 196 P. 790 [attorney for administrator may also act as attorney for one heir against another]; *Goldberg v. Frye* (1990) 217 C.A.3d 1258, 1267, 266 C.R. 483 [attorney for administrator has no contractual duty to devisees of estate]; 66 A.L.R.2d 1169 [right of coexecutor to retain separate counsel].) Directions by the testator for the appointment of an attorney are not binding; the executor may choose his or her own. (*Highfield v. Bozio* (1922) 188 C. 727, 207 P. 242.) (See 83 A.L.R.3d 1160 [liability of estate for services of attorney employed by estate attorney without consent of representative].)

The beneficiaries may not require discharge of the executor's attorney. In *Estate of Effron* (1981) 117 C.A.3d 915, 173 C.R. 93, the beneficiaries sought to compel removal of the executor because he refused to discharge the law firm chosen by him to handle the estate. *Held*, there is no policy justification to subordinate the executor's duties and responsibilities to the controlling power of beneficiaries. "The unilateral demand of Beneficiaries for action by an executor cannot be honored unless the merits of that demand coincide with the interest of the court and all others who may have a stake in the efficient administration of the estate." (117 C.A.3d 929.)

(2) *Tax Advisors.* The personal representative may employ tax counsel, tax auditors, accountants and other "tax experts" for assistance in negotiation, litigation, or tax return preparation "which may be necessary for the final determination and payment of taxes." These services may be paid for with funds of the estate. (*Prob.C. 10801(b)*.)

(3) *Malpractice Action by Successor Fiduciary.* *Borissoff v. Taylor & Faust* (2004) 33 C.4th 523, 15 C.R.3d 735, 93 P.3d 337, a case of first impression, held that the successor fiduciary of an estate in probate could assert a malpractice claim against attorneys retained by the predecessor fiduciary to provide tax assistance to the estate, despite lack of privity of contract between the successor and the attorneys.

(a) *Prob.C. 10801(b)* authorizes the employment of tax counsel and payment for their services with funds of the estate. *Prob.C. 8524(c)* (supra, §462) gives a successor personal representative the same powers and duties with respect to continued administration as the predecessor would have had, which includes the authority, under *Prob.C. 9820(a)*

(infra, §513), to commence and maintain actions for the benefit of the estate. Read together, these provisions compel two conclusions: (1) A fiduciary who hires an attorney with estate funds to provide tax assistance to the estate may, in the event of malpractice harming the estate, commence an action for the benefit of the estate to recover the loss. (2) If the fiduciary who hired the attorney is replaced, the successor acquires the same powers as the predecessor with respect to estate administration, including the power to sue for malpractice. *Goldberg v. Frye, supra*, is distinguishable. It involved the rights of estate beneficiaries, not a successor fiduciary. (33 C.4th 530.)

(b) "[T]he successor fiduciary must have standing to sue the predecessor's attorney if there is to be an effective remedy for legal malpractice that harms estates and trusts administered by successor fiduciaries." (33 C.4th 531.) Neither the probate court's ability to reduce attorneys' fees that may remain unpaid nor its ability to surcharge the predecessor fiduciary in appropriate circumstances is a sufficient remedy. (33 C.4th 531.)

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e. Court Supervision.

1. General Rule: No Approval Required.

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[§ 468] General Rule: No Approval Required.

Unless *Prob.C. 9600* et seq. "specifically provide a proceeding to obtain court authorization or require court authorization," the powers and duties set forth in those sections "may be exercised by the personal representative without court authorization, instruction, approval, or confirmation." (*Prob.C. 9610*.) However, nothing in this provision precludes the personal representative from seeking authorization, instructions, approval, or confirmation (see *Prob.C. 9611*, *infra*, §469). (*Prob.C. 9610*.) A similar statute applies to guardians and conservators. (See *Prob.C. 2450*, *infra*, §1002.)

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2. Instructions or Confirmation.

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[§ 469] Instructions or Confirmation.

(1) *Petition*. Where no other procedure is provided by statute, on the petition of the personal representative, "the court may authorize and instruct the personal representative, or confirm and approve the acts of the personal representative, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses." (*Prob.C. 9611(a)*.) Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9611(b)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §15:14 [petition for instructions], §15:15 [order instructing personal representative]; Rutter Group, Cal. Practice Guide: Probate §14:265 et seq., Form 14:I.)

The Law Revision Commission Comment makes the following observations:

(a) *Prob.C. 9611* is drawn from *Prob.C. 2403* (instructions and confirmation to guardians and conservators; see *infra*, §1001), but is available only where no procedure is provided by statute and does not authorize creditors or other interested persons to petition. (On petition by interested person for order compelling personal representative to act or not to act, see *Prob.C. 9613*, *infra*, §470.)

(b) "If some other procedure is provided by statute but the personal representative is uncertain whether the statute providing the other procedure is applicable to the particular case, the personal representative may petition in the alternative, giving notice that is sufficient to satisfy the requirements both of Section 9611 and the other possible applicable statute."

(c) "A petition for instructions is used to obtain court authorization to incorporate the decedent's unincorporated business, there being no specific provision governing that matter."

(2) *Effect of Authorization or Approval*. When a judgment or order concerning the administration of a decedent's estate (including an order settling an interim or final account of the personal representative) becomes final, "it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order." (*Prob.C. 7250(a)*)

.) This provision is drawn from *Prob.C. 2103* (effect of final judgment in guardianship and conservatorship proceedings; *infra*, §962). *Prob.C. 7250* is not applicable where the judgment is obtained by fraud, conspiracy, or misrepresentation or omission of a material fact. (*Prob.C. 7250(c)*.) (On extrinsic fraud, see 8 *Cal. Proc. (4th)*, *Attack on Judgment in Trial Court*, §223 et seq.)

(3) *Illustrations*. Decisions under the former statute are illustrative. (See *Estate of Schneider (1944)* 62 C.A.2d 463, 465, 145 P.2d 90 [statutory procedure for determining legality of sales tax precluded instruction procedure]; *Estate of Howe (1948)* 31 C.2d 395, 397, 189 P.2d 5 [decedent made contract leaving business to executor; fact that validity of contract could be tried on hearing of objections to settlement of executor's account did not preclude petition for instructions]; *Estate of Munson (1948)* 86 C.A.2d 67, 71, 194 P.2d 70 [particular issue could be determined either on termination of testamentary trust, or by petition for instructions during trust's existence]; *Estate of Winder (1950)* 99 C.A.2d 83, 85, 221 P.2d 193 [administrator of sole stockholder could petition for instructions on how to vote stock, but erroneously sought order authorizing corporate acts]; *Estate of Ledbetter (1958)* 50 C.2d 283, 287, 324 P.2d 884 [petition for instructions was appropriate procedure to approve compromise of wrongful death claim that included attorney's fee award despite separate statutory procedure for allowance of fees]; *Estate of Feierman (1962)* 202 C.A.2d 552, 558, 20 C.R. 883 [reversing order determining, on petition for instructions, that gift to legatee in Soviet Union failed and should be paid to testator's wife where there were at least three alternatives: petition for preliminary distribution, petition for final distribution, and petition to determine heirship]; *Estate of Hoffman (1968)* 265 C.A.2d 135, 145, 71 C.R. 230 [testator's sons claimed rights under contract, executor sought instruction as to identity of grandchildren as interested beneficiaries and therefore necessary parties; held that proper procedure was petition to determine heirship]; *Estate of Denton (1971)* 17 C.A.3d 1070, 1074, 95 C.R. 347 [power to instruct is permissive, and refusal to instruct will normally be upheld as exercise of discretion].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Effect of Authorization or Approval*.

Extrinsic fraud:

Cross-Reference: 8 *Cal. Proc. (5th)*, *Attack on Judgment in Trial Court*, §225 et seq.



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e. Court Supervision.

3. Order To Act or Not To Act.

14 Witkin Sum. Cal. Law Wills § 470

[§ 470] Order To Act or Not To Act.

Any interested person may petition the court for an order directing the personal representative to act or not to act concerning the estate, on a showing that the estate will suffer "great or irreparable injury" if the petition is not granted. The order may include terms and conditions "appropriate under the circumstances." (*Prob.C. 9613(a)*.) The showing of irreparable injury under *Prob.C. 9613* is analogous to the irreparable injury required for injunctive relief. (Law Rev. Com. Comment.) (See 6 *Cal. Proc. (4th), Provisional Remedies*, §298.) Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9613(b)*.) (See *Cal. Civil Practice*, 2 Probate and Trust Proceedings, §15:16 [petition to compel personal representative not to act], §15:17 [order directing personal representative not to act].) *Prob.C. 9613* does not preclude a petition for instructions under *Prob.C. 9611* (*supra*, §469). (*Prob.C. 9611(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]
Irreparable injury required for injunctive relief:

Cross-Reference: 6 *Cal. Proc. (5th), Provisional Remedies*, §295.



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e. Court Supervision.

4. Suspension of Powers.

14 Witkin Sum. Cal. Law Wills § 471

[§ 471] Suspension of Powers.

(1) *Petition and Parties.* "On petition of an interested person, the court may suspend the powers of the personal representative in whole or in part, for a time, as to specific property or circumstances or as to specific duties of the office, or may make any other order to secure proper performance of the duties of the personal representative, if it appears to the court that the personal representative otherwise may take some action that would jeopardize unreasonably the interest of the petitioner. Persons with whom the personal representative may transact business may be made parties." (*Prob.C. 9614(a)*, based on *Unif.Prob.C.*, §3-607.) (See *Cal. Civil Practice*, 2 Probate and Trust Proceedings, §15:18.)

(2) *Notice and Hearing.* Unless the parties agree otherwise, the matter must be set for hearing within 10 days. Notice must be given to the personal representative and the attorney of record, and to any other parties named in the petition. (*Prob.C. 9614(b)*.)

(3) *Award of Attorneys' Fees Where Petition Is Unreasonable.* If the court determines that the petition was brought "unreasonably and for the purpose of hindering the personal representative in the performance of the duties of the office," it may assess attorney's fees against the petitioner and make the assessment a charge against the petitioner's interest. (*Prob.C. 9614(c)*.)

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f. Summary Determination of Disputes.

14 Witkin Sum. Cal. Law Wills § 472

[§ 472] Summary Determination of Disputes.

(1) *Agreement To Submit Dispute to Temporary Judge.* If a dispute relating to the estate exists between the personal representative and a third person, the parties may agree in writing to refer the dispute to a designated temporary judge. The agreement must be filed with the clerk, and the court must enter an order referring the matter to the judge. The temporary judge hears and determines the matter by summary procedure, without pleadings or discovery, and the decision is subject to *C.C.P.* 632 (statement of decision; see 7 *Cal. Proc.* (4th), *Trial*, §399 et seq.). Judgment is entered on the decision and is "as valid and effective as if rendered by a judge of the court in an action against the personal representative or the third person commenced by ordinary process." (*Prob.C.* 9620(a).) (On stipulation to trial by temporary judge, see 2 *Cal. Proc.* (4th), *Courts*, §353 et seq.)

Alternatively, the parties may, with the written consent of the judge, agree in writing that the judge will hear and determine the dispute pursuant to *Prob.C.* 9620(a). The agreement and the judge's written consent must be filed with the clerk within the time specified in *Prob.C.* 9353 (infra, §646) for bringing an independent suit on the matter in dispute. (*Prob.C.* 9620(b).)

The Law Revision Commission Comment explains: (a) There is no right to a jury trial. (b) The matter need not be tried in a regular courtroom. (c) Nothing in *Prob.C.* 9620 limits reference and trial by a referee under *Prob.C.* 638 et seq. (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §58 et seq.).

(2) *Agreement To Submit Dispute to Arbitration.* If a dispute relating to the estate exists between the personal representative and a third person, the parties may agree in writing to submit the dispute to arbitration under *C.C.P.* 1280 et seq. (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §491 et seq.). The agreement must be approved by the court, and a copy must be filed. Notice of the hearing of the petition for approval of the agreement must be given as provided in *Prob.C.* 1220 (mailed notice; supra, §391), unless the court, on a showing of good cause, reduces the time or dispenses with notice. An order approving the agreement may be made ex parte. (*Prob.C.* 9621.) (See *Cal. Civil Practice*, 2 Probate and Trust Proceedings, §15:19 et seq.) A similar statute applies to guardianship and conservatorship claims. (See *Prob.C.* 2406, infra, §998.)

The Law Revision Commission Comment observes: (a) There is no right to a trial de novo. (b) The grounds for

correction or vacation of the award are limited. (c) There is no right to a jury trial when an arbitration award is confirmed.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Agreement To Submit Dispute to Temporary Judge.*

Statement of decision:

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §390 et seq.

Stipulation to trial by temporary judge:

Cross-Reference: 2 Cal. Proc. (5th), *Courts*, §348 et seq. *Trial by referee:*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §63 et seq.

(2) *Agreement To Submit Dispute to Arbitration.*

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §512 et seq.



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g. Joint Representatives.

1. Authority To Act.

14 Witkin Sum. Cal. Law Wills § 473

[§ 473] Authority To Act.

(1) *Death, Removal, or Resignation.* Where joint personal representatives have been appointed and one dies, resigns, or is removed, "the powers and duties continue in the remaining joint personal representatives as if they were the only personal representatives until further appointment is made by the court." (*Prob.C. 9630(b)*.) A similar statute applies to guardians and conservators. (See *Prob.C. 2105*, *infra*, §963.)

(2) *Absence or Inability To Act.* Where joint personal representatives have been appointed and one or more are (a) absent from the state and unable to act, (b) otherwise unable to act, or (c) legally disqualified, "the court may, by order made with or without notice, authorize the remaining joint personal representatives to act as to all matters embraced within its order." (*Prob.C. 9630(c)*.) The Law Revision Commission Comment notes that absence from the state does not suspend a personal representative's power to act, and, unless there is a court order, the same number of joint representatives must concur in an action if one is absent from the state as would be required if he or she were not absent. A similar statute applies to guardians and conservators. (See *Prob.C. 2105*, *infra*, §963.)

(3) *When Joint Action Is Not Required.* A joint personal representative may do the following:

(a) Oppose a petition by another personal representative or any other person. (*Prob.C. 9630(d)(1)*.)

(b) Petition for an order requiring the personal representatives to take specific action or not to take specific action. If a statutory procedure is provided, the petition is filed using that procedure. If no other procedure is provided, the petition is filed under *Prob.C. 9611* (petition for instructions; *supra*, §469). (*Prob.C. 9630(d)(2)*.)

(4) *When Joint Action Is Required.* Subject to *Prob.C. 9630(b)*, (c), (d), joint action is required as follows:

(a) Where there are two personal representatives, both must concur in exercising a power. (*Prob.C. 9630(a)(1)*, codifying rule of *Bullis v. Security Pac. Nat. Bank* (1978) 21 C.3d 801, 810, 148 C.R. 22, 582 P.2d 109.)

(b) Where there are more than two personal representatives, a majority must concur in exercising a power. (*Prob.C. 9630(a)(2)*.)

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g. Joint Representatives.

2. Liability of One for Breach by Another.

14 Witkin Sum. Cal. Law Wills § 474

[§ 474] Liability of One for Breach by Another.

One joint personal representative is not liable for a breach of fiduciary duty by another, except in the following circumstances:

(1) "Where the personal representative participates in a breach of fiduciary duty committed by the other personal representative." (*Prob.C. 9631(b)(1).*)

(2) "Where the personal representative improperly delegates the administration of the estate to the other personal representative." (*Prob.C. 9631(b)(2).*)

(3) "Where the personal representative approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by the other personal representative." (*Prob.C. 9631(b)(3).*)

(4) "Where the personal representative's negligence enables the other personal representative to commit a breach of fiduciary duty." (*Prob.C. 9631(b)(4).*)

(5) "Where the personal representative knows or has information from which the personal representative reasonably should have known of the breach of fiduciary duty by the other personal representative and fails to take reasonable steps to compel the other personal representative to redress the breach." (*Prob.C. 9631(b)(5).*)

Similar statutes govern joint guardians and conservators (see *Prob.C. 2105.5*, *infra*, §963) and cotrustees (see *Prob.C. 16402*, *13 Summary* (10th), *Trusts*, §119).

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2. Possession and Management of Estate.

a. Duty To Take Possession.

1. Right and Duty.

14 Witkin Sum. Cal. Law Wills § 475

[§ 475] Right and Duty.

(1) *In General.* Ordinarily, the personal representative has the right to possession and control of the property of the decedent to be administered in the estate and must collect all debts due to the decedent or the estate. "The personal representative is not accountable for any debts that remain uncollected without his or her fault." (*Prob.C. 9650(a)(1)*, based on *Unif.Prob.C.*, §3-709.) (See *Prob.C. 9820*, *infra*, §513 [personal representative may maintain action for benefit of estate]; *Prob.C. 9654*, *infra*, §514 [personal representative and heirs or devisees may maintain action for possession or quiet title]; Rutter Group, *Cal. Practice Guide: Probate* §6:1 et seq.; on predecessor statutes, see *Security-First Nat. Bank of Los Angeles v. Perrine* (1938) 29 C.A.2d 223, 225, 84 P.2d 248; *Estate of Jameson* (1949) 93 C.A.2d 35, 40, 208 P.2d 54.) This provision is applicable "except as provided by statute." (*Prob.C. 9650(a)*.) (See, e.g., *Prob.C. 6500*, *infra*, §765 [temporary possession of family dwelling and exempt property]; *Prob.C. 9780*, *infra*, §510 [abandonment of tangible personal property].)

(2) *Rents and Profits.* "The personal representative is entitled to receive the rents, issues, and profits from the real and personal property in the estate until the estate is distributed." (*Prob.C. 9650(a)(2)*.) This provision is applicable "except as provided by statute." (*Prob.C. 9650(a)*.)

(3) *When Property May Be Surrendered to Presumptive Beneficiary.* Real property and tangible personal property may be left with or surrendered to those presumptively entitled to it "unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration." The person holding the property must surrender it to the personal representative on request. (*Prob.C. 9650(c)*, based on *Unif.Prob.C.*, §3-709.)

The Law Revision Commission Comment states: "Subdivision (c) is designed to avoid disruption of possession of the decedent's assets by the devisees or heirs whenever possible. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, the heir or devisee must surrender the asset to the personal representative. It may be possible for the heir or devisee to question the judgment of the personal representative in a later proceeding to surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate. On the other hand, the

personal representative may be liable for failing to take possession of estate property if the property is thereby lost to those entitled to it. However, where the property is in the possession of the person who will ultimately receive it ... , the personal representative is not liable to the person having the property if it is not properly cared for by that person."

(4) *Form of Holding Securities*. "The personal representative may hold a security in the name of a nominee or in any other form without disclosure of the estate so that title to the security may pass by delivery." (*Prob.C.* 9736.) (See *Prob.C.* 70 ["security" defined]; *Fin.C.* 1563 [trust company may register securities in name of nominee].) A similar statute applies to trustees. (See *Prob.C.* 16238; 13 *Summary* (10th), *Trusts*, §109.)

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SUPPLEMENT: [This section is current through the latest supplement]



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2. Mistaken Possession in Good Faith.

14 Witkin Sum. Cal. Law Wills § 476

[§ 476] Mistaken Possession in Good Faith.

(1) *In General.* A personal representative who takes possession of real or personal property in good faith, and reasonably believes that the property is part of the estate of the decedent, is neither criminally nor civilly liable for doing so. (*Prob.C. 9651(a)*.) However, the personal representative must make "reasonable efforts" to determine the true nature of the property and its title. (*Prob.C. 9651(b)*.)

(2) *Income, Expenses, and Delivery.* During possession, the personal representative is entitled to receive rents, issues, and profits of the property. If the property is later determined not to be part of the decedent's estate, the personal representative must deliver the property to the person legally entitled to it, together with all rents, issues, and profits received, less expenses incurred in protecting and maintaining the property and in collecting rents, issues, and profits. The personal representative may request court approval before delivering the property. (*Prob.C. 9651(c)*.)

(3) *Compensation.* The court may allow the personal representative reasonable compensation for services under *Prob.C. 9651* in connection with property later determined not to be part of the decedent's estate, if the court makes one of the following findings:

(a) The services were of benefit to the estate. "If the court makes this finding, the compensation and the expenses and costs of litigation, including attorney's fees for the attorney hired by the personal representative to handle the matter, are a proper expense of administration." (*Prob.C. 9651(d)(1)*.)

(b) The services were essential to preserve, protect, and maintain the property. "If the court makes this finding, the court shall award compensation and the expenses and costs of litigation, including attorney's fees of the attorney hired by the personal representative to handle the matter, as an expense deductible from the rents, issues, and profits received by the personal representative, or, if these are insufficient, as a lien against the property." (*Prob.C. 9651(d)(2)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Duty To Care for Property.

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[§ 477] Duty To Care for Property.

(1) *In General.* The personal representative must pay taxes on property in his or her possession and must "take all steps reasonably necessary for the management, protection, and preservation of, the estate." (*Prob.C. 9650(b)*, based on *Unif.Prob.C., §3-709.*) (See *Estate of Freud* (1901) 131 C. 667, 671, 63 P. 1080 [representative must keep property clear of liens and may redeem property from existing liens]; *Estate of Rindge* (1934) 136 C.A. 263, 266, 28 P.2d 705 [representative must keep buildings and fixtures in tenantable repair]; *Los Angeles v. Morrison* (1940) 15 C.2d 368, 372, 101 P.2d 470 [duty to pay taxes]; 64 A.L.R.2d 857 [repair of personal property].)

(2) *Insurance.* The personal representative may insure estate property against damage or loss and himself or herself against liability to third persons. (*Prob.C. 9656.*)

Although the statute is permissive, the personal representative's fiduciary duty (see *supra*, §464) may require insuring estate assets in appropriate circumstances. (See Law Rev. Com. Comment to *Prob.C. 9600* [personal representative has discretion in determining amount of insurance]; Law Rev. Com. Comment to *Prob.C. 9650* [personal representative has duty to obtain and maintain insurance reasonably necessary to protect estate property].) The Comment to *Prob.C. 9656* states: "The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence require that the power be exercised, and may not exercise the power to the extent that ordinary care and diligence require that the power not be exercised. ... For example, if the estate includes real property, the personal representative ordinarily will have the responsibility to maintain a reasonable amount of insurance on improvements on property and may insure himself or herself against personal liability arising out of the duty to maintain the property. Where the personal representative properly exercises the power under this section, the cost of insurance for estate property or to protect the personal representative against liability is a proper expense of estate administration."

(3) *Limitation of Liability.* "The personal representative shall not make profit by the increase, nor suffer loss by the decrease or destruction without his or her fault, of any part of the estate." (*Prob.C. 9657.*)

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SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Sum. Cal. Law Wills § 478

[§ 478] Duty To Recover Property.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action To Recover Property*. See *Estate of Myers (2006)* 139 C.A.4th 434, 444, 42 C.R.3d 753 [creditor's application under *Prob.C.* 9653 was not exclusive remedy to recover profits from sale of property that had been fraudulently conveyed by decedent, especially where executor and her husband had allegedly participated in fraudulent transfer; creditor could petition for determination of claim to property under *Prob.C.* 850 (text, §356)].



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[§ 478] Duty To Recover Property.

(1) *Action To Recover Property.* In specified circumstances, *Prob.C.* 9653 authorizes an action to recover real or personal property of the decedent on the application of a creditor. (See *Cal. Civil Practice*, 2 Probate and Trust Proceedings, §15:31 [petition to compel personal representative to recover fraudulently conveyed property], §15:32 [order directing personal representative to recover property]; *Perry v. Superior Court* (1938) 29 *C.A.2d* 114, 117, 84 *P.2d* 250 [former statute; insufficient showing to justify action where all transfers had been ratified by sole beneficiary under will].) The personal representative must commence and prosecute the action if the personal representative has insufficient assets to pay creditors and the decedent "during lifetime" did any of the following:

- (a) Made a gift of the property in view of death. (*Prob.C.* 9653(a)(1).)
- (b) Made a conveyance of the property or an interest in the property that is fraudulent as to creditors under *C.C.* 3439 et seq. (Uniform Fraudulent Transfer Act; see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §460 et seq.). (*Prob.C.* 9653(a)(2).)
- (c) Directed transfer of designated property registered in beneficiary form (a vehicle, vessel, mobilehome, etc.) to a designated beneficiary on the decedent's death, and the property was transferred as directed. (*Prob.C.* 9653(a)(3).) (On transfer of property registered in beneficiary form, see *supra*, §312.)

The Law Revision Commission Comment makes the following points:

- (a) As under prior law, the personal representative may, with court approval, assign the right to bring the action to the creditor, citing *Webb v. Pillsbury* (1943) 23 *C.2d* 324, 328, 144 *P.2d* 1 [cause of action assigned to sole creditor].
- (b) The requirement that the transfer be made "during lifetime" does not preclude recovery of property given by a transfer of property taking effect at death, such as joint tenancy or life insurance, citing *Rupp v. Kahn* (1966) 246 *C.A.2d* 188, 55 *C.R.* 108 [joint tenancy], and *Headen v. Miller* (1983) 141 *C.A.3d* 169, 190 *C.R.* 198 [life insurance].
- (c) The authority to recover a gift made in view of death is qualified by the requirement that there be insufficient assets to pay creditors, citing *Adams v. Prather* (1917) 176 *C.* 33, 40, 167 *P.* 534.

(d) Where *Prob.C. 9653* applies, the personal representative must take action to recover the property even in the absence of a request from a creditor, citing *Goldstein v. Prien* (1956) 143 C.A.2d 123, 127, 299 P.2d 344.

(2) *Costs and Attorneys' Fees*. A creditor making an application under *Prob.C. 9653* must pay "such part of the costs and expenses of the suit and attorney's fees, or give an undertaking to the personal representative for that purpose, as the personal representative and the creditor agree, or, absent an agreement, as the court or judge orders." (*Prob.C. 9653(b)*.)

(3) *Disposition of Recovered Property and Proceeds*. Property recovered under *Prob.C. 9653* is sold for the payment of debts "in the same manner as if the decedent had died seised or possessed of the property." The proceeds are applied first to payment of the costs and expenses of the action, including attorney's fees, and then to payment of the debts of the decedent "in the same manner as other property in possession of the personal representative." After all the debts of the decedent have been paid, the remaining proceeds are paid to the person from whom the property was recovered. "The property may be sold in its entirety or in such portion as necessary to pay the debts." (*Prob.C. 9653(c)*.)

West's Key Number Digest, Executors and Administrators k.130(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action To Recover Property*. See *Estate of Myers* (2006) 139 C.A.4th 434, 444, 42 C.R.3d 753 [creditor's application under *Prob.C. 9653* was not exclusive remedy to recover profits from sale of property that had been fraudulently conveyed by decedent, especially where executor and her husband had allegedly participated in fraudulent transfer; creditor could petition for determination of claim to property under *Prob.C. 850* (text, §356)].

Uniform Fraudulent Transfer Act:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §488 et seq.



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[§ 479] Exercise of Shareholder and Membership Rights.

The personal representative has specified rights with respect to shares of stock of domestic and foreign corporations held in the estate, memberships in nonprofit corporations held in the estate, and other property held in the estate. (*Prob.C. 9655.*) A similar statute applies to guardians and conservators. (See *Prob.C. 2458*; *infra*, §1002.) The personal representative may do the following:

(1) "Vote in person, and give proxies to exercise, any voting rights with respect to the share, membership, or other property." (*Prob.C. 9655(a).*) (See *Corp.C. 702(a)* [corporate shares held by personal representative may be voted by holder in person or by proxy, without transfer of shares into holder's name]; 9 *Summary* (10th), *Corporations*, §160.)

(2) "Waive notice of a meeting or give consent to the holding of a meeting." (*Prob.C. 9655(b).*)

(3) "Authorize, ratify, approve, or confirm any action which could be taken by shareholders, members, or property owners." (*Prob.C. 9655(c).*)

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14 Witkin Sum. Cal. Law Wills § 480

[§ 480] Deposit of Money and Personal Property.

(1) *Estate Funds Deposited in Financial Institution.* The personal representative may deposit money of the estate in an insured account in a financial institution in California. Unless otherwise provided by court order, the money may be withdrawn without a court order. (*Prob.C. 9700.*) (See *Prob.C. 46* ["insured account in financial institution" defined].)

(2) *Personal Property Deposited With Trust Company.* The personal representative may deposit personal property of the estate with a trust company for safekeeping. Unless otherwise provided by court order, the personal property may be withdrawn without a court order. (*Prob.C. 9701.*)

(3) *Securities Deposited in Securities Depository.* A trust company serving as a personal representative or holding securities deposited by a personal representative may deposit securities in a securities depository under *Fin.C. 775.* (*Prob.C. 9702.*)

(4) *Order That Withdrawals Require Court Authorization.* On the application of the personal representative, the court may, with or without notice, order that money or property deposited under *Prob.C. 9700* or *9701* be subject to withdrawal only on court authorization. (*Prob.C. 9703(a).*) The personal representative must deliver a copy of the order to the depository at the time of deposit. (*Prob.C. 9703(b).*) No depository is on notice of the order unless it has actual notice. (*Prob.C. 9703(c).*) (On reduction of personal representative's bond where property is deposited and withdrawal requires court order, see *Prob.C. 8483*, *supra*, §449.)

The Law Revision Commission Comment points out that an interested person may neither apply for a withdrawal restriction order under *Prob.C. 9703* nor apply for instructions for that order under *Prob.C. 9611* (*supra*, §469). However, on application of any interested person, the court may order a personal representative to deposit estate money or property in a bank or trust company, with repayment conditioned on a court order. (*Fin.C. 764, 1586.*)

(5) *Direct Distribution by Depository.* Where money or property has been deposited under *Prob.C. 9700* et seq. and the court orders distribution, the depository may deliver the property directly to the distributee and file a receipt with the clerk. (*Prob.C. 9704.*)

(6) *Interest on Deposit by Trust Company.* "[W]here a trust company is a personal representative and in the exercise of reasonable judgment deposits money of the estate in an account in any department of the corporation or association of which it is a part, it is chargeable with interest thereon at the rate of interest prevailing among banks of the locality on such deposits." (*Prob.C. 9705(a)*.) However, when it is to the "advantage of the estate," cash "reasonably necessary for orderly administration" may be deposited in a noninterest checking account. (*Prob.C. 9705(b)*.)

The Law Revision Commission Comment states: "The type of account into which moneys of the estate are to be deposited depends on the type of account which best serves the needs of the estate. The time within which the estate may be distributed, the time of the receipt of the funds, and the immediate need for funds in order to meet the requirements of administration are all factors to be considered in determining the type of account in which the funds should be deposited. For example, where there is a substantial sum in excess of the immediate requirements and the sum is to be held over a period of time, the personal representative should deposit the funds in an account (which would include purchase of a certificate of deposit where appropriate under the circumstances) which not only would safeguard the funds but also allow a rate of interest on the funds that is advantageous to the estate."

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Securities Deposited in Securities Depository.* *Fin.C. 775* was repealed in 2008. Comparable provisions are now in *Fin.C. 1592*.

(4) *Order That Withdrawals Require Court Authorization.* *Fin.C. 764* was repealed in 2008.



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f. Investments.

1. Investments Without Court Approval.

14 Witkin Sum. Cal. Law Wills § 481

[§ 481] Investments Without Court Approval.

A personal representative must invest cash in the estate in interest-bearing accounts or in other investments authorized by law, except to the extent that (a) cash is "reasonably necessary for orderly administration," or (b) the testator's will provides otherwise. (*Prob.C. 9652.*) (See 1 Proof of Facts 2d 467 [proof of breach of investment duties by fiduciary].) A personal representative may, without court approval, invest estate funds in the following:

(1) *Short-term government obligations.* "Direct obligations" of the United States or California maturing within 1 year from the date of the investment. (*Prob.C. 9730(a).*)

(2) *Money market and collective trust funds.* Interests in money market mutual funds registered under the Investment Company Act of 1940 (*15 U.S.C., §80a-1 et seq.*) or investment vehicles authorized for the collective investment of trust funds under 12 C.F.R., §9.18, with portfolios limited to United States Government obligations maturing within 5 years from the date of the investment and to "repurchase agreements fully collateralized by United States government obligations." (*Prob.C. 9730(b).*)

(3) *Common trust funds.* Units of a common trust fund described in *Fin.C. 1564*. The common trust fund must invest primarily in short-term fixed income obligations and must be permitted to value investments at cost under appropriate regulations. (*Prob.C. 9730(c).*)

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2. Investments With Court Approval.

14 Witkin Sum. Cal. Law Wills § 482

[§ 482] Investments With Court Approval.

The personal representative or any interested person may petition for an order authorizing the personal representative, pending settlement of the estate, to invest in securities of California or the United States. The petition must state the types of securities proposed to be purchased and the advantage to the estate. On a showing that the investment is to the advantage of the estate, the court may authorize the investment. (*Prob.C. 9731(a), (b).*) (On form of holding securities, see *Prob.C. 9736*, supra, §475.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §15:64 [petition for authority to invest money], §15:65 [order authorizing investment of money]; C.E.B., 3 Decedent Estate Practice, §30.1 et seq.) Notice of the hearing on the petition is given as provided by *Prob.C. 1220* (mailed notice; supra, §391). (*Prob.C. 9731(c).*)

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3. Investments Provided in Will.

14 Witkin Sum. Cal. Law Wills § 483

[§ 483] Investments Provided in Will.

(1) *Petition.* The personal representative or any interested person may petition for an order that money in the estate be invested in a manner provided by the will. The petition must show the general condition of the estate and the types of proposed investments. (*Prob.C. 9732(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §15:66 [petition for authority to invest money as provided in will], §15:68 [objection to petition]; C.E.B., 3 Will Drafting 3d, §§33.19, 33.20.)

(2) *Conditions.* *Prob.C. 9732(a)* sets forth three conditions for the order:

(a) The time for filing claims has expired. (*Prob.C. 9732(a)(1).*)

(b) All debts have been paid or are sufficiently secured, or there is sufficient cash in the estate (aside from the money to be invested) to pay all the debts, or the court is "otherwise satisfied that all the debts will be paid." (*Prob.C. 9732(a)(2).*) (See *Prob.C. 11401*, *infra*, §648 ["debts" defined for this purpose].)

(c) The estate is not in a condition to be finally distributed. (*Prob.C. 9732(a)(3).*)

If the requirements of *Prob.C. 9732(a)* are not satisfied, estate funds may still be deposited under *Prob.C. 9700* or *9703* (*supra*, §480) or invested under *Prob.C. 9730* (*supra*, §481) or *Prob.C. 9731* (*supra*, §482). (Law Rev. Com. Comment.)

(3) *Notice.* Notice of the hearing is given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). In addition, the petitioner must mail notice of the hearing and a copy of the petition to "all known devisees" of property proposed to be invested. Where the property proposed to be invested is devised to a trust or trustee, notice of the hearing and a copy of the petition must be mailed to the trustee or, if the trustee has not yet accepted the trust, to the person named in the will as trustee. (*Prob.C. 9732(c).*)

(4) *Order.* If no objection has been filed by an interested person, the court may authorize or direct the personal representative to invest "such portion of the money of the estate as the court deems advisable" in the investments

proposed in the petition and authorized by the will. If there is "no substantial reason" why some or all of the investment powers given by the will should not be exercised, the court shall make the order. The order may be for a limited period or until the administration of the estate is completed. On petition of the personal representative or any interested person, the order may be renewed, modified, or terminated at any time. (*Prob.C. 9732(d).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §15:67.)

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14 Witkin Sum. Cal. Law Wills § 484

[§ 484] Purchase of Property.

(1) *Purchase of Annuity Granted in Will.* If a decedent's will devises an annuity or makes a direction for periodic payments, the court may, on the petition of the personal representative or any interested person and on a showing of good cause, order the personal representative to purchase an annuity to satisfy the devise or direction. (*Prob.C. 9733(a).*) Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9733(b).*)

(2) *Exercise of Estate's Option Right.* If the assets of an estate include an option right, the court may, on the petition of the personal representative or any interested person and a showing that the exercise of the option would be to the advantage of the estate and in the best interests of the interested persons, authorize the personal representative to exercise the option. Any property in the estate may be used to acquire the property covered by the option. (*Prob.C. 9734(a), (b).*) Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9734(c).*)

(3) *Exercise of Subscription Rights.* If an estate, by reason of owning securities, also owns or receives subscription rights for the purchase of additional securities, the court may, on the petition of the personal representative or any interested person and a showing that the exercise of the rights is to the advantage of the estate, authorize the personal representative to exercise the subscription rights. The petition must state the nature of the subscription rights and the advantage to the estate of exercising them. (*Prob.C. 9737(a), (b).*) Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9737(c).*) (On sale of subscription rights, see *Prob.C. 10202*, *infra*, §700.)

(4) *Purchase of Undelivered Securities or Commodities.* When a party to an incomplete contract dies having sold but not delivered securities or commodities not owned by the decedent, the court may, on petition by the personal representative or any party to the contract, authorize the personal representative to purchase securities or commodities required to perform the contract. The terms and conditions of the purchase are fixed by the court's order. (*Prob.C. 9735(a), (b).*) Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; see *supra*, §391). (*Prob.C. 9735(b).*) However, no notice need be given when the maximum purchase price is fixed or when the securities or commodities are to be purchased on an established exchange. (*Prob.C. 9735(c).*) (On form of holding

securities, see *Prob.C. 9736*, supra, §475.)

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14 Witkin Sum. Cal. Law Wills § 485

[§ 485] Former Law and Law Revision Commission Report.

(1) *Former Law*. Under former Prob.C. 572, the court could authorize a personal representative to continue the decedent's business. (See *California Emp. Stabilization Com. v. Hansen* (1945) 69 C.A.2d 767, 771, 160 P.2d 173; *Kirman v. Borzage* (1946) 75 C.A.2d 865, 172 P.2d 90 [requirement of license for regulated business]; *Johnston v. Long* (1947) 30 C.2d 54, 181 P.2d 645 [tort liability of personal representative for wrongful act of employee].) The testator could also give express authority to carry out the business, which had the same effect as court authorization. (See *Estate of Ward* (1932) 127 C.A. 347, 353, 354, 15 P.2d 901 [statutory procedure for notice and court order need not be followed]; *Estate of Guglielmi* (1934) 138 C.A. 80, 87, 31 P.2d 1078 [property left to executor as trustee to continue business; testator did not intend to suspend operation of business during administration].)

In the absence of express authority, the personal representative ordinarily had no duty or authority to carry on a business. A personal representative who did so had to account to the estate for profits, but was personally liable for losses. (See *Estate of Rose* (1889) 80 C. 166, 172, 22 P. 86 [expenses of carrying out business were properly charged to estate]; *Estate of De Rome* (1917) 175 C. 399, 165 P. 919 [creditor had no claim against estate itself]; *Riedy v. Bidwell* (1925) 70 C.A. 552, 555, 233 P. 995.)

However, temporary activity, dictated by necessity, such as harvesting a crop, or selling out a stock in trade, could be authorized under the general duty to preserve and care for the assets of the estate. (*Estate of Fernandez* (1898) 119 C. 579, 585, 51 P. 851 [caring for cattle, sheep, etc., until they were sold]; *Estate of Smith* (1897) 118 C. 462, 50 P. 701 [caring for vineyard to prevent destruction of vines]; *Estate of Massena* (1933) 129 C.A. 255, 259, 18 P.2d 779 [main asset was hotel, and administrator, with consent of all known heirs, spent money for repairs and operation, in order to maintain good will and to sell hotel as going concern; expenditures were proper, even though administrator should have obtained court order].)

(2) *Law Revision Commission Report*. In its 1986 Recommendation Relating to Supervised Administration of Decedent's Estate (19 Cal. Law Rev. Com. Reports, p. 17 et seq.), the Commission recommended modifying the statutes and case law to expand and clarify the authority of the personal representative to continue the decedent's business.

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[§ 486] Decedent's Nonpartnership Business.

(1) *Definition.* As used in *Prob.C. 9760*, "decedent's business" means an unincorporated business or venture wholly or partly owned by the decedent at the time of death, but does not include "a business operated by a partnership in which the decedent was a partner." (*Prob.C. 9760(a)*.) (On operation of decedent's partnership, see *Prob.C. 9761*, *infra*, §487.)

(2) *Authority To Continue Business.* "If it is to the advantage of the estate and in the best interest of the interested persons, the personal representative, with or without court authorization, may continue the operation of the decedent's business." However, continuation longer than 6 months from the date letters are issued requires a court order for continued operation. (*Prob.C. 9760(b)*.) It is "generally advisable" for the personal representative to obtain an order authorizing continued operation. The court may ratify acts and expenditures in the operation of the business after the fact "only upon the showing that it was to the advantage of the estate and in the best interest of interested persons to continue the operation." (Law Rev. Com. Comment, citing *Estate of Maddalena (1940) 42 C.A.2d 12, 19, 108 P.2d 17* [ratification of unauthorized operation].) (See generally Rutter Group, Cal. Practice Guide: Probate §14:64 et seq., Forms 14:D, 14:E; C.E.B., 3 Will Drafting 3d, §§33.42, 33.43; C.E.B., 2 Decedent Estate Practice, §17.1 et seq.)

(3) *Petition.* The personal representative or any interested person may petition for an order (a) authorizing the personal representative to continue the operation of the decedent's business, or (b) directing the personal representative to discontinue the operation of the decedent's business. The petition must show advantage to the estate and benefit to the interested persons. Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9760(c)*.)

(4) *Order.* The court may either (a) authorize the personal representative to continue the business subject to any restrictions the court deems appropriate, or (b) direct the personal representative to discontinue the business within a specified time. (*Prob.C. 9760(d)*.)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Operation of Decedent's Business.

c. Decedent's Partnership Business.

14 Witkin Sum. Cal. Law Wills § 487

[§ 487] Decedent's Partnership Business.

(1) *Authority To Continue as Partner.* On a showing that it would be to the advantage of the estate and in the best interest of the interested persons, the court may authorize the personal representative to continue as a general or a limited partner in a partnership in which the decedent was a general partner at the time of death. The court's order may specify terms and conditions of the personal representative's participation as a partner that the court determines are to the advantage of the estate and in the best interest of the interested persons. However, terms and conditions that are inconsistent with the terms of a written partnership agreement are subject to the written consent of all of the surviving partners. (*Prob.C. 9762(a).*)

(2) *Rights, Powers, and Duties of Personal Representative.* If a written partnership agreement permits the personal representative to participate as a partner, the personal representative has all the rights, powers, duties, and obligations provided in the agreement, except as otherwise ordered by the court. (*Prob.C. 9762(b).*) If there is no agreement, the personal representative has the rights, powers, duties, and obligations specified by the court. (*Prob.C. 9762(c).*) (On right of personal representative of last surviving partner to wind up partnership affairs, see *Corp.C. 16803, 9 Summary* (10th), *Partnership*, §48; on inconsistency between Probate Code and Corporations Code, see *Corp.C. 16109.*)

(3) *Petition.* To obtain an order to continue as a partner, the personal representative or any interested person must file a petition showing that the order would be to the advantage of the estate and in the best interest of interested persons. Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). Unless the court orders otherwise, the petitioner must also mail notice of the hearing and a copy of the petition to each surviving general partner at least 15 days before the hearing. (*Prob.C. 9762(d).*)

(4) *Restriction of Activities Requiring Professional License.* The Law Revision Commission Comment to *Prob.C. 9762* makes the following observations: (a) Nothing in *Prob.C. 9762* authorizes the personal representative to perform acts as a partner for which a professional license is required, or authorizes otherwise prohibited fee-sharing by a licensed professional with unlicensed persons. (See, e.g., Rules of Professional Conduct of the State Bar of California, Rule 3-102 (payment of fees to deceased lawyer's estate or other specified person).) (b) *Prob.C. 9762* is subject to regulatory provisions governing the use of a license after death of a licensee. (See, e.g., *B. & P.C. 7076* [temporary continuance of licensed contractor's business by family member of deceased licensee].)

(5) *Exercise of Decedent's Partnership Rights.* If the decedent was a general partner, the personal representative may commence and maintain any action against a surviving partner that the decedent could have commenced and maintained. (*Prob.C. 9763(a).*) If the decedent was a limited partner, the personal representative may exercise the decedent's rights as provided in *Corp.C. 15675* (exercise of rights for purpose of administering estate; see 9 *Summary* (10th), *Partnership*, §94). (*Prob.C. 9763(b).*)

(6) *Accounting by Surviving Partner.* If a partnership existed between the decedent and another person at the time of the decedent's death, on application of the personal representative, the court may order a surviving partner to render an account under specified provisions of the Corporations Code. The order may be enforced by the court's power to punish for contempt (see *C.C.P. 717.010*; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §332). (*Prob.C. 9761.*)

The Law Revision Commission Comment points out that only the personal representative may apply; an interested person may neither apply for an order under *Prob.C. 9761* nor apply for instructions for that order under *Prob.C. 9611* (supra, §469). (On personal representative's right to partnership information, see *Corp.C. 16403*, 9 *Summary* (10th), *Partnership*, §33; on purchase of deceased partner's interest, see *Corp.C. 16701*, 9 *Summary* (10th), *Partnership*, §45.)

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(6) *Accounting by Surviving Partner.*

Enforcement by contempt power:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §340.



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 - a. Authority To Borrow and Encumber.

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[§ 488] Authority To Borrow and Encumber.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

(New) Filing Fees: Govt.C. 70657.5 and 70658 impose filing fees for various transactions under the Probate Code, including transactions involving the estates of decedents. (See Supp., supra, §380E.) Under Govt.C. 70657.5(b)(2) and 70658(d), added in 2007, these fees may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning borrowing money with the loan secured by an encumbrance on real property. (Govt.C. 70658(d)(12).)



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14 Witkin Sum. Cal. Law Wills § 488

[§ 488] Authority To Borrow and Encumber.

(1) *In General.* When authorized by a court order on a showing that it would be to the advantage of the estate, the personal representative may borrow money on a secured or unsecured note in order to (a) pay the debts of the decedent or the estate, devise, the expenses of administration, and charges against the estate, (b) "pay, reduce, extend, or renew" an existing security interest, lien, mortgage or deed of trust on estate property, or (c) "improve, use, operate, or preserve" estate property. (*Prob.C. 9800(a).*) (See Law Rev. Com. Comment ["debts" includes taxes].) (See *31 Am.Jur.2d* (2002 ed.), *Executors and Administrators* §377 et seq.; Rutter Group, Cal. Practice Guide: Probate §13:285 et seq.; C.E.B., 3 Decedent Estate Practice, §31.1 et seq.) The personal representative must apply the money to the purpose specified in the order. (*Prob.C. 9800(b).*) Comparable statutes apply to guardians and conservators. (See *Prob.C. 2551, 2552; infra, §1021.*)

(2) *Consent of Surviving Spouse.* If a surviving spouse has elected to have his or her share of community real property administered in the decedent's estate (see *infra, §820*), the personal representative must have the written consent of the surviving spouse to borrow money secured by a mortgage or deed of trust on community real property in the estate. (*Prob.C. 9800(c).*)

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14 Witkin Sum. Cal. Law Wills § 489

[§ 489] Authority To Act With Other Owners.

If property of the estate consists of an undivided interest, or an interest less than the entire ownership, the court may authorize the personal representative to join with the owners of the other interests in borrowing money and executing a joint and several note and a security interest, lien, mortgage, or deed of trust to secure the note. The order must be on a showing that it would be to the advantage of the estate to borrow money to "improve, use, operate, or preserve" the property jointly or to "pay, reduce, extend, or renew" an existing security interest, lien, mortgage, or deed of trust. (*Prob.C. 9801.*) A comparable statute applies to guardians and conservators. (See *Prob.C. 2552*; *infra*, §1021.)

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c. Petition and Notice.

14 Witkin Sum. Cal. Law Wills § 490

[§ 490] Petition and Notice.

(1) *Petition.* The personal representative or any interested person may file a petition under *Prob.C. 9800* et seq., stating the purpose for which the order is sought and the "necessity for or the advantage to accrue from the order." "If applicable, the petition shall also show the amount of money proposed to be borrowed, the rate of interest to be paid, the length of time the note is to run, and a general description of the property proposed to be mortgaged or subjected to the deed of trust, security interest, or other lien." (*Prob.C. 9802.*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:111; Rutter Group, Cal. Practice Guide: Probate, Form 13:J.)

(2) *Notice of Hearing.* Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; supra, §391). (*Prob.C. 9803.*)

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d. Order.

14 Witkin Sum. Cal. Law Wills § 491

[§ 491] Order.

(1) *In General.* If the court is satisfied that doing so will be to the advantage of the estate, it may authorize or require the personal representative to (a) borrow money and execute a note, (b) execute a mortgage or deed of trust or give security by a security interest or lien, or (c) pay, reduce, extend, or renew an existing security interest, lien, mortgage or deed of trust. (*Prob.C. 9804(a)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:112; Rutter Group, Cal. Practice Guide: Probate, Form 13:K.) The court may do any one or more of the following:

(a) Order that the amount specified in the petition, or a lesser amount, be borrowed. (*Prob.C. 9804(b)(1)*.)

(b) Prescribe the maximum rate of interest and the period of the loan. (*Prob.C. 9804(b)(2)*.)

(c) Require that the interest and all or some of the principal be paid from time to time out of the whole estate or any part of the estate. (*Prob.C. 9804(b)(3)*.)

(d) Require that the personal property used as security, or buildings on real property to be mortgaged or subjected to a deed of trust, be insured and that the premiums be paid out of the estate. (*Prob.C. 9804(b)(4)*.)

(e) Specify the purpose for which the money to be borrowed is to be applied. (*Prob.C. 9804(b)(5)*.)

(f) Specify the terms and conditions of any extension or renewal agreement. (*Prob.C. 9804(b)(6)*.)

(g) "Prescribe such other terms and conditions concerning the transaction as the court determines to be to the advantage of the estate." (*Prob.C. 9804(b)(7)*.)

(2) *Consent of Surviving Spouse.* If a surviving spouse has elected to have his or her share of community real property administered in the decedent's estate (see *infra*, §820), an order authorizing or requiring the personal representative to borrow money secured by a mortgage or deed of trust on the community real property of the estate may be made only if the written consent of the surviving spouse has been filed with the court. (*Prob.C. 9804(c)*.)

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e. Execution of Instruments.

14 Witkin Sum. Cal. Law Wills § 492

[§ 492] Execution of Instruments.

The personal representative must execute and deliver the mortgage or deed of trust, or execute and deliver the instrument creating the security interest, "setting forth therein that it is made by authority of the order, giving the date of the order." (*Prob.C. 9805(a)*.) (See *Prob.C. 7261*, supra, §412 [content of instrument affecting real property executed under court order]; *Prob.C. 7262*, supra, §412 [transaction executed under court order has same effect as though carried out by decedent while living and with legal capacity to do so].)

The note and the mortgage, deed of trust, or other instrument creating a security interest must be signed by the personal representative and must be acknowledged by the personal representative if the instrument creates a lien on real property. (*Prob.C. 9805(b)*.) (On liability of representative who signs instrument, see *Prob.C. 9606*, infra, §523.)

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f. Effect of Encumbrance Under Order.

14 Witkin Sum. Cal. Law Wills § 493

[§ 493] Effect of Encumbrance Under Order.

(1) *Right, Title, and Interest Created by Encumbrance.* A mortgage, deed of trust, or security interest made pursuant to a court order under *Prob.C. 9800* et seq. is effective to mortgage the following interests, or to subject them to the deed of trust or security interest:

(a) All right, title, and interest the decedent had in the property at the time of the decedent's death. (*Prob.C. 9806(a)(1).*)

(b) Any right, title, or interest in the property acquired by the estate, by operation of law or otherwise, since the time of the decedent's death. (*Prob.C. 9806(a)(2).*)

(c) Any right, title, or interest in the community real property belonging to the decedent's surviving spouse whose written consent has been filed with the court and which is referred to in the court order. (*Prob.C. 9806(a)(3).*)

(2) *Jurisdiction.* Jurisdiction of the court to administer the estate of the decedent vests the court with jurisdiction to make the order for the note and for the security interest, lien, mortgage, or deed of trust. This jurisdiction conclusively inures to the benefit of the owner of the security interest or lien, the mortgagee named in the mortgage, or the trustee and beneficiary named in the deed of trust, and their heirs and assigns. (*Prob.C. 9806(b).*)

(3) *Encumbrance Valid Despite Procedural Irregularity.* No omission, error, or irregularity in a proceeding under *Prob.C. 9800* et seq. impairs or invalidates the proceeding or the note, security interest, lien, mortgage, or deed of trust. Subject to *Prob.C. 9807* (anti-deficiency provision; see *infra*, §494), "the owner of the security interest or lien, the mortgagee named in the mortgage, or the trustee and beneficiary named in the deed of trust, and their heirs and assigns, have and possess the same rights and remedies on the note and the security interest or lien or mortgage or deed of trust as if it had been made by the decedent prior to his or her death." (*Prob.C. 9806(c).*)

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g. Restriction on Deficiency After Foreclosure or Sale.

14 Witkin Sum. Cal. Law Wills § 494

[§ 494] Restriction on Deficiency After Foreclosure or Sale.

If the note, security interest, mortgage, or deed of trust was given to "pay, reduce, extend, or renew" a lien, mortgage, security interest, or deed of trust existing at the time of death of the decedent and the secured indebtedness was a claim established under *Prob.C. 9000*, the portion of the indebtedness remaining unsatisfied is classed with other established claims. (*Prob.C. 9807(b)*.)

Except as provided in *Prob.C. 9807(b)*, "no judgment or claim for any deficiency shall be had or allowed against the personal representative or the estate if (1) there is a foreclosure or sale under a security interest, lien, mortgage, or deed of trust and (2) the proceeds of sale of the encumbered property are insufficient to pay the note, the security interest, lien, mortgage, or deed of trust, and the costs or expenses of sale." (*Prob.C. 9807(a)*.)

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[§ 495] Sale of Property.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Filing Fees.* *Govt.C. 70657.5* and *70658* impose filing fees for various transactions under the Probate Code, including transactions involving the estates of decedents. (See Supp., supra, §380E.) Under *Govt.C. 70657.5(b)(2)* and *70658(d)*, added in 2007, these fees may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning the sale, exchange, or grant of an option to purchase real property. (*Govt.C. 70658(d)(11).*)



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[§ 495] Sale of Property.

(1) *When Property May Be Sold.* Subject to the "limitations, conditions, and requirements" of *Prob.C. 10000* et seq. (infra, §671 et seq.), the personal representative may sell real or personal property of the estate in the following circumstances:

(a) "Where the sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes." (*Prob.C. 10000(a).*)

(b) "Where the sale is to the advantage of the estate and in the best interest of the interested persons." (*Prob.C. 10000(b).*)

(c) "Where the property is directed by the will to be sold." (*Prob.C. 10000(c).*)

(d) "Where authority is given in the will to sell the property." (*Prob.C. 10000(d).*)

(2) *Petition To Compel Sale.* Under *Prob.C. 10001(a)* (infra, §672), if the personal representative neglects or refuses to sell real or personal property of the estate, any interested person may petition the court for an order requiring the personal representative to sell the property in any of the following circumstances:

(a) "Where the sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes." (*Prob.C. 10001(a)(1).*)

(b) "Where the sale is to the advantage of the estate and in the best interest of the interested persons." (*Prob.C. 10001(a)(2).*)

(c) "Where the property is directed by the will to be sold." (*Prob.C. 10001(a)(3).*)

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14 Witkin Sum. Cal. Law Wills § 496

[§ 496] Exchange of Property.

(1) *Authorization by Court.* A personal representative may, with court authorization, exchange property of the estate for other property if it is to the advantage of the estate to do so. The court may impose terms and conditions on the exchange, including the payment or receipt of part cash by the personal representative. (*Prob.C. 9920.*)

(2) *Petition.* To obtain an order for an exchange, the personal representative or any interested person must file a petition describing the property, setting forth the terms and conditions of the proposed exchange, and showing the advantage to the estate to accrue from the exchange. (*Prob.C. 9921.*)

(3) *Notice.* Notice of the hearing must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391), except that, in an exchange of securities as defined by *Prob.C. 10200* (*infra*, §700), the court, on a showing of good cause, may order *ex parte* that notice be given for a shorter period or that it be dispensed with. (*Prob.C. 9922.*)

(4) *Exchange Valid Despite Procedural Irregularity.* No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the exchange. (*Prob.C. 9923.*) However, this provision does not limit the court's authority to set aside an order for mistake, inadvertence, surprise, or excusable neglect under *C.C.P. 473* (see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152 et seq.). (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Exchange Valid Despite Procedural Irregularity.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.



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7. Option To Purchase Property.

a. Authority To Grant Option.

14 Witkin Sum. Cal. Law Wills § 497

[§ 497] Authority To Grant Option.

(1) *Authorization.* When authorized by a court order under *Prob.C. 9960* et seq., a personal representative may grant an option to purchase real property of the estate for a period within or beyond the period of administration. (*Prob.C. 9960.*) (See *83 A.L.R.2d 1310* [authority to give option to purchase].) (On exercise of estate's option right, see *Prob.C. 9374(c)*, *supra*, §484.)

(2) *Minimum Purchase Price.* The purchase price of the property subject to the option must be at least 90% of the appraised value, based on an appraisal made in the manner provided in *Prob.C. 10309(c)* (*infra*, §693) within 1 year before the hearing on the petition. (*Prob.C. 9962.*)

(3) *Petition.* To obtain an order authorizing an option, the personal representative must file a petition describing the property, setting forth the terms and conditions of the proposed option, and showing the advantage to the estate to accrue from granting the option. (*Prob.C. 9961.*) An interested person may neither petition under *Prob.C. 9961* nor petition for instructions under *Prob.C. 9611* (*supra*, §469). (Law Rev. Com. Comment.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:83.)

(4) *Notice of Hearing.* Notice of the hearing on the petition must be posted as provided by *Prob.C. 1230* (*supra*, §394) and given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) to each person listed in *Prob.C. 1220* and to each known heir or devisee whose interest in the estate would be affected by granting the option. (*Prob.C. 9963(b).*)

(5) *Order.* The court must authorize the personal representative to grant an option, on the terms and conditions stated in the order, if the court is satisfied as to all the following:

(a) "Good reason exists to grant the option and granting the option will be to the advantage of the estate." (*Prob.C. 9964(a)(1).*)

(b) "It does not appear that a higher offer with respect to the purchase price of the real property subject to the option may be obtained." An offer is a higher offer only if it satisfies the requirements of *Prob.C. 10311* (increased bids in real property sales; *infra*, §696). (*Prob.C. 9964(a)(2).*)

(c) "It does not appear that a better offer with respect to the terms of the option may be obtained." An offer is better only if materially more advantageous to the estate. (*Prob.C. 9964(a)(3).*)

A higher or better offer may be considered only if the personal representative informs the court before the order is granted that the offer is acceptable. (*Prob.C. 9964(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:84.)

(6) *Expiration of Recorded Option.* An option granted under *Prob.C. 9960* et seq., whether within or beyond the administration of the estate, is subject to C.C. 884.010 et seq. (termination of unexercised options; see 12 *Summary* (10th), *Real Property*, §339). (*Prob.C. 9965.*)

(7) *Option Valid Despite Procedural Irregularity.* No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the option. (*Prob.C. 9966.*) However, this provision does not limit the court's authority to set aside an order for mistake, inadvertence, surprise, or excusable neglect under *C.C.P. 473* (see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152 et seq.). (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Option Valid Despite Procedural Irregularity.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.



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b. Exercise of Option Given in Will.

14 Witkin Sum. Cal. Law Wills § 498

[§ 498] Exercise of Option Given in Will.

(1) *Time for Exercise.* When a will gives an option to purchase real or personal property, the person given the option may exercise the option at any time within the time limit provided by the will. For this purpose, if a time limit in the will is measured from the death of the testator, that time is extended by the period between the testator's death and the issuance of letters or by 6 months, whichever is shorter. (*Prob.C. 9980(a).*) If the will does not provide a time limit for exercising of the option, the time limit is 1 year from the death of the decedent. (*Prob.C. 9980(b).*) However, subject to the 1-year time limit, if the option is exercisable under the terms of the will after the time that the estate would otherwise be closed, the property subject to the option must be distributed subject to the option. (*Prob.C. 9980(c).*) (See *Estate of Secreto* (1982) 134 C.A.3d 938, 946, 184 C.R. 873 [former statute; after statutory time limit has elapsed, personal representative may petition for instructions to allow transfer of property]; *Estate of Clark* (1984) 152 C.A.3d 894, 898, 199 C.R. 753 [former statute; waiver by failure to give notice of intention to exercise option within statutory time limit].)

(2) *Petition for Order To Transfer.* When a will admitted to probate gives an option to purchase real or personal property, the court may order the personal representative to transfer the property to the person given the option on compliance with the terms and conditions stated in the will. (*Prob.C. 9981(a).*) Either the personal representative or the person given the option may petition for the order. (*Prob.C. 9981(b).*) Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9981(c).*) (See 13 A.L.R.4th 947 [determination of price under testamentary option to buy real property].)

(3) *Order.* The court may not make the order unless either (a) it determines that the rights of creditors will not be impaired by the order, or (b) it requires a bond "in an amount and with such surety as the court shall direct or approve." (*Prob.C. 9982.*)

(4) *Transfer Valid Despite Procedural Irregularity.* No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the transfer. (*Prob.C. 9983.*) However, this provision does not limit the court's authority to set aside an order for mistake, inadvertence, surprise, or excusable neglect under C.C.P. 473 (see 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §152 et seq.). (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Transfer Valid Despite Procedural Irregularity.*

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144 et seq.



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8. Dedication or Conveyance of Property to Public Entity.

14 Witkin Sum. Cal. Law Wills § 499

[§ 499] Dedication or Conveyance of Property to Public Entity.

(1) *Authorization by Court.* The court may authorize a personal representative, with or without consideration, to dedicate or convey real property or an easement or access rights in real property to a governmental entity if doing so is to the advantage of the estate and in the best interest of the interested persons. (*Prob.C. 9900.*) On such terms as the court may prescribe, the personal representative may do any of the following:

(a) Dedicate or convey real property in the estate for any purpose to California, a public entity in California, the United States, or an agency or instrumentality of the United States. (*Prob.C. 9900(a).*)

(b) Dedicate or convey an easement over real property in the estate to any person for any purpose. (*Prob.C. 9900(b).*) (See *44 A.L.R.2d 573* [power to create easement].)

(c) Convey, release, or relinquish to California or any public entity in California access rights to a street, highway, or freeway from real property of the estate. (*Prob.C. 9900(c).*)

(d) Consent as a lienholder to a dedication, conveyance, release, or relinquishment under *Prob.C. 9900(a), (b), (c)* by the owner of the property subject to the lien. (*Prob.C. 9900(d).*)

(2) *Petition and Notice.* The personal representative or any interested person may petition for an order under *Prob.C. 9900.* (*Prob.C. 9901(a).*) Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9901(b).*)

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9. Purchase of Estate Property by Representative or Attorney.

a. Prohibition and Exemptions.

14 Witkin Sum. Cal. Law Wills § 500

[§ 500] Prohibition and Exemptions.

(1) *General Prohibition Against Purchase.* Except as provided in *Prob.C. 9880 et seq.*, neither the personal representative nor the personal representative's attorney may do either of the following:

(a) "Purchase any property of the estate or any claim against the estate, directly or indirectly." (*Prob.C. 9880(a).*) (See *Estate of Martin* (1999) 72 C.A.4th 1438, 1443, 86 C.R.2d 37 [redemption of shares by family owned corporation of which executor was officer, director, and shareholder was indirect sale to executor in violation of *Prob.C. 9880* and should have been set aside on beneficiary's request].)

(b) "Be interested in any such purchase." (*Prob.C. 9880(b).*)

(2) *Purchase With Consent of All Heirs or Devisees.* The court may authorize the personal representative or the attorney to purchase estate property if (a) the purchase is shown to be to the advantage of the estate, and (b) each known heir or devisee whose interest in the estate is affected by the proposed purchase signs a written consent filed with the court. (*Prob.C. 9881.*)

(3) *Purchase Under Terms of Will.* The court may authorize the personal representative or the attorney to purchase estate property if the decedent's will authorizes the personal representative or the attorney to purchase the property. (*Prob.C. 9882.*)

(4) *Purchase Pursuant to Decedent's Contract To Sell.* *Prob.C. 9880 et seq.* do not prohibit purchase of estate property by the personal representative or the attorney under a written contract made during the decedent's lifetime if the contract can be specifically enforced and the requirements of *Prob.C. 850 et seq.* are satisfied. (*Prob.C. 9884.*) (On transfer of decedent's property under contract, see *Prob.C. 850 et seq.*, supra, §356 et seq.)

(5) *Exercise of Option Given in Will.* *Prob.C. 9880 et seq.* do not prohibit the exercise by the personal representative or the attorney of an option to purchase estate property given in the decedent's will if the requirements of *Prob.C. 9980 et seq.* (supra, §498) are satisfied. (*Prob.C. 9885.*)

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9. Purchase of Estate Property by Representative or Attorney.

b. Petition, Hearing, and Order.

14 Witkin Sum. Cal. Law Wills § 501

[§ 501] Petition, Hearing, and Order.

(1) *Petition.* The personal representative files a petition, setting forth the facts on which the request for the order is based, requesting an order authorizing a purchase under *Prob.C. 9881* (consent of heirs and devisees; *supra*, §500) or *Prob.C. 9882* (purchase authorized by will; *supra*, §500). (*Prob.C. 9883(a).*) Only the personal representative may petition; an interested person may neither petition under *Prob.C. 9883* nor petition for instructions under *Prob.C. 9611* (*supra*, §469). (Law Rev. Com. Comment.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:68.)

(2) *Notice.* Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) to each person listed in *Prob.C. 1220* and to each known heir and devisee whose interest in the estate would be affected by the proposed purchase. (*Prob.C. 9883(c).*)

(3) *Order.* If satisfied that the purchase should be authorized, the court authorizes the purchase on the terms and conditions specified in the order. The personal representative may execute a conveyance or transfer according to the terms of the order. Unless otherwise provided in the will or in the order, the sale of the property is made "in the same manner as other estate property of the same nature." (*Prob.C. 9883(d).*) If confirmation of the sale is required, the court may make the order at the time of confirmation. (*Prob.C. 9883(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:69.)

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10. Lease of Estate Property.

a. In General.

14 Witkin Sum. Cal. Law Wills § 502

[§ 502] In General.

(1) *Lease Without Court Approval.* The personal representative may lease, as lessor, real property of the estate without authorization of the court, if doing so is to the advantage of the estate, in two circumstances:

- (a) Where the rent does not exceed \$ 5,000 a month and the term does not exceed 1 year. (*Prob.C. 9941(a).*)
- (b) Where the lease is from month to month, regardless of the amount of the rent. (*Prob.C. 9941(b).*)

(2) *Lease With Court Approval.* On a showing that the proposed lease is to the advantage of the estate, the personal representative may lease, as lessor, real property of the estate when authorized by the court. (*Prob.C. 9942(a).*) (See C.E.B., 3 Will Drafting 3d, §§33.17, 33.18; C.E.B., 3 Decedent Estate Practice, §32.1 et seq.; Rutter Group, Cal. Practice Guide: Probate §13:352 et seq.) (On procedure for court approval and court order, see *infra*, §§503, 504.)

(3) *Option To Purchase.* For purposes of *Prob.C. 9940* et seq., "lease" includes a lease with an option to purchase real property of the estate. (*Prob.C. 9940(a).*) If the proposed lease includes an option to purchase, the provisions for court approval in *Prob.C. 9940* et seq. and *Prob.C. 9960* et seq. (granting option to purchase real property; *supra*, §497) apply to the execution of the lease. (*Prob.C. 9942(b).*)

(4) *Term Includes Extension.* "If a lease gives the lessee the right to extend the term of the lease, the length of the term shall be considered as though the right to extend had been exercised." (*Prob.C. 9940(b).*)

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b. Petition, Notice, Hearing, and Determination.

14 Witkin Sum. Cal. Law Wills § 503

[§ 503] Petition, Notice, Hearing, and Determination.

(1) *Petition.* To obtain an order under *Prob.C. 9940 et seq.*, the personal representative or any interested person files a petition containing (a) a general description of the real property proposed to be leased, (b) a statement of the term, rent, and general conditions, and (c) a showing of the advantage to the estate to accrue from the lease. (*Prob.C. 9943(a).*) If the lease is for longer than 10 years, the petition must state facts showing the need for the longer lease, the advantage to the estate, and the benefit to interested persons. (*Prob.C. 9943(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:98; Rutter Group, Cal. Practice Guide: Probate, Form 13:L.)

(2) *Notice.* Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) and must be posted as provided by *Prob.C. 1230* (*supra*, §394). (*Prob.C. 9944(a).*) Unless the will authorizes or directs the personal representative to sell or lease property, notice must also be given as provided by *Prob.C. 10300* (sale of real property; *infra*, §691). (*Prob.C. 9944(b).*) If the proposed term is longer than 10 years, notice must also be given as provided by *Prob.C. 1220* to each known heir or devisee whose interest in the estate would be affected by the proposed lease. (*Prob.C. 9944(c).*)

(3) *Hearing and Determination.* At the hearing, the court must entertain and consider any good faith offer to lease the same property at more favorable terms. (*Prob.C. 9945(a).*) "If the court is satisfied that it will be to the advantage of the estate, and, if the lease is for more than 10 years, that it is to the benefit of interested persons," the court authorizes the personal representative to make the lease on the terms and conditions stated in the order. The court may not authorize the personal representative to make the lease to any person other than the lessee named in the petition unless the offer made at the hearing is acceptable to the personal representative. (*Prob.C. 9945(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:99.)

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c. Order and Lease.

14 Witkin Sum. Cal. Law Wills § 504

[§ 504] Order and Lease.

(1) *Maximum Period.* The period of the lease may be for such time as the court authorizes. (*Prob.C. 9947(a).*) However, a lease longer than 10 years may not be authorized if any heir or devisee who has an interest in the property objects at the hearing (*Prob.C. 9947(b)*), except that mineral, oil, gas, hydrocarbon, and geothermal leases may last beyond 10 years in specified circumstances (*Prob.C. 9947(c)*).

(2) *Effect of Multiple Owners.* "If the lease covers additional property owned by other persons or an undivided or other interest of the decedent less than the entire ownership in the property, the order may authorize the lease to provide for division of rental and royalty in the proportion that the land or interest of each owner bears to the total area of the land or total interests covered by the lease." (*Prob.C. 9946(c).*)

(3) *Other Terms and Conditions.* Subject to *Prob.C. 9947*, the order authorizing the execution of a lease must set forth the minimum rent or royalty and the period of the lease, and may authorize other terms and conditions. (*Prob.C. 9946(a), (b).*) (On authorized provisions in mineral, oil, gas, hydrocarbon, and geothermal leases, see *Prob.C. 9946(b).*)

(4) *Execution of Lease.* The personal representative must execute, acknowledge, and deliver the lease, which must give the date of the order and specify that it is made by authority of the order. (*Prob.C. 9948(a).*) The lease is effectual to lease the premises described in the order on the rent, terms, and conditions specified in the order. (*Prob.C. 9948(b).*) (On effect of instruments executed by personal representative under court order, see *supra*, §412.)

(5) *Jurisdiction To Make Order.* Jurisdiction of the court in Probate Code proceedings concerning the administration of the estate of the decedent "vests the court with jurisdiction to make the order for the lease." This jurisdiction "conclusively" inures to the benefit of the lessee and the lessee's heirs and assigns. (*Prob.C. 9948(c).*)

(6) *Lease Valid Despite Procedural Irregularity.* No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the lease. (*Prob.C. 9948(d).*) However, this provision does not limit the court's authority to set aside an order for mistake, inadvertence, surprise, or excusable neglect under *C.C.P. 473* (see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152 et seq.). (Law Rev. Com. Comment.)

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SUPPLEMENT: [This section is current through the latest supplement]

(6) *Lease Valid Despite Procedural Irregularity*.

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.



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11. Compromise of Claims and Actions.

a. Former Law and Law Revision Commission Report.

14 Witkin Sum. Cal. Law Wills § 505

[§ 505] Former Law and Law Revision Commission Report.

(1) *Former Statutes and Case Law.* Under former Prob.C. 578 et seq. and former Prob.C. 718.5 et seq., a personal representative could, with court approval after a noticed hearing, compromise claims against debtors of the estate and claims for wrongful death or injury to the decedent. (See *Estate of McAllister* (1933) 134 C.A. 349, 353, 25 P.2d 507; *See v. Joughin* (1937) 18 C.A.2d 414, 418, 64 P.2d 149 [representative who acts without court order does so at his or her peril]; *Estate of Richards* (1941) 17 C.2d 259, 267, 109 P.2d 923 [statute authorizing compromise of estate's claim against debtor was not applicable to settlement of account of representative]; *Estate of Stevens* (1945) 27 C.2d 108, 118, 162 P.2d 918 [right to contribution or preferential abatement cannot be finally decided on petition to compromise creditor's claim, but must await petition for distribution]; *Estate of Quinn* (1958) 156 C.A.2d 684, 689, 320 P.2d 219 [error to approve compromise, against opposition of Attorney General, in which charities gave up valid interests under testamentary trusts to heirs with no legal claim]; *Byrne v. Harvey* (1962) 211 C.A.2d 92, 112, 27 C.R. 110 [vacation of approval before completion of compromise]; *Treharne v. Loftin* (1984) 153 C.A.3d 878, 886, 200 C.R. 668 [successor administrator was estopped to repudiate former administrator's compromise of disputed claim with third party despite failure to secure court approval where compromise was equitable, just, and made in good faith; rejecting *Joughin*].)

The claim need not be valid or enforceable; it is enough to show advantage to the estate. (See *Estate of Wilson* (1953) 116 C.A.2d 523, 528, 253 P.2d 1011 [sufficiency of showing].) Thus, a compromise may be approved even though it is possible or probable that the statute of limitations is a bar, where application of the statute is disputed, or there are other circumstances making the compromise desirable. (*Estate of Lucas* (1943) 23 C.2d 454, 144 P.2d 340.)

While cases held that a court could authorize a compromise but could not compel the representative to make it or carry it out (see *McPike v. Superior Court* (1934) 220 C. 254, 258, 30 P.2d 17; *Mazza v. Austin* (1938) 25 C.A.2d 85, 88, 76 P.2d 533; *Estate of Boyd* (1963) 212 C.A.2d 634, 636, 28 C.R. 258), if the personal representative petitioned for instructions, the court could make a binding order requiring a compromise (see *Estate of Lucas*, *supra*, 23 C.2d 468).

(2) *Law Revision Commission Report.* In its 1986 Recommendation Relating to Supervised Administration of Decedent's Estate (see 19 Cal. Law Rev. Com. Reports, p. 15), the California Law Revision Commission explained its recommended change in the claim compromise statutes: "Although the existing statutes appear to require court authorization before the personal representative may compromise and settle claims and actions against the estate, the

cases hold that the personal representative may make settlements without court authorization, but that in so doing the personal representative acts at his or her peril. The proposed law makes clear that the personal representative may compromise and settle claims and actions without court approval, except in specific situations designated by statute."

SUPPLEMENT: [This section is current through the latest supplement]



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b. Compromise With Court Approval.

Witkin Sum. Cal. Law Wills § 506

[§ 506] Compromise With Court Approval.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Compromise of Claim of Minor or Incompetent.* C.R.C., Rule 7.950 et seq. were amended in 2006 to refer to a "minor or person with a disability."



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14 Witkin Sum. Cal. Law Wills § 506

[§ 506] Compromise With Court Approval.

(1) *Compromise Before Expiration of Time for Creditor's Claims.* Unless the time for filing creditor claims has expired, authorization is required for the compromise or settlement of a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate. (*Prob.C. 9831.*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §13:60.)

(2) *Compromise Relating to Real Property.* Authorization is required for a compromise, settlement, extension, release, or modification that affects (a) title to real property, (b) an interest in real property or a lien or encumbrance on real property, or (c) an option to purchase real property or an interest in real property. (*Prob.C. 9832(a).*) However, authorization is not required for the extension, renewal, or modification of a lease if the action is to the advantage of the estate and (a) the rent does not exceed \$ 5,000 per month and the term does not exceed 1 year, or (b) regardless of the rent, the term is from month to month. For purposes of this provision, if the lessee has the right to extend the term of the lease, the length of the term is considered as though the right to extend had been exercised. (*Prob.C. 9832(b).*)

(3) *Compromise in Excess of \$ 25,000.* Authorization is required for a compromise or settlement of a matter when the transaction requires the transfer or encumbrance of property of the estate, or the creation of an unsecured liability of the estate, or both, in excess of \$ 25,000. (*Prob.C. 9833.*) This provision does not apply to a claim by the estate. (Law Rev. Com. Comment.)

(4) *Compromise of Claim Against Representative or Attorney.* Court authorization is required for the following:

(a) "A compromise or settlement of a claim by the estate against the personal representative or the personal representative's attorney, whether or not the claim arises out of the administration of the estate." (*Prob.C. 9834(a).*)

(b) "An extension, renewal, or modification of the terms of a debt or similar obligation of the personal representative, or the personal representative's attorney, owing to, or in favor of, the estate." (*Prob.C. 9834(b).*)

The Law Revision Commission Comment points out that court approval is required because these matters may involve a conflict of interest for the personal representative.

(5) *Compromise of Death and Personal Injury Actions.* Authorization is required for the compromise or settlement of a claim or right of action given to the personal representative by any law for the wrongful death or injury of the decedent, including an action by the personal representative to enforce the claim or right of action. Authorization to compromise or settle the claim or right of action includes authorization to give a covenant not to sue. (*Prob.C.* 9835.)

(6) *Compromise of Claim of Minor or Incompetent.* Additional requirements apply to court approval of a compromise or covenant not to sue involving a minor or incompetent. (See C.R.C., Rule 7.950 et seq., *infra*, §1014.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Compromise of Claim of Minor or Incompetent.* C.R.C., Rule 7.950 et seq. were amended in 2006 to refer to a "minor or person with a disability."



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c. Compromise Without Court Approval.

14 Witkin Sum. Cal. Law Wills § 507

[§ 507] Compromise Without Court Approval.

(1) *Authorized Acts*. Generally, the personal representative may do the following "without court authorization, instruction, approval, or confirmation":

(a) "Compromise or settle a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate, including the giving of a covenant not to sue." (*Prob.C. 9830(a)(1)*.)

(b) "Extend, renew, or in any manner modify the terms of an obligation owing to or in favor of the decedent or the estate." (*Prob.C. 9830(a)(2)*.)

(c) "Release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible." (*Prob.C. 9830(a)(3)*.)

(2) *Scope of Authority*. The personal representative may act under *Prob.C. 9830(a)* unless *Prob.C. 9830* et seq. or "some other applicable statute" requires court authorization, if the action is to the advantage of the estate. (*Prob.C. 9830(a)*.) (See 72 *A.L.R.2d* 191 [authority to compromise claim due estate]; 72 *A.L.R.2d* 243 [authority to compromise claim against estate]; 72 *A.L.R.2d* 285 [authority to compromise action or cause of action for death].) A similar statute applies to guardians and conservators. (See *Prob.C. 2500*; *infra*, §1012.)

Nothing in *Prob.C. 9830* precludes the personal representative from seeking court authorization. (*Prob.C. 9830(b)*.) By permitting but not requiring prior court authorization, this provision continues prior law. (Law Rev. Com. Comment.)

(3) *Order Limiting Authority*. The court may limit the personal representative's authority under *Prob.C. 9830(a)* on petition of an interested person or on its own motion. Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9830(c)*.) In illustrating the scope of this provision, the Law Revision Commission Comment states: "For example, the court may require prior court authorization for any compromise or settlement of a particular matter or of a particular kind of matter. Or the court may order that no compromise or settlement be made unless it has first been authorized by the court."

SUPPLEMENT: [This section is current through the latest supplement]



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d. Procedure.

14 Witkin Sum. Cal. Law Wills § 508

[§ 508] Procedure.

(1) *Petition.* A petition for court authorization under *Prob.C. 9830* et seq. may be filed by the personal representative or an interested person who has obtained the personal representative's written approval. (*Prob.C. 9837(a)*.) The petition must show the terms of the compromise, settlement, extension, renewal, or modification and its advantage to the estate. (*Prob.C. 9837(b)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §13:58 [petition to discharge obligation by estate], §13:59 [order authorizing discharge]; C.E.B., 3 Decedent Estate Practice, §26.8 et seq.)

(2) *Filing.* Court authorization under *Prob.C. 9830* et seq. must be obtained from the court in which the estate is being administered. (*Prob.C. 9836*.) This provision is applicable whether or not the matter is the subject of a pending claim or proceeding. (Law Rev. Com. Comment.)

(3) *Notice.* Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9837(c)*.)

(4) *Payment of Claim.* If the personal representative pays a claim for less than its full amount, his or her accounts may be credited only for the amount actually paid. (*Prob.C. 9839*.)

(5) *Transfer of Property To Effectuate Compromise.* If an order made under *Prob.C. 9837* requires the transfer of estate real property, the personal representative must execute the conveyance, which must refer to the order authorizing the compromise or settlement and directing that the conveyance be executed. A certified copy of the order must be recorded in each county where any portion of the property is located. (*Prob.C. 9838(a)*.) (See *Prob.C. 7261*, *supra*, §412 [execution of instrument directed by court order]; *Prob.C. 7263*, *supra*, §412 [recordation of order affecting real property].)

(6) *Effect of Conveyance.* A conveyance made in compliance with the court order directing the conveyance to be executed vests both of the following in the transferee:

(a) "All the right, title, and interest which the decedent had in the property at the time of the decedent's death." (*Prob.C. 9838(b)(1)*.)

(b) "Any other or additional right, title, or interest in the property acquired by the estate of the decedent, by operation of law or otherwise, prior to the transfer." (*Prob.C. 9838(b)(2).*)

The conveyance has the same effect as though properly executed by the decedent. (*Prob.C. 7262, supra, §412.*)

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14 Witkin Sum. Cal. Law Wills § 509

[§ 509] Transactions Under Mortgage or Deed of Trust.

(1) *Deed in Lieu of Foreclosure.* If it is to the advantage of the estate to accept a deed to property that is subject to a mortgage or deed of trust in lieu of foreclosure of the mortgage or sale under the deed of trust, the personal representative may do so, with court authorization on "such terms and conditions as may be imposed by the court." (*Prob.C. 9850(a).*)

To obtain the order, the personal representative or any interested person files a petition showing the advantage to the estate of accepting the deed. Notice of the hearing on the petition is given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9850(b).*) The court may make the order only if the advantage to the estate is shown by clear and convincing evidence. (*Prob.C. 9850(c).*)

"Among the factors to be taken into consideration by the court in determining whether it is to the advantage of the estate to take a deed in lieu of foreclosure are (1) whether there will be subordinate liens that will continue on the property if the deed is taken that would be eliminated if the mortgage is foreclosed or the property is sold under the deed of trust and (2) whether there is a right to a deficiency judgment that would continue if the mortgage were foreclosed and the property were to fail to yield enough to pay the amount of the encumbrance. These factors would not necessarily preclude the granting of the order (as where the subordinate lien that would continue is for only a small amount or where the deficiency judgment would be uncollectible)." (Law Rev. Com. Comment.)

(2) *Partial Satisfaction or Reconveyance.* If it is to the advantage of the estate to give a partial satisfaction of a mortgage or to cause a partial reconveyance to be executed by a trustee under a trust deed held by the estate, the personal representative may give the partial satisfaction or cause the partial reconveyance to be executed with court authorization on "such terms and conditions as may be imposed by the court." (*Prob.C. 9851(a).*) However, no authorization is necessary if the partial satisfaction or reconveyance is executed pursuant to the terms of a mortgage or deed of trust held by the estate. (*Prob.C. 9851(c).*)

To obtain the order, the personal representative or any interested person files a petition showing the advantage to the estate of the partial satisfaction or reconveyance. Notice of the hearing on the petition is given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 9851(b).*)

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a. Power To Abandon.

14 Witkin Sum. Cal. Law Wills § 510

[§ 510] Power To Abandon.

Subject to the requirements of *Prob.C. 9780* et seq., a personal representative may dispose of or abandon tangible personal property not specifically devised "where the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value." (*Prob.C. 9780*.) Court authorization or approval is not required unless the will provides otherwise. (*Prob.C. 9781*.) (On procedure, see *infra*, §511.) A similar provision governs abandonment by guardians and conservators. (See *Prob.C. 2465*; *infra*, §1002.)

Prob.C. 9780 et seq. apply only to tangible personal property. As to intangible property, under *Prob.C. 9820* (*infra*, §513), the personal representative may decline to commence an action to collect intangible property where the cost of collection is likely to exceed the amount likely to be collected. (Law Rev. Com. Comment to *Prob.C. 9780*.)

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b. Procedure.

14 Witkin Sum. Cal. Law Wills § 511

[§ 511] Procedure.

(1) *Notice of Proposed Abandonment.* Before disposing of or abandoning property, the personal representative must give notice to (a) each known heir or devisee whose interest in the estate would be affected by the proposed action, (b) each person who has requested special notice under *Prob.C. 1250* (supra, §395), and (c) the Attorney General (at the Sacramento office), if any portion of the estate is to escheat to the state and the state's interest would be affected by the action. (*Prob.C. 9782(a)*.) Notice need not be given to any person who, in writing, consents to the proposed action or waives notice of the proposed action. (*Prob.C. 9785*.)

The notice must describe the property to be disposed of or abandoned, indicate the manner in which the property is to be disposed of or abandoned, and specify the date on or after which the property will be disposed of or abandoned. (*Prob.C. 9782(b)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §15:80.)

(2) *Manner of Giving Notice.* The notice must be delivered personally to each person required to be given notice or mailed to the person at the person's last known address. If the notice is delivered personally, it must be delivered not less than 5 days before the date of disposal or abandonment specified in the notice. If the notice is mailed, it must be deposited in the mail not less than 10 days before that date. (*Prob.C. 9782(c)*.)

(3) *Objection and Petition for Authority.* A person entitled to notice under *Prob.C. 9782* may mail or deliver a written objection to the personal representative on or before the date specified in the notice. Subject to *Prob.C. 9788* (infra, this section), the personal representative may not dispose of or abandon the property after receipt of the objection without a court order under *Prob.C. 9611* (supra, §469). (*Prob.C. 9783*.) This provision prevents the disposition of apparently valueless property that has sentimental or other special value to heirs or devisees. (19 Cal. Law Rev. Com. Reports, p. 19.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §15:81.)

(4) *Restraining Order To Prevent Abandonment.* A person entitled to notice under *Prob.C. 9782* may apply to the court having jurisdiction over the proceeding for an order restraining the personal representative from disposing of or abandoning the property without prior court authorization. (*Prob.C. 9784(a)*.) The court must grant the order without requiring notice to the personal representative and without a showing of cause if the court is "satisfied that the estate will not suffer any loss or unreasonable expense if the order is granted." The court may require the person applying for

the order (a) to pay the costs of storing and protecting the property or (b) to provide security by a bond or cash deposit. (*Prob.C. 9784(b).*)

The personal representative is deemed to have notice of the order if it is served on the personal representative before the proposed date of disposal or abandonment in the manner authorized by the court or the manner provided by *C.C.P. 415.10* (personal delivery; see 3 *Cal. Proc. (4th), Actions, §924*) or *C.C.P. 415.30* (service by mail; see 3 *Cal. Proc. (4th), Actions, §930 et seq.*). (*Prob.C. 9784(c).*)

(5) *Tender of Possession to Person Objecting.* Notwithstanding *Prob.C. 9783* and *9784*, the personal representative may dispose of or abandon property without court authorization if the person who objected or obtained the restraining order fails to take possession at his or her own expense within 10 days after the personal representative requests that person to do so. (*Prob.C. 9788(a).*) A person who takes possession under *Prob.C. 9788* is liable for the property's safekeeping until relieved of that obligation by a court order. (*Prob.C. 9788(b).*)

(6) *Notice of Hearing on Petition.* A person who objects to the disposition or abandonment under *Prob.C. 9783* or who serves a restraining order issued under *Prob.C. 9784* must be given notice of any hearing on a petition for court authorization to dispose of or abandon the property. (*Prob.C. 9786.*)

(7) *Waiver of Court Review.* A person entitled to notice under *Prob.C. 9782* who receives notice of a proposed disposition or abandonment waives the right to have the court later review the disposition or abandonment unless he or she (a) delivers or mails a written objection under *Prob.C. 9783*, or (b) serves a restraining order under *Prob.C. 9784*, before the proposed date of disposition or abandonment in the personal representative's notice or the actual date of disposition or abandonment, whichever is later. (*Prob.C. 9787(a).*) However, subject to waiver or consent under *Prob.C. 9785*, the court may review the disposition or abandonment of property on motion of a person entitled to notice under *Prob.C. 9782* who establishes that he or she did not actually receive notice before the time to object expired. (*Prob.C. 9787(b).*)

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SUPPLEMENT: [This section is current through the latest supplement]

(4) *Restraining Order To Prevent Abandonment.* *Personal delivery:*

Cross-Reference: 3 *Cal. Proc. (5th), Actions, §1008.*

Service by mail:

Cross-Reference: 3 *Cal. Proc. (5th), Actions, §1015 et seq.*



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a. Statutory Framework.

14 Witkin Sum. Cal. Law Wills § 512

[§ 512] Statutory Framework.

(1) *Study and Recommendation.* As part of its continuing revision of the Probate Code, the California Law Revision Commission studied litigation involving decedents and comprehensively reviewed provisions of the Probate Code governing actions by and against personal representatives and of the Code of Civil Procedure governing the survival and continuation of actions, statutes of limitations, and parties. (See 19 Cal. Law Rev. Com. Reports, pp. 899 et seq., 1201 et seq.; 20 Cal. Law Rev. Com. Reports, pp. 895 et seq., 955 et seq.) The Commission recommended a consolidation and reorganization of the existing statutes, taking into account areas in which provisions of the Code of Civil Procedure overlapped or disagreed with provisions of the Probate Code.

(2) *Statutory Reorganization.* In 1987, 1988, 1990, and 1992, the Legislature followed the Commission's recommendations by reorganizing portions of the Code of Civil Procedure and the Probate Code. The existing provisions governing actions by and against personal representatives (former Prob.C. 573 et seq.), limitations (former C.C.P. 353), and parties (former C.C.P. 377, 385) were repealed. Conforming amendments were made in the Civil Code, the Code of Civil Procedure, and the Probate Code. (See 24 *Pacific L. J.* 605.)

(3) *Current Statutes.* The following provisions are relevant to actions involving estates:

(a) *Actions by and Against Personal Representative.* Prob.C. 9820 et seq. (See *infra*, §513.)

(b) *Action Where Decedent's Liability Is Covered by Insurance.* Prob.C. 550 et seq. (See *infra*, §515.)

(c) *Limitation of Actions After Death.* C.C.P. 366.1 et seq. (See *infra*, §§516, 517.)

(d) *Effect of Death on Parties to Civil Action.* C.C.P. 377.10 et seq. (See *infra*, §518 et seq.)

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b. Probate Code Actions.

1. In General.

14 Witkin Sum. Cal. Law Wills § 513

[§ 513] In General.

(1) *Authority To Sue and Defend.* The personal representative may commence and maintain actions and proceedings for the benefit of the estate and defend actions and proceedings against the decedent, the personal representative, or the estate. (*Prob.C. 9820.*) (See C.E.B., 3 Will Drafting 3d, §33.6; C.E.B., 3 Decedent Estate Practice, §23.1 et seq.) (For statutes authorizing particular types of actions, see *infra*, §514.)

The Law Revision Commission Comment observes:

(a) The authority to defend actions and proceedings against the personal representative refers to actions or proceedings against the personal representative in a representative, not individual, capacity.

(b) The personal representative may act under *Prob.C. 9820* without prior court authorization, but may seek instructions under *Prob.C. 9611* (*supra*, §469) if in doubt about the appropriate action to take.

(c) The personal representative and a third party may agree to a summary procedure (e.g., arbitration) to resolve a dispute.

(2) *Parties.* Actions involving the estate are generally brought by or against the personal representative under the general statutory authority to sue and defend (*Prob.C. 9820*). In the absence of special circumstances (see *infra*, §518 et seq.), heirs and devisees are not necessary or proper parties and may not sue alone. (*C.C.P. 369*; see *Holland v. McCarthy* (1918) 177 C. 507, 510, 171 P. 421; *Hall v. Alexander* (1937) 18 C.A.2d 660, 662, 64 P.2d 767; *Wood v. American Nat. Bank of San Bernardino* (1938) 24 C.A.2d 313, 321, 74 P.2d 1051; *Graybiel v. Burke* (1954) 124 C.A.2d 255, 261, 268 P.2d 551 [personal representative may maintain action for possession and protection of decedent's property pending administration; action by special administrator to recover possession of real property and to enjoin waste]; *Estate of Sidebotham* (1956) 138 C.A.2d 412, 416, 291 P.2d 965; *Estate of Turino* (1970) 8 C.A.3d 642, 647, 87 C.R. 581 [executor was authorized to defend against claim that estate assets were trust property and not part of estate]; 4 *Cal. Proc. (4th)*, *Pleading*, §115 et seq.; 19 Am.Jur. Trials 5 [actions by or against decedent's estate].)

Where a personal representative appears in a representative capacity, whether as plaintiff or defendant, that capacity must be alleged. (See *Grisingher v. Shaeffer* (1938) 25 C.A.2d 5, 9, 76 P.2d 149; 5 Cal. Proc. (4th), Pleading, §856.)

(3) *Procedure*. Except as otherwise provided, the rules of practice in civil actions constitute the rules of practice under the Probate Code. (*Prob.C. 1000*, supra, §371.) (On service of process and notices on nonresident personal representative, see *Prob.C. 8572* et seq., supra, §§431, 432; on survival of actions, see *infra*, §518; on limitations on damages, see *infra*, §§519, 520; on effect of death on statutes of limitation, see *infra*, §§516, 517; on costs, see *Prob.C. 1002*, supra, §400.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Parties*.

Action by or against personal representative:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §134 et seq.

Allegation of capacity:

Cross-Reference: 5 Cal. Proc. (5th), Pleading, §902.



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2. Particular Actions by and Against Personal Representative.

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[§ 514] Particular Actions by and Against Personal Representative.

A number of particular actions by and against the personal representative are recognized, including the following:

(1) *Action for Possession or To Quiet Title.* "The heirs or devisees may themselves, or jointly with the personal representative, maintain an action for possession of property or to quiet title to property against any person except the personal representative." (*Prob.C.* 9654.) (See *Estate of Hughes* (1992) 5 C.A.4th 1607, 1611, 7 C.R.2d 742, 12 Summary (10th), *Real Property*, §44 [personal representative was not entitled to recover rent or possession of estate property occupied by partial devisee before distribution]; *Olson v. Toy* (1996) 46 C.A.4th 818, 54 C.R.2d 29, 4 Cal. Proc. (4th), *Pleading*, Supp., §§116, 117 [action by heirs to invalidate living trust and recover property for estate].) (For cases under former statute, see *Mau v. McManaman* (1938) 29 C.A.2d 631, 634, 85 P.2d 209; *Reed v. Hayward* (1943) 23 C.2d 336, 340, 144 P.2d 561; *Bank of America v. Atherton* (1943) 60 C.A.2d 268, 274, 140 P.2d 678; 4 Cal. Proc. (4th), *Pleading*, §117.)

(2) *Action Where Personal Representative Acts Wrongfully.* If a personal representative is guilty of fraud or collusion with those against whom a cause of action exists, the heirs or devisees may maintain the action themselves. (See *Landis v. First Nat. Bank* (1937) 20 C.A.2d 198, 207, 66 P.2d 730 [executor was president of bank that sold decedent's stock as pledgee at private sale, making a profit].)

(3) *Action on Bond of Former Representative.* A personal representative may bring an action on the bond of a former personal representative for the same estate, "for the use and benefit of all interested persons." (*Prob.C.* 9822.) This authority is not exclusive; liability on a bond may also be enforced on a motion under C.C.P. 996.440 (see 6 Cal. Proc. (4th), *Provisional Remedies*, §38). (Law Rev. Com. Comment, citing *Estate of Johnson* (1984) 162 C.A.3d 917, 919, 208 C.R. 821 [liability on bond determined on settlement of account].)

(4) *Action To Set Aside Fraudulent Conveyance.* On application of a creditor, the personal representative must commence and prosecute an action to recover property of the decedent for the benefit of creditors if the assets are insufficient and if the decedent (a) made a fraudulent transfer, (b) made a gift in view of death, or (c) directed a transfer on death of a vehicle, vessel, mobilehome, etc., to a designated beneficiary, and the property was transferred as directed.

(*Prob.C. 9653(a)*, *supra*, §478.)

(5) *Action for Partition*. If a decedent leaves an undivided interest in property, a partition action by or against the personal representative is authorized. (*Prob.C. 9823*.) The Law Revision Commission Comment points out that (a) court authorization is not required to commence the action, and (b) the personal representative and the other party may agree to use a summary procedure (e.g., arbitration) for determination of a dispute.

(6) *Action Against Surviving Partner*. If the decedent was a general partner, the personal representative may commence and maintain any action against the surviving partner that the decedent could have commenced or maintained. (*Prob.C. 9763(a)*, *supra*, §487.)

(7) *Action for Wrongful Taking of Estate Property*. The personal representative may maintain an action for damages against one who wrongfully takes, conceals, or disposes of estate property. (*Prob.C. 859*, *supra*, §359.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action for Possession or To Quiet Title*.

Olson case:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §§135, 136.

Cases under former statute:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §136.

(3) *Action on Bond of Former Representative*.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §38.



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3. Decedent's Liability Covered by Insurance.

14 Witkin Sum. Cal. Law Wills § 515

[§ 515] Decedent's Liability Covered by Insurance.

(1) *Former Statute and Case Law.* Former Prob.C. 721, adopted in 1971, authorized an action against the estate of a decedent to recover to the extent of insurance coverage, without the necessity of appointing or joining a personal representative or filing a claim. (See *Neuland v. Russell* (1975) 50 C.A.3d 1, 6, 123 C.R. 230; *Eken v. Bosworth* (1977) 72 C.A.3d 248, 252, 139 C.R. 834 [no claim required where statute became effective during period in which claim could have been filed; statute extended time to seek recovery on cause of action which had not been barred by former statute of limitations]; *Bartman v. Estate of Bartman* (1978) 83 C.A.3d 780, 787, 788, 148 C.R. 207 [statute cannot be applied retroactively to revive right of action previously barred by failure to comply with then applicable creditor's claim statutes]; *Romo v. Estate of Bennett* (1979) 97 C.A.3d 304, 307, 158 C.R. 635.)

(2) *Nature and Scope of Action Under Current Statute.* Subject to Prob.C. 550 et seq., an action to establish a decedent's liability for which the decedent was protected by insurance may be commenced against the estate without joining the personal representative or the decedent's successor in interest as a party. (Prob.C. 550(a).) This remedy is cumulative and may be pursued concurrently with other remedies. (Prob.C. 550(b).) The creditor's claim procedure (Prob.C. 9000 et seq.; infra, §612 et seq.) is such a remedy. (Law Rev. Com. Comment.)

(3) *Statute of Limitations.* Notwithstanding C.C.P. 366.2 (infra, §517), an action against a decedent's insurer under Prob.C. 550 et seq. may be commenced within 1 year after expiration of the limitations period otherwise applicable. (Prob.C. 551.)

(4) *Pleading and Parties.* An action under Prob.C. 550 et seq. must name as the defendant "Estate of (name of decedent), Deceased." Summons is served on the insurer or its designate. Further proceedings are in the name of the estate but are conducted in the same manner as if the action were against the personal representative. (Prob.C. 552(a).)

On motion of an interested person, or on its own motion, the court may, for good cause, order the appointment and substitution of the personal representative as the defendant. (Prob.C. 552(b).) The action against the estate may also be consolidated with an action against the personal representative. (Prob.C. 552(c).) The consolidated action may be for an amount greater than the insurance coverage. (Law Rev. Com. Comment.) Unless the personal representative is joined as

a party, the judgment in the action does not adjudicate rights by or against the estate. (*Prob.C. 553.*)

(5) *Defenses.* The insurer may deny or contest liability in an action under *Prob.C. 550* et seq. or by an independent action. (*Prob.C. 553.*)

(6) *Damages Recoverable.* Damages sought in an action under *Prob.C. 550* et seq. must be within the limits and coverage of the insurance, or damages outside the limits and coverage must be waived. A judgment in favor of the plaintiff is enforceable only from the insurance coverage and not against the property of the estate. (*Prob.C. 554(a).*) However, these limitations are not applicable if (a) the personal representative is joined as a party, and (b) the plaintiff files a claim in compliance with *Prob.C. 9390* (infra, §631). (*Prob.C. 554(b).*)

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1. Decedent's Cause of Action.

14 Witkin Sum. Cal. Law Wills § 516

[§ 516] Decedent's Cause of Action.

If a person entitled to bring an action dies before the applicable limitations period expires, and the cause of action survives, the action may be commenced within (1) 6 months after death, or (2) the limitations period applicable if the person had not died, whichever is later. (*C.C.P. 366.1.*) This provision makes clear that the decedent's death does not shorten the limitations period applicable to the cause of action, but may extend it up to 6 months. (*Law Rev. Com. Comment.*) (On survival of causes of action, see *C.C.P. 377.20*, *infra*, §518.)

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2. Action Against Decedent.

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[§ 517] Action Against Decedent.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Estate of Yool* (2007) 151 C.A.4th 867, 875, 60 C.R.3d 526 [C.C.P. 366.2(a) did not govern petition under Prob.C. 850 to determine title to real property held by decedent and child as co-owners and claimed by child as resulting trust; cause of action did not arise out of personal liability or involve debt of decedent and had not accrued at time of death].(3) *Period Is Not Tolloed or Extended.*

(a) C.C.P. 366.2(b)(1) was renumbered C.C.P. 366.2(b)(2) in 2006.

(b) C.C.P. 366.2(b)(2) was renumbered C.C.P. 366.2(b)(3) in 2006.

(c) C.C.P. 366.2(b)(3) was renumbered C.C.P. 366.2(b)(4) in 2006.

(d) *(New) Holiday:* Under C.C.P. 366.2(b)(1), added in 2006, the limitations period may be extended under C.C.P. 12, 12a, and 12b (extension where last day is holiday).(5) *Promise Concerning Distribution.* C.C.P. 366.3(b) was amended in 2006 to provide that the limitations period may also be extended under C.C.P. 12, 12a, and 12b (extension where last day is holiday).

In *Embre v. Embree* (2004) 125 C.A.4th 487, 22 C.R.3d 782, a decedent's former wife sued the beneficiaries who received property on the termination of the decedent's revocable living trust to enforce a marital settlement agreement that provided for a trust or annuity for the wife's benefit on the decedent's death. *Held*, the action was time-barred. Even if the marital settlement agreement was a spousal support judgment enforceable until fully paid under *Family C. 4502* (now *Family C. 291*; see 11 *Summary* (10th), *Husband and Wife*, Supp., §248), the wife was required by Prob.C. 19400 (see 13 *Summary* (10th), *Trusts*, §287) and C.C.P. 366.2 to make a claim against the decedent's trust beneficiaries within 1 year of the decedent's death to reach trust property that had been distributed to them. (125 C.A.4th 495.)

In *Stewart v. Seward* (2007) 148 C.A.4th 1513, 56 C.R.3d 651, the daughter of the decedent's predeceased spouse filed a creditor's claim seeking damages for the decedent's breach of an oral contract with her mother to will half of a

piece of real property to her. The administrator rejected the claim. The creditor sued on the claim within 3 months (as required by *Prob.C. 9353(a)*) but 2 days beyond the 1-year anniversary of the death of the decedent. *Held*, the action was time-barred. The action was on a claim arising from an agreement for a distribution from an estate under *C.C.P. 366.3*, and the 1-year limitations period of that statute is not tolled for creditor claims. (*148 C.A.4th 1522*, citing *Embree*.) The action was not within the 1-year period of *C.C.P. 366.2*, which is tolled for creditor claims, even though the creditor here was seeking money damages from the decedent rather than an interest in the real property. The nature of the claim, rather than the nature of the remedy, is determinative. (*148 C.A.4th 1522, 1523*.) Judicial Council Form No. DE-174, which advises that the claimant on a rejected claim has three months in which to sue on the claim, presents a trap for the unwary. Nothing in the form tells the claimant if the claim was rejected on the ground that the claimant did not qualify as a creditor (and thus falls within *C.C.P. 366.3*). (*148 C.A.4th 1524*, footnote 7.) (See *Wilkison v. Wiederkehr* (2002) *101 C.A.4th 822, 823, 124 C.R.2d 631* [action for damages for breach of agreement to make specific bequest in will was barred for failure to file creditor's claim]; on creditor claims, see text, §612.) *Correction*: Page 589, last line of subdivision (2), citation to Family C. 337 or Family C. 339 should be to *C.C.P. 337* or *C.C.P. 339*.



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14 Witkin Sum. Cal. Law Wills § 517

[§ 517] Action Against Decedent.

(1) *In General.* If a person against whom an action may be brought (whether arising in tort, contract, or otherwise, and whether accrued or not accrued) dies before the applicable limitations period expires, and the cause of action survives, the action may be commenced within 1 year after the date of death, and the limitations period that would otherwise have been applicable does not apply. (*C.C.P. 366.2(a).*) (See *Bradley v. Breen* (1999) 73 C.A.4th 798, 803, 86 C.R.2d 726 [C.C.P. 366.2 barred cross-complaint for equitable indemnity against estate, even though action for equitable indemnity had not yet accrued].)

The Law Revision Commission Comment makes the following points:

(a) The 1-year period applies regardless of whether the statute otherwise applicable would have expired before or after the 1-year period.

(b) A personal representative appointed during the 1-year period must notify creditors, and filing a creditor's claim tolls the statute of limitations. Creditors may also petition for appointment during that time.

(c) The 1-year period applies in any action on a liability of the decedent, whether against a personal representative or another, such as a trustee or one who takes the decedent's property by affidavit.

(2) *Action for Necessaries of Life.* In an action to recover from one spouse on a debt of the other spouse for necessities of life under *Family C. 914*, *C.C.P. 366.2* ordinarily applies if the indebted spouse dies. However, if the surviving spouse has actual knowledge of the debt before the period of *C.C.P. 366.2* expires, and the personal representative of the decedent's estate fails to provide the creditor with a timely written notice of probate administration, the claim is governed by the applicable statute of limitations under *Family C. 337* or *Family C. 339*. (*Family C. 914(c).*)

(3) *Period Is Not Tolloed or Extended.* The limitations period provided in *C.C.P. 366.2(a)* is not tolloed or extended for any reason, except as provided in the following "where applicable":

(a) *Prob.C. 9000 et seq.* (creditor claims; *infra*, §612 et seq.). (*C.C.P. 366.2(b)(1).*)

(b) *Prob.C. 19000* et seq. (payment of claims from revocable trust of decedent; see 13 *Summary* (10th), *Trusts*, §260 et seq.). (*C.C.P. 366.2(b)(2)*.)

(c) *Prob.C. 21300* et seq. (no contest clauses; *infra*, §561 et seq.). (*C.C.P. 366.2(b)(3)*.)

The Law Revision Commission Comment makes the following points:

(a) Under the trust claims and probate claims procedures, a creditor's claim may be extinguished before expiration of the 1-year limitations period by failure to file a claim.

(b) Filing a claim tolls the 1-year limitations period under *Prob.C. 9352* (probate) and *Prob.C. 19253* (trust).

(4) *Equitable Estoppel*. The doctrine of equitable estoppel may be applied to a case that would otherwise be barred by *C.C.P. 366.2*. Even though the statute indicates that the limitations period may not be tolled or extended, it says nothing about equitable estoppel. In the absence of language or legislative history suggesting that the doctrine was intended *not* to apply, it does so. (*Battuello v. Battuello* (1998) 64 C.A.4th 842, 847, 75 C.R.2d 548.)

(5) *Promise Concerning Distribution*. If a claim arises from a promise or agreement with a decedent, whether oral or written, for a distribution from an estate or trust or under another instrument, an action to enforce the claim must be commenced within 1 year of the date of death. The limitations period that would otherwise apply is not applicable. (*C.C.P. 366.3(a)*.) The 1-year period may not be tolled or extended for any reason except as provided in *Prob.C. 21300* et seq. (no contest clauses; *infra*, §561 et seq.). (*C.C.P. 366.3(b)*.)

(6) *Action Against Decedent's Insurer*. Notwithstanding *C.C.P. 366.2*, an action against a decedent's insurer under *Prob.C. 550* et seq. (*supra*, §515) may be commenced within 1 year after expiration of the limitations period otherwise applicable. (*Prob.C. 551*.)

(7) *Illustrative Decisions*. Decisions under the prior statutes are illustrative. (See *Dodson v. Greuner* (1938) 28 C.A.2d 418, 421, 82 P.2d 741 [where special administrator was given general powers, action after statute had run and 1 year after letters was barred]; *San Francisco Bank v. St. Clair* (1941) 47 C.A.2d 194, 202, 117 P.2d 703 [statute does not shorten time allowed by statute of limitations, but merely gives an extension after it has run]; *Silva v. Superior Court* (1948) 83 C.A.2d 521, 529, 189 P.2d 314 [on death of judgment debtor, judgment "became dormant" until 1 year after issuance of letters]; *Dawes v. Rich* (1997) 60 C.A.4th 24, 32, 70 C.R.2d 72 [under predecessor statute, creditor's judgment against surviving husband could not be enforced against trusts funded with deceased wife's community property on her death where enforcement action was not brought within 1 year of death].)

In *Burgos v. Tamulonis* (1994) 28 C.A.4th 757, 33 C.R.2d 728, plaintiff was injured in an automobile accident. Within a year, she filed a personal injury action, naming the other driver in the complaint, unaware that he had since died. *Held*, the action was timely. Plaintiff lacked actual knowledge of the death, and the statute required that the action be commenced within 1 year of death, not that it be commenced against the personal representative within that time. The amended complaint, naming the personal representative, related back to the date of the original complaint. (28 C.A.4th 763.)

In *Levine v. Levine* (2002) 102 C.A.4th 1256, 126 C.R.2d 255, the beneficiaries of two custodial accounts for minors, which had been closed by the custodian and transferred into his revocable trust, brought an action against the trust for breach of the custodian's fiduciary duty more than 1 year after his death. *Held*, the action was barred by *C.C.P. 366.2*. *C.C.P. 366.2(b)* tolls the absolute 1-year period only in limited circumstances, e.g., where a creditor claim, a petition for the payment of a debt or claim from the decedent's revocable trust, or a proceeding to construe a no contest provision is timely filed. The proceeding remains timely, even though the claim is acted upon outside the limitations period. (102 C.A.4th 1261.) Here, there was no timely claim and the statute was not tolled. Further, the 1-year period is not subject to delayed discovery or tolling for minority or incapacity. (102 C.A.4th 1265.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Estate of Yool* (2007) 151 C.A.4th 867, 875, 60 C.R.3d 526 [C.C.P. 366.2(a) did not govern petition under Prob.C. 850 to determine title to real property held by decedent and child as co-owners and claimed by child as resulting trust; cause of action did not arise out of personal liability or involve debt of decedent and had not accrued at time of death].(3) *Period Is Not Tolloed or Extended.*

(a) C.C.P. 366.2(b)(1) was renumbered C.C.P. 366.2(b)(2) in 2006.

(b) C.C.P. 366.2(b)(2) was renumbered C.C.P. 366.2(b)(3) in 2006.

(c) C.C.P. 366.2(b)(3) was renumbered C.C.P. 366.2(b)(4) in 2006.

See *Wagner v. Wagner* (2008) 162 C.A.4th 249, 256, 75 C.R.3d 511 [C.C.P. 366.2 was not tolled by oral claim of trustee of decedent's revocable living trust to reimburse herself for cost of caring for decedent before death; trustee must present own claim in writing like any other creditor].

(d) *(New) Holiday:* Under C.C.P. 366.2(b)(1), added in 2006, the limitations period may be extended under C.C.P. 12, 12a, and 12b (extension where last day is holiday).(5) *Promise Concerning Distribution.* C.C.P. 366.3(b) was amended in 2006 to provide that the limitations period may also be extended under C.C.P. 12, 12a, and 12b (extension where last day is holiday).

In *Embree v. Embree* (2004) 125 C.A.4th 487, 22 C.R.3d 782, a decedent's former wife sued the beneficiaries who received property on the termination of the decedent's revocable living trust to enforce a marital settlement agreement that provided for a trust or annuity for the wife's benefit on the decedent's death. *Held*, the action was time-barred. Even if the marital settlement agreement was a spousal support judgment enforceable until fully paid under *Family C. 4502* (now *Family C. 291*; see 11 *Summary* (10th), *Husband and Wife*, Supp., §248), the wife was required by Prob.C. 19400 (see 13 *Summary* (10th), *Trusts*, §287) and C.C.P. 366.2 to make a claim against the decedent's trust beneficiaries within 1 year of the decedent's death to reach trust property that had been distributed to them. (125 C.A.4th 495.)

In *Stewart v. Seward* (2007) 148 C.A.4th 1513, 56 C.R.3d 651, the daughter of the decedent's predeceased spouse filed a creditor's claim seeking damages for the decedent's breach of an oral contract with her mother to will half of a piece of real property to her. The administrator rejected the claim. The creditor sued on the claim within 3 months (as required by Prob.C. 9353(a)) but 2 days beyond the 1-year anniversary of the death of the decedent. *Held*, the action was time-barred. The action was on a claim arising from an agreement for a distribution from an estate under C.C.P. 366.3, and the 1-year limitations period of that statute is not tolled for creditor claims. (148 C.A.4th 1522, citing *Embree*.) The action was not within the 1-year period of C.C.P. 366.2, which is tolled for creditor claims, even though the creditor here was seeking money damages from the decedent rather than an interest in the real property. The nature of the claim, rather than the nature of the remedy, is determinative. (148 C.A.4th 1522, 1523.) Judicial Council Form No. DE-174, which advises that the claimant on a rejected claim has three months in which to sue on the claim, presents a trap for the unwary. Nothing in the form tells the claimant if the claim was rejected on the ground that the claimant did not qualify as a creditor (and thus falls within C.C.P. 366.3). (148 C.A.4th 1524, footnote 7.) (Judicial Council Form No. DE-174 has been amended to add a warning that claims not treated as creditors' claims are subject to special statutes of limitation.) (See *Wilkison v. Wiederkehr* (2002) 101 C.A.4th 822, 823, 124 C.R.2d 631 [action for damages for breach of agreement to make specific bequest in will was barred for failure to file creditor's claim]; on creditor claims, see text, §612.)*Correction:* Page 589, last line of subdivision (2), citation to Family C. 337 or Family C. 339 should be to C.C.P. 337 or C.C.P. 339.



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G. Powers and Duties.

14. Actions Involving Estate.

d. Effect of Death on Parties to Civil Actions.

1. In General.

14 Witkin Sum. Cal. Law Wills § 518

[§ 518] In General.

(1) *Definitions.* The following definitions apply for purposes of *C.C.P. 377.10* et seq.:

(a) *Decedent's successor in interest.* A decedent's successor in interest is the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or an item of property that is the subject of a cause of action. (*C.C.P. 377.11.*) The term does not include a person to whom the cause of action or property was assigned during the decedent's lifetime. (Law Rev. Com. Comment.)

(b) *Beneficiary of the decedent's estate.* If the decedent died testate, the term "beneficiary of the decedent's estate" refers to those who succeed under the decedent's will to a cause of action or an item of property that is the subject of a cause of action. (*C.C.P. 377.10(a).*) If the decedent died intestate, the term refers to those who succeed under the applicable laws of intestacy to a cause of action or an item of property that is the subject of a cause of action. (*C.C.P. 377.10(b).*) A similar definition applies to the disposition of estates without administration. (See *Prob.C. 13006*, *infra*, §793.)

(2) *Survival of Cause of Action.* "Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." (*C.C.P. 377.20(a).*) "This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage." (*C.C.P. 377.20(b).*) The Law Revision Commission Comment points out that the applicable limitations period may be affected by death. (See *C.C.P. 366.1, 366.2*, *supra*, §§516, 517; 3 *Cal. Proc. (4th)*, *Actions*, §64 et seq.)

(3) *Continuation of Pending Action.* A pending action does not abate by the death of a party if the cause of action survives. (*C.C.P. 377.21.*)

(4) *Assignability of Cause of Action.* Nothing in *C.C.P. 377.10* et seq. affects the assignability of a cause of action. (*C.C.P. 377.22.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Survival of Cause of Action*. *Cross-Reference:* 3 *Cal. Proc.* (5th), *Actions*, §12 et seq.



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[§ 519] Decedent's Cause of Action.

(1) *Assertion of Cause of Action.* Subject to *Prob.C. 7000* and *7001* (passage of decedent's property; *supra*, §§404, 405), a cause of action that survives the death of the person entitled to commence the action passes to the decedent's successor in interest. The action may be commenced by the decedent's personal representative or, if none, by the successor in interest. (*C.C.P. 377.30.*) (See *Parsons v. Tickner* (1995) 31 C.A.4th 1513, 1521, 37 C.R.2d 810 [daughter of deceased musician was successor in interest under *C.C.P. 377.30* and had standing to sue decedent's music managers for fraud without reopening probate through administrator of estate]; *In re A.C.* (2000) 80 C.A.4th 994, 1003, 96 C.R.2d 79 [decedent's right to petition for destruction of juvenile dependency file under *Welf.C. 826* does not survive death].)

The Law Revision Commission Comment makes two points:

(a) An action may be commenced by the decedent's successor in interest only if there is no personal representative.
(b) The distributee of the cause of action in probate is the successor in interest. If there is no distribution, the heir, devisee, trustee, or other successor has the right to proceed under *C.C.P. 377.30* et seq.

(2) *Continuation of Pending Action.* On motion after the death of a person who commenced an action, the court must allow a pending action that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest. (*C.C.P. 377.31.*) The right to be substituted is not discretionary with the court. (Law Rev. Com. Comment.) (See *In re Marriage of Drake* (1997) 53 C.A.4th 1139, 1152, 62 C.R.2d 466 [custodial parent's action seeking increased child support could be continued after her death by executor-trustees on behalf of dependent son]; 4 *Cal. Proc.* (4th), *Pleading*, §238 et seq.)

(3) *Affidavit.* Those seeking to commence or continue an action as a decedent's successor in interest must execute an affidavit under penalty of perjury and file it with a certified copy of the decedent's death certificate. The affidavit must provide identifying information and (a) state that no proceeding for administration is pending, (b) if the estate was administered, include a copy of the order showing distribution of the cause of action to the successor in interest, (c) show that the affiant is the successor in interest or is authorized to act on behalf of the successor in interest, and (d) state

that no other person has a superior right to commence or continue the action. (C.C.P. 377.32.) (On procedure for acquiring certified copy of death certificate, see *Health & Saf.C. 103526*.) (See *Parsons v. Tickner*, *supra*, 31 C.A.4th 1523 [although C.C.P. 377.32 does not require affidavit as condition precedent to commencing or continuing action, failure to file affidavit could subject action to plea in abatement].)

(4) *Orders*. The court in which the action is commenced or continued may make any order "appropriate to ensure proper administration of justice in the case, including appointment of the decedent's successor in interest as a special administrator or guardian ad litem." (C.C.P. 377.33.) The Law Revision Commission Comment notes that the references to appointment as a special administrator or guardian ad litem are intended to recognize that there may be a need to impose fiduciary duties on the successor in interest to protect the interests of other potential beneficiaries.

(5) *Damages Recoverable*. In an action by the personal representative or successor in interest on the decedent's cause of action, recoverable damages are limited to loss or damage that the decedent sustained or incurred before death, including penalties or punitive or exemplary damages the decedent would have been entitled to recover had the decedent lived. Recoverable damages do not include damages for pain, suffering, or disfigurement. (C.C.P. 377.34.) This limitation does not apply to a cause of action others may have for the wrongful death of the decedent. (Law Rev. Com. Comment.) (See *Kellogg v. Asbestos Corp., Ltd.* (1996) 41 C.A.4th 1397, 1404, 49 C.R.2d 256 [where plaintiff died after submission but before judgment, former statute precluded damages for pain and suffering]; *Garcia v. Superior Court* (1996) 42 C.A.4th 177, 181, 49 C.R.2d 580 [C.C.P. 377.34 precludes recovery of damages for pain and suffering in federal civil rights action]; *Los Angeles v. Superior Court (Schonert)* (1999) 21 C.4th 292, 303, 87 C.R.2d 441, 981 P.2d 68 [C.C.P. 377.34 precludes recovery of damages for pain and suffering in action asserting sexual harassment in violation of state and federal law]; 40 *Santa Clara L. Rev.* 409 [decedent's right to pain and suffering damages under 42 U.S.C., §1983]; 3 *Cal. Proc.* (4th), *Actions*, §§68, 69.)

In *Sullivan v. Delta Air Lines* (1997) 15 C.4th 288, 63 C.R.2d 74, 935 P.2d 781, plaintiff, in an action against his employer, was awarded damages for emotional distress totaling \$ 275,000. Pending appeal plaintiff died, and his mother, as sole beneficiary, was appointed his special administrator and substituted as plaintiff. The Court of Appeal reversed, relying on the portion of C.C.P. 377.34 precluding damages for "pain, suffering, or disfigurement." *Held*, reversing the Court of Appeal, plaintiff's death pending appeal did not preclude recovery of damages for pain and suffering awarded in final judgment.

(a) The history of C.C.P. 377.34 is instructive. California followed the common law rule that causes of action for personal torts abated on death of the injured party before, but not after, judgment. (15 C.4th 294.) California's first statute providing for survival of personal tort actions was enacted in 1949. Although the Legislature has codified that law successively three times, the provision limiting recovery of damages for pain and suffering has remained substantively unchanged. Both former C.C. 956, enacted in 1949, and its recodification in former Prob.C. 573, enacted in 1961, limited recovery of damages for pain and suffering in survival actions only when death occurred "before judgment," thereby adopting the common law rule that death after judgment does not abate any aspect of personal tort actions. (15 C.4th 297.)

(b) C.C.P. 377.34 was adopted in 1992 as part of the third major revision of the law governing survival of actions. Although C.C.P. 377.34 omitted the earlier statutory reference to death "before judgment," the California Law Revision Commission characterized C.C.P. 377.34 as a restatement of former Prob.C. 573 "without substantive change." (15 C.4th 300.) If the commission had truly intended to abolish the long-standing common law rule that death after judgment does not abate personal tort actions, it is unlikely that the commission would have done so by implication, and the commission would certainly not have characterized the abolishing statute as merely restating its predecessor. (15 C.4th 302.)

(c) Defendant's primary contention is that the phrase "before judgment," in former Prob.C. 573, meant before resolution of the *appeal* from the judgment. Defendant reads "before judgment" to mean "before *final* judgment," and contends that a judgment is not "final" until it has been affirmed on appeal or the time for appeal has passed. But finality

on appeal is not the only meaning of the phrase. In its most fundamental sense, finality is an attribute of every judgment at the moment it is rendered; indeed, if a judicial determination is not immediately "final" in this sense it is not a judgment, no matter what it is called. It follows that, while pending on appeal, a judgment is both "final" in the sense that it is appealable and not "final" in the sense that the appeal remains unresolved. (15 C.4th 303.)

(d) The phrase "before judgment" in former Prob.C. 573 should be read to mean before rendition of a judgment that is final in the fundamental sense that it leaves no issue to be determined between the parties except the fact of compliance. This reading gives significance to the fact that the Legislature omitted the word "final" from the phrase "before judgment" in former Prob.C. 573, because that word is redundant if "judgment" is used in the sense of an appealable judicial determination. Also, it results in a reading of former Prob.C. 573 consistent with the rule that the death of a prevailing plaintiff after rendition of judgment does not abate the action. (15 C.4th 305.)

(e) C.C.P. 377.34, like its predecessors, did not abolish the common law rule that death after judgment does not abate any aspect of personal tort actions, including the right to recover damages for pain and suffering. The Court of Appeal therefore erred in holding that the statute bars recovery of pain and suffering damages awarded in a judgment if the plaintiff dies after that judgment is rendered but while an appeal is pending. (15 C.4th 305.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Continuation of Pending Action.*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §259 et seq.(5) *Damages Recoverable.*

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §§16, 17.



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3. Cause of Action Against Decedent.

14 Witkin Sum. Cal. Law Wills § 520

[§ 520] Cause of Action Against Decedent.

(1) *Assertion of Cause of Action.* Subject to *Prob.C. 9000* et seq. (creditor claims; *infra*, §612 et seq.), a cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest. (*C.C.P. 377.40.*)

(2) *Continuation of Pending Action.* On motion, the court must allow a pending action against the decedent that does not abate to be continued against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest, except that continuation against the personal representative requires proof of compliance with *Prob.C. 9000* et seq. (*C.C.P. 377.41.*) (See 4 *Cal. Proc.* (4th), *Pleading*, §238 et seq.)

If the death occurs after the verdict or decision, even though before judgment, the court may render a judgment against the decedent, which is payable as a claim in the course of administration. (*C.C.P. 669; Prob.C. 9300* et seq., *infra*, §627; see 7 *Cal. Proc.* (4th), *Judgment*, §5; *Cal. Civil Practice*, 2 Probate and Trust Proceedings, §14:36.)

(3) *Damages Recoverable.* In an action against the decedent's personal representative or successor in interest on a cause of action against the decedent, all damages that might have been recovered against the decedent had the decedent lived are recoverable except punitive or exemplary damages. (*C.C.P. 377.42.*) (See 3 *Cal. Proc.* (4th), *Actions*, §§68, 69; 6 *Summary* (10th), *Torts*, §1559 et seq.)

The scope of *C.C.P. 377.42* was considered in *Whelan v. Rallo* (1997) 52 *C.A.4th* 989, 60 *C.R.2d* 876. W obtained a judgment against P and others that included punitive damages against P. The defendants appealed, filed a bond, and made a deposit in court. The judgment was affirmed, but P died in the interim. W then brought this action to enforce the judgment against the bond and deposit. W was allowed to enforce the judgment, including the punitive damages award against P, despite the contention of P's estate that recovery was barred by *C.C.P. 377.42*. *Held*, affirmed.

(a) By 1956, *Simone v. McKee* (1956) 142 *C.A.2d* 307, 298 *P.2d* 667, and other cases had established the rule that the availability of punitive damages was extinguished if the defendant died before the trial court entered judgment, but not if the death occurred *after* judgment. In 1961, former *Prob.C. 573* was amended to expressly preclude an award of

punitive damages in an action against an executor or administrator. This statute, as the Law Revision Commission Comment pointed out, while continuing the rule that punitive damages may not be recovered against the estate of a deceased wrongdoer, was intended to be declarative of existing law. In 1992, this provision was replaced by *C.C.P.* 377.42 without substantive change. (52 *C.A.4th* 993.)

(b) Despite this expressed intent to continue existing law, the estate argues that changes in the statutory language reveal a legislative intent to extend the prohibition against punitive damages to cases where the defendant dies while the case is on appeal. This argument is without merit: (1) The claim that the 1992 legislation eliminated the "before judgment" limitation on the award of punitive damages ignores the fact that that language only appeared in the part of former *Prob.C.* 573 concerning the death of a plaintiff, not the death of a defendant. (2) Under *C.C.P.* 377.42, the action or proceeding against the personal representative must be on a "cause of action against the decedent." However, the statute further provides that the claim is merged into the judgment. Thus, after judgment, W's cause of action against P ceased to exist. Instead of pursuing an award of damages on a cause of action against P, he was resisting an appeal and attempting to recover the judgment. (3) An action is pending until its final determination on appeal, but that does not mean that an action on appeal is "on a cause of action" within the meaning of *C.C.P.* 377.42. Indeed, an appeal can only be taken from a final judgment, which was "final" and perfected as to the punitive damages award against P. (52 *C.A.4th* 994.)

(c) Allowing a plaintiff to enforce a punitive damages award in these circumstances is supported by policy considerations: (1) Punitive damages may not be awarded against a deceased defendant's estate, because the primary purpose of the award is to punish and deter the wrongdoer. This policy is served by making entry of judgment the dividing line. If the defendant is still alive, the judgment punishes the wrongdoer by describing egregious conduct and setting the liability for it, something it would not do if the liability for punitive damages disappeared on the defendant's death. (2) If liability for punitive damages has been imposed incorrectly, the burden is on the defendant to have that determination made in a timely fashion. After judgment is entered, the plaintiff should not be asked to bear the risk that the defendant's death during appeal will, in effect, reverse a punitive damages award otherwise properly imposed. (3) Permitting enforcement is consonant with the policy behind requiring a bond or deposit on appeal, i.e., to assure collection of a money judgment and to protect against passage of time, delay, or other reason. If the defendant's death during appeal extinguished the judgment as to punitive damages, one of the "other reasons" would be allowed to frustrate the purpose of the bond or deposit. (52 *C.A.4th* 995.)

(4) *Insured Claims.* An action to establish a decedent's liability for which the decedent was protected by insurance may be commenced or continued against the decedent's estate as provided in *Prob.C.* 550 et seq. (supra, §515). (*C.C.P.* 377.50.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Continuation of Pending Action.*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §259 et seq.

Death after verdict or decision:

Cross-Reference: 7 *Cal. Proc.* (5th), *Judgment*, §5.

(3) *Damages Recoverable.*

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§16, 17.



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4. Wrongful Death.

Witkin Sum. Cal. Law Wills § 521

[§ 521] Wrongful Death.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Bouley v. Long Beach Memorial Med. Center* (2005) 127 C.A.4th 601, 606, 25 C.R.3d 813, 6 Summary (10th), Torts, Supp., §1391 [retroactive application of extension of wrongful death statute to domestic partners]; *Armijo v. Miles* (2005) 127 C.A.4th 1405, 1411, 26 C.R.3d 623 [same]; 8 A.L.R.6th 339 [validity of claim predicated on same-sex relationship].



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14 Witkin Sum. Cal. Law Wills § 521

[§ 521] Wrongful Death.

(1) *In General.* A cause of action for wrongful death may be asserted by the following persons or by the decedent's personal representative on their behalf:

(a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue, those who would be entitled to the decedent's property by intestate succession, including the surviving spouse or domestic partner. (*C.C.P. 377.60(a)*.) For this purpose, "domestic partner" means the registered domestic partner of the decedent at the time of the decedent's death under *Family C. 297* (see 11 *Summary* (10th), *Husband and Wife*, §27). (*C.C.P. 377.60(f)*.) (See *Cheyanna M. v. A.C. Nielsen Co. (1998)* 66 *C.A.4th* 855, 863, 78 *C.R.2d* 335, 6 *Summary* (10th), *Torts*, §1393 [standing of afterborn child to bring action for wrongful death of parent; law of intestate succession (see *supra*, §93 et seq.) determines meaning of "children" for purposes of *C.C.P. 377.60*]; *Chavez v. Carpenter (2001)* 91 *C.A.4th* 1433, 1442, 111 *C.R.2d* 534, 6 *Summary* (10th), *Torts*, §1397 [decedent's parents lacked standing to sue for wrongful death under *C.C.P. 377.60(a)*; where decedent's daughter survived him for over 120 hours even though she died shortly thereafter, her cause of action for his wrongful death survived her own death and her mother had standing to sue on her behalf].)

(b) The decedent's putative spouse, children of the putative spouse, stepchildren, or parents, if they were dependent on the decedent. (*C.C.P. 377.60(b)*.)

(c) A minor who, at the time of death, resided in the decedent's household for the previous 180 days and was dependent on the decedent for one-half or more of the minor's support. (*C.C.P. 377.60(c)*.)

The Law Revision Commission Comment notes the following:

(a) The cause of action may be asserted against the personal representative of the wrongdoer if the wrongdoer dies before or after the decedent.

(b) The cause of action belongs not to the decedent or the decedent's estate, but to those persons specified, and the

authority of the personal representative to assert the cause of action is for administrative convenience only, not for the benefit of creditors or other persons interested in the decedent's estate. (See *Lab.C. 2803* [personal representative's cause of action against employer for death of employee]; 6 *Summary* (10th), *Torts*, §1377 et seq.)

(c) The decedent's children, and issue of deceased children, are proper parties along with the surviving spouse even if the estate is entirely community property. The statute codifies the rule of *Fiske v. Wilkie* (1945) 67 C.A.2d 440, 154 P.2d 725, 11 *Summary* (10th), *Community Property*, §40.

(2) *Damages Recoverable*. In an action under C.C.P. 377.60, damages that are just under all the circumstances may be awarded, but may not include damages recoverable under C.C.P. 377.34 (supra, §519). The court must determine the respective rights in an award of the persons entitled to assert the cause of action. (C.C.P. 377.61.)

(3) *Joinder and Consolidation*. An action under C.C.P. 377.30 (supra, §519) may be joined with a wrongful death action arising out of the same wrongful act or neglect. (C.C.P. 377.62(a).) An action under C.C.P. 377.31 (supra, §519) may be consolidated with a wrongful death action arising out of the same wrongful act or neglect. (C.C.P. 377.62(b).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Bouley v. Long Beach Memorial Med. Center* (2005) 127 C.A.4th 601, 606, 25 C.R.3d 813, 6 *Summary* (10th), *Torts*, Supp., §1391 [retroactive application of extension of wrongful death statute to domestic partners]; *Armijo v. Miles* (2005) 127 C.A.4th 1405, 1411, 26 C.R.3d 623 [same]; 8 A.L.R.6th 339 [validity of claim predicated on same-sex relationship].



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CHAPTER XXI - Wills and Probate

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X. EXECUTORS AND ADMINISTRATORS
H. Liabilities.
1. In General.

14 Witkin Sum. Cal. Law Wills § 522

[§ 522] In General.

(1) *Scope of Liability.* The liabilities of a personal representative parallel the duties and limitations on authority already discussed. (See *supra*, §464 et seq.) (On continuing liability of one personal representative who is replaced by another, see *Prob.C. 8525(b)*, *supra*, §463.) Former statutes and cases focused on specific acts or omissions warranting liability (see *infra*, §536); the current law imposes a broad duty of care in managing and controlling the estate (*Prob.C. 9600*, *supra*, §465), and sets forth a general measure of liability for breach of a personal representative's fiduciary duty (*Prob.C. 9601*, *9602*, *infra*, §525). (See C.E.B., 3 Will Drafting 3d, §32.21 et seq.)

(2) *Enforcement.* A personal representative's liability may be enforced by a setoff against the representative's claim for statutory compensation. (See *Estate of Smith (1954) 123 C.A.2d 844, 849, 268 P.2d 53.*)

(3) *Particular Situations.* A personal representative may be personally liable in a variety of situations. The following are illustrative:

(a) *Sale of Estate Property.* A personal representative may be liable for neglect, misconduct, or fraud in the sale of estate property. (See *Prob.C. 10380* [neglect and misconduct], *Prob.C. 10381* [fraud], *infra*, §709.)

(b) *Failure To Obey Court Order.* In *Harm v. Frasher (1960) 181 C.A.2d 405, 5 C.R. 367*, the court ordered the sale of property pursuant to a contract, confirmed the sale, and directed the executors to execute and deliver the necessary documents. They refused. *Held*, not only was the estate liable (see *supra*, §466), but the executors were personally liable. "[T]he fact that the defendants are individually chargeable with their neglect of duty, and the damages caused plaintiffs thereby, does not affect the responsibility of the estate for the breach of contract made on its behalf. The liability of the defendants as individuals is not based upon their breach of contract, but upon their refusal to obey the court order which resulted in the estate's breach of the contract. The plaintiffs should not be required to elect between the defendants as individuals or the defendants as executors in seeking compensation for the damage they have sustained." (*181 C.A.2d 423.*)

(c) *Independent Torts.* A representative is personally liable for his or her independent tort. (*Rapaport v. Forer (1937) 20 C.A.2d 271, 278, 66 P.2d 1242.*) And, because the estate is not an entity, the personal representative is also personally liable for the torts of employees. "Nor can the executor properly be regarded as the agent of the heirs or

distributees, for his authority is derived from the will, and the control that is exercised over him is the control exercised by the probate court. ... His position is more nearly that of a trustee or of the decedent himself than that of an agent." (*Johnston v. Long* (1947) 30 C.2d 54, 63, 181 P.2d 645.) In *Johnston*, where an executor carried on the decedent's business pursuant to court direction, the court made a distinction between contract and tort obligations: (a) Contractual obligations are chargeable against the estate, and not against the executor personally. (30 C.2d 61, 62.) (b) Tort liability under the doctrine of respondeat superior, resulting from torts of employees of the business, is imposed on the executor, although the executor has a right of reimbursement from the estate. (30 C.2d 63.) (See 35 Cal. L. Rev. 586; 21 So. Cal. L. Rev. 199; 3 Summary (10th), *Agency and Employment*, §173; 5 Summary (10th), *Torts*, §31.)

(d) *Debt Owed to Decedent*. The appointment of a person as personal representative does not discharge any claim the decedent has against the person. (*Prob.C.* 9605.) (For decisions under former statute, see *Sanchez v. Forster* (1901) 133 C. 614, 615, 65 P. 1077 [former statute was not applicable to administrator]; *Estate of Clary* (1928) 203 C. 335, 340, 264 P. 242; *Estate of Jones* (1931) 115 C.A. 664, 670, 2 P.2d 483 [surety was liable even though executor in fact had no money]; *Estate of King* (1942) 19 C.2d 354, 361, 121 P.2d 716.)

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SUPPLEMENT: [This section is current through the latest supplement]



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H. Liabilities.
2. Limitations.

14 Witkin Sum. Cal. Law Wills § 523

[§ 523] Limitations.

A personal representative's liability is limited in several instances, including the following:

(1) *Breach of Duty by Another Representative.* Where there is more than one personal representative, one representative is liable for a breach of fiduciary duty by another only in the circumstances set forth in *Prob.C. 9631* (supra, §474).

(2) *Mistaken Possession of Property.* A personal representative who, in good faith, takes possession of property mistakenly believing it to be property of the estate is not liable for doing so. (*Prob.C. 9651*, supra, §476.)

(3) *Reversal of Appointment on Appeal.* If an order appointing a personal representative is reversed on appeal for error, the personal representative is not liable for any otherwise proper act done in good faith before the reversal. (*Prob.C. 1311*, supra, §402.)

(4) *Revocation of Probate.* If probate of the will is revoked, the personal representative is not liable for any otherwise proper act done in good faith before the revocation. (*Prob.C. 8272*, infra, §582.)

(5) *Instrument Executed in Fiduciary Capacity.* Generally, a personal representative is not personally liable on an instrument (including a note, mortgage, deed of trust, or other contract) properly entered into in a fiduciary capacity in the course of administration of the estate "unless the personal representative fails to reveal the personal representative's capacity or identify the estate in the instrument." (*Prob.C. 9606*.) Comparable provisions apply to trustees (*Prob.C. 18000*; see 13 *Summary* (10th), *Trusts*, §244) and to guardians and conservators (*Prob.C. 2110*; see infra, §1020).

(6) *Promise To Pay Decedent's Debt.* A personal representative is not "chargeable upon a special promise to answer in damages for a liability of the decedent or to pay a debt of the decedent out of the personal representative's own estate unless the agreement for that purpose, or some memorandum or note thereof, is in writing" and signed by the personal representative or another person specifically authorized to do so by the personal representative. (*Prob.C. 9604*.) (See 1 *Summary* (10th), *Contracts*, §377.)

SUPPLEMENT: [This section is current through the latest supplement]



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H. Liabilities.
3. Liability of Surety.

14 Witkin Sum. Cal. Law Wills § 524

[§ 524] Liability of Surety.

The surety on a personal representative's bond is liable for the representative's acts committed in his or her representative capacity. (See *Prob.C. 8480*, supra, §448.) (See *82 A.L.R.3d 869* [liability of surety for funds received by personal representative under color of office].)

Several odd aspects of this rule were involved in *Alexandrou v. Alexander* (1974) 37 C.A.3d 306, 112 C.R. 307. Decedent died intestate. T petitioned for letters of administration as decedent's adopted son and sole heir. He was appointed, appropriated all the assets to himself, and obtained an order settling a final account, a decree of distribution, and an order of final discharge, which exonerated his surety. No appeal was taken from these orders. Subsequently, decedent's actual heirs filed actions to impress a trust on the property distributed, alleging and proving that T was only the stepson of decedent, and that they had been kept in ignorance of the probate proceedings. The trial judge gave a money judgment against T and his surety. *Held*, affirmed.

(a) The surety's first defense was that no action lies against a surety until there has been a prior court order fixing the liability of the administrator. This is the general rule; but it is subject to exceptions (e.g., death of the representative before final accounting, removal of the representative, or amount susceptible of ascertainment without an accounting). And this case justifies an exception. The action directly attacked the decree for extrinsic fraud, charged that all of the estate had been wrongfully taken, and an accounting would be useless. Thus, in one lawsuit, with all necessary parties before the court, the entire matter was properly decided. (37 C.A.3d 311, 313.)

(b) The surety further contended that T did not perform the wrongful acts in his capacity as administrator. But the record showed violation of his oath and duties in the false representation that he was entitled to letters as the son and sole heir, in his deliberate failure to attempt to determine who were the natural heirs and their addresses for notice, and in his preparation and signing of the final account and petition for distribution with its false statement of his claim of heirship. (37 C.A.3d 314.)

(c) The order settling the final account of T and exonerating the surety was not res judicata, for the fraud involved--keeping the heirs in ignorance of the proceedings--was extrinsic. (37 C.A.3d 314; see 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §225.)

In *Estate of Johnson* (1984) 162 C.A.3d 917, 208 C.R. 821, decedent's daughter and sole heir was appointed administrator and later absconded with estate assets. The son of decedent's predeceased spouse was then appointed special administrator, and sought to recover the value of those assets from the surety on the absconding administrator's bond. *Held*, neither the absconding administrator nor her surety were liable. Even though the special administrator was entitled to distribution of the estate on disappearance of the absconding administrator, the absconding administrator would have been entitled to distribution but for her disappearance and breached no fiduciary duty. Thus, there was no basis for liability against the surety. (162 C.A.3d 921.)

SUPPLEMENT: [This section is current through the latest supplement]

Res judicata effect of extrinsic fraud:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §227.



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H. Liabilities.

4. Breach of Fiduciary Duty.

a. Statutory Framework.

14 Witkin Sum. Cal. Law Wills § 525

[§ 525] Statutory Framework.

(1) *Measure of Liability.* A personal representative who breaches a fiduciary duty is chargeable with any of the following that is "appropriate under the circumstances":

(a) "Any loss or depreciation in value of the decedent's estate resulting from the breach of duty, with interest." (*Prob.C. 9601(a)(1).*)

(b) "Any profit made by the personal representative through the breach of duty, with interest." (*Prob.C. 9601(a)(2).*) The Law Revision Commission Comment notes that "profit" refers to the personal representative's personal profit, not the profit to the estate.

(c) "Any profit that would have accrued to the decedent's estate if the loss of profit is the result of the breach of duty." (*Prob.C. 9601(a)(3).*)

The court has discretion to choose the measure of liability in *Prob.C. 9601(a)* that is appropriate under the circumstances. (Law Rev. Com. Comment.) If the personal representative has acted "reasonably and in good faith under the circumstances" and it is equitable to do so, the court has discretion to excuse the personal representative from liability under *Prob.C. 9601(a)* in whole or in part. (*Prob.C. 9601(b).*) A comparable provisions applies to trustees. (See *Prob.C. 16440*; 13 *Summary* (10th), *Trusts*, §134.)

(2) *Interest.* If a personal representative is liable for interest under *Prob.C. 9601(a)*, that liability is for the greater of (a) the amount that accrues at the legal rate on judgments (see *C.C.P. 685.010*; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §35), or (b) the amount actually received. (*Prob.C. 9602(a).*) The Law Revision Commission Comment observes that, unlike former case law, *Prob.C. 9602* does not allow for annual compounding, even when the personal representative is negligent.

If the personal representative has acted "reasonably and in good faith under the circumstances" and it is equitable to do so, the court has discretion to excuse the personal representative from liability for interest in whole or in part. (*Prob.C. 9602(b).*) A comparable provision applies to trustees. (See *Prob.C. 16441*; 13 *Summary* (10th), *Trusts*, §135.)

(3) *Other Available Remedies.* The provisions of *Prob.C. 9601* and *9602* "do not prevent resort to any other remedy available against the personal representative under the statutory or common law." (*Prob.C. 9603.*) A comparable provision applies to trustees. (See *Prob.C. 16442*; *13 Summary* (10th), *Trusts*, §136.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Interest.*

Legal rate on judgment:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §42.



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H. Liabilities.

4. Breach of Fiduciary Duty.

b. Case Law Illustrations.

14 Witkin Sum. Cal. Law Wills § 526

[§ 526] Case Law Illustrations.

The current statutes set forth a general measure of liability for breach of a personal representative's fiduciary duty. (See *Prob.C. 9601, 9602, supra*, §525.) In contrast, the former statutes and cases tended to focus on specific acts and omissions. Nevertheless, these decisions are illustrative of circumstances warranting liability.

(1) *Management of Estate Property.* Where an administrator occupied estate property without attempting to rent it, it was held that she was properly charged with the reasonable rental value. (*Estate of Pardue (1943) 57 C.A.2d 918, 921, 135 P.2d 394*; cf. *Estate of Shannon (1941) 43 C.A.2d 425, 427, 110 P.2d 1017* [executor who was also given life tenancy was entitled to occupy without paying rent].) But where an executor, unable to obtain a tenant, occupied the property personally in order to care for it, and continued attempts to sell or rent, he was held not liable for its rental value. (*Estate of Rindge (1934) 136 C.A. 263, 266, 28 P.2d 705.*)

(2) *Failure To Defend Action.* An executor's account may be challenged by a showing of loss of property resulting from failure to contest an unwarranted action against the estate. (See *Estate of McSweeney (1954) 123 C.A.2d 787, 793, 268 P.2d 107* [heirs, entitled to some intestate property, offered evidence that claimant to estate land was allowed to take it by consent judgment]; *14 A.L.R.3d 1036* [liability for negligence or default in defending action against estate].)

(3) *Failure To File Tax Returns.* An executor or administrator may be liable for penalties resulting from failure to file tax returns. (See *Estate of Harvey (1964) 224 C.A.2d 555, 557, 36 C.R. 788* [failure to file fiduciary income tax returns]; *47 A.L.R.3d 507* [liability for penalty, interest, etc., because of tax law violations]; *55 A.L.R.3d 785* [liability for overpaying or unnecessarily paying tax].)

(4) *Misuse of Estate Property.* A personal representative who uses funds of the estate may be charged with interest. In *Estate of McSweeney, supra*, the executors were held liable for interest on over \$ 11,000 improperly claimed for estate purposes, even though, as executors, devisees, and legatees, they had claims against the estate under the will and for services in excess of that sum. "When an executor is also a devisee the law necessarily recognizes as distinct his individual and official capacities. So far as sums due him as devisee are concerned, he is in no better position than any other devisee. He is not entitled to use such sums until they are distributed to him in the manner provided by law." (*123 C.A.2d 792.*)

(5) *Commingling Funds*. Mere commingling is not a ground for liability where the personal representative does not use the funds for his or her own purposes, and there is no loss to the estate. (*Estate of Burnett* (1941) 42 C.A.2d 427, 433, 109 P.2d 26.) And where a trust company representative deposits money in its banking department, it is chargeable only with the prevailing interest rate. (*Prob.C.* 9705, *supra*, §480; see *Estate of Smith* (1931) 112 C.A. 680, 683, 297 P. 927.) But an executor who commingles funds is, like a trustee, chargeable with interest. In the absence of contrary evidence, the executor is presumed to have received profits from the use of commingled funds. (*Estate of Harvey* (1964) 224 C.A.2d 555, 559, 36 C.R. 788.)

(6) *Liability for Misconduct of Attorney*. In *Estate of Barbikas* (1959) 171 C.A.2d 452, 341 P.2d 32, P and J, executors of decedent's will, employed a reputable attorney. He negotiated the sale of an estate business, acting as escrow holder and embezzling the purchase money. *Held*, the court properly refused to charge the executors with the loss. They were not absolutely liable for the misconduct of the attorney, but only for negligence; and there was no negligence in hiring, and none in delaying prosecution. As to the latter point, the court observed that it may be prudent to allow a debtor a chance to make reimbursement, and that other counsel had recommended that this be done. (171 C.A.2d 459.) (See 28 A.L.R.3d 1191 [liability for act or default of agent or attorney]; cf. *Estate of Guiol* (1972) 28 C.A.3d 818, 824, 105 C.R. 35 [distinguishing *Barbikas* and holding administrator liable where she turned over possession and control of estate money to attorney]; *Estate of Spirtos* (1973) 34 C.A.3d 479, 488, 109 C.R. 919 [following *Guiol* and holding administrator liable where she knowingly acquiesced in failure to comply with statutory requirements for sale].)

The court has jurisdiction to impose surcharges on the executor or administrator (see *Estate of Guiol*, *supra*); it has no jurisdiction to impose surcharges on the attorneys for alleged negligence resulting in losses to the estate. (*Estate of Lagios* (1981) 118 C.A.3d 459, 463, 173 C.R. 506 [distinguishing *Estate of De Barry* (1941) 43 C.A.2d 715, 726, 111 P.2d 728, where attorney was held in contempt for failure to refund unauthorized overpayment of fees].)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 527

[§ 527] Reimbursement for Expenses.

The personal representative is allowed "all necessary expenses in the administration of the estate, including, but not limited to, necessary expenses in the care, management, preservation, and settlement of the estate." (*Prob.C. 11004.*) But reimbursement may be denied where the expenditure is unnecessary or in connection with matters beyond the authority of the representative. (See *Estate of Bell* (1905) 145 C. 646, 648, 79 P. 358; *Estate of Pease* (1906) 149 C. 167, 169, 85 P. 149.) And no reimbursement can be had for expenses incurred or services performed prior to the initiation of the probate proceedings. (*Estate of Tubbs* (1947) 82 C.A.2d 305, 318, 186 P.2d 7.) The following are examples of expenditures that call for reimbursement:

(1) Taxes, insurance, or cost of repairs and upkeep of estate property. (*Estate of Fulmer* (1928) 203 C. 693, 697, 265 P. 920; *Estate of Maddalena* (1940) 42 C.A.2d 12, 18, 108 P.2d 17; see *supra*, §477.) Care and management expenses include items such as insurance, gardening, pool maintenance, and maintenance of property pending sale or distribution. (Law Rev. Com. Comment to *Prob.C. 11004.*)

(2) Wages or other expenses of preservation or management. (*Estate of Parker* (1921) 186 C. 668, 670, 200 P. 619 [traveling expense incurred in locating assets]; *Estate of Boggs* (1939) 33 C.A.2d 30, 33, 90 P.2d 814 [accountant]; *Estate of Reinhertz* (1947) 82 C.A.2d 156, 161, 185 P.2d 858 [compensation, at ordinary value, for personal services of executor in operation and upkeep of apartment house constituting nearly entire estate].)

(3) Claims against the estate. (See *infra*, §644.)

(4) Costs of necessary litigation, including attorneys' fees. (*Ludwig v. Superior Court* (1933) 217 C. 499, 500, 19 P.2d 984; *Estate of Hart* (1959) 51 C.2d 819, 827, 337 P.2d 73; *Estate of Turino* (1970) 8 C.A.3d 642, 647, 87 C.R. 581.)

(5) Cost of the personal representative's bond. (*Prob.C. 8486*, *supra*, §448.)

(6) The compensation of tax experts. (*Prob.C. 10801(b)*, *supra*, §467.)

(7) The compensation of the attorney for the personal representative. (*Prob.C. 10830(c)*, *10831(d)*, *infra*, §542.)

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SUPPLEMENT: [This section is current through the latest supplement]



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J. Compensation of Personal Representative and Attorney.
1. In General.
a. Percentage of Value of Estate.

14 Witkin Sum. Cal. Law Wills § 528

[§ 528] Percentage of Value of Estate.

(1) *Statutory Framework.* Separate but parallel statutes govern the compensation of the personal representative (*Prob.C. 10800* et seq.) and the compensation of the attorney for the personal representative (*Prob.C. 10810* et seq.). (See Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative, 20 Cal. Law Rev. Com. Reports, p. 31.)

(2) *General Rule.* The compensation of a personal representative for ordinary services is a percentage of the value of the estate accounted for. (*Prob.C. 10800*; *infra*, §529.) (Cf. *Unif.Prob.C.*, §3-719 [personal representative is entitled to "reasonable compensation"].) (See generally Cal. Civil Practice, 3 Probate and Trust Proceedings, §20:1 et seq.; Rutter Group, Cal. Practice Guide: Probate §16:261 et seq., Forms 16:L, 16:M; C.E.B., 2 Decedent Estate Practice, §20.1 et seq.; C.E.B., 3 Will Drafting 3d, §32.19; 31 *Am.Jur.2d* (2002 ed.), *Executors and Administrators* §836 et seq.; 40 *A.L.R.4th* 1189 [court's power to depart from statutory schedule]; on compensation for extraordinary services, see *infra*, §534.) A comparable provision applies to the attorney for the personal representative. (See *Prob.C. 10810*.)

(3) *Contract for Higher Compensation Is Void.* An agreement between the personal representative and an heir or devisee for a higher compensation than that allowed by statute is void. (*Prob.C. 10803*.) A comparable provision applies to the attorney for the personal representative. (See *Prob.C. 10813*.)

(4) *Effect of Representative's Neglect or Mismanagement.* Several early cases held that a personal representative guilty of neglect or mismanagement would be credited with fees and charged with losses arising from neglect. (See *Estate of Carver* (1898) 123 C. 102, 105, 55 P. 770; *Estate of Roberts* (1945) 27 C.2d 70, 76, 162 P.2d 461.) Under *Prob.C. 9601* (*supra*, §525), a representative who breaches a fiduciary duty is chargeable with a resulting loss or depreciation in value of the decedent's estate. In addition, the court may reduce fees and commissions, otherwise reasonable, for causing unreasonable delay in distribution of the estate. (*Prob.C. 12205*, *infra*, §741.)

(5) *Charge Against Compensation for Improper Expenses.* Expenses incurred for services an executor has the duty to perform may be charged against the executor's statutory compensation. (*Estate of Billings* (1991) 228 C.A.3d 426, 431, 278 C.R. 439 [trial court did not abuse discretion in determining that accountant's fee for preparing ordinary probate accounting should be paid by executor, not by estate].)

(6) *Recovery of Fees by Out-of-State Attorney*. An out-of-state attorney representing the out-of-state executor of an estate in California is entitled to statutory fees. (*Estate of Condon* (1998) 65 C.A.4th 1138, 76 C.R.2d 922, 1 Cal. Proc. (4th), Attorneys, Supp., §408.)

West's Key Number Digest, Executors and Administrators k.495(.5) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Recovery of Fees by Out-of-State Attorney*.

Estate of Condon:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §388.



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J. Compensation of Personal Representative and Attorney.
1. In General.
b. Statutory Schedule.

14 Witkin Sum. Cal. Law Wills § 529

[§ 529] Statutory Schedule.

(1) *Percentage of Value of Estate. Prob.C. 10800(a)* sets forth the following schedule for compensation of the personal representative based on the value of the estate:

- (a) 4 percent on the first \$ 100,000.
- (b) 3 percent on the next \$ 100,000.
- (c) 2 percent on the next \$ 800,000.
- (d) 1 percent on the next \$ 9 million.
- (e) 1/2 of 1 percent on the next \$ 15 million.
- (f) A reasonable amount determined by the court for amounts over \$ 25 million.

A comparable schedule applies to the attorney for the personal representative. (See *Prob.C. 10810(a)*.)

(2) *Constitutionality of Schedule.* In *Estate of Effron* (1981) 117 C.A.3d 915, 173 C.R. 93, beneficiaries under the will challenged the award of fees on the ground that the compensation statute was a price-fixing measure and violative of the Sherman Act (15 U.S.C., §1 et seq.). The court rejected the challenge, holding that the statutory price-fixing was within the state action exemption (see 1 *Summary* (10th), *Contracts*, §559). (117 C.A.3d 922, 923.) In *Estate of Johnston* (1956) 47 C.2d 265, 303 P.2d 1, the court followed *Estate of Spires* (1932) 126 C.A. 174, 176, 14 P.2d 340, dealing with 1925 changes in extraordinary fees, and the weight of American authority, holding that the compensation statute is procedural and that heirs and devisees have no vested right in the statutory limits at the time their interests vest. Accordingly, the schedule in effect at the time of settlement of the account was applied. (47 C.2d 270.) (See *Estate of Lucksinger* (1956) 47 C.2d 396, 397, 303 P.2d 1016 [following *Johnston*].)

(3) *Calculation.* C.R.C., Rule 7.705 sets forth a form for the calculation of the personal representative's statutory commission and the attorney's statutory fee. When an account is filed, the petition for statutory compensation must state

the amount payable, the estate accounted for, and the calculation of the statutory compensation. (C.R.C., Rule 7.705(a).) When an account is waived, the petition for statutory compensation must include the basis for the computation in substantially the same form. Notwithstanding a waiver, detailed schedules of receipts and gains and losses on sales must be included if the petition requests compensation based on an amount other than the amount of the inventory and appraisal. (C.R.C., Rule 7.705(b).) (On effect of waiver of account, see C.R.C., Rule 7.550, *infra*, §712.)

SUPPLEMENT: [This section is current through the latest supplement]



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[§ 530] Provision in Will.

Except as otherwise provided by *Prob.C. 10802*, if the decedent's will provides for the personal representative's compensation, the compensation provided by the will is the "full and only compensation" of the personal representative. (*Prob.C. 10802(a)*.) (For cases under prior statute, see *Estate of Shaw* (1927) 85 C.A. 518, 523, 260 P. 351; *Estate of Fritz* (1933) 130 C.A. 725, 731, 20 P.2d 361; *Estate of Van Every* (1944) 67 C.A.2d 164, 166, 153 P.2d 614.)

The personal representative may petition the court to be relieved from a provision in the will providing for compensation. (*Prob.C. 10802(b)*.) (On notice of hearing on petition, see *Prob.C. 10802(c)*.) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §20:28 [petition].)

The court may order compensation greater than that provided in the will if it determines that "it is to the advantage of the estate and in the best interest of the persons interested in the estate." (*Prob.C. 10802(d)*.) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §20:29 [order].)

A similar statute governs a provision in the decedent's will specifying the compensation of the attorney for the personal representative. (See *Prob.C. 10812*.)

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[§ 531] Determination of Amount.

(1) *Statutory Formula.* For purposes of the statutory fee schedule (supra, §529), the value of the estate is "the total amount of the appraisal value of the property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property." (*Prob.C. 10800(b)*.) A similar provision applies to the computation of the fee of the attorney for the personal representative. (See *Prob.C. 10810(b)*.) (See 32 *A.L.R.2d* 778 [compensation of estate assets distributed in kind]; C.E.B., 2 Decedent Estate Practice, §20.16 et seq.; for decisions under former statute, see *Estate of Lampman* (1940) 15 *C.2d* 212, 215, 100 *P.2d* 488; *Estate of Boggs* (1939) 33 *C.A.2d* 30, 32, 90 *P.2d* 814; *Estate of Stein* (1968) 267 *C.A.2d* 631, 73 *C.R.* 324.)

(2) *Duties After Final Account.* No additional compensation is authorized for duties of administration performed after filing the final account, unless there are extraordinary services. (*Estate of Phelps* (1921) 186 *C.* 292, 199 *P.* 10; see infra, §534 et seq.)

(3) *Operation of Decedent's Business.* In *Estate of Reinhertz* (1947) 82 *C.A.2d* 156, 185 *P.2d* 858, the court held that fees calculated on profits of operation of apartment houses should be based not on gross receipts but on net income after deducting expenses of operation. (82 *C.A.2d* 163.) (See *Estate of Sanchez* (1995) 33 *C.A.4th* 239, 242, 39 *C.R.2d* 141 [fees calculated on operation of decedent's business should be based not on gross receipts but on net receipts; citing *Estate of Reinhertz*].)

(4) *Brokerage Account.* The net amount of a stock brokerage margin account was held to be the proper basis for determining the fee in *Estate of Wittenberg* (1962) 202 *C.A.2d* 867, 21 *C.R.* 258. The testator's security account had stock valued at \$ 392,923.68. However, under the typical margin agreement, the certificates were never delivered to him, but were held in pledge with the broker for the sums advanced. Under proper authorization, the shares were sold by the executors, and, deducting the broker's claims, the sum realized was \$ 212,362.36. *Held*, the fee was properly fixed as a percentage of the reduced sum. Because the margin agreement left possession of the stock in the broker-pledgee, the executors never had possession of the shares, and the property "accounted for" was the amount realized on the sales after the deductions. (202 *C.A.2d* 875.)

(5) *Out-of-State Uncollected Assets*. Compensation is based on the amount of estate "accounted for" by the representative (Prob.C. 901), and the personal representative is chargeable with the estate that comes into his or her possession. Accordingly, where the personal representative takes no steps as domiciliary representative to reduce foreign assets to possession, those assets are not "accounted for" and their value cannot be included in the computation of the personal representative's compensation. (*Estate of Johnston* (1956) 47 C.2d 265, 272, 303 P.2d 1.)

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14 Witkin Sum. Cal. Law Wills § 532

[§ 532] Apportionment Among Several Representatives.

If there are two or more representatives, the compensation is apportioned by the court according to services actually rendered by each or as agreed by the personal representatives. (*Prob.C. 10805*; see *Dobbins v. Title Guarantee & Trust Co. (1943) 22 C.2d 64, 67, 136 P.2d 572.*) This rule of apportionment applies not only to coexecutors and coadministrators, but also where a special administrator is followed by a general personal representative. (See *Prob.C. 8547*, supra, §429; *Estate of Cazaurang (1938) 28 C.A.2d 505, 507, 82 P.2d 951.*) A similar provision applies to the apportionment of compensation where there are two or more attorneys for the personal representative. (See *Prob.C. 10814.*)

Even where one representative resigns or is removed, and is replaced by a successor, the court has discretion to determine the allowance and amount of compensation for services previously performed in good faith. (See *Estate of Clark (1939) 33 C.A.2d 523, 527, 92 P.2d 505*; *Estate of Piercy (1914) 168 C. 750, 754, 145 P. 88*; *Estate of Gonzales (1949) 93 C.A.2d 440, 442, 209 P.2d 21* [compensation divided between public administrator and executor appointed later when will discovered]; *Estate of Buchman (1955) 138 C.A.2d 228, 234, 291 P.2d 547* [executor and special administrator]; cf. *Estate of Algee (1958) 158 C.A.2d 691, 694, 323 P.2d 221* [partial compensation to attorney after substitution of other counsel]; *Estate of McManus (1963) 214 C.A.2d 390, 400, 29 C.R. 543* [same].)

In *Estate of Schwartz (1948) 87 C.A.2d 569, 573, 197 P.2d 223*, an order appointing an administrator was reversed on the ground that she was not entitled to appointment. *Held*, she was properly awarded compensation for services from the time of her appointment until the time of filing of the notice of appeal, after which all proceedings below were stayed and any acts as administrator were without authority. (The court should then have appointed a special administrator; see supra, §425.) She was not entitled to compensation for services during the additional period of the appeal and until her final removal.

C.R.C., Rule 7.704 governs the apportionment of the statutory commission or fee as follows:

(a) Regardless of the number of personal representatives or attorneys performing services, for ordinary services there is a single statutory commission for personal representatives, and a single statutory fee for attorneys. The court apportions the statutory commission or fee among multiple, successive, and concurrent personal representatives or

attorneys based on any agreement among them, and in the absence of an agreement, based on the services actually rendered by each of them. (C.R.C., Rule 7.704(a).)

(b) If there has been a change of personal representatives or a substitution of attorneys, notice of the hearing on any petition seeking or waiving an award of a statutory commission or fee must be given to all prior personal representatives or attorneys unless (1) waiver of notice by all prior representatives or attorneys is or has been filed, (2) a signed, written agreement allocating the statutory commission or fee among all present and prior personal representatives or attorneys is or has been filed, or (3) the file and the petition demonstrate that commissions of prior representatives or fees of prior attorneys have been provided for and allowed by the court. (C.R.C., Rule 7.704(b).)

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f. Representative Acting as Own Attorney.

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[§ 533] Representative Acting as Own Attorney.

(1) *Common Law Rule Against Double Compensation.* An executor, administrator, or testamentary trustee who is an attorney at law may properly employ another attorney to render legal services for the estate, at the usual compensation. (*Estate of Graham* (1921) 187 C. 222, 227, 201 P. 456.) But on grounds of public policy (duty of loyalty and rule against self-dealing), an executor, administrator, or testamentary trustee who elected to act as his or her own attorney was not entitled to double compensation. (See *Estate of Parker* (1926) 200 C. 132, 135, 251 P. 907 [executor appointed his own law firm attorney; firm was not entitled to fees]; *Estate of Lair* (1945) 70 C.A.2d 330, 336, 161 P.2d 288 [testamentary trustee]; *Estate of Scherer* (1943) 58 C.A.2d 133, 140, 136 P.2d 103 [allowing recovery of compensation for extraordinary work as executor, distinct from legal services]; 15 Cal. L. Rev. 339; 11 *Hastings L. J.* 64; 65 A.L.R.2d 809 [extra compensation for legal services rendered by executor or administrator].) Two exceptions were recognized: (a) The arrangement could be made openly with consent of the interested parties. (See *Estate of Lankershim* (1936) 6 C.2d 568, 573, 58 P.2d 1282.) (b) The double fee could be expressly authorized by the will. (See *Estate of Thompson* (1958) 50 C.2d 613, 617, 328 P.2d 1.)

(2) *Codification.* The rule against double compensation has been codified, but the common law exceptions have been eliminated. Notwithstanding any provision in the decedent's will, a personal representative who is an attorney is entitled to receive the personal representative's compensation provided in *Prob.C. 10800* et seq., but may not receive compensation for services as the attorney for the personal representative unless the court specifically approves the right to compensation in advance, and finds that the arrangement is to the "advantage, benefit, and best interests" of the decedent's estate. (*Prob.C. 10804*; C.R.C., Rule 7.706(a).) The rule does not apply to accounting services. (*Estate of Haviside* (1980) 102 C.A.3d 365, 369, 162 C.R. 393.)

(3) *Compensation of Personal Representative's Law Firm.* A law firm in which the personal representative is a partner or shareholder may request compensation for legal services in addition to the personal representative's compensation if a written agreement "not to participate in each other's compensation" is signed by the personal representative and authorized representatives of the firm and filed in the estate proceeding. (C.R.C., Rule 7.706(b).)

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1. Nature of Allowance.

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[§ 534] Nature of Allowance.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Contingent Fee*. In *Estate of Stevenson* (2006) 141 C.A.4th 1074, 46 C.R.3d 573, the trial court, without notice, approved a fee agreement for extraordinary services to an estate. After a settlement with creditors, the personal representative petitioned the court for the payment of fees pursuant to the agreement. A creditor of the estate objected, contending that the agreement was not a valid contingent fee agreement under *Prob.C. 10811(c)*. The trial court approved a fee smaller than what would have been allowed under the fee agreement and the personal representative appealed. *Held*, affirmed. The agreement was not valid.

(a) The agreement was not a contingent fee agreement for purposes of *Prob.C. 10811(c)*. It did not provide for a percentage or portion of any recovery. Rather, it was a lodestar agreement in which the fee was based on the total number of hours worked, at twice the firm's normal hourly rate if sufficient assets were available after the payment of administrative expenses, otherwise at the firm's normal hourly rate. Typically, a contingent fee provides no fee if there is no recovery. The agreement here, in contrast, guaranteed fees in some amount and authorized the attorney to take the entire recovery to satisfy the agreement. (141 C.A.4th 1084, 1086.)

(b) The court erred in dispensing with notice of the hearing on the petition to approve the fee agreement. Notice is required by *Prob.C. 10811(c)* unless the court dispenses with it for good cause under *Prob.C. 1220(c)*. Here, good cause did not exist. The argument that revealing the terms of the agreement would reveal the personal representative's litigation strategy and give the creditors an unfair advantage is without merit. The agreement contained only information that had or would be revealed in other documents. (141 C.A.4th 1086, 1087.)

(c) The court may not approve an agreement under *Prob.C. 10811(c)* unless the agreement is in the best interests of those persons interested in the estate. This includes creditors, and an agreement that might allow the entire estate to be consumed by fees is not in their best interests. (141 C.A.4th 1087.)



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[§ 534] Nature of Allowance.

(1) *Extraordinary Services of Personal Representative.* Subject to *Prob.C. 10800* et seq., the court may allow additional compensation for extraordinary services by the personal representative "in an amount the court determines is just and reasonable." (*Prob.C. 10801(a)*.) (On what constitutes extraordinary services, see *infra*, §§536, 537; on determination of allowance and amount, see *infra*, §§538, 539.) The fees are apportioned among corepresentatives in the same manner as statutory fees. (*Dobbins v. Title Guarantee & Trust Co. (1943) 22 C.2d 64, 67, 136 P.2d 572*; see *supra*, §532.) (On employment of tax experts and payment for tax services from estate funds, see *Prob.C. 10801(b)*, *supra*, §467.)

(2) *Extraordinary Services of Attorney.* Subject to *Prob.C. 10800* et seq., the court may allow additional compensation for extraordinary services by the attorney for the personal representative "in an amount the court determines is just and reasonable." (*Prob.C. 10811(a)*.) (On what constitutes extraordinary services, see *infra*, §§536, 537; on determination of allowance and amount, see *infra*, §§538, 539.)

(3) *Services Performed by Paralegal.* Extraordinary services by an attorney may include services performed by a paralegal under the attorney's direction and supervision. (*Prob.C. 10811(b)*.) C.R.C., Rule 7.703(e) sets forth the following requirements for a request for extraordinary services performed by a paralegal:

(a) The request must describe the paralegal's qualifications, including education, certification, continuing education, and experience.

(b) The request must state the hours spent and the hourly rate requested.

(c) The request must describe the services performed.

(d) The request must state why it was appropriate to use the paralegal's services in the particular case.

(e) The request must demonstrate that the "total amount requested for the extraordinary services of the attorney and the paralegal does not exceed the amount appropriate if the attorney had performed the services without the paralegal's

assistance."

(4) *Contingent Fee*. At one time it was held that the court has no authority to allow an attorney's compensation on a contingent fee basis. (See *Estate of Rowe* (1944) 66 C.A.2d 594, 603, 152 P.2d 765; *Estate of McDonald* (1940) 37 C.A.2d 521, 525, 99 P.2d 1115; *Estate of Schnell* (1947) 82 C.A.2d 170, 174, 185 P.2d 854; *Estate of Hastings* (1952) 108 C.A.2d 713, 716, 239 P.2d 684.) However, a contingent fee agreement for extraordinary services is now authorized by *Prob.C. 10811(c)*. (See 25 *Pacific L. J.* 381.) The following conditions apply:

(a) The agreement must be in writing and must comply with *B. & P.C. 6147* (required disclosures to client; see 1 *Cal. Proc.* (4th), *Attorneys*, §206). (*Prob.C. 10811(c)(1)*; C.R.C., Rule 7.703(d).)

(b) The agreement must be approved by the court following a noticed hearing. (*Prob.C. 10811(c)(2)*.)

(c) The court must determine that the compensation is "just and reasonable" and the agreement is to the advantage of the estate and in the best interests of the persons interested in the estate. (*Prob.C. 10811(c)(3)*; C.R.C., Rule 7.703(d).)

(d) In the absence of an emergency or other "unusual circumstances," the personal representative must obtain the court's approval for the contingency fee agreement before services are performed. (C.R.C., Rule 7.703(d).)

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SUPPLEMENT: [This section is current through the latest supplement]

(4) *Contingent Fee*. In *Estate of Stevenson* (2006) 141 C.A.4th 1074, 46 C.R.3d 573, the trial court, without notice, approved a fee agreement for extraordinary services to an estate. After a settlement with creditors, the personal representative petitioned the court for the payment of fees pursuant to the agreement. A creditor of the estate objected, contending that the agreement was not a valid contingent fee agreement under *Prob.C. 10811(c)*. The trial court approved a fee smaller than what would have been allowed under the fee agreement and the personal representative appealed. *Held*, affirmed. The agreement was not valid.

(a) The agreement was not a contingent fee agreement for purposes of *Prob.C. 10811(c)*. It did not provide for a percentage or portion of any recovery. Rather, it was a lodestar agreement in which the fee was based on the total number of hours worked, at twice the firm's normal hourly rate if sufficient assets were available after the payment of administrative expenses, otherwise at the firm's normal hourly rate. Typically, a contingent fee provides no fee if there is no recovery. The agreement here, in contrast, guaranteed fees in some amount and authorized the attorney to take the entire recovery to satisfy the agreement. (141 C.A.4th 1084, 1086.)

(b) The court erred in dispensing with notice of the hearing on the petition to approve the fee agreement. Notice is required by *Prob.C. 10811(c)* unless the court dispenses with it for good cause under *Prob.C. 1220(c)*. Here, good cause did not exist. The argument that revealing the terms of the agreement would reveal the personal representative's litigation strategy and give the creditors an unfair advantage is without merit. The agreement contained only information that had or would be revealed in other documents. (141 C.A.4th 1086, 1087.)

(c) The court may not approve an agreement under *Prob.C. 10811(c)* unless the agreement is in the best interests of those persons interested in the estate. This includes creditors, and an agreement that might allow the entire estate to be consumed by fees is not in their best interests. (141 C.A.4th 1087.)

Disclosures to client:

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §180.



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[§ 535] Distinctions.

(1) *Representing Distributee*. The services must not only be extraordinary; they must be rendered on behalf of the estate and not merely for the benefit of a particular person interested in the estate. The executor has no duty to support the position of any party as to the manner in which the estate is to be distributed, and, if the executor employs an attorney to assist in determining questions of this nature, extraordinary attorneys' fees are not allowable. (*Estate of Murphey* (1936) 7 C.2d 712, 716, 62 P.2d 374.)

In *Estate of Poisl* (1957) 153 C.A.2d 661, 315 P.2d 98, the testator married after making his will and his wife survived him. She petitioned for revocation as to her interest and ultimately prevailed in the Supreme Court. The attorney for the executor, who opposed the petition in all courts, sought \$ 10,500 in fees, admittedly reasonable for the legal services performed. *Held*, he was not entitled. Under the principle set forth in *Estate of Murphey*, *supra*, he had no duty to support the position of one claimant or group against another. (153 C.A.2d 665.)

However, in appropriate circumstances, extraordinary or unusual services may be rendered by an attorney engaged by a particular distributee. Where the services are beneficial to the estate and other distributees, compensation may be awarded, not under the compensation statute but under the general equitable rule on preserving a common fund. (See *Estate of Lundell* (1951) 107 C.A.2d 463, 465, 237 P.2d 62; cf. *Estate of Bullock* (1955) 133 C.A.2d 542, 547, 284 P.2d 960, and *Estate of Phelps* (1955) 132 C.A.2d 850, 853, 283 P.2d 293 [denying award where services were not of general benefit]; for full discussion, see 7 Cal. Proc. (4th), *Judgment*, §215 et seq.)

(2) *Defending Estate Against Trust Action*. In *Estate of McSweeney* (1951) 107 C.A.2d 140, 236 P.2d 846, the testator left property to the Ws (executors) and to R, but died intestate as to some property which went to appellant heirs. R sued to establish a trust based on a promise to will, and the Ws defended. After a compromise, the Ws were awarded \$ 8,000 for litigation services. *Held*, this was improper. (a) Because expenses of administration, including such a fee, are first charged against intestate property, appellant heirs would be forced to pay the whole amount, while the Ws, who were mainly benefited, paid none. (b) The R suit was in equity and affected title of the devisees or heirs only in their individual capacities; hence, the cost of the litigation should be borne by them personally. (107 C.A.2d 145.) The court pointed out that the possible right of the Ws to contribution from appellant heirs on the theory that their

efforts had preserved a fund was not involved in this proceeding. (107 C.A.2d 145.)

(3) *No Extraordinary Fee for Appraisal*. "Neither the personal representative nor the attorney for the personal representative is entitled to receive compensation for extraordinary services by reason of appraising any property in the estate." (Prob.C. 8907, *infra*, §602.) This restriction does not affect estate tax work performed by the attorney. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Representing Distributee*.

Preservation of common fund:

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §249 et seq.



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1. In General.

14 Witkin Sum. Cal. Law Wills § 536

[§ 536] In General.

Former Prob.C. 902 listed examples of extraordinary services. Although the current statute no longer does so, the former statutory list is illustrative:

(1) Sales or mortgages of real or personal property. (See *Estate of Neff* (1943) 56 C.A.2d 728, 729, 133 P.2d 413; *Estate of Rowe* (1944) 66 C.A.2d 594, 601, 152 P.2d 765; *Estate of Reinhertz* (1947) 82 C.A.2d 156, 161, 185 P.2d 858.)

(2) Contested or litigated claims against the estate.

(3) Litigation with respect to estate property.

(4) Carrying on decedent's business pursuant to court order. (See *Estate of King* (1942) 19 C.2d 354, 358, 121 P.2d 716.)

(5) Tax services. (On compensation of tax experts as expense of administration, see *Prob.C. 10801(b)*, *supra*, §467.)

(6) Will contests. (a) The good faith defense of a will that is contested after the will is admitted to probate. (See *Estate of Dunton* (1936) 15 C.A.2d 729, 731, 60 P.2d 159; *Estate of Corotto* (1954) 125 C.A.2d 314, 318, 320, 270 P.2d 498; 40 A.L.R.2d 1407 [right to allowance out of estate of attorneys' fees incurred in attempt to establish or defeat will].) (b) The successful defense of a will that is contested before the will is admitted to probate. (See *Estate of Schuster* (1984) 163 C.A.3d 337, 342, 209 C.R. 289 [settlement may constitute "successful defense"].) Under prior case law, compensation was not authorized for any pre-probate will contest. (See *Estate of Hite* (1909) 155 C. 448, 455, 101 P. 448; *Estate of Higgins* (1910) 158 C. 355, 358, 111 P. 8; *Estate of Arnold* (1932) 121 C.A. 247, 8 P.2d 897; *Estate of Silva* (1938) 29 C.A.2d 52, 55, 84 P.2d 59; *Estate of Schwartz* (1948) 87 C.A.2d 569, 574, 197 P.2d 223; *Estate of Bloom* (1980) 107 C.A.3d 195, 201, 165 C.R. 591 [no compensation to attorney who unsuccessfully petitioned for probate of will naming him attorney].)

(7) Catch-all provisions: "Such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend, or perform." (See *Estate of Beach* (1975) 15 C.3d 623, 644, 125 C.R. 570, 542 P.2d 994 [expenditures to defend against exceptions to executor's account]; *Estate of Haviside* (1980) 102 C.A.3d 365, 369, 162 C.R. 393 [accounting services performed by executor's firm; rule against self-dealing by attorneys (*supra*, §500) does not apply to accountants]; 65 A.L.R.2d 838 [extra compensation for accounting services rendered by executor or administrator].)

C.R.C., Rule 7.703 illustrates the activities for which extraordinary compensation may be awarded:

(1) *Activities of Personal Representative*. C.R.C., Rule 7.703(b) lists the following activities of the personal representative:

- (a) Selling, leasing, exchanging, financing, or foreclosing real or personal property.
- (b) Preparing tax returns.
- (c) Handling audits or litigation involving tax liability of the decedent or the estate.

(2) *Activities of Attorney*. C.R.C., Rule 7.703(c) lists the following activities of the attorney:

- (a) Legal services in connection with the sale of estate property.
- (b) Services to secure a loan to pay estate debts.
- (c) Litigation to benefit the estate or protect estate assets.
- (d) Defense of the personal representative's account.
- (e) Defense of a will contested after admission of the will to probate.
- (f) Successful defense of a will contested before admission of the will to probate.
- (g) Successful defense of a personal representative in a removal proceeding.
- (h) Extraordinary efforts to locate estate assets.
- (i) Litigation in support of the attorney's request for extraordinary compensation, "where prior compensation awards are not adequate compensation under all the circumstances."
- (j) Coordination of ancillary administration.
- (k) Accounting for a deceased, incapacitated, or absconded personal representative under *Prob.C. 10953* (*infra*, §711).

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SUPPLEMENT: [This section is current through the latest supplement]



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2. Fee-Related Services.

14 Witkin Sum. Cal. Law Wills § 537

[§ 537] Fee-Related Services.

In *Estate of Trynin* (1989) 49 C.3d 868, 264 C.R. 93, 782 P.2d 232, attorneys who represented coadministrators of an estate in litigation against them prevailed on a petition for fees for extraordinary services in the litigation. The trial court denied their additional petitions for compensation for the time spent in establishing and defending their fee claims ("fees on fees"). *Held*, reversed; under former Prob.C. 910, the court could award extraordinary fees for work reasonably performed by an attorney to establish and defend a fee claim.

(a) Where the right to attorneys' fees is based on statutes authorizing recovery from the opposing party, recovery for fee-related services has been consistently allowed. (49 C.3d 874, 875, 876.) Where fees are awarded under the common fund and common benefit theories, fee-related services have not generally been allowed. (49 C.3d 876.) Probate fees are a third category, statutorily authorized and approved by the court, but not payable by a litigation opponent. (49 C.3d 877.)

(b) "Although no previous case has considered the right to attorney fees for fee-related services under section 910," compensation for fee-related services has been allowed to testamentary trustees, guardians, and in bankruptcy matters. (49 C.3d 877, 878.)

(c) "[I]f counsel is not compensated for expenses reasonably incurred in fee litigation, the compensation awarded for the underlying services may be effectively diluted or dissipated, and the fee will vary with the nature of the opposition. While fee litigation confers no immediate or direct benefit on the estate, it becomes a necessary incident to the attorney's work for the estate, and so compensable, when unjustified challenges are raised to a fee claim. Probate attorneys can hardly be expected to work for nothing, and if they have no reasonable assurance of full and fair compensation, they will be reluctant to undertake extraordinary services on behalf of decedents' estates." (49 C.3d 879.) (See 17 Pepperdine L. Rev. 1135 [*Estate of Trynin*].)

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c. Considerations Governing Allowance and Amount.

1. Discretion of Court.

14 Witkin Sum. Cal. Law Wills § 538

[§ 538] Discretion of Court.

The wide discretion of the probate court in the allowance and the amount of compensation will normally be upheld. The court may take into consideration the value of the estate, the benefit to the estate, if any, the reasonableness of the statutory compensation, and the motive or personal interest that actuated the executor or administrator in performing the services. (*Estate of Keith* (1936) 16 C.A.2d 67, 70, 60 P.2d 171; *Estate of Fulton* (1937) 23 C.A.2d 563, 567, 73 P.2d 664; *Estate of Herbst* (1938) 26 C.A.2d 249, 251, 79 P.2d 139 [requisites of petition for compensation]; *Estate of Pomin* (1939) 33 C.A.2d 544, 546, 92 P.2d 479; *Estate of Scherer* (1943) 58 C.A.2d 133, 142, 136 P.2d 103; *Estate of Merritt* (1950) 98 C.A.2d 70, 76, 219 P.2d 40; *Estate of Harvey* (1951) 103 C.A.2d 192, 199, 229 P.2d 68; *Estate of Gump* (1954) 129 C.A.2d 783, 790, 277 P.2d 886; *Estate of Lanza* (1964) 229 C.A.2d 720, 726, 40 C.R. 528; see *Estate of Broome* (1912) 162 C. 258, 263, 122 P. 470 [court found services of great value but denied compensation on theory that they were outside duties of administrator; order reversed]; *Estate of Lundell* (1949) 95 C.A.2d 352, 356, 212 P.2d 914, *infra*, §539 [order of allowance of large sum reversed where showing was insufficient]; *Estate of Baum* (1989) 209 C.A.3d 744, 750, 257 C.R. 566 [court was authorized to award extraordinary fees despite settlement estimating fees at lower amount]; *Estate of Gilkison* (1998) 65 C.A.4th 1443, 1447, 1448, 77 C.R.2d 463, citing the text [trial court properly denied extraordinary fees and reported attorney's possible breach of fiduciary obligation (removing amount of disputed fee from client trust account) to State Bar].)

Estate of Buchman (1955) 138 C.A.2d 228, 291 P.2d 547, uttered a caution: Services rendered in reducing the estate to possession, payment of claims, and collection of debts, are ordinary, and do not call for extra compensation, unless the claims are contested in good faith or the debtor resists payment and litigation results. "The personal representative and his attorney are entitled to statutory fees as a matter of right, and the fact that the estate is a simple one and the fees larger than would be adequate compensation for the work involved, does not affect the right to the full statutory compensation. Conversely, if the estate is more complicated and requires more work, effort and skill than is required in the simple estate, that does not change the nature of the services from ordinary to extraordinary. Those undertaking the duties of offices of this character take the bitter with the sweet." (138 C.A.2d 235.)

In *Estate of Tubbs* (1947) 82 C.A.2d 305, 186 P.2d 7, an award was reversed on the ground that the services rendered in connection with a very small estate were minor; e.g., assisting a trustee in foreclosure of a deed of trust,

locating assets, investigating inheritance tax, and "ascertaining whether" a trust deed is barred by limitation (a settled legal question). (82 C.A.2d 308.)

Estate of Hilton (1996) 44 C.A.4th 890, 52 C.R.2d 491, involved the calculation of extraordinary fees in an exceptionally large estate. Attorney H performed both statutory and extraordinary services for the estate for over 12 years, beginning in 1979. He was awarded statutory fees in 1980 and extraordinary fees in 1984 and 1989, totaling over \$ 1,850,000. In 1986, the statutory fee schedule was amended to provide that, in large estates, statutory fees are set at a reasonable amount determined by the court for estate value in excess of \$ 25 million. (See *supra*, §529.) In 1992, H sought additional fees for extraordinary services not yet compensated. The trial judge determined that the total reasonable value of all statutory services during administration was \$ 263,000 and that the value of additional extraordinary services was not more than \$ 900,000. *Held*, H was not entitled to fees beyond those already paid, but was not required to refund any excess.

(a) Statutory fees already paid may not be modified downward once the time for appeal has expired. The amendment modifying the statutory fee schedule, whether substantive or procedural, may not operate retroactively "to impair the integrity of prior partial statutory fee orders." (44 C.A.4th 908, 910.) In addition, extraordinary fees already paid may not be recovered. The determination of extraordinary fees in a prior proceeding is *res judicata* that H was entitled to those extraordinary fees in addition to the statutory fee. (44 C.A.4th 910.)

(b) In determining the current petition for extraordinary fees, the trial judge properly considered the total amount of fees already awarded. The probate court has discretion to deny extraordinary fees where the statutory fees reasonably compensate for statutory services and uncompensated extraordinary services, even where there have been awards of statutory and extraordinary fees. (44 C.A.4th 914.) In making a partial award of statutory fees, "the probate court does not need to attempt to fix a precise value on the statutory services performed to date, but only to estimate the total statutory services that will be required in the estate proceedings and to endeavor to make certain that the statutory services performed to date are a large enough proportion of that total to justify the partial award." (44 C.A.4th 915.) Here, there was no abuse of discretion. (44 C.A.4th 923.)

(c) The opinion closes with the following advice: "When an attorney's fees are dependent upon court authorization or approval, the attorney should seek the authorization or approval as soon and as often within reason as the law permits. It is a tactical error for the attorney to wait until the end, running the risk that he or she will find out that he or she has performed vast amounts of services for free or at greatly reduced rates. ... The practice of waiting until an order requiring the presentation of any fee petitions is made is particularly unwise." (44 C.A.4th 923, footnote 33.)

An award of extraordinary compensation is within the discretion of the court, which may consider the amount of statutory compensation when determining compensation for extraordinary services. (C.R.C., Rule 7.703(a).)

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2. Sufficiency of Showing.

14 Witkin Sum. Cal. Law Wills § 539

[§ 539] Sufficiency of Showing.

The claimant should make an adequate showing of the extraordinary nature of the services. (See, e.g., *Estate of Harvey (1951) 103 C.A.2d 192, 199, 229 P.2d 68* [long review by court of work done, with hours, reasonable value of time, skill exercised, and success obtained]; *Estate of Lanza (1964) 229 C.A.2d 720, 727, 40 C.R. 528* [\$ 50,000 fee to special tax counsel upheld on evidence of hours spent, reasonable value of services, and \$ 500,000 saving to estate].)

In *Estate of Lundell (1949) 95 C.A.2d 352, 212 P.2d 914*, a fee of \$ 15,000 was sought for 100 hours of work assertedly expended in negotiating a compromise of the estate's claim of \$ 150,000 worth of life insurance for \$ 100,000. *Held*, the probate judge's award of \$ 12,000 was an abuse of discretion. There was neither a statement nor testimony concerning the exact nature of the services, and no showing why the executors, who participated in the negotiations, could not have brought about the settlement without the aid of attorneys; and the claim of about \$ 120 per hour for nonlitigation services was said to "shock the conscience." The court emphatically rejected the suggestion that information furnished in an off-the-record conversation by counsel and the judge could constitute a basis for affirming an award on an inadequate record. (95 C.A.2d 355.)

In contrast, *Estate of Merritt (1950) 98 C.A.2d 70, 219 P.2d 40*, upheld an award of extraordinary fees consisting of the entire assets of an insolvent estate. The evidence showed long, varied, and valuable services such as sales, negotiations, conferences and actions, very beneficial to the preferred creditors. In the end, the estate, after paying expenses and preferred creditors, had \$ 14,253.20, and owed general creditors \$ 1,070,044.79. The probate judge divided the estate balance between the executor and the attorney. In affirming the award, the court took note of the objection of appellant, the main general creditor, that it profited little by the services. The answer was that most of the activities were necessary in resisting the exorbitant claims of appellant, to protect the preferred and other general creditors. (98 C.A.2d 77.)

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Witkin Sum. Cal. Law Wills § 540

[§ 540] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition.*

(New) Filing fee: The filing fee for a petition, application, or opposition to an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of an attorney is \$ 180. (*Govt.C. 70658(a)(4).*) The filing fee for a petition, application, or opposition to an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of a fiduciary is \$ 180. (*Govt.C. 70658(a)(5).*) However, the fee may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning the allowance of the personal representative's compensation (*Govt.C. 70658(d)(1)*) or the allowance of the compensation of the attorney for the personal representative (*Govt.C. 70658(d)(2)*).



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[§ 540] In General.

(1) *Statutory Framework.* Compensation may be sought either during the course of administration under *Prob.C. 10830* or at the time of the petition for final distribution under *Prob.C. 10831*. The procedure under both statutes is comparable.

(2) *Petition.* At any time after 4 months from the issuance of letters, the personal representative may petition for an allowance on the personal representative's compensation and the personal representative or the attorney may petition for an allowance on the attorney's compensation. (*Prob.C. 10830.*) (See *Estate of De Barry (1941) 43 C.A.2d 715, 725, 111 P.2d 728* [attorney may apply directly to court]; *Estate of Hunt (1939) 33 C.A.2d 356, 357, 91 P.2d 612.*) (On allowance on compensation of special administrator and his or her attorney, see *Prob.C. 8547*, *supra*, §429.) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §20:30 [petition].)

Under C.R.C., Rule 7.702, a petition for extraordinary compensation must be accompanied by a statement of facts stating all of the following:

- (a) The nature and difficulty of the tasks performed.
- (b) The results achieved.
- (c) The benefit of the services to the estate.
- (d) The amount requested for each category of services.
- (e) The hours and hourly rate of each person who performed services.
- (f) The services rendered "in sufficient detail to demonstrate the productivity of the time spent."

(g) The estimated amount of statutory compensation to be paid, if the petition is not part of a final account or report.

(3) *Notice*. Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to (a) each person listed in *Prob.C. 1220*, (b) each known heir or devisee whose interest in the estate would be affected by the payment, and (c) the Attorney General (at the Sacramento office), if any portion of the estate is to escheat to the state and its interest is affected by the payment. (*Prob.C. 10830(b)*.)

(4) *Order*. For services "rendered up to that time," the court allows the portion of the compensation it deems proper, and authorizes the personal representative to charge that amount against the estate. (*Prob.C. 10830(c)*.) (See *Estate of Algee* (1958) 158 C.A.2d 691, 694, 323 P.2d 221 [part of statutory amount awarded to attorney removed by substitution].) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §20:31 [order].)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition*.

(*New*) *Filing fee*: The fee for filing a petition, application, or opposition concerning an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of an attorney is \$ 350. (*Govt.C. 70658(a)(4)*, as amended in 2008.) The fee for filing a petition, application, or opposition concerning an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of a fiduciary is \$ 350. (*Govt.C. 70658(a)(5)*, as amended in 2008.)



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b. Advance Payment.

14 Witkin Sum. Cal. Law Wills § 541

[§ 541] Advance Payment.

(1) *Advance Payment for Extraordinary Services.* Notwithstanding *Prob.C. 10830* and *10831* (supra, §540), the court may allow compensation to the personal representative for extraordinary services before final distribution if (a) it appears likely that administration will continue for an unusually long time, whether due to litigation or otherwise, or (b) present payment will benefit the estate or the beneficiaries, or (c) other good cause is shown. (*Prob.C. 10832.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §20:26 [declaration supporting extraordinary attorneys' fees], §20:27 [order authorizing payment of extraordinary attorneys' fees].)

(2) *Advance Payment for Ordinary Services.* The court may authorize an allowance of statutory fees and commissions before approval of the final account and decree for final distribution, as long as the allowance is "low enough to avoid the possibility of overpayment." The allowance must be based on the estimated amount of statutory compensation payable as of the date of the petition. It must be in proportion to the work actually performed and based on a "detailed description of the ordinary services performed and remaining to be performed." (C.R.C., Rule 7.701.)

(3) *No Advance Payment Without Court Order.* The personal representative may not pay or receive and the attorney may not receive statutory or extraordinary fees or commissions in advance of a court order authorizing payment. (C.R.C., Rule 7.700(a).) In addition to removing the personal representative and imposing other authorized sanctions against the personal representative or the attorney, the court may surcharge the personal representative for the payment or receipt of fees or commissions in advance of a court order authorizing payment, and the surcharge may include interest at the legal rate from the date of payment. (C.R.C., Rule 7.700(b).)

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14 Witkin Sum. Cal. Law Wills § 542

[§ 542] Personal Liability of Representative for Attorney's Compensation.

The representative is not personally liable for the attorney's compensation in the ordinary case; compensation is a proper charge against the estate to be paid in the course of administration. (*Prob.C. 10830(c)* and *10831(d)*; see *Estate of Kelleher* (1928) 205 C. 757, 763, 272 P. 1060; *Houghton v. Coberly* (1962) 201 C.A.2d 820, 823, 20 C.R. 489; *Hatch v. Bush* (1963) 215 C.A.2d 692, 703, 30 C.R. 397.) However, where funds are available, and the representative refuses to pay, or by some wrongful conduct prevents the attorney from receiving his or her compensation, two courses of action against the representative are apparently recognized:

(1) Under *Prob.C. 11424* (*infra*, §650), an order for payment of a creditor's claim imposes a personal liability on the representative, and the order may be enforced like a money judgment. It has been suggested that the order allowing the attorney's compensation comes within this provision. (*Zagoren v. Superior Court* (1931) 117 C.A. 548, 552, 4 P.2d 279; *Zagoren v. Hall* (1932) 122 C.A. 460, 465, 10 P.2d 202; but cf. *Fall v. State Bar* (1944) 25 C.2d 149, 156, 153 P.2d 1.)

(2) An action against the representative may be proper. (See *Platnauer v. Forni* (1933) 131 C.A. 393, 397, 21 P.2d 638 [executor procured final accounting and discharge by falsely concealing attorney's claim]; *Summ v. Superior Court* (1938) 29 C.A.2d 303, 306, 84 P.2d 152 [administrator kept attorneys' fees after allowance].)

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A. Probate of Will.
1. Production of Will.

14 Witkin Sum. Cal. Law Wills § 543

[§ 543] Production of Will.

(1) *Custodian's Duty To Deliver Will.* The custodian of a will, unless a petition for probate of the will has been filed, must do the following within 30 days after having knowledge of the testator's death:

(a) Deliver the will to the clerk of the superior court in the county in which the decedent's estate may be administered. No fee may be charged for compliance with this requirement. (*Prob.C. 8200(a)(1).*)

(b) Mail a copy of the will to the named executor, if the executor's whereabouts is known to the custodian, or if not, to a named beneficiary, if the beneficiary's whereabouts is known. (*Prob.C. 8200(a)(2).*)

The statute requires delivery of the original will to the clerk in all cases, to "ensure that the will is kept safe and available when needed by interested persons." (19 Cal. Law Rev. Com. Reports, p. 791.)

A custodian who fails to comply is liable for all damages sustained by any person injured by the failure. (*Prob.C. 8200(b).*) (See *Snyder v. Security-First Nat. Bank (1939) 31 C.A.2d 660, 664, 88 P.2d 760* [former statute; estate was distributed and depleted before will was produced; custodian was liable to sole beneficiary]; *79 Am.Jur.2d (2002 ed.), Wills §730* et seq.)

Only the custodian, i.e., a person to whom the will was entrusted by the decedent, is liable. A complaint merely alleging that defendants found the will and failed to present it states no cause of action. (*Ahlborn v. Peters (1940) 37 C.A.2d 698, 707, 100 P.2d 542.*) However, an attorney who knew of the execution and probable existence of a will, but nevertheless sought the appointment of his client as special administrator on an allegation of intestacy, was held subject to discipline. (*McMahon v. State Bar (1952) 39 C.2d 367, 370, 246 P.2d 931*; see *1 Cal. Proc. (4th), Attorneys, §556.*)

(2) *Order for Production of Will.* On a petition alleging that a person has possession of a decedent's will, the superior court in the county in which the decedent's estate is being or may be administered may order the person to produce the will. (*Prob.C. 8201.*) It has been held that the probate court has exclusive jurisdiction over the production of wills and that a civil action to produce a will is improper. (See *Reed v. Hayward (1943) 23 C.2d 336, 339, 144 P.2d 561*; *Cal. Civil Practice, 1 Probate and Trust Proceedings, §9:27.*)

(3) *Copy of Will Detained Outside California.* If the will of a person domiciled in California at the time of death is

detained in a court of another state or country and cannot be produced for probate in California, a certified photographic copy may be admitted to probate with the same force and effect as the original. The same proof is required as if the original will were produced. (*Prob.C. 8202.*) (On proof of will, see *Prob.C. 8220 et seq.*, *infra*, §545 *et seq.*) Domicile, not residence, is the determining factor, and a certified copy, not an authenticated copy, is required. (Law Rev. Com. Comment.)

(4) *Release of Copy by Clerk.* The clerk must release a copy of the will "for attachment to a petition for probate of the will or otherwise" on payment of the required fee and receipt of either (a) a court order for production of the will, or (b) a certified copy of the death certificate. (*Prob.C. 8200(c).*) (On procedure for acquiring certified copy of death certificate, see *Health & Saf.C. 103526.*)

(5) *Transfer of Will.* *Prob.C. 8203* establishes the following procedure for transferring a will from one county to another:

(a) If a will has been delivered to the superior court clerk in a county in which no proceeding for administration is pending, the court may order the will transferred to the superior court clerk in a county in which a proceeding is pending.

(b) A petition for the transfer may be presented and heard without notice but may not be granted without proof that a copy of the petition has been mailed to the petitioner and those who have requested special notice in the pending proceeding. The petition and the order must include the case number of the pending proceeding.

(c) The clerk transmits the will and certified copies of the petition, the order, and any supporting documents for filing by the clerk in the pending proceeding.

West's Key Number Digest, Wills k.236

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Custodian's Duty To Deliver Will.* *Attorney discipline for improper allegation of intestacy:*

Cross-Reference: 1 *Cal. Proc.* (5th), *Attorneys*, §496.



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2. Petition for Probate.

14 Witkin Sum. Cal. Law Wills § 544

[§ 544] Petition for Probate.

(1) *Petition.* At any time after the decedent's death, an interested person may petition for an order determining the date and place of the decedent's death and for probate of the decedent's will. (*Prob.C. 8000*, infra, §583.) (On failure of named executor to petition, see *Prob.C. 8001*, infra, §583; on contents of petition, see *Prob.C. 8002*, infra, §584; on filing fee, see infra, §585.)

(2) *Hearing and Contest.* The petition is set for hearing, and notice of the hearing is served and published. (*Prob.C. 8003*, infra, §587 et seq.) The will may be contested. (*Prob.C. 8004*, infra, §586.)

(3) *Order.* The court determines the time and place of the decedent's death and the jurisdiction of the court. When appropriate, it admits the will to probate. (*Prob.C. 8006*, infra, §590.)

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A. Probate of Will.

3. Proof of Will.

a. Proof by Subscribing Witness.

14 Witkin Sum. Cal. Law Wills § 545

[§ 545] Proof by Subscribing Witness.

(1) *Affidavit or Deposition of Witness.* In the absence of a will contest, a will may be proved on the evidence of one subscribing witness, "if the evidence shows that the will was executed in all particulars as prescribed by law." (*Prob.C. 8220(a)*.) Evidence may be received as follows:

(a) *Affidavit.* Evidence of execution may be received by (1) an affidavit of the subscribing witness with a photographic copy of the will attached, or (2) an affidavit in the original will that includes or incorporates the attestation clause. (*Prob.C. 8220(b)*.) The Judicial Council has approved a form for the affidavit of a subscribing witness. (See Judicial Council Form No. DE-131 [Proof of Subscribing Witness].) (See Cal. Civil 1 Practice, Probate and Trust Proceedings, §9:28 [letter to subscribing witness].)

(b) *Deposition.* "If no subscribing witness resides in the county, but the deposition of a witness can be taken elsewhere, the court may direct the deposition to be taken. On the examination, the court may authorize a photographic copy of the will to be made and presented to the witness, and the witness may be asked the same questions with respect to the photographic copy as if the original will were present." (*Prob.C. 8220(c)*.)

(2) *Preservation of Testimony.* "The testimony of each witness in a proceeding concerning the execution or provisions of a will, the testamentary capacity of the decedent, and other issues of fact, may be reduced to writing, signed by the witness, and filed, whether or not the will is contested. The testimony so preserved, or an official reporter's transcript of the testimony, is admissible in evidence in any subsequent proceeding concerning the will if the witness has become unavailable as a witness" within the meaning of *Ev.C. 240* (see *1 Cal. Evidence (4th)*, *Hearsay*, §18 et seq.). (*Prob.C. 8224*.)

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b. Proof When Subscribing Witness Is Unavailable.

14 Witkin Sum. Cal. Law Wills § 546

[§ 546] Proof When Subscribing Witness Is Unavailable.

(1) *Proof by Attestation Clause or Affidavit.* If no subscribing witness is available and the will is valid on its face, the court may permit proof of the will by proof of the testator's handwriting and one of the following:

(a) Proof of the handwriting of a subscribing witness. (*Prob.C. 8221(a).*)

(b) Receipt in evidence of either (1) a writing in the will bearing the signatures of all subscribing witnesses, or (2) an affidavit of a person with personal knowledge of the circumstances of execution. The writing or affidavit must recite facts showing due execution. (*Prob.C. 8221(b).*) (See *1 A.L.R.5th* 965 [proper execution of self-proving affidavit as curing defective execution of will].)

(2) *Proof by Testimony.* At the trial of a will contest, the subscribing witnesses must be produced and examined. If no subscribing witness is available, the court may admit the evidence of other witnesses to prove due execution. (*Prob.C. 8253.*) However, it has been held that the statute does not preclude the introduction of other evidence where witnesses are available, e.g., where the subscribing witnesses deny or do not recollect the execution. (See *Estate of Gray* (1948) 89 C.A.2d 478, 486, 201 P.2d 392 [testimony of decedent's attorney admitted]; *Estate of Cecala* (1949) 92 C.A.2d 834, 839, 208 P.2d 436.)

In *Estate of Burdette* (2000) 81 C.A.4th 938, 97 C.R.2d 263, decedent's executor submitted decedent's 1993 will for probate, and devisees under an earlier will contested the executor's proof of execution. The executor relied on the testimony of one subscribing witness and a sworn written transcript of the out-of-state statement of the other subscribing witness. *Held*, the executor met the burden of proving due execution. By its terms, *Prob.C. 8224* (supra, §545), authorizing the preservation in a signed writing of the testimony of an unavailable witness concerning the execution of a will, applies whether or not the will is contested. Read together with this provision, *Prob.C. 8253* means that, in a will contest, the testimony of one subscribing witness alone may be sufficient to prove due execution if the other subscribing witness is unavailable. In addition, as authorized by *Prob.C. 8224*, the written statement of the unavailable witness may be used. (81 C.A.4th 945.)

(3) *Presumption of Due Execution.* The presumption of due execution usually applies (see supra, §147), and when

the proponent makes a prima facie showing of execution, it is improper to take the case from the jury by an order denying probate (the equivalent of a nonsuit). (*Estate of Browne (1958) 159 C.A.2d 99, 101, 323 P.2d 827.*)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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XI. ESTATE ADMINISTRATION

A. Probate of Will.

3. Proof of Will.

c. Proof of Holographic Will.

14 Witkin Sum. Cal. Law Wills § 547

[§ 547] Proof of Holographic Will.

A holographic will may be proved in the same manner as other writings. (*Prob.C. 8222.*) (On authentication and proof of writings, see *Ev.C. 1400* et seq.; *2 Cal. Evidence (4th), Documentary Evidence*, §2 et seq.; on execution of holographic will, see *supra*, §148 et seq.) The Judicial Council has approved a form for proof of a holographic will. (See Judicial Council Form No. DE-135 [Proof of Holographic Instrument].)

SUPPLEMENT: [This section is current through the latest supplement]



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A. Probate of Will.
4. Admission to Probate.

14 Witkin Sum. Cal. Law Wills § 548

[§ 548] Admission to Probate.

An uncontested will is admitted or rejected by an order, a contested will by a judgment. (*Prob.C. 8254* [contested will]; *Estate of Jamison (1951) 107 C.A.2d 483, 486, 237 P.2d 546.*) The order is appealable. (*Prob.C. 1303(b)*; see *supra*, §411; 9 *Cal. Proc. (4th), Appeal*, §159.) It may be vacated for mistake or inadvertence under *C.C.P. 473*. (See *Estate of Strobeck (1952) 111 C.A.2d 853, 858, 245 P.2d 317*; 8 *Cal. Proc. (4th), Attack on Judgment in Trial Court*, §152.)

When the court admits a will to probate, that fact is recorded in the minutes by the clerk and the will is filed. (*Prob.C. 8225.*) The minute order is followed by a formal order for probate, which orders appointment of a personal representative and the issuance of letters. (See *infra*, §590.) The Judicial Council has approved a form for the order. (See Judicial Council Form No. DE-140 [Order for Probate].)

West's Key Number Digest, Wills k.233

SUPPLEMENT: [This section is current through the latest supplement]

Appealable order:

Cross-Reference: 9 *Cal. Proc. (5th), Appeal*, §212.

Vacation of order:

Cross-Reference: 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court*, §144 et seq.



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A. Probate of Will.

5. Effect of Order Admitting Will to Probate.

14 Witkin Sum. Cal. Law Wills § 549

[§ 549] Effect of Order Admitting Will to Probate.

(1) *Former Statute and Case Law.* A proceeding to probate a will is said to be in rem; and under former Prob.C. 384, the probate, if uncontested within the time allowed, was conclusive in subsequent proceedings except for minors and persons of unsound mind who were not made parties. Thus, the order was conclusive as to the validity of the will and its content, e.g., as to the integration of several papers or the effect of cancellations. (See *Estate of Parsons* (1925) 196 C. 294, 298, 237 P. 744; *Estate of Caruch* (1956) 139 C.A.2d 178, 187, 293 P.2d 514 [witnessed will containing holographic interlineations, probably invalid, was admitted without contest; held, issue of due execution and validity was not open to collateral attack].)

However, an order was not conclusive against strangers as to the facts on which the establishment of the will depended, e.g., the mental condition of the testator, the relationship of the parties to the decedent, the residence of the testator, or even the fact of death. (See *Estate of Bloom* (1931) 213 C. 575, 578, 2 P.2d 753; cf. *Estate of Brace* (1960) 180 C.A.2d 797, 802, 4 C.R. 683 [order conclusive on California residence as to parties and persons in privity].)

(2) *Current Statute.* If no person contests the validity of a will or petitions for revocation within the time allowed, admission to probate is conclusive, subject to Prob.C. 8007. (Prob.C. 8226(a).) (On time for revocation, see Prob.C. 8270, *infra*, §581.) Under Prob.C. 8007 (*supra*, §353), the order is conclusive as to the court's jurisdiction and cannot be collaterally attacked except where it was procured by extrinsic fraud or based on an erroneous determination of the decedent's death. (See 55 A.L.R.3d 755 [probate of will as precluding later contest under doctrine of res judicata].)

(3) *Admission of More Than One Will.* *Estate of Salmonski* (1951) 38 C.2d 199, 238 P.2d 966, illustrates an important distinction. The testator executed a typewritten will giving substantial shares to his brother and sister conditioned on their proving survivorship within a year (he doubted if they were alive). Five days later he wrote a letter to B stating that in case of his death she was to divide everything between herself and another woman, and that "This is my last wish." The second holographic instrument was thus completely inconsistent with the first will and doubtless should have been held a revocation (see *supra*, §176). However, because the second contained no revocation clause, the probate judge admitted both. In a subsequent heirship proceeding brought by the brother and sister, the prior order was given conclusive effect as to the two documents constituting a will and codicil, and as to the appointment of the executor in the formal document. But their interpretation was not previously in issue and was not concluded. Accordingly, distribution was correctly ordered to the two women, pursuant to the directions of the second document.

(38 C.2d 207.) (See *Estate of Neubauer* (1958) 49 C.2d 740, 744, 321 P.2d 741; *infra*, §719.)

If a new will is discovered, the old proceedings are not reopened, but the new will is probated. The prior decree of distribution, even though based upon a finding of intestacy, is not a bar. The rights of the beneficiaries under the new will may be determined by a suit in equity against the original distributees of the property. (See *Estate of Walker* (1911) 160 C. 547, 549, 117 P. 510; *Estate of Mitchell* (1931) 115 C.A. 348, 352, 1 P.2d 536; *Estate of Cecala* (1951) 104 C.A.2d 526, 534, 232 P.2d 48; 65 A.L.R.2d 1201 [discovery of will during intestate administration]; 2 A.L.R.4th 1315 [discovery of will after intestate administration].)

The proponent of a will who has received notice of a petition for probate or for letters of administration may only petition for probate of that will within either (a) 120 days after the order admitting the first will to probate or determining that the decedent died intestate, or (b) 60 days after the proponent first obtains knowledge of the will, whichever is later. (*Prob.C.* 8226(c).)

Subject to *Prob.C.* 8226(c), "a will may be admitted to probate notwithstanding prior admission to probate of another will or prior distribution of property in the proceeding. The will may not affect property previously distributed, but the court may determine how any provision of the will affects property not yet distributed and how any provision of the will affects provisions of another will." (*Prob.C.* 8226(b).)

The Law Revision Commission Comment makes the following observations:

(a) "If more than one will is admitted to probate, the court should resolve any conflicts in provisions, including what provisions control nomination of an executor."

(b) The court may order adjustments in gifts in light of a later will but may not rescind a distribution once made.

(c) In the case of property discovered after the close of administration, a later will would be admissible to govern distribution of that property notwithstanding *Prob.C.* 11642 (distribution of after-discovered property; *infra*, §732).

(4) *Effective Date of Order.* The date of the order is significant for purposes of a petition to revoke probate. Under *Prob.C.* 8270 (*infra*, §581), a revocation petition must be filed within 120 days after the will is admitted to probate. Under the predecessor statute, the time was 4 months.

In *Wolfson v. Superior Court* (1976) 60 C.A.3d 153, 131 C.R. 265, there were two orders: (1) The first, on January 13, was a minute entry on a printed form, with boxes checked for "Petition granted," and "Order to be prepared." (2) The second, on January 23, was a written order on another printed form, reciting January 13 as the date of hearing, stating that the will was admitted to probate, and dated at the bottom "Jan 23 1975." The petition to revoke probate was filed May 14, more than 4 months after the minute entry. *Held*, the petition was timely.

(a) The minute entry, considered alone, was a valid record of the order of admission. The direction that an order be prepared did not indicate that the decision was deferred until its filing. (60 C.A.3d 156, 159.) The purpose of having two methods of recording is apparent: The minute entry in the courtroom has to be made quickly and accurately, giving the substance of the decision; for other purposes a more formal writing, with recitals and findings, is desirable. (60 C.A.3d 159.)

(b) Thus, the time would have run, except for the fact that the two orders created an ambiguity as to the critical date. The minute entry was dated January 13, but the written order signed by the judge indicated that the date of admission was January 23. Under these circumstances, the case is governed by the rule of *Slawinski v. Mocettini* (1965) 63 C.2d 70, 45 C.R. 15, 403 P.2d 143, as interpreted in *Hollister Convalescent Hosp. v. Rico* (1975) 15 C.3d 660, 125 C.R. 757, 542 P.2d 1349. In determining the time for notice of appeal, if the minutes and the formal order are in conflict on the date of entry of an order, the conflict is to be resolved in favor of the right of appeal. (See 9 Cal. Proc. (4th), *Appeal*, §483.) Similarly, the conflict between the minute entry and the formal order here must be resolved in favor of

the right of contest. (60 C.A.3d 160.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Effective Date of Order.Determining time for notice of appeal:*

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §591.



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XI. ESTATE ADMINISTRATION

A. Probate of Will.

6. Probate of Lost or Destroyed Will.

a. In General.

14 Witkin Sum. Cal. Law Wills § 550

[§ 550] In General.

(1) *Right To Probate.* A lost or destroyed will may be proved and established, and goes through the usual procedure of probate. (See *Swift v. Superior Court* (1952) 39 C.2d 358, 361, 247 P.2d 6; 80 Am.Jur.2d (2002 ed.), Wills §934 et seq.) Where a will is torn or otherwise mutilated, the missing portion may be proved in the same manner as a lost will. (*Estate of Camp* (1901) 134 C. 233, 235, 66 P. 227.) (See C.E.B., Probate Workflow Manual, §§7.52, 7.53; 54 Proof of Facts 3d 239 [proof of missing will]; 41 A.L.R.2d 393 [proof of due execution of lost will]; 31 A.L.R.4th 306 [revocation of prior will by revocation clause in lost will]; on proof of will, see supra, §545.)

(2) *Statement of Testamentary Provisions.* "The petition for probate of a lost or destroyed will shall include a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate." (*Prob.C.* 8223.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Former Restrictions.

14 Witkin Sum. Cal. Law Wills § 551

[§ 551] Former Restrictions.

(1) *Proof of Existence of Will at Death or Improper Destruction.* Under former Prob.C. 350, the will had to be either (a) "proved to have been in existence at the time of the death of the testator," or (b) "shown to have been destroyed by public calamity, or destroyed fraudulently in the lifetime of the testator, without his knowledge." (See *Estate of Thompson* (1941) 44 C.A.2d 774, 778, 112 P.2d 937 [destroyed by decedent's husband who was excluded from share]; *Estate of Paul* (1947) 81 C.A.2d 595, 596, 184 P.2d 526 [proof held sufficient]; 39 Cal. L. Rev. 156; 75 Harv. L. Rev. 432; 16 U.S.F. L. Rev. 631 [effect of requirement on doctrine of dependent relative revocation].)

Despite the statutory language ("destroyed fraudulently"), there was no need to prove fraud in the strict sense. In *Estate of Arbuckle* (1950) 98 C.A.2d 562, 220 P.2d 950, decedent's business manager, B, who supervised the execution, placed the will and a later codicil in his box for safekeeping. After decedent had been placed in a mental sanitarium and her half sister had terminated B's services, B destroyed the will and codicil. *Held*, this was a fraudulent destruction within the meaning of the statute. B, a trusted agent with custody of the will, was subject to the fiduciary obligations of a trustee. His destruction of the instrument was a breach of duty, and, although done in good faith, was a constructive fraud on the decedent and the beneficiaries named in this will. (98 C.A.2d 569.) (See 39 Cal. L. Rev. 156.)

(2) *Proof of Provisions of Will.* Under former Prob.C. 350, the provisions of the will had to be "clearly and distinctly proved by at least two credible witnesses." (See *Estate of Reynolds* (1949) 94 C.A.2d 851, 855, 211 P.2d 608; *Estate of Robinson* (1961) 192 C.A.2d 847, 851, 13 C.R. 842.)

There was no need to prove the exact words of the original; the substance was sufficient, and it was immaterial that the witnesses differed as to the precise words. (*Estate of Camp* (1901) 134 C. 233, 235, 66 P. 227.) And where the witnesses could not recall the entire contents, but could testify as to any substantial portion complete and independent in itself, probate could be granted as to that portion. (*Estate of Patterson* (1909) 155 C. 626, 632, 102 P. 941.) Frequently, the decedent's attorney had a copy of the will, which could be offered in evidence. Where no copy was available, oral testimony by the attorney could establish its terms. (See *Estate of Thompson*, *supra*, 44 C.A.2d 776.)

The testimony of only one witness who saw the will, coupled with evidence of the declarations of the deceased, was not sufficient. (*Estate of Thompson* (1921) 185 C. 763, 766, 198 P. 795; *Estate of Edwardson* (1960) 186 C.A.2d

122, 130, 8 C.R. 889 [only attorney who prepared will; no other living witness saw the will or decedent].) But the requirement of proof was greatly relaxed where a copy of the will was produced. In *Estate of Moramarco (1948)* 86 C.A.2d 326, 194 P.2d 740, the will and a carbon copy were prepared by a notary public, and he and his wife signed as witnesses. The original was never found. In a proceeding to probate it as a lost will, the carbon was produced and identified by both witnesses, but the notary's wife had no knowledge of its contents. *Held*, the statute ordinarily requires proof of the provisions by two witnesses who have read and who recall its contents, but this requirement is not applicable where the provisions are proved by a carbon copy and not by the knowledge and recollection of the witnesses. "The question was whether the carbon copy that was exhibited to the witnesses was identified by them as a duplicate of the original will. If it was proved to be a true copy, the terms of the will were thereby established. The code would require in that case that the identity of the copy be proved clearly and distinctly by the testimony of two credible witnesses." (86 C.A.2d 331.)

(3) *Law Revision Commission Report*. In its 1982 Tentative Recommendation Relating to Wills and Intestate Succession (see 16 Cal. Law Rev. Com. Reports, pp. 2327, 2328), the California Law Revision Commission recommended repeal of former Prob.C. 350:

"A valid, unrevoked will that cannot be found after the testator's death is denied probate under existing California law unless it is established that the will was in existence at the testator's death or that the will was destroyed during the testator's lifetime and without the testator's knowledge, either fraudulently or by public calamity. The rule that denies probate to a missing will under these circumstances--in cases where there is no reasonable doubt that there was such a will and that it was valid and unrevoked at the testator's death--is a substantial defect in California law. The proposed law repeals the rule so that any valid, unrevoked will is provable whether or not the will is physically in existence."

"If a missing will is admitted to probate, California law requires that the will provisions be 'clearly and distinctly proved by at least two credible witnesses.' This extraordinary proof requirement increases the hazard that the terms of a valid, unrevoked will may not be provable. The requirement that at least two witnesses prove the provisions of a missing will has not worked satisfactorily in those states that have such a rule. The quality of evidence cannot be measured in terms of the number of witnesses; the question is rather one of the credibility of the witnesses. There may well be cases in which only one witness is available, but the witness is of such credibility that no further proof is necessary, and none should be required."

"The proposed law repeals California's extraordinary proof and two-witness requirements for proof of the terms of a missing will. It adopts the rule that proof is by a preponderance of the evidence and requires no minimum number of witnesses. This will avoid the situation where the terms of a valid and unrevoked will are known but nonetheless not provable."

Following the Commission's recommendation, *Prob.C. 350* was repealed.

SUPPLEMENT: [This section is current through the latest supplement]



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- A. Probate of Will.
- 6. Probate of Lost or Destroyed Will.
 - c. Presumption of Revocation.

Witkin Sum. Cal. Law Wills § 552

[§ 552] Presumption of Revocation.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Codification.* A photocopy is not a "duplicate original" for purposes of *Prob.C. 6124*. (*Lauermann v. Superior Court* (2005) 127 C.A.4th 1327, 1330, 26 C.R.3d 258 [where original will could not be found, surviving photocopy was insufficient to overcome presumption of revocation].)



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6. Probate of Lost or Destroyed Will.
c. Presumption of Revocation.

14 Witkin Sum. Cal. Law Wills § 552

[§ 552] Presumption of Revocation.

(1) *Nature of Presumption.* Where it is shown that the will was in the possession of the testator before death, that the testator was fully competent until death, and that afterwards the will could not be found, it is presumed that the testator destroyed the will with intent to revoke. (*Estate of Ross* (1926) 199 C. 641, 646, 250 P. 676; *Estate of LeSure* (1937) 21 C.A.2d 73, 80, 68 P.2d 313; *Estate of Duffill* (1936) 14 C.A.2d 284, 285, 58 P.2d 185; *Estate of Flood* (1941) 47 C.A.2d 809, 812, 119 P.2d 168; *Sparks v. Lauritzen* (1967) 248 C.A.2d 269, 274, 56 C.R. 370, citing the text.)

The presumption does not apply where the will is not shown to have been in the possession of the testator at death. (See *Estate of Thompson* (1941) 44 C.A.2d 774, 777, 112 P.2d 937 [testator deposited will with custodian so that it was physically impossible to reach and destroy it]; *Estate of Arbuckle* (1950) 98 C.A.2d 562, 566, 220 P.2d 950 [will kept in safe deposit box of decedent's business manager]; 86 A.L.R.3d 980 [sufficiency of evidence that will was not accessible to testator for destruction].) And there is no clear basis for the presumption where the will was executed in duplicate and only one of the duplicate originals is missing. (See *Estate of Janes* (1941) 18 C.2d 512, 517, 518, 116 P.2d 438.)

In *Estate of Obernolte* (1979) 91 C.A.3d 124, 153 C.R. 798, the court described and classified the presumption as follows: (a) It is not one of the listed statutory presumptions, but was judicially developed; and it is in reality a double presumption: Destruction of the will is presumed from its disappearance, and revocation is presumed from its destruction. (91 C.A.3d 129, footnote 7, citing *Cal. Evidence*.) (b) A presumption that implements the policy of giving security to those who entrust their property to the administration of others affects the burden of proof, but here, the security of decedent's estate is not involved. The determination is merely whether the estate will be administered pursuant to a will or pursuant to statutory law. (91 C.A.3d 129, footnote 6.) (c) Hence the presumption is one affecting only the burden of producing evidence; i.e., the presumption exists only until evidence is introduced that would support a finding of its nonexistence. (91 C.A.3d 129.)

(2) *Showing To Overcome Presumption.* The presumption is rebuttable by evidence showing an intention to die testate. In *Estate of Ronayne* (1951) 103 C.A.2d 852, 230 P.2d 423, an attorney drew a will, retained a copy, and gave a copy to the testator. She habitually kept papers around the house, and a few days before her death twice referred to her will as in the house but mislaid. Two prior wills showed a consistent testamentary plan. She had received unkind treatment by, and had no affection for, her husband (the contestant). Before a complete search of the house could be

made the contestant took possession. *Held*, order admitting lost will affirmed. (103 C.A.2d 856.)

Some cases show such extraordinary liberality toward the proponent as to reduce the presumption to a figure of speech. The principal example is *Estate of Bristol* (1943) 23 C.2d 221, 224, 143 P.2d 689, where the court upheld admission of the lost instrument on evidence merely that the testator had indicated a belief in its existence shortly before his death, and that his widow had expressed a desire to destroy it. (See *Estate of Boyer* (1944) 67 C.A.2d 83, 85, 153 P.2d 793 [similar facts]; *Estate of Coolman* (1931) 112 C.A. 744, 745, 297 P. 593 [evidence that testator discussed will on several occasions shortly before death]; 32 Cal. L. Rev. 221.)

In *Estate of Moramarco* (1948) 86 C.A.2d 326, 194 P.2d 740, all of the factors giving rise to the presumption appeared (will in possession of testator, testator was fully competent, and original will could not be found after death). But the presumption was held overcome by evidence that the disposition of the property was in accordance with the testator's previously expressed desires, and that the testator had made statements shortly before death tending to indicate a belief that the will was in existence. The basis of the opinion was that the trial court's finding was based on a permissible inference, which the appellate court must uphold even though a contrary inference is equally reasonable or even more reasonable. (86 C.A.2d 338; see *Estate of Reynolds* (1949) 94 C.A.2d 851, 855, 211 P.2d 608 [similar facts and results].)

In *Estate of Obernolte*, *supra*, there was evidence of decedent's unhappiness with the will's beneficiaries and her remarks about destroying the will, during the 2-month period between its preparation and her death. But she also expressed concern about the will's security, and she visited her attorney's office 11 days before her death and talked with his secretary ("something of a confidante") without mention of destroying or redoing the will. The trial judge, on evidence that persons other than the decedent had access to the original will, found that it was "equally probable" that it was destroyed by someone other than the decedent. *Held*, although "equal probability" does not satisfy a burden of proof, it does satisfy a burden of producing evidence, and the presumption was overcome. (91 C.A.3d 130.)

(3) *Codification*. The presumption has been codified. "If the testator's will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator's death, it is presumed that the testator destroyed the will with intent to revoke it. The presumption is a presumption affecting the burden of producing evidence." (*Prob.C. 6124*.) (See 70 A.L.R.4th 323 [sufficiency of evidence of nonrevocation where will was accessible to testator]; 84 A.L.R.4th 531 [sufficiency of evidence of nonrevocation where codicil survives].)

The Law Revision Commission Comment notes that the presumption does not apply if a duplicate original will exists. "For example, if a duplicate original is in possession of the testator's attorney, it is less likely that the testator will preserve his or her duplicate original with the same care as if it were the only such instrument."

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Codification*. A photocopy is not a "duplicate original" for purposes of *Prob.C. 6124*. (*Lauermann v. Superior Court* (2005) 127 C.A.4th 1327, 1330, 26 C.R.3d 258 [where original will could not be found, surviving photocopy was insufficient to overcome presumption of revocation].)



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XI. ESTATE ADMINISTRATION

B. Contest of Will.

1. Right To Contest.

a. Necessity of Pecuniary Interest.

14 Witkin Sum. Cal. Law Wills § 553

[§ 553] Necessity of Pecuniary Interest.

(1) *Former Statute and Case Law.* Under our former statutes, the contestant in a will contest had to have an interest in the estate, but the terms "person interested" (former Prob.C. 370) and "interested person" (former Prob.C. 380) were not defined by statute. The cases interpreting the statutes required a showing of pecuniary interest, i.e., an interest that would be impaired by the probate of the will or benefited by setting it aside. (See *Estate of Land* (1913) 166 C. 538, 543, 137 P. 246; *Estate of McCabe* (1934) 219 C. 742, 744, 29 P.2d 195 [if decedent leaves no heirs, state has sufficient interest to contest]; *Estate of Peterson* (1934) 138 C.A. 443, 446, 32 P.2d 423 [same]; *Estate of Bily* (1950) 96 C.A.2d 333, 335, 215 P.2d 78, *infra*, §559; *Estate of Arbuckle* (1950) 98 C.A.2d 562, 566, 220 P.2d 950; *Estate of Harootenian* (1951) 38 C.2d 242, 248, 238 P.2d 992, *infra*, §557; *Estate of O'Brien* (1966) 246 C.A.2d 788, 792, 55 C.R. 343, *infra*, §555, citing the text; *Jay v. Superior Court* (1970) 10 C.A.3d 754, 757, 89 C.R. 466, *infra*, §559, citing the text; *Estate of Getty* (1978) 85 C.A.3d 755, 758, 149 C.R. 656; 40 Cal. L. Rev. 449; 4 Stanf. L. Rev. 607.)

(2) *Current Statute.* The current statute does not specifically refer to the persons who may contest a will. Instead, an "interested person" may submit a written objection at the hearing of any matter under the Probate Code, unless another procedure is otherwise prescribed. (*Prob.C. 1043*, *supra*, §378.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §10:1 et seq.; Rutter Group, 2 Cal. Practice Guide: Probate §15:1 et seq.; 78 A.L.R.4th 90 [estoppel to contest will by acceptance of benefits thereunder]; 11 California Tax Lawyer 17 (Spring, 2002) [tax treatment of will contest recovery].)

"Interested person" includes "[a]n heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding." (*Prob.C. 48(a)(1)*.) The meaning of the term as it relates to particular persons "may vary from time to time and shall be determined according to the particular purpose of, and matter involved in, any proceeding." (*Prob.C. 48(b)*.) Thus, cases decided under the former statutes (see *infra*, §§577, 580) should be relevant in evaluating the property rights or claims of persons seeking to contest a will. (See C.E.B., 3 Decedent Estate Practice, §22.1 et seq.; 79 Am.Jur.2d (2002 ed.), Wills §780 et seq.)

(3) *Prima Facie Showing Is Sufficient.* For purposes of initiating a contest, a prima facie showing of interest is enough. It is sufficient that the contestant show that his or her interest "may" be impaired; the contestant need not prove

that it will necessarily be impaired. Thus, in *Estate of Plaut* (1945) 27 C.2d 424, 164 P.2d 765, the testator made a will creating a trust for his daughter as life tenant, with a contingent remainder in favor of petitioner, his granddaughter (she was to take in default of appointment by the life tenant). Later he made a codicil giving respondent, his nurse, \$ 15,000. Both instruments were proved, but petitioner sought to revoke probate of the codicil on the ground of undue influence. *Held*, petitioner was an "interested" person. Respondent's objection that the trust violated the then rule against undue suspension of the power of alienation was premature, for the court will not construe the will and determine questions of validity and effect in a proceeding to contest it. "The contest of a will is not an end in itself. It is but the first in a series of proceedings by which the contestant seeks to have his claim to all or part of the estate adjudicated. If the court allowed respondent to raise the issue of the validity of the trust, it would in effect prevent petitioner from initiating the first of these proceedings unless she established at the outset the very right that she seeks to establish in the final proceeding." (27 C.2d 428.)

In *Estate of Lind* (1989) 209 C.A.3d 1424, 257 C.R. 853, the decedent's foster brother brought a will contest, alleging (1) that a devise of one-half of the estate to the attorney who drafted the will was procured by undue influence, and (2) that, but for a legal barrier (prohibition of adult adoption at that time), he would have been adopted by decedent's parents and would be entitled to the devise by intestacy if the will contest were successful. The trial judge dismissed the contest for lack of standing. *Held*, reversed.

(a) A parent and child relationship exists between foster parents and their foster child if (1) the relationship began during the child's minority and continued through their joint lifetimes, and (2) "clear and convincing evidence" establishes that the foster parents would have adopted the child "but for a legal barrier." (209 C.A.3d 1431.) Here, the probate court could have inferred, from three unrefuted statements of family history (two letters and a sworn affidavit executed by the decedent), that the contestant would have been adopted. (209 C.A.3d 1433.)

(b) If the proponents of the will wish to challenge the contestant's standing, the appropriate procedure is to hold an evidentiary hearing on the standing question before proceeding with the trial on the contest. (209 C.A.3d 1434.) The contestant has the burden of proof on the issue, and the contest should be dismissed if he fails to establish standing. (209 C.A.3d 1435.) However, the contestant's failure to prove standing would not necessarily leave the alleged undue influence unchallenged. The probate court may raise a presumption of undue influence on its own motion and require the proponents to rebut it. (209 C.A.3d 1436.)

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1. Right To Contest.

b. Persons Entitled To Contest.

1. Heir at Law.

14 Witkin Sum. Cal. Law Wills § 554

[§ 554] Heir at Law.

An heir is ordinarily an interested party, provided that the heir is not precluded from succeeding to a part of the estate if the will is rejected. (See *Estate of Field* (1951) 38 C.2d 151, 153, 238 P.2d 578 [widow]; *Estate of Anthony* (1932) 127 C.A. 186, 188, 15 P.2d 531; *Estate of Butzow* (1937) 21 C.A.2d 96, 99, 68 P.2d 374 [allegation that contestant is heir at law is sufficient pleading of interest].) A surviving spouse may contest, despite the execution of a separation agreement waiving property rights, unless the agreement clearly excludes any right of inheritance. (*Estate of Minier* (1932) 215 C. 31, 37, 8 P.2d 123.) (See 78 A.L.R.2d 1060 [spouse as proper party to contest will].)

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2. Devisee Under Will.

14 Witkin Sum. Cal. Law Wills § 555

[§ 555] Devisee Under Will.

(1) *Devisee Under Former Will.* A devisee under an earlier will that would otherwise be entitled to probate has sufficient interest to contest the validity of a later will, even though the devisee is not an heir or would not take by succession if the contested will were set aside. (*Estate of Munfrey* (1943) 61 C.A.2d 565, 567, 143 P.2d 414; *Estate of Harootenian* (1951) 38 C.2d 242, 248, 238 P.2d 992; *Estate of Plaut* (1945) 27 C.2d 424, 430, 164 P.2d 765, *supra*, §553 [contingent remainderperson under first will has pecuniary interest sufficient to contest codicil modifying that will]; *Estate of Arbuckle* (1950) 98 C.A.2d 562, 566, 220 P.2d 950; see 39 A.L.R.3d 321 [standing of devisee under prior or subsequent will to oppose probate or contest will].)

It is not necessary that this contestant produce and offer the earlier will for probate; that requirement would defeat the right in cases where the will was concealed or withheld by others. (*Estate of Munfrey, supra.*) The same is true where the will is lost or destroyed: It is enough that the contestant makes a prima facie showing of the statutory conditions for probate of a lost will (*supra*, §550). (*Estate of Arbuckle, supra.*) But no such prima facie case is made by allegations on information and belief and hearsay testimony of the existence of some kind of will naming the contestants as beneficiaries. (*Estate of Sherwood* (1954) 123 C.A.2d 209, 217, 266 P.2d 580.)

Where the prior lost will is directly challenged, the court may require more than a prima facie showing. And if, on the hearing, the proof fails to establish the elements of a lost will, the proponent's contest of the later will may be dismissed. (*Estate of Robinson* (1961) 192 C.A.2d 847, 851, 853, 13 C.R. 842.)

(2) *Devisee Under Later Will.* In *Estate of O'Brien* (1966) 246 C.A.2d 788, 55 C.R. 343, the testator left a will dated December 13, 1962, which was admitted to probate October 19, 1964. On March 30, 1965, M filed a contest after probate, alleging that she was sole beneficiary under a will dated August 2, 1963. *Held*, she was entitled. Although the earlier and later will situations are not precisely the same, the rule should be the same; i.e., a beneficiary under a later will may be an interested party if impairment of, or benefit to, his or her interest, is established. (246 C.A.2d 792.) Benefit was shown here. Although the later will did not contain an express revocation clause or on its face dispose of all the property, if M could set the first will aside she might, under the presumption against intestacy, get the whole estate. (246 C.A.2d 796.) The court added a hint that a more desirable procedure would have been consolidation of the

proceedings pertinent to both wills. (246 C.A.2d 798.) (See *Estate of Powers* (1979) 91 C.A.3d 715, 722, 154 C.R. 366; 39 A.L.R.3d 321 [standing of devisee under prior or subsequent will to oppose probate or contest will].)

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3. Assignee or Survivor of Interested Person.

14 Witkin Sum. Cal. Law Wills § 556

[§ 556] Assignee or Survivor of Interested Person.

The right to contest is held to arise out of the violation of a property right, and is consequently both assignable and survivable. (See *Estate of Field* (1951) 38 C.2d 151, 155, 238 P.2d 578 [contest by administrator of testator's widow]; *Estate of Sanderson* (1962) 58 C.2d 522, 526, 25 C.R. 69, 375 P.2d 37 [survivable]; *Estate of Clark* (1928) 94 C.A. 453, 460, 271 P. 542 [assignment]; 40 Cal. L. Rev. 454; 25 So. Cal. L. Rev. 493; 39 A.L.R.3d 696 [right of heir's assignee to contest will]; 11 A.L.R.4th 907 [inheritability or descendability of right to contest will]; cf. *Estate of Collins* (1968) 268 C.A.2d 86, 91, 73 C.R. 599 [assignment to nonlawyer furnishing legal services is illegal, and assignee has no standing to contest].)

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4. Judgment Creditor With Lien.

14 Witkin Sum. Cal. Law Wills § 557

[§ 557] Judgment Creditor With Lien.

The difficult problem of the right of a creditor of an heir to contest was considered in *Estate of Harootenian (1951) 38 C.2d 242, 238 P.2d 992*, in which the will expressly disinherited G, son of the testator. G's wife, awarded support by a decree, obtained a judgment against G for unpaid sums, on which execution issued. *Held*, she was entitled to contest the will; but the several opinions took sharply differing views as to general and lien creditors.

(a) The small minority view permitting contest by a general creditor without a judgment or other lien was rejected. (*38 C.2d 249, 251.*) Likewise, the right of a mere attaching creditor had the support of only two concurring justices. (*38 C.2d 252.*)

(b) The majority view permitting contest by a judgment creditor with a lien (judgment lien on real property, or execution lien) was approved by four justices in two opinions. (*38 C.2d 249, 251.*) But the right of a judgment creditor without a lien (abstract of judgment not recorded or no real property to which it can attach, and no execution lien) had the support of only two concurring justices. (*38 C.2d 252.*) (See *4 Stanf. L. Rev. 609; 14 Hastings L. J. 18; 40 Cal. L. Rev. 449.*)

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5. Executor Under Admitted Will.

14 Witkin Sum. Cal. Law Wills § 558

[§ 558] Executor Under Admitted Will.

In *Estate of Costa* (1961) 191 C.A.2d 515, 12 C.R. 920, the decedent's will was admitted and respondent qualified as the executor. Then decedent's surviving widow petitioned for probate of an alleged subsequent holographic will. *Held*, the executor was entitled to oppose. Although the precise point was apparently new, the court relied on *Estate of Ronayne* (1951) 103 C.A.2d 852, 855, 230 P.2d 423, and other cases affirming the right of the executor to resist a contest of the will. "Since the admission to probate of a subsequent will has the effect of nullifying a prior will, we can make no practical distinction between the established right of an executor to resist a contest either before or after probate of the will under which he serves and his right to oppose a different will subsequently offered for probate." (191 C.A.2d 518.) The court also noted that the widow had prayed for the discharge of the executor, an additional reason for regarding him as an interested party. (191 C.A.2d 518.) (See *Estate of Denman* (1979) 94 C.A.3d 289, 292, 156 C.R. 341 [rule applied to administrator with the will annexed]; cf. *Jay v. Superior Court* (1970) 10 C.A.3d 754, 758, 89 C.R. 466, *infra*, §559; see 94 A.L.R.2d 1409 [right of trustee under earlier will to contest later will].)

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c. Persons Not Entitled To Contest.

14 Witkin Sum. Cal. Law Wills § 559

[§ 559] Persons Not Entitled To Contest.

(1) *Heir Not Entitled To Succeed or Benefit by Contest.* In *Estate of Eskridge* (1942) 51 C.A.2d 634, 635, 125 P.2d 527, a petition merely alleging that petitioner was a niece of the testator was held insufficient against a general demurrer, because she would not be an heir at law if there were closer relatives. And even a showing of heirship may not be sufficient where the only effect of invalidating the will would be to reinstate an earlier will making an identical provision for the contestant. (*Estate of Land* (1913) 166 C. 538, 543, 137 P. 246; see *Estate of Powers* (1979) 91 C.A.3d 715, 720, 154 C.R. 366 [status as heir is insufficient where successful contest would not result in intestacy]; 2 Cal. L. Rev. 343.)

A pretermitted child has no standing to contest because the pretermitted child takes a share by law, irrespective of the terms of the will, and can obtain no benefit from denial of probate. (*Estate of Sankey* (1926) 199 C. 391, 403, 249 P. 517; *Estate of Philippi* (1945) 71 C.A.2d 127, 133, 161 P.2d 1006, supra, §§104, 280; see *Estate of Shimun* (1977) 67 C.A.3d 436, 440, 136 C.R. 668, citing the text [same rule applied to widow and children taking under marriage and survival statute].)

(2) *Public Administrator.* The public administrator has no interest in the estate and cannot contest. (*In re Sanborn* (1893) 98 C. 103, 104, 32 P. 865; *Estate of Golden* (1935) 4 C.2d 300, 308, 48 P.2d 962.)

(3) *Debtor of Estate.* In *Estate of Bily* (1950) 96 C.A.2d 333, 215 P.2d 78, decedent died in Florida. His will was offered for probate here, the California property consisting of a contract cause of action against two California residents. The latter opposed admission to probate. *Held*, they had no standing; mere "interest in the estate" is insufficient. "The phrase 'any person interested' includes only persons who, either absolutely or contingently, are entitled to share in the estate. Appellants ... do not have any pecuniary interest in the devolution of the estate as may be defeated or impaired by the probate of the will. They are not in any way interested in preserving the assets, or in the settlement of the estate." (96 C.A.2d 335.) (See 15 A.L.R.2d 864 [right of debtor liable to estate to contest will or challenge probate].)

(4) *Executor or Trustee Removed by Codicil.* In *Jay v. Superior Court* (1970) 10 C.A.3d 754, 89 C.R. 466, petitioner was named as a coexecutor in a will and a first codicil to it. A second codicil revoked his appointment as coexecutor, but made no change in the disposition of the testator's property. Petitioner was not an heir or a devisee

under the will. *Held*, petitioner lacked standing to contest the second codicil; his only legal interest in the estate was in receiving administration fees for his services as executor. (10 C.A.3d 758.)

A contingent trustee is not entitled to contest a will where the pecuniary interest of the beneficiary would not be impaired by the contest; the right to receive fees for administering the trust is not a sufficient pecuniary interest. (*Estate of Getty* (1978) 85 C.A.3d 755, 760, 149 C.R. 656.)

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B. Contest of Will.

2. No Contest Clause.

a. Law Revision Commission Report.

14 Witkin Sum. Cal. Law Wills § 560

[§ 560] Law Revision Commission Report.

In its 1989 Recommendation Relating to No Contest Clauses (20 Cal. Law Rev. Com. Reports, p. 11 et seq.), the California Law Revision Commission proposed a partial codification of case law governing no contest clauses:

"A will, trust, or other instrument may contain a no contest, or *in terrorem*, clause to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is designed to reduce litigation by persons whose expectations are frustrated by the donative scheme of the instrument."

"While some jurisdictions refuse to recognize the validity of a no contest clause, and most allow the clause to be given effect only against a person who makes a contest without probable cause, California continues to follow the traditional, and now minority, rule to allow enforcement of the clause regardless of the beneficiary's probable cause in making the contest."

"In the course of its study of probate law and procedure the California Law Revision Commission has reexamined the policies involved in enforcement of no contest clauses. In favor of a probable cause exception are the policy of the law to facilitate full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument, and to avoid forfeiture. Opposed to a probable cause exception are the policy of the law to honor the intent of the donor and to discourage litigation. The Commission believes that the balance between these conflicting policies achieved by existing California law is basically sound. The no contest clause is effective to deter unmeritorious litigation but does not hinder a contest or an appropriate settlement in cases where the grounds for contest are strong. On the other hand, a probable cause exception would encourage litigation and would shift the balance unduly in favor of contestants. The existing law gives the donor some assurance that the donor's estate plan will be honored."

"For these reasons, the Commission recommends codification of existing California law governing enforcement of no contest clauses. The Commission also recommends a number of significant changes to improve the existing law."

"A major concern with the application of existing California law is that a beneficiary cannot predict with any consistency when an activity will be held to fall within the proscription of a particular no contest clause. To increase

predictability, the proposed law recognizes that a no contest clause is to be strictly construed in determining the donor's intent. This is consistent with the public policy to avoid a forfeiture absent the donor's clear intent. The law also makes clear that a request by a beneficiary for declaratory relief in the form of a petition for construction of the instrument to determine whether a particular activity would violate a no contest clause does not itself trigger operation of the clause."

"Under existing law, a no contest clause is not enforceable against a person who, in good faith, contests a will on the ground of forgery or revocation by execution of a subsequent will. The basis of this exception is that it furthers, rather than contravenes, the testator's intent. This exception is applicable regardless of the manner in which a particular no contest clause is phrased or construed, and therefor should be codified."

"Existing California law precludes enforcement of a no contest clause where the challenge is to a gift to an interested witness to a will. This limitation is appropriate because of the danger of fraud or undue influence where a devise is made to a person involved in the execution of the will itself. The rule should be extended beyond witnesses to other persons who prepare or participate in the preparation of an instrument, specifically persons who draft or transcribe the instrument or who give directions concerning dispositive or other substantive provisions of the instrument. These persons are in an even more sensitive position than a witness to a will."

"The proposed statutory exceptions to enforcement of a no contest clause are based on strong public policy grounds. Therefore, the proposed statute also makes clear that the no contest clause may not by its terms override the exceptions."

"Although much of the development of the law governing no contest clauses has occurred in relation to wills and will contests, in recent years trusts and other donative transfer instruments have become important estate planning devices and may also include no contest clauses. The issues involved are the same for all such instruments, and the proposed statute applies the rules governing no contest clauses uniformly to trusts and other instruments as well as to wills."

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B. Contest of Will.

2. No Contest Clause.

a-1. (New) Revised No Contest Clause Statutes.

14 Witkin Sum. Cal. Law Wills § 560A

[§ 560A] (New) Revised No Contest Clause Statutes.

(1) *Enactment and Effective Date.* In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*) were adopted. The new provisions are operative on January 1, 2010. (Stats. 2008, Chap. 174, §3.)

(2) *Major Changes.* Pursuant to a legislative directive, the California Law Revision Commission reviewed the no contest clause statutes. (See 37 Cal. Law Rev. Com. Reports, p. 359 et seq.) The Commission's recommendation focused on the following defects in the existing statutes: (a) uncertain application, (b) over-reliance on declaratory relief, (c) the possibility that fraud and undue influence could be shielded from judicial review, and (d) problems with forced elections. The revised statutes make the following major changes:

(a) Enforcement of no contest clauses was limited to three types of contests: direct contests, property ownership disputes, and creditor claims.

(b) The probable cause exception to enforcement was extended to all forms of direct contests, and a uniform standard of "reasonable likelihood" of relief being granted was adopted.

(c) Enforcement of no contest clauses with respect to property ownership disputes ("forced election") and creditor claims was narrowed.

(d) Enforcement of no contest clauses with respect to indirect contests was eliminated, and the complex list of statutory exceptions to enforcement was omitted.

(e) The use of declaratory relief in no contest clause litigation was eliminated.

(3) *Scope of Coverage.* *Prob.C. 21310 et seq.* apply to instruments, whenever executed, that become irrevocable on or after January 1, 2001. The new statutes do not apply to instruments that became irrevocable before that date. (*Prob.C. 21315.*) Those instruments continue to be governed by prior law. (Law Rev. Com. Comment.) The new statutes apply "notwithstanding a contrary provision in the instrument." (*Prob.C. 21314.*)

(4) *Case Law Preserved.* *Prob.C. 21310* et seq. are not intended to be a complete codification of the law governing the enforcement of no contest clauses, and the common law governs enforcement to the extent the statutes do not apply. (*Prob.C. 21313.*)

(5) *Strict Construction.* In determining the intent of the transferor, a no contest clause is to be strictly construed. (*Prob.C. 21312.*)

(6) *Authorized Enforcement.* A no contest clause may be enforced only against the following types of contests:

(a) *Direct contest without probable cause.* A no contest clause may be enforced in a direct contest brought without probable cause. (*Prob.C. 21311(a)(1).*) For this purpose, "probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." (*Prob.C. 21311(b).*) Where a direct contest is based on disqualification of a beneficiary under *Prob.C. 6112* (interested witness) or *Prob.C. 21350* (transfer to drafter or related person), the probable cause exception requires only that the contestant show probable cause that a beneficiary is an interested witness or a disqualified person. (Law Rev. Com. Comment.)

(b) *Property transfer disputes.* A no contest clause may be enforced where a pleading challenges a transfer of property on the ground that it was not the transferor's property at the time of the transfer, but only if the clause "expressly provides for that application." (*Prob.C. 21311(a)(2).*) Probable cause is not a defense to the enforcement of a no contest clause under this provision. (Law Rev. Com. Comment.)

(c) *Creditor's claim.* A no contest clause may be enforced against the filing of a creditor's claim or the prosecution of an action based on a creditor's claim, but only if the clause "expressly provides for that application." (*Prob.C. 21311(a)(3).*) Probable cause is not a defense to the enforcement of a no contest clause under this provision. (Law Rev. Com. Comment.)

(7) *Definitions.* The following definitions apply:

(a) *Contest.* A "contest" is "a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced." (*Prob.C. 21310(a).*)

(b) *Direct contest.* A "direct contest" is a contest that alleges the invalidity of a "protected instrument" or one or more of its terms based on one or more of the following: (1) forgery, (2) lack of due execution, (3) lack of capacity, (4) menace, duress, fraud, or undue influence, (5) revocation of the instrument, (6) disqualification of a beneficiary under *Prob.C. 6112* (interested witness) or *Prob.C. 21350* (transfer to drafter or related person). (*Prob.C. 21310(b).*)

(c) *No contest clause.* A "no contest clause" is "a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court." (*Prob.C. 21310(c).*)

(d) *Pleading.* A "pleading" is "a petition, complaint, cross-complaint, objection, answer, response, or claim." (*Prob.C. 21310(d).*)

(e) *Protected instrument.* A "protected instrument" is the instrument that contains the no contest clause or an instrument in existence on the date of execution of the instrument containing the no contest clause that is "expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause." (*Prob.C. 21310(e).*) The term may include "an instrument that expressly incorporates or republishes a no contest clause in another instrument." (Law Rev. Com. Comment.)

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2. No Contest Clause.
b. Statutory Framework.

14 Witkin Sum. Cal. Law Wills § 561

[§ 561] Statutory Framework.

(1) *Definitions.* The following terms are defined in the no contest statutes:

(a) *Contest:* A "contest" is an action identified in a no contest clause as a violation of the clause. The term includes both direct and indirect contests. (*Prob.C. 21300(a).*)

(b) *Direct contest:* A "direct contest" is a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms based on revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery. (*Prob.C. 21300(b).*) (See *Prob.C. 45* ["instrument" defined].)

(c) *Indirect contest:* An "indirect contest" is a pleading in a proceeding in any court that indirectly challenges an instrument or one or more of its terms based on a ground not contained in *Prob.C. 21300(b)* and that does not contain any of those grounds. (*Prob.C. 21300(c).*)

(d) *No contest clause:* A "no contest clause" is "a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court." (*Prob.C. 21300(d).*) (See *Prob.C. 24* ["beneficiary" defined].) The term "forfeiture clause" has also been used.

A contest may initiate a proceeding (e.g., contest by petition to revoke probate of a will; see *infra*, §581) or may occur as an objection in a proceeding (e.g., contest by objection to probate of a will; see *infra*, §577). (See *3 A.L.R.5th* 590 [what constitutes contest within meaning of forfeiture provision].)

(2) *Scope of Statutes.* *Prob.C. 21300* et seq. apply to wills, trusts, deeds, and other instruments, unless the provision or context otherwise requires. (*Prob.C. 21101.*) The statutes apply "notwithstanding a contrary provision in the instrument." (*Prob.C. 21302.*) "An instrument may not vary the rules provided in this part, since the rules are intended to implement the public policy of ensuring judicial access to information necessary for the proper administration of justice." (Law Rev. Com. Comment.) (See *Prob.C. 45* ["instrument" defined]; *Rest.3d, Property (Wills and Other Donative Transfers)* §8.5 [enforceability of no contest clause].)

(3) *Case Law Preserved.* *Prob.C. 21300* et seq. are "not intended as a complete codification of the law governing enforcement of a no contest clause." The common law governs enforcement to the extent *Prob.C. 21300* et seq. do not apply. (*Prob.C. 21301.*) The Law Revision Commission Comment states: "As used in this section, the 'common law' does not refer to the common law as it existed in 1850 ... ; rather, the reference is to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. Such issues, for example, as whether a contest that is later abandoned violates a no contest clause, whether an attack on the jurisdiction of the court violates the clause, and whether proceedings in estate administration other than a direct contest (including proceedings to set aside a small estate or probate homestead, to establish a family allowance, or to take as a pretermitted heir) violate the clause, continue to be governed by relevant case law except to the extent this part deals directly with the issue. The resolution of these matters is determined, in part, by the terms of the no contest clause and the character of the beneficiary's contest."

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.)

(1) *Definitions.*

(a) *Contest:* The term "contest" is now defined in *Prob.C. 21310(a)*.

(b) *Direct contest:* The term "direct contest" is now defined in *Prob.C. 21310(b)*. Mistake and misrepresentation are no longer included as separate grounds for a direct contest. (Law Rev. Com. Comment.)(c) *Indirect contest:* The term "indirect contest" is not used in the revised statute.

(d) *No contest clause:* Former *Prob.C. 21300(d)* is continued in *Prob.C. 21310(c)* without substantive change.

(2) *Scope of Statutes.* Former *Prob.C. 21302* is continued in *Prob.C. 21314* without substantive change.

(3) *Case Law Preserved.* Former *Prob.C. 21301* is continued in *Prob.C. 21313* without substantive change.



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CHAPTER XXI - Wills and Probate

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XI. ESTATE ADMINISTRATION

B. Contest of Will.

2. No Contest Clause.

c. Determination Whether Act Constitutes Contest.

Witkin Sum. Cal. Law Wills § 562

[§ 562] Determination Whether Act Constitutes Contest.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Authorized Proceeding*. See *Estate of Davies* (2005) 127 C.A.4th 1164, 1174, 26 C.R.3d 239 [surviving widow of decedent's beneficiary contended that beneficiary satisfied 120-day survivorship requirement; filing objection to trustee's petition for instructions about calculation of 120-day period would not constitute contest]; *Estate of Rossi* (2006) 138 C.A.4th 1325, 1333, 42 C.R.3d 244 [court had subject matter jurisdiction to hear application under *Prob.C.* 21320 to determine whether filing probate petitions would violate no contest clause even though proposed petitions were not submitted at same time as application]; *McKenzie v. Vanderpoel* (2007) 151 C.A.4th 1442, 1451, 61 C.R.3d 129 [petition by net income beneficiary of trust for reallocation of principal and income under *Prob.C.* 16336 (see 13 *Summary* (10th), *Trusts*, §172) in order to guarantee minimum income for that beneficiary would impair rights of remainder beneficiaries and, thus, would be contest; availability of reallocation procedure does not insulate petition from impact of no contest clause].

In *Hearst v. Ganzi* (2006) 145 C.A.4th 1195, 52 C.R.3d 473, the will of William Randolph Hearst contained a broad no contest clause applicable to the instrument's testamentary trust and limited the personal liability of the trustees to losses by reason of "gross neglect or fraudulent misconduct." The trust corpus consisted of the common stock of the Hearst Corporation, and the trust instrument specifically authorized the trustees to make long-term investment decisions that inured to the benefit of the remainder beneficiaries at the expense of the income beneficiaries. Several of the income beneficiaries petitioned under *Prob.C.* 21320 for a determination whether a petition alleging a breach of the trustees' fiduciary duty under *Prob.C.* 16003 (see 13 *Summary* (10th), *Trusts*, §65) to deal impartially with all beneficiaries would violate the no contest clause. *Held*, the petition would violate the clause.

(a) The corporation's dividend policy, implemented by the trustees, favors remainder beneficiaries over income beneficiaries, but furthers the decedent's intent that the trust retain the stock of the corporation. The will vests broad discretion in the trustees to determine principal and income, to hold funds in nonincome producing property, and to retain corporate assets. (145 C.A.4th 1210, 1211.)

(b) The no contest clause precludes interfering with the business operations of the corporation, but it is undisputed that the trustees could increase the trust's income, as required by the petition, only by causing the corporation to change

its dividend policy or by selling some of the corporation's stock. Thus, the petition, which challenges the corporation's dividend policy, would be a contest. (145 C.A.4th 1212.)

(c) Although the will permits the trustees to depart from their statutory duty of impartiality with respect to income beneficiaries, they must exercise their discretion in good faith and without an improper motive. (145 C.A.4th 1211, citing *Rest.2d, Trusts* §187.) The petition, however, contains no allegation of bad faith, improper motivation, or dishonesty. (145 C.A.4th 1211.) In addition, it seeks to impose personal liability on the trustees, but does not allege gross neglect or fraudulent misconduct. Thus, it seeks relief contrary to what is permitted by the will. (145 C.A.4th 1213.)

The opinion in *Hearst v. Ganzi* does not mention *Prob.C. 21305(b)(6)* (text, §576), which provides, as a matter of public policy, that a proceeding (other than a direct contest) challenging the exercise of a fiduciary power does not violate a no contest clause, notwithstanding a contrary provision in the instrument.



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XI. ESTATE ADMINISTRATION

B. Contest of Will.

2. No Contest Clause.

c. Determination Whether Act Constitutes Contest.

14 Witkin Sum. Cal. Law Wills § 562

[§ 562] Determination Whether Act Constitutes Contest.

(1) *Authorized Proceeding.* "If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether a particular motion, petition, or other act by the beneficiary" would be a contest within the terms of the no contest clause. (*Prob.C. 21320(a)*.) The no contest clause is not enforceable against a beneficiary to the extent an application under *Prob.C. 21320(a)* is limited to the procedure and purpose described in *Prob.C. 21320(a)*. (*Prob.C. 21320(b)*.) This provision offers a limited form of declaratory relief. (Law Rev. Com. Comment.) The statute includes, but is not limited to, the following:

(a) A determination whether a creditor claim under *Prob.C. 9000* et seq. (infra, §612) or *Prob.C. 19000* et seq. (13 *Summary* (10th), *Trusts*, §260 et seq.) would be a contest.

(b) A determination whether an action under *Prob.C. 21700* (contracts regarding testamentary or intestate succession; see supra, §326) would be a contest.

(c) A determination whether an action under *Prob.C. 21305* (limitations on enforcement of no contest clauses; see infra, §565 et seq.) would be a contest.

Where a beneficiary argues that a proposed action would not violate a no contest clause because the clause or its application would violate public policy, and that determination can be made as a matter of law without reference to factual matters, the determination may be made in a proceeding under *Prob.C. 21320*. (*Estate of Ferber* (1998) 66 *C.A.4th* 244, 251, 254, 77 *C.R.2d* 774 [contention that no contest clause violated public policy by prohibiting removal of executor and objections to accounting; clause was valid only to extent it prohibited frivolous challenge to executor or frivolous objection to accounting].) (See *Prob.C. 21320(c)*, infra, §575.)

(2) *Venue.* *Prob.C. 21321* sets for the following rules for venue for an action under *Prob.C. 21320*:

(a) If a proceeding is pending for administration of the transferor's estate, the application must be filed in the court where the proceeding is pending. (*Prob.C. 21321(a)*.)

(b) If no proceeding for administration is pending and the transferor is deceased, the application may be filed in the

superior court in any county in which administration of the transferor's estate would be proper or, if none, any county in which property affected by the transfer is located or, if none, any county in California. (*Prob.C. 21321(b).*)

(c) If the transferor is living and resides in California, the application must be filed in the superior court in the county in which the transferor resides. (*Prob.C. 21321(c).*)

(d) If the transferor is living and does not reside in California, the application may be filed in the superior court in the county in which property affected by the transfer is located or, if none, any county in California. (*Prob.C. 21321(d).*)

(e) Notwithstanding the foregoing provisions, if the instrument containing the no contest clause is a trust, the application must be filed in the court having jurisdiction over the trust under *Prob.C. 17000* et seq. (see 13 *Summary* (10th), *Trusts*, §220 et seq.). (*Prob.C. 21321(e).*)

(3) *Notice.* *Prob.C. 21322* provides for notice of the hearing on an application under *Prob.C. 21320* as follows:

(a) If a proceeding for the administration of the transferor's estate is pending, notice is given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to (1) each person listed in *Prob.C. 1220*, (2) each beneficiary named in the instrument whose interest could be adversely affected by the application, and (3) the Attorney General, if the instrument involves or may involve a testamentary trust for charitable purposes without a designated California trustee or a devise for charitable purposes without an identified devisee. (*Prob.C. 21322(a).*)

(b) If no proceeding for administration is pending, at least 30 days before the hearing the applicant must serve notice as provided in *C.C.P. 415.10* (personal delivery; see 3 *Cal. Proc.* (4th), *Actions*, §924) or *C.C.P. 415.30* (service by mail; see 3 *Cal. Proc.* (4th), *Actions*, §930) on (1) each beneficiary named in the instrument whose interest could be affected by the application, (2) each executor, trustee, or fiduciary named in the instrument, and (3) the Attorney General, if the instrument involves or may involve a testamentary trust for charitable purposes without a designated California trustee or a devise for charitable purposes without an identified devisee. (*Prob.C. 21322(b).*)

(4) *Statute of Limitations Is Tolled.* The statute of limitations for the commencement of a motion, petition, or other act referred to in *Prob.C. 21320(a)* is tolled from the date an application for declaratory relief under *Prob.C. 21320(a)* is made to the date the court's determination becomes final. (*Prob.C. 21308.*)

(5) *Standing To Appeal Determination.* A trustee may appeal an order determining that a trust beneficiary's proposed claim would not violate the trust's no contest clause. (*Estate of Goulet* (1995) 10 C.4th 1074, 43 C.R.2d 111, 898 P.2d 425, 9 *Cal. Proc.* (4th), *Appeal*, §196.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See *Supp.*, *supra*, §560A.) A declaratory relief proceeding under former *Prob.C. 21320* et seq. is not authorized by the new statutes.

(1) *Authorized Proceeding.* See *Estate of Davies* (2005) 127 C.A.4th 1164, 1174, 26 C.R.3d 239 [surviving widow of decedent's beneficiary contended that beneficiary satisfied 120-day survivorship requirement; filing objection to trustee's petition for instructions about calculation of 120-day period would not constitute contest]; *Estate of Rossi* (2006) 138 C.A.4th 1325, 1333, 42 C.R.3d 244 [court had subject matter jurisdiction to hear application under *Prob.C. 21320* to determine whether filing probate petitions would violate no contest clause even though proposed petitions were not submitted at same time as application]; *McKenzie v. Vanderpoel* (2007) 151 C.A.4th 1442, 1451, 61 C.R.3d 129 [petition by net income beneficiary of trust for reallocation of principal and income under *Prob.C. 16336* (see 13 *Summary* (10th), *Trusts*, §172) in order to guarantee minimum income for that beneficiary would impair rights of remainder beneficiaries and, thus, would be contest; availability of reallocation procedure does not insulate petition from impact of no contest clause]; *Betts v. City Nat. Bank* (2007) 156 C.A.4th 222, 233, 67 C.R.3d 152 [in safe harbor

proceeding under *Prob.C. 21320*, petition by trust beneficiary alleging that successor trustee breached fiduciary duty by allowing agent under power of attorney to appropriate trust assets to her own use would not violate trust's no contest clause even though trust's exculpatory provision limited successor trustee's liability only to its own wilful misconduct or breach of good faith; petition sufficiently alleged wilful misconduct and bad faith and did not seek to nullify exculpatory provision]; *Montegani v. Johnson* (2008) 162 C.A.4th 1231, 1239, 76 C.R.3d 621 [claimant who was not beneficiary of trust could not use *Prob.C. 21320* procedure with respect to that trust]; *Safai v. Safai* (2008) 164 C.A.4th 233, 245, 78 C.R.3d 759 [in safe harbor proceeding under *Prob.C. 21320*, 15-year-old beneficiary of trust appearing through guardian ad litem would not violate no contest clause by filing petition to set aside trust on grounds of forgery; because beneficiary lacks capacity to act in his own name, his participation in contest would not be "voluntary" within meaning of clause].

In *Hearst v. Ganzi* (2006) 145 C.A.4th 1195, 52 C.R.3d 473, the will of William Randolph Hearst contained a broad no contest clause applicable to the instrument's testamentary trust and limited the personal liability of the trustees to losses by reason of "gross neglect or fraudulent misconduct." The trust corpus consisted of the common stock of the Hearst Corporation, and the trust instrument specifically authorized the trustees to make long-term investment decisions that inured to the benefit of the remainder beneficiaries at the expense of the income beneficiaries. Several of the income beneficiaries petitioned under *Prob.C. 21320* for a determination whether a petition alleging a breach of the trustees' fiduciary duty under *Prob.C. 16003* (see 13 Summary (10th), *Trusts*, §65) to deal impartially with all beneficiaries would violate the no contest clause. *Held*, the petition would violate the clause.

(a) The corporation's dividend policy, implemented by the trustees, favors remainder beneficiaries over income beneficiaries, but furthers the decedent's intent that the trust retain the stock of the corporation. The will vests broad discretion in the trustees to determine principal and income, to hold funds in nonincome producing property, and to retain corporate assets. (145 C.A.4th 1210, 1211.)

(b) The no contest clause precludes interfering with the business operations of the corporation, but it is undisputed that the trustees could increase the trust's income, as required by the petition, only by causing the corporation to change its dividend policy or by selling some of the corporation's stock. Thus, the petition, which challenges the corporation's dividend policy, would be a contest. (145 C.A.4th 1212.)

(c) Although the will permits the trustees to depart from their statutory duty of impartiality with respect to income beneficiaries, they must exercise their discretion in good faith and without an improper motive. (145 C.A.4th 1211, citing *Rest.2d, Trusts* §187.) The petition, however, contains no allegation of bad faith, improper motivation, or dishonesty. (145 C.A.4th 1211.) In addition, it seeks to impose personal liability on the trustees, but does not allege gross neglect or fraudulent misconduct. Thus, it seeks relief contrary to what is permitted by the will. (145 C.A.4th 1213.)

The opinion in *Hearst v. Ganzi* does not mention *Prob.C. 21305(b)(6)* (text, §576), which provides, as a matter of public policy, that a proceeding (other than a direct contest) challenging the exercise of a fiduciary power does not violate a no contest clause, notwithstanding a contrary provision in the instrument.(3) *Notice*.

Personal delivery:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §1008.

Service by mail:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §1015 et seq.(5) *Standing To Appeal Determination*.

Estate of Goulet:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §51.



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CHAPTER XXI - Wills and Probate

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 XI. ESTATE ADMINISTRATION

B. Contest of Will.

2. No Contest Clause.

d. Validity and Effect of Clause.

14 *Witkin Sum. Cal. Law Wills* § 563

[§ 563] Validity and Effect of Clause.

(1) *In General*. Except to the extent otherwise provided by *Prob.C. 21300* et seq., "a no contest clause is enforceable against a beneficiary who brings a contest within the terms of the no contest clause." (*Prob.C. 21303*.) (See *Estate of Hite* (1909) 155 C. 436, 439, 101 P. 443 [opposition to codicils]; *In re Kitchen* (1923) 192 C. 384, 389, 220 P. 301 [broad provision covering "any suit" against executor applied to suit to enforce claim against estate]; *Estate of Lefranc* (1952) 38 C.2d 289, 292, 294, 301, 239 P.2d 617; *Estate of Markham* (1941) 46 C.A.2d 307, 314, 115 P.2d 866; *Estate of Mathie* (1944) 64 C.A.2d 767, 776, 149 P.2d 485 [attempt to probate earlier will, opposition to probate of later lost will]; *Estate of Howard* (1945) 68 C.A.2d 9, 11, 155 P.2d 841; *Estate of Friedman* (1979) 100 C.A.3d 810, 814, 161 C.R. 311; 15 *Hastings L. J.* 45; 7 *A.L.R.2d* 1357 [application of forfeiture clause to contest by nonbeneficiary]; 23 *A.L.R.4th* 369 [validity and enforceability of forfeiture clause]; 3 *A.L.R.5th* 590 [what constitutes contest within forfeiture provision]; 80 *Am.Jur.2d* (2002 ed.), *Wills* §1334 et seq.; cf. *Rest.2d, Property (Donative Transfers)* §9.1 [provision is valid unless there is probable cause for making attack]; *Unif.Prob.C.* §3-905 [provision is unenforceable if probable cause exists for instituting proceedings]; *Cal. Transactions Forms*, 1 *Estate Planning* §§2:34 et seq., 6:34 et seq., 6:116 et seq.)

(2) *Effect of Dismissal*. In *Estate of Fuller* (1956) 143 C.A.2d 820, 300 P.2d 342, M filed a contest charging unsound mind, undue influence, and lack of due execution. Before answer and trial she dismissed it, and thereafter contended that she did not come within the forfeiture clause because it was a mere "paper contest." *Held*, the clause was violated by commencement of the contest, regardless of its subsequent withdrawal. The rule of strict construction (*infra*, §564) does not call for artificial distinctions or quibbling to escape the penalty. (143 C.A.2d 824.)

(3) *Contestant May Take Independently*. If the contestant is an heir, the forfeiture clause does not always prevent the heir from sharing in the estate. In the absence of a substitute disposition, as by a residuary clause, upon the forfeiture, there will be a partial intestacy, and the contestant may take an intestate share. (See *Estate of Mathie*, *supra*, 64 C.A.2d 780; *Estate of Lefranc*, *supra*, 38 C.2d 295; *Estate of Munson* (1958) 164 C.A.2d 146, 151, 330 P.2d 302.) Likewise, a contest does not negate the operation of the omitted spouse or child statutes. (See *Estate of Torregano* (1960) 54 C.2d 234, 248, 5 C.R. 137, 352 P.2d 505, *supra*, §286 [claim of pretermitted heir]; *Estate of Katleman* (1993) 13 C.A.4th 51, 64, 16 C.R.2d 468, *supra*, §279 [unsuccessful will contest did not impair omitted spouse's right to share in estate under omitted spouse statute, despite no contest clause; right to share is independent of will].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised no contest clause statutes: In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.)

(1) *In General.* See *Schwartz v. Schwartz* (2008) 167 C.A.4th 733, 745, 84 C.R.3d 387 [trust's no contest clause was enforceable against beneficiary who filed safe harbor proceeding under *Prob.C. 21320* with respect to distribution petition, later filed distribution petition itself before decision in safe harbor proceeding, and then attempted to withdraw petition after court set petition for hearing and trustee responded].



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XI. ESTATE ADMINISTRATION

B. Contest of Will.
2. No Contest Clause.
e. Strict Construction.

14 Witkin Sum. Cal. Law Wills § 564

[§ 564] Strict Construction.

"In determining the intent of the transferor, a no contest clause shall be strictly construed." (*Prob.C. 21304*; see *Prob.C. 81* ["transferor" defined].) (See *Estate of Miller* (1964) 230 C.A.2d 888, 900, 41 C.R. 410; *Estate of Schreck* (1975) 47 C.A.3d 693, 697, 121 C.R. 218, *infra*, §571; *Estate of Lindstrom* (1987) 191 C.A.3d 375, 383, 236 C.R. 376 [no contest clause in pourover will applied only to will, not to living trust]; *Poag v. Winston* (1987) 195 C.A.3d 1161, 1175, 241 C.R. 330 [no contest clause in living trust, by its terms, was not applicable to claims based on written and signed agreements of settlor to confer benefit on claimant; held not to apply to claim based on agreement to establish separate trust for claimant and execute codicil]; 4 *So. Cal. L. Rev.* 73; 19 *Cal. L. Rev.* 216.) Thus, where the provision was directed against any "attempt to defeat the provisions of this will," an offer for probate of a later will believed to be genuine was held not to work a forfeiture. (*Estate of Bergland* (1919) 180 C. 629, 631, 182 P. 277; see *Estate of Gonzalez* (2002) 102 C.A.4th 1296, 126 C.R.2d 332, *infra*, §569 [distinguishing *Estate of Bergland*; attempt to probate spurious will was not in good faith]; 12 *Cal. L. Rev.* 532.) And a provision for forfeiture of the gift to anyone who should "institute proceedings" was not violated by merely furnishing money and evidence to the contestant. (*Lobb v. Brown* (1929) 208 C. 476, 487, 489, 281 P. 1010.) (See *Estate of Coplan* (2004) 123 C.A.4th 1384, 1388, 20 C.R.3d 686 [personal representative who was also beneficiary did not violate no contest clause by petitioning to be relieved of provision in will stating that personal representative would not receive compensation, in light of extensive litigation involving estate; petition was filed in capacity as personal representative, not as beneficiary].)

The policy against forfeitures (see 13 *Summary* (10th), *Equity*, §20) has caused some courts to go to great lengths to avoid the effect of the no contest clause. (See *infra*, §565 *et seq.*) Under the modern liberal view of *Estate of Russell* (1968) 69 C.2d 200, 70 C.R. 561, 444 P.2d 353, *supra*, §187, evidence of surrounding circumstances may be introduced to show that the clause was intended to protect the contestant. (See *Estate of Balyeat* (1968) 268 C.A.2d 556, 560, 74 C.R. 120 [contest by sons of testator, to whom she left residue of estate in trust]; 16 *Stanf. L. Rev.* 355 [argument that C.C. 3369, preventing forfeitures, may be invoked].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised no contest clause statutes: In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*), operative on January 1, 2010, were adopted. (See *Supp.*, *supra*,

§560A.) Former Prob.C. 21304 is continued in *Prob.C. 21312* without change.

See *Meyer v. Meyer* (2008) 162 C.A.4th 983, 996, 76 C.R.3d 546 [under rule of strict construction, order for distribution setting forth terms of testamentary trust did not incorporate will's no contest clause; clause referred to contest of will and did not unequivocally express intent that clause would apply to trust beneficiaries].



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CHAPTER XXI - Wills and Probate

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XI. ESTATE ADMINISTRATION

B. Contest of Will.

2. No Contest Clause.

f. Limitations on Enforcement.

1. In General.

14 Witkin Sum. Cal. Law Wills § 565

[§ 565] In General.

Although the decisions concerning no contest clauses have not always been consistent, the statutory trend seems to be to restrict the application of these clauses. Enforcement of no contest clauses is expressly prohibited by several statutes, but these provisions are not intended as a complete list of acts that may be held exempt from enforcement. (Law Rev. Com. Comments to *Prob.C. 21305*, *21306*, and *21307*.) The primary statute, *Prob.C. 21305*, includes two kinds of limitations: those that may be expressly negated by the no contest clause (*Prob.C. 21305(a)*; see *infra*, §§570, 572, 573) and those that violate public policy (*Prob.C. 21305(b)*; see *infra*, §576). (See generally *32 McGeorge L. Rev. 681*; on proposals to abolish or limit enforcement of no-contest clauses, see *10 California Trusts and Estates Quarterly*, p. 6 et seq. (Fall 2004).) The applicable restrictions tend to fall within the following categories:

- (1) Contest based on forgery. (See *infra*, §566.)
- (2) Contest alleging revocation. (See *infra*, §567.)
- (3) Contest of a provision benefiting an interested person. (See *infra*, §568.)
- (4) Contest to establish an invalid donative transfer. (See *infra*, §569.)
- (5) Claim by a creditor. (See *infra*, §570.)
- (6) Claim to property independent of the instrument containing the clause. (See *infra*, §571.)
- (7) Action to determine the character, title, or ownership of property. (See *infra*, §572.)
- (8) Challenge to the validity of another instrument. (See *infra*, §573.)
- (9) Challenge based on duress and undue influence. (See *infra*, §574.)
- (10) Procedural challenges. (See *infra*, §575.)

(11) Public policy limitations. (See *infra*, §576.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised no contest clause statutes: In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*), operative on January 1, 2010, were adopted. (See *Supp.*, *supra*, §560A.) Limitations on enforcement are now set forth in *Prob.C. 21311*.



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CHAPTER XXI - Wills and Probate

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B. Contest of Will.

2. No Contest Clause.

f. Limitations on Enforcement.

2. Forgery.

14 Witkin Sum. Cal. Law Wills § 566

[§ 566] Forgery.

A no contest clause is not enforceable to the extent that the beneficiary, with reasonable cause, brings a contest on the ground of forgery. (*Prob.C. 21306(a)*.) For this purpose, "reasonable cause" means that "the party filing the action, proceeding, contest, or objections has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter filed with the court may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery." (*Prob.C. 21306(b)*.) (See *infra*, §569.)

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*), operative on January 1, 2010, were adopted. (See *Supp.*, *supra*, §560A.) Limitations on enforcement are now set forth in *Prob.C. 21311*. The reasonable cause requirement of former *Prob.C. 21306* has been restated in terms of "probable cause" in *Prob.C. 21311(b)* with two exceptions: (1) The current statute requires both proof of factual contentions and a legally sufficient ground for the requested relief. (2) The current statute requires a "reasonable likelihood" that the requested relief will be granted, rather than the lower standard under the former statute that success be "likely." (*Law Rev. Com. Comment.*)



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f. Limitations on Enforcement.

3. Revocation.

14 Witkin Sum. Cal. Law Wills § 567

[§ 567] Revocation.

A no contest clause is not enforceable to the extent that the beneficiary, with reasonable cause, brings a contest on the ground of revocation. (*Prob.C. 21306(a)*.) For this purpose, "reasonable cause" means that "the party filing the action, proceeding, contest, or objections has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter filed with the court may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery." (*Prob.C. 21306(b)*.) (See *infra*, §569.)

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*), operative on January 1, 2010, were adopted. (See *Supp.*, *supra*, §560A.) A contest on the ground of revocation is now set forth in *Prob.C. 21310(b)(5)*. (On probable cause requirement under current statute, see *Supp.*, *supra*, §566.)



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4. Benefit to Interested Person.

14 Witkin Sum. Cal. Law Wills § 568

[§ 568] Benefit to Interested Person.

A no contest clause is not enforceable to the extent that the beneficiary, with probable cause, contests a provision that benefits (1) a witness, (2) a person who drafted or transcribed the instrument, or (3) "a person who gave directions to the drafter of the instrument concerning dispositive or other substantive contents of the provision or who directed the drafter to include the no contest clause in the instrument," unless "the transferor affirmatively instructed the drafter to include the contents of the provision or the no contest clause." (*Prob.C. 21307*.) The provision concerning one who gives the drafter directions does not apply to one who merely provides information, such as the spelling of names; it applies only where the beneficiary directs the drafter of the instrument without the concurrence of the transferor. (Law Rev. Com. Comment.)

In *Estate of Peterson (1999) 72 C.A.4th 431, 85 C.R.2d 110*, plaintiff and defendant were beneficiaries under a will of which defendant was named executor. Plaintiff's will contest was rejected. Thereafter, at defendant's request, the trial judge ordered enforcement of a no contest provision in the will. *Held*, reversed; *Prob.C. 21307* precluded enforcement of the no contest provision. Probable cause to contest the will was not at issue, but defendant argued that, in addition to probable cause, *Prob.C. 21307* required plaintiff to prove that defendant was, in fact, a person described in one of the three subdivisions of that statute. Plaintiff, on the other hand, argued that probable cause alone was sufficient. Plaintiff's interpretation is correct.

(a) *Genger v. Delsol (1997) 56 C.A.4th 1410, 66 C.R.2d 527, infra, §573*, does not support defendant's interpretation. That case said only that *Prob.C. 21307* requires probable cause and a contest based on a provision benefiting a person described in one of the statute's three subdivisions. Whether the defendant in the contest must have, in fact, been a person listed in *Prob.C. 21307* was not considered. (*72 C.A.4th 435*.)

(b) Defendant's position would render probable cause irrelevant. A trial court finding that the defendant either drafted or directed the drafting of a will would satisfy the requirement of probable cause, regardless of the frame of mind of the contestant at the time of the contest; on the other hand, if the trial court found that defendant did not draft or direct the drafting, it would make no difference that the contestant filed the petition with probable cause. (*72 C.A.4th 437*.)

(c) The legislative history of *Prob.C. 21307* does not support an interpretation that would disregard probable cause. It is improbable that the Legislature intended to require a contestant to risk, at the time the contest is filed, being able to establish that the defendant was in fact a person described in *Prob.C. 21307*. Instead, it is enough that the contestant had probable cause to believe that the defendant was a person named in the statute. (72 C.A.4th 437.)

(d) The objective of *Prob.C. 21307* is to protect against improper influences in the preparation of the instrument. Proof that the contestant had probable cause to believe that these influences existed is sufficient, by itself, to prevent potential abuses and at the same time ensure that the testator's true wishes are carried out. (72 C.A.4th 437.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.) A contest on the ground of benefit to an interested person is now set forth in *Prob.C. 21310(b)(6)*.



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5. Invalid Donative Transfer.

14 Witkin Sum. Cal. Law Wills § 569

[§ 569] Invalid Donative Transfer.

In *Graham v. Lenzi* (1995) 37 C.A.4th 248, 43 C.R.2d 407, a husband and wife established a living trust, with a no contest clause, under which they were the sole beneficiaries during their lifetimes and their daughter, plaintiff, was the sole remainder beneficiary on the death of the surviving trustor. When the wife died, the husband amended the trust to provide that defendant stockbroker, whom the husband had consulted about changes in the trust's investment portfolio, would be entitled to half the residue, with plaintiff to receive the other half. Plaintiff petitioned to determine if the no contest clause would be violated by a claim that the gift to defendant was invalid under *Prob.C. 21350* (supra, §303), prohibiting donative transfers to certain disqualified persons. *Held*, invoking the protection of *Prob.C. 21350* did not constitute a "contest."

(a) A claim under *Prob.C. 21350* is not an attack on an instrument within the definition of "contest" in *Prob.C. 21300* (supra, §561). Rather, it is a means of enforcing a specific statutory mandate. *Prob.C. 21350* and *21351* are designed to prevent certain individuals uniquely positioned to procure gifts from elderly persons through fraud, menace, duress, or undue influence from taking advantage of trustors and testators. The rule that no contest clauses are unenforceable against beneficiaries challenging gifts to these disqualified persons is inherent in the legislative scheme. A contrary rule would permit a disqualified person to be effectively insulated from the reach of *Prob.C. 21350* merely by persuading a trustor to insert a boilerplate no contest clause into the will or trust instrument. (37 C.A.4th 255.)

(b) *Prob.C. 21307* (supra, §568) precludes enforcement of a no contest clause against a beneficiary who contests a provision in a donative instrument benefiting a person who drafted or transcribed the instrument, gave directions to the drafter, or acted as a witness to the instrument. While plaintiff's claim did not fall squarely within this statutory prohibition, the statute is not intended as a complete listing of acts that may be held exempt from enforcement of a no contest clause. The statute is based on strong public policy grounds--guarding against abuses by persons in a position to control or influence the distribution of property under a will or trust that is contrary to the intent of the trustor or testator. The same public policy necessarily underlies *Prob.C. 21350*, as both statutes address the same concerns. (37 C.A.4th 256.)

(c) Plaintiff's claims for declaratory relief (whether the trust could be amended by her father after her mother's

death and whether she would be entitled to take the entire trust estate as an heir of the trustors even if she were deemed to have forfeited her interest as a beneficiary of the trust under the no contest clause) would not constitute contests, because they merely sought construction of the terms of the trust. (37 C.A.4th 258, citing *Estate of Kruse* (1970) 7 C.A.3d 471, 86 C.R. 491.)

The holding in *Graham v. Lenzi* has been codified. A no contest clause is not enforceable to the extent that a beneficiary, with reasonable cause, brings an action to establish the invalidity of a transfer under *Prob.C. 21350*. (*Prob.C. 21306(a)*.) For this purpose, "reasonable cause" means that "the party filing the action, proceeding, contest, or objections has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter filed with the court may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery." (*Prob.C. 21306(b)*.)

Estate of Gonzalez (2002) 102 C.A.4th 1296, 126 C.R.2d 332, addressed the "reasonable cause" requirement in *Prob.C. 21306*. Decedent executed wills in 1992 and 1998. The 1998 will, executed shortly before death, left all the property to one son. After protracted litigation, that will was denied probate on the ground of undue influence by the son. The executor of the 1992 will then petitioned to determine the son's entitlement under the 1992 will, contending that he violated the forfeiture clause of the 1992 will by submitting the 1998 will for probate. *Held*, the son lacked reasonable cause to offer the 1998 will for probate and thus violated the forfeiture clause of the 1992 will.

(a) Although no reported case had discussed the meaning of "reasonable cause" in *Prob.C. 21306*, the concept has been discussed in the context of malicious prosecution and government tort claims. In those contexts, reasonable cause is determined objectively, as a matter of law, on the basis of facts known at the time. Here, the trial court properly applied the objective standard to the facts known by the son at the time he submitted the 1998 will for probate. (102 C.A.4th 1304, 1305.)

(b) The trial court found that the son coerced his sick and elderly father to revoke the 1992 will by executing the 1998 will, thereby disinheriting his other children, on "robust" evidence that (1) the father was critically ill, disoriented, and malnourished, (2) that a confidential relationship existed between the father and son, (3) that the son presented a grant deed drafted by the son's tax preparer for the father's signature and brought a notary to the father's bedside, and (4) that a lawyer friend of the son's prepared the 1998 will without talking to the father alone and other friends of the son acted as witnesses. Armed with these facts, a reasonable person would not have cause to believe that the 1998 will was valid. (102 C.A.4th 1304, 1306.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.) A contest on the ground of an invalid donative transfer is now set forth in *Prob.C. 21310(b)(6)*. (On probable cause requirement under current statute, see Supp., supra, §566.)



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6. Claim of Creditor.

Witkin Sum. Cal. Law Wills § 570

[§ 570] Claim of Creditor.

SUPPLEMENT: [This section is current through the latest supplement]

In *Zwirn v. Schweizer* (2005) 134 C.A.4th 1153, 36 C.R.3d 527, plaintiff alleged an oral agreement by his aunt and uncle to leave property to him on the death of the survivor. The surviving aunt died, leaving the property to others under a trust and will, both containing no contest clauses. *Held*, in a safe harbor proceeding under *Prob.C. 21320* (text, §562), filing a creditor's claim against the trust and the estate would violate the no contest clauses. Plaintiff's claim is a contest and does not fit within the creditor's claim exception provided by *Prob.C. 21305(a)(1)*. As in *Nairne v. Jessop-Humblet* (2002) 101 C.A.4th 1124, 124 C.R.2d 726, text, §571, plaintiff's claim directly attacks the decedent's intended plan of distribution. It does not, like a contractual claim unrelated to the estate, merely reduce the amount available to other beneficiaries. (134 C.A.4th 1158, 1160.)

In *Colburn v. Northern Trust Co.* (2007) 151 C.A.4th 439, 59 C.R.3d 828, a carefully drafted no contest clause in a trust required the settlor's former wife and the children of that marriage to elect between enforcing their rights under the marital dissolution judgment by filing a creditor's claim or relinquishing those rights and taking the gifts provided in trust. *Held*, in a safe harbor proceeding under *Prob.C. 21320* (text, §562), filing a creditor's claim against the trust would violate the no contest clause; the clause does not deprive them of their right to support under the marital judgment or hinder their ability to assert that right and, thus, does not violate public policy. (151 C.A.4th 446.)



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14 Witkin Sum. Cal. Law Wills § 570

[§ 570] Claim of Creditor.

Filing a creditor's claim or prosecuting an action on a creditor's claim does not constitute a contest "unless expressly identified in the no contest clause as a violation of the clause." (*Prob.C. 21305(a)(1)*.) Generally, *Prob.C. 21305* applies to instruments executed on or after January 1, 2001. (*Prob.C. 21305(a)*; see *Prob.C. 21305(c)* [*Prob.C. 21305(a)* does not apply to codicil or amendment executed on or after January 1, 2001, unless codicil or amendment adds no contest clause or amends no contest clause in instrument executed before January 1, 2001].) (See *Varney v. Superior Court* (1992) 10 C.A.4th 1092, 12 C.R.2d 865, *infra*, §571 [filing creditor's claim based on quantum meruit value of services would not violate no contest clause].)

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*), operative on January 1, 2010, were adopted. (See *Supp.*, *supra*, §560A.) Former *Prob.C. 21305(a)(1)* is continued in *Prob.C. 21311(a)(3)* without substantive change.

In *Zwirn v. Schweizer* (2005) 134 C.A.4th 1153, 36 C.R.3d 527, plaintiff alleged an oral agreement by his aunt and uncle to leave property to him on the death of the survivor. The surviving aunt died, leaving the property to others under a trust and will, both containing no contest clauses. *Held*, in a safe harbor proceeding under *Prob.C. 21320* (text, §562), filing a creditor's claim against the trust and the estate would violate the no contest clauses. Plaintiff's claim is a contest and does not fit within the creditor's claim exception provided by *Prob.C. 21305(a)(1)*. As in *Nairne v. Jessop-Humblet* (2002) 101 C.A.4th 1124, 124 C.R.2d 726, text, §571, plaintiff's claim directly attacks the decedent's intended plan of distribution. It does not, like a contractual claim unrelated to the estate, merely reduce the amount available to other beneficiaries. (134 C.A.4th 1158, 1160.)

In *Colburn v. Northern Trust Co.* (2007) 151 C.A.4th 439, 59 C.R.3d 828, a carefully drafted no contest clause in a trust required the settlor's former wife and the children of that marriage to elect between enforcing their rights under the marital dissolution judgment by filing a creditor's claim or relinquishing those rights and taking the gifts provided in trust. *Held*, in a safe harbor proceeding under *Prob.C. 21320* (text, §562), filing a creditor's claim against the trust would violate the no contest clause; the clause does not deprive them of their right to support under the marital

judgment or hinder their ability to assert that right and, thus, does not violate public policy. (151 C.A.4th 446.)



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7. Property Claimed Independent of Instrument.

14 Witkin Sum. Cal. Law Wills § 571

[§ 571] Property Claimed Independent of Instrument.

A proceeding to obtain property independent of the instrument containing the no contest clause has been held not to be a contest. (See *Estate of Dow* (1957) 149 C.A.2d 47, 51, 308 P.2d 475 [action to recover community property, action against administrator for conversion, and applications for statutory family allowance]; *Estate of Watson* (1986) 177 C.A.3d 569, 573, 223 C.R. 14 [action by children of predeceased husband against estate of surviving wife to enforce oral contract to convey property inherited from husband to his children at wife's death did not violate no contest clause in husband's will]; cf. *Nairne v. Jessop-Humble* (2002) 101 C.A.4th 1124, 1128, 124 C.R.2d 726 [complaint to establish and enforce oral contract to convey specific property, even though based on right independent of trust, would violate trust's broadly worded forfeiture clause; complaint would directly attack provision including that property in trust and would frustrate settlors' intent].)

In *Estate of Schreck* (1975) 47 C.A.3d 693, 121 C.R. 218, the testator left his estate in trust, with life income to his widow and remainder to his brothers and sisters. The forfeiture clause included anyone who "seeks to succeed to any part of my estate except through this will." A remainderperson contended that the widow had violated the clause by (a) claiming an automobile held in joint tenancy, and (b) having certain exempt property set apart. *Held*, there was no violation. She did not seek to invalidate the will, and neither the property she took as surviving joint tenant nor that set aside to her came by intestate succession. (47 C.A.3d 697.)

In *Estate of Black* (1984) 160 C.A.3d 582, 206 C.R. 663, petitioner cohabited with the decedent for 18 years. The will, which contained a no contest clause, devised a mobilehome to petitioner and established a small trust to pay the expenses connected with it. The bulk of decedent's estate was devised to his children. In a petition to determine her interest under the will, petitioner sought a ruling that filing a petition under former Prob.C. 851.5 (now Prob.C. 9860, supra, §356) to require conveyance of estate property under an implied or express domestic partnership would not violate the no contest clause. The trial judge ruled that the petition to determine interest did not violate the clause but that a petition for conveyance would do so. *Held*, reversed in part; the petition for conveyance would not forfeit petitioner's right to the mobilehome.

(a) The petition to determine interest did not violate the clause. The merits of the domestic partnership claim were

not in issue. Petitioner sought a ruling whether filing the claim would result in a forfeiture under a clause prohibiting "contests or attacks" by a beneficiary "directly or indirectly." This determination "requires interpretation of the will to ascertain the testator's intent and in no way frustrates the testamentary scheme." To impose a forfeiture would be "going far beyond the plain import of the testator's language." (160 C.A.3d 589.)

(b) A petition for conveyance would not violate the clause. Proceedings by beneficiaries to assert claims to property based on a right independent of the will have been held not to violate various no contest clauses, depending on the language expressing the testator's intent. (160 C.A.3d 590.) Here, the basis for petitioner's claim is that decedent did not intend to dispose of by will that property representing petitioner's partnership interest, which she is entitled to claim regardless of the will. This interpretation is consistent with decedent's express intent to dispose of property which he had the right to dispose of by will. (160 C.A.3d 591, following *Estate of Schreck*.)

In *Varney v. Superior Court* (1992) 10 C.A.4th 1092, 12 C.R.2d 865, petitioner alleged that decedent orally promised that, on death, he would transfer title to his home and his interest in their coowned restaurant to petitioner, in exchange for petitioner's promise to provide services to the restaurant at a substantially reduced rate of pay. Decedent's will left specified percentages of his estate to named persons (including petitioner), and contained a no contest clause. Petitioner requested a declaration under *Prob.C. 21320* (supra, §562) concerning both a proposed creditor's claim for the reasonable value of services to the restaurant and a petition for specific performance of the agreement. The trial judge ruled that both the creditor's claim and the petition for specific performance would violate the no contest clause. *Held*, reversed.

(a) *Petition for specific performance*. Petitioner is seeking to enforce a contract that is independent of the will. He is not seeking either to impose a constructive trust on specified bequests left to other beneficiaries or to achieve a result contrary to the will. A successful conclusion to his petition will not affect the other beneficiaries' right to recover the percentage of the estate left to them by the will. Hence, the petition for specific performance does not contest the provisions of the will. (10 C.A.4th 1107.)

(b) *Creditor's claim*. The mere filing of a creditor's claim will not violate the narrow no contest provision involved in this case. (10 C.A.4th 1107.) Furthermore, if the creditor's claim is denied and petitioner chooses to bring an action for the reasonable value of his service, the action will not violate the no contest provision. That provision only bars contests of the provisions of the will itself, while petitioner's quantum meruit claim is for services performed under an alleged oral agreement that was unquestionably independent of the will. (10 C.A.4th 1108.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Revised no contest clause statutes*: In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.)



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8. Action To Determine Character, Title, or Ownership of Property.

14 Witkin Sum. Cal. Law Wills § 572

[§ 572] Action To Determine Character, Title, or Ownership of Property.

In *Estate of Kazian* (1976) 59 C.A.3d 797, 130 C.R. 908, the testator declared that all property in her name was separate, left most of it to her children and grandchildren, and left the smaller part to her second husband. He sued to establish a community interest in all of the testator's property. He lost the suit, and the probate court thereafter held that the will's forfeiture clause applied. *Held*, affirmed. A "contest" may be any legal proceeding designed to thwart a testator's wishes as expressed in the will; it need not be the technical "contest" under the no contest statute. The husband's contention that his action merely sought a "construction" of the will was unsound. The testator's declaration concerning her separate property needed no construction, and his suit was an attempt to obtain estate property in direct contravention of her dispositions. (59 C.A.3d 804.)

In *Estate of Richter* (1993) 12 C.A.4th 1361, 16 C.R.2d 108, the decedent's will included a no contest clause and a residuary devise of which 20% went to his surviving spouse. She petitioned to determine whether filing a petition to determine her community property interest in assets acquired during marriage would violate the no contest clause. *Held*, the petition would not violate the clause.

(a) Decedent's will referred to "my estate" in general terms, did not specify any particular property that constituted his estate, and did not state that any particular assets were his separate property. Nor did he indicate an intent to dispose of community property and require his surviving spouse to elect to take under the will and forfeit her community property interest. (12 C.A.4th 1368, 1369.)

(b) By petitioning to determine her community property interest, the surviving spouse would not challenge the inclusion of particular property in the estate, but would seek to determine what property was part of the estate and what property was not subject to disposition by decedent's will. In doing so, she would not thwart decedent's stated intent. Thus, the proposed petition would not be a will contest. (12 C.A.4th 1369, 1370, following *Estate of Black* (1984) 160 C.A.3d 582, 206 C.R. 663, supra, §571, and distinguishing *Estate of Kazian*.)

In *Jacobs-Zorne v. Superior Court* (1996) 46 C.A.4th 1064, 54 C.R.2d 385, the decedent's will included a no contest clause and pecuniary devises to his surviving spouse and to others. She petitioned to determine whether various

bank accounts were joint tenancy property rather than probate property. *Held*, filing the petition did not violate the clause.

(a) Under *Prob.C. 21304* (supra, §564), no contest clauses are to be strictly construed. Cases decided before the enactment of the statute that do not adhere to a strict rule of construction are unpersuasive and "on that basis no longer should be followed." (46 C.A.4th 1077, rejecting *Estate of Kazian*.)

(b) Here, the surviving spouse's petition does not challenge any of the provisions of the will, but asserts a claim based on an independent right, a joint tenancy right of survivorship. In the absence of language in the will mandating a forced election between ownership rights and rights under the will, an attempt to determine independent property rights is not an attack on the will. (46 C.A.4th 1978, 1081, following *Estate of Black* and *Estate of Richter*.)

Jacobs-Zorne was distinguished in *Estate of Pittman* (1998) 63 C.A.4th 290, 73 C.R.2d 622, holding an attempt to recharacterize property to be a contest. A married couple's trust provided, on the death of the survivor, for residuary gifts of the husband's separate and community property to his children and of the wife's separate and community property to her children. The trust included a broadly worded no contest clause and detailed schedules characterizing assets as the husband's separate property, the wife's separate property, or community property. After the death of the survivor, the wife's children petitioned the court to recharacterize various items listed as the husband's separate property as community property. The husband's children contended that the petition was a contest and sought to enforce the no contest clause. *Held*, the petition violated the no contest clause.

(a) The no contest clause was extremely broad. It not only prohibited a contest in the traditional sense, but also prohibited a beneficiary from seeking an adjudication that a provision was void or from seeking "otherwise" to void, nullify, or set aside the trust or any of its provisions. (63 C.A.4th 298.)

(b) The trustors meticulously characterized specific assets as separate or community and clearly intended their property to be distributed according to that precise identification. The contestants here were not seeking to characterize uncharacterized property, as in *Jacobs-Zorne*, but "were seeking to thwart the trustors' clear intent" by recharacterizing property that had been specifically characterized. (63 C.A.4th 303.) By doing so, they contested the portions of the trust declaring the nature of the scheduled property. (63 C.A.4th 305.)

The general rule that an action to characterize property is not a contest has been codified. Bringing an action to determine the character, title, or ownership of property does not constitute a contest "unless expressly identified in the no contest clause as a violation of the clause." (*Prob.C. 21305(a)(2)*.) Generally, *Prob.C. 21305* applies to instruments executed on or after January 1, 2001. (*Prob.C. 21305(a)*; see *Prob.C. 21305(c)* [*Prob.C. 21305(a)* does not apply to codicil or amendment executed on or after January 1, 2001, unless codicil or amendment adds no contest clause or amends no contest clause in instrument executed before January 1, 2001].) (See *Estate of Strader* (2003) 107 C.A.4th 996, 1004, 132 C.R.2d 649 [request in final accounting to distribute proceeds of litigation only to beneficiaries who financed litigation did not violate no contest clause; request was akin to attempt to characterize property not expressly mentioned in will].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised no contest clause statutes: In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.) Former *Prob.C. 21305(a)(2)* is continued in *Prob.C. 21311(a)(2)* without substantive change.



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2. No Contest Clause.

f. Limitations on Enforcement.

9. Challenge to Validity of Another Instrument.

Witkin Sum. Cal. Law Wills § 573

[§ 573] Challenge to Validity of Another Instrument.

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Davies (2005) 127 C.A.4th 1164, 1174, 26 C.R.3d 239* [following *Genger v. Delsol (1997) 56 C.A.4th 1410, 66 C.R.2d 527*, text, p. 660; challenging validity of probate court order approving amendments to testator's trust would nullify testator's express wishes and would constitute contest].

In *McIndoe v. Olivos (2005) 132 C.A.4th 483, 33 C.R.3d 689*, the trustors, husband and wife, established a revocable living trust to take advantage of the federal estate tax marital deduction. The trust was divided into a revocable survivor's trust and an irrevocable exempt trust on the death of the husband. The wife later made amendments to the survivor's trust to remove one of their daughters as a beneficiary and trustee of the survivor's trust. *Held*, in a safe harbor proceeding under *Prob.C. 21320* (text, §562), challenging those amendments would not constitute a contest of the exempt trust. The surviving trustor did not retain control of the assets in the exempt trust and did not have the power to amend, revoke, or terminate the exempt trust. "As a result, it is reasonable to conclude that the trustors did not intend that a contest to amendments to the survivor's trust would result in a contest and possible forfeiture of the exempt trust. Rather, only a contest to the exempt trust could trigger a possible forfeiture of a beneficiary's rights under the exempt trust." Otherwise, the surviving trustor effectively would have control over the assets of the exempt trust, a result that was clearly not intended by using the exempt trust with the marital deduction. (*132 C.A.4th 489*.)

In *Estate of Rossi (2006) 138 C.A.4th 1325, 42 C.R.3d 244*, the decedent executed a revocable living trust and a pour-over will, both containing no contest clauses. A later amendment to the trust, which did not contain a no contest clause, reduced one beneficiary's share of trust assets. That beneficiary applied for a determination under *Prob.C. 21320* whether filing probate petitions challenging the amendment on the ground of undue influence would constitute a contest. *Held*, the petitions would not constitute a contest.

(a) All of the documents at issue here were executed after January 1, 2001, the effective date of *Prob.C. 21305*, and all are instruments within the meaning of *Prob.C. 45* (text, §50). (*138 C.A.4th 1335, 1336*.) Thus, *Prob.C. 21305(a)(3)* (text, p. 661) applies unless the exception set forth in *Prob.C. 21305(c)* (text, p. 661) applies. The executor attempted to shield the trust amendment from a challenge by contending that, under *Prob.C. 21305(c)*, the trust declaration and the

trust amendment form a single integrated document and that *Prob.C. 21305(a)(3)* does not apply unless the trust amendment contains its own no contest clause. The executor also argued that, because the trust amendment does not add or amend a no contest clause, the exception is applicable and *Prob.C. 21305(a)(3)* does not apply. This interpretation suggests that *Prob.C. 21305(a)(3)* is inapplicable so long as an amendment does not change the no contest clause in the original instrument regardless of when the original instrument was executed. The interpretation renders superfluous the last phrase of *Prob.C. 21305(c)* ("contained in an instrument executed before January 1, 2001"). (*138 C.A.4th 1337.*) In addition, the first clause of *Prob.C. 21305(c)* provides that *Prob.C. 21305(a)* does not apply to a codicil or amendment executed after January 1, 2001, because the instrument itself, executed on or after that date, is already subject to *Prob.C. 21305(a)*. (*138 C.A.4th 1338.*)

(b) *Prob.C. 21305(a)(3)* grants a safe harbor to an action challenging an instrument other than the instrument containing the no contest clause. Here, the trust amendment is such a document. It is separate from the instrument containing the no contest clause because it does not contain a no contest clause. And it may be challenged without violating the no contest clause there because the no contest clause in the instrument fails to expressly identify the action as a violation. (*138 C.A.4th 1338.*)



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CHAPTER XXI - Wills and Probate

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XI. ESTATE ADMINISTRATION

B. Contest of Will.

2. No Contest Clause.

f. Limitations on Enforcement.

9. Challenge to Validity of Another Instrument.

14 Witkin Sum. Cal. Law Wills § 573

[§ 573] Challenge to Validity of Another Instrument.

In *Burch v. George* (1994) 7 C.4th 246, 27 C.R.2d 165, 866 P.2d 92, plaintiff's husband placed the bulk of his assets, including his pension plan account, in a living trust for the benefit of various relatives. Plaintiff was the beneficiary of one of six subsidiary trusts. The trust contained a no contest clause applicable to the extent a beneficiary "seeks to obtain in any proceeding in any court an adjudication that this Trust or any of its provisions ... is void, or seeks otherwise to void, nullify or set aside this Trust or any of its provisions." After her husband's death, plaintiff petitioned the probate court to determine whether she could, without violating the no contest clause, proceed with a state action against the trust to litigate her community property rights and a federal action against the pension plan to litigate her pension rights. *Held*, the proposed actions would amount to a contest and preclude plaintiff's recovery of decedent's separate property left to her under the trust.

(a) *Each action would constitute a contest.* Because plaintiff's proposed state and federal actions would thwart the trustor's intention, each would constitute a contest:

(1) Whether there has been a contest for purposes of a no contest clause is controlled by the trustor's intention. (7 C.4th 255.) Here, the language of the trust and extrinsic evidence (statements of the trustee and the drafting attorney) demonstrate that the trustor intended to dispose of the whole trust estate and intended "to put his surviving spouse to an election between taking the distribution provided for her under the trust, or alternatively, renouncing that distribution and taking against the trust estate pursuant to her independent legal rights." (7 C.4th 257, citing the text.)

(2) The proposed federal action would amount to a contest even though it seeks no relief directly from the trust or the estate. If successful, the federal complaint, like the state complaint, would nullify the trust provisions providing for the allocation of trust assets to the various subsidiary trusts and would nullify the trustor's clearly stated intent that the surviving spouse be put to an election. (7 C.4th 261.)

(3) A number of decisions have held that a beneficiary's proceeding to assert claims based on a source of right independent of the will or trust instrument was not a contest. (7 C.4th 261, citing *Estate of Black* (1984) 160 C.A.3d 582, 206 C.R. 663, and other cases, *supra*, §571.) "These cases do not stand for the categorical proposition that any

proceeding based upon a claim of right independent of a will or trust instrument is never a contest for purposes of the no contest law. The respective courts in these cases simply followed the established rules for construing a no contest clause and determined that the particular claims asserted were consistent with the respective testators' intentions. These cases are factually distinguishable and do not call for a different result in the matter before us." (7 C.4th 261.)

(b) *No contest clause is enforceable.* The no contest clause here is properly enforceable against the surviving spouse:

(1) While no contest clauses discourage some surviving spouses from litigating over perceived community rights in estate property, the fact that a no contest clause might discourage a surviving spouse does not mean that a "theft" of community property has occurred. "Such a clause does not deprive the spouse of his or her community interests in property, nor does it hinder the ability of the spouse to assert such interests. To the extent the spouse believes valid community claims may be made against estate property, the spouse remains free to pursue them at his or her option. In doing so, however, the spouse may not retain the distribution conditionally provided under the estate plan. ... [I]t is neither unlawful nor against public policy to enforce a no contest clause against a surviving spouse who decides to pursue community interests in estate property." (7 C.4th 265.)

(2) "[E]quitable principles support the enforcement of no contest clauses against surviving spouses asserting community interests in estate property when such claims would plainly frustrate the expectations of the decedent spouses. There is considerable unfairness in allowing a surviving spouse to accept a will or trust instrument to the extent it confers a benefit, and at the same time attack the instrument to the extent it does not. Under such circumstances, the surviving spouse would receive a windfall to the detriment of the other beneficiaries." (7 C.4th 267.)

(c) *No federal preemption.* The no contest clause is not preempted to the extent federal pension benefits are involved. The relevant federal act preempts state law insofar as it "relates to" an employee benefit plan. Under federal decisions, a state law relates to a benefit plan to the extent it is specifically designed to affect benefit plans or singles out those plans, by express reference, for special treatment. "This bright line rule of preemption is not implicated here because California's no contest law makes no specific reference and affords no special treatment to ERISA benefit plans." (7 C.4th 269.) The no contest law neither prohibits plaintiff's ability to pursue her claims or take advantage of the federal statute's civil enforcement scheme, nor does it have a chilling effect on the pursuit of these rights. (7 C.4th 270.)

Two justices dissented, arguing that the no contest clause should be strictly construed not to apply to the assertion of a spouse's community interest in donative property. (7 C.4th 274.) (See 22 *Pepperdine L. Rev.* 866 [*Burch v. George*].)

In *Genger v. Delsol* (1997) 56 C.A.4th 1410, 66 C.R.2d 527, the decedent executed three documents as part of an integrated estate plan: a trust, a pour-over will, and a corporate stock redemption agreement. Under the plan, the corporation would, at decedent's death, redeem the stock by cancelling decedent's debt to the corporation and deeding a house to the estate. As a result of these transactions, decedent's son-in-law would own decedent's business interest and decedent's widow would own the house (as well as pension and IRA accounts passing outside the estate plan). The redemption agreement recited that the value of the stock was equal to the value of the house plus the amount of the debt. The trust contained a no contest clause. Plaintiff, decedent's widow, proposed to challenge the redemption agreement on the ground that the stock was worth far more than the house and the debt, and petitioned to determine whether the challenge would be a contest. *Held*, the complaint would violate the no contest clause.

(a) *Indirect challenge is contest.* Plaintiff challenges the stock redemption agreement, contending that the no contest clause is triggered only by a challenge to the will or trust. "We reject the argument. A 'contest' is not confined to a *direct* attack on a will or trust instrument. It may include a separate legal proceeding which is designed to thwart the testator's expressed wishes." (56 C.A.4th 1420.) If successful, plaintiff's complaint would "completely unravel" the estate plan and would nullify the express provisions of the trust calling for redemption of the stock under the

redemption agreement. Thus, the complaint would constitute a contest. (56 C.A.4th 1422.)

(b) *No contest clause applies to plaintiff.* The no contest clause applies to plaintiff, a named beneficiary of the trust. It is not necessary to show that the decedent "unequivocally intended" a forfeiture by that beneficiary in the event of a contest. Evidence that decedent intended plaintiff to be precluded from taking an interest in the family business supports the conclusion that plaintiff is a beneficiary for purposes of the no contest clause. (56 C.A.4th 1425.)

(c) *No contest clause is enforceable.* Plaintiff claims an exemption from the no contest clause under *Prob.C. 21307* (supra, §568), alleging that decedent's son-in-law was involved in drafting the instruments. However, this determination cannot be made in advance of the contest. *Prob.C. 21320* (supra, §562) provides, "as the parties phrase it, a 'safe harbor' for beneficiaries who seek an advance judicial determination of whether a proposed legal challenge would be a contest. But the issue permitted to be decided in that 'safe harbor' proceeding is justifiably confined to the question whether a proposed action would be a contest." If the ruling is adverse, the beneficiary is put to an election either to accede to the will or trust or to pursue the contest. A beneficiary who chooses to pursue the contest may, in another proceeding, assert the exemptions of *Prob.C. 21306* or *21307*. However, under *Prob.C. 21320(c)* (now *Prob.C. 21320(d)*), "the beneficiary is not entitled to an additional ruling in advance on whether, if the proposed contest were to be pursued, the no contest clause would nonetheless be unenforceable." (56 C.A.4th 1428, 1429.)

The general rule that challenging the validity of an instrument that does not include a no contest clause is not a contest has been codified. Challenging the validity of an instrument, contract, agreement, beneficiary designation, or other document, other than the instrument containing the no contest clause, does not constitute a contest "unless expressly identified in the no contest clause as a violation of the clause." (*Prob.C. 21305(a)(3)*.) Generally, *Prob.C. 21305* applies to instruments executed on or after January 1, 2001. (*Prob.C. 21305(a)*; see *Prob.C. 21305(c)* [*Prob.C. 21305(a)* does not apply to codicil or amendment executed on or after January 1, 2001, unless codicil or amendment adds no contest clause or amends no contest clause in instrument executed before January 1, 2001].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.) Former *Prob.C. 21305(a)(3)* is similar to *Prob.C. 21310(e)*, defining the term "protected instrument."

See *Estate of Davies* (2005) 127 C.A.4th 1164, 1174, 26 C.R.3d 239 [following *Genger v. Delsol* (1997) 56 C.A.4th 1410, 66 C.R.2d 527, text, p. 660; challenging validity of probate court order approving amendments to testator's trust would nullify testator's express wishes and would constitute contest].

In *McIndoe v. Olivos* (2005) 132 C.A.4th 483, 33 C.R.3d 689, the trustors, husband and wife, established a revocable living trust to take advantage of the federal estate tax marital deduction. The trust was divided into a revocable survivor's trust and an irrevocable exempt trust on the death of the husband. The wife later made amendments to the survivor's trust to remove one of their daughters as a beneficiary and trustee of the survivor's trust. *Held*, in a safe harbor proceeding under *Prob.C. 21320* (text, §562), challenging those amendments would not constitute a contest of the exempt trust. The surviving trustor did not retain control of the assets in the exempt trust and did not have the power to amend, revoke, or terminate the exempt trust. "As a result, it is reasonable to conclude that the trustors did not intend that a contest to amendments to the survivor's trust would result in a contest and possible forfeiture of the exempt trust. Rather, only a contest to the exempt trust could trigger a possible forfeiture of a beneficiary's rights under the exempt trust." Otherwise, the surviving trustor effectively would have control over the assets of the exempt trust, a result that was clearly not intended by using the exempt trust with the marital deduction. (132 C.A.4th 489.)

In *Estate of Rossi* (2006) 138 C.A.4th 1325, 42 C.R.3d 244, the decedent executed a revocable living trust and a pour-over will, both containing no contest clauses. A later amendment to the trust, which did not contain a no contest clause, reduced one beneficiary's share of trust assets. That beneficiary applied for a determination under *Prob.C. 21320* whether filing probate petitions challenging the amendment on the ground of undue influence would constitute a

contest. *Held*, the petitions would not constitute a contest.

(a) All of the documents at issue here were executed after January 1, 2001, the effective date of *Prob.C. 21305*, and all are instruments within the meaning of *Prob.C. 45* (text, §50). (*138 C.A.4th 1335, 1336.*) Thus, *Prob.C. 21305(a)(3)* (text, p. 661) applies unless the exception set forth in *Prob.C. 21305(c)* (text, p. 661) applies. The executor attempted to shield the trust amendment from a challenge by contending that, under *Prob.C. 21305(c)*, the trust declaration and the trust amendment form a single integrated document and that *Prob.C. 21305(a)(3)* does not apply unless the trust amendment contains its own no contest clause. The executor also argued that, because the trust amendment does not add or amend a no contest clause, the exception is applicable and *Prob.C. 21305(a)(3)* does not apply. This interpretation suggests that *Prob.C. 21305(a)(3)* is inapplicable so long as an amendment does not change the no contest clause in the original instrument regardless of when the original instrument was executed. The interpretation renders superfluous the last phrase of *Prob.C. 21305(c)* ("contained in an instrument executed before January 1, 2001"). (*138 C.A.4th 1337.*) In addition, the first clause of *Prob.C. 21305(c)* provides that *Prob.C. 21305(a)* does not apply to a codicil or amendment executed after January 1, 2001, because the instrument itself, executed on or after that date, is already subject to *Prob.C. 21305(a)*. (*138 C.A.4th 1338.*)

(b) *Prob.C. 21305(a)(3)* grants a safe harbor to an action challenging an instrument other than the instrument containing the no contest clause. Here, the trust amendment is such a document. It is separate from the instrument containing the no contest clause because it does not contain a no contest clause. And it may be challenged without violating the no contest clause there because the no contest clause in the instrument fails to expressly identify the action as a violation. (*138 C.A.4th 1338.*) (See *Perrin v. Lee (2008) 164 C.A.4th 1239, 1247, 79 C.R.3d 885* [following *Estate of Rossi*; where amendments to trust did not contain no contest clauses, petition challenging amendments on grounds of undue influence would not violate no contest clause contained in trust agreement, even though amendments "confirm and ratify" trust agreement].)



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2. No Contest Clause.

f. Limitations on Enforcement.

10. Challenge on Ground of Duress and Undue Influence.

14 Witkin Sum. Cal. Law Wills § 574

[§ 574] Challenge on Ground of Duress and Undue Influence.

In *Scharlin v. Superior Court* (1992) 9 C.A.4th 162, 11 C.R.2d 448, a married couple established a living trust, which, on the husband's death, was divided into an irrevocable decedent's trust and a revocable survivor's trust, with the son and daughter as remainder beneficiaries. The wife later amended the survivor's trust to remove the son as a beneficiary. Both the original trust and the amendment contained no contest clauses. Plaintiff son petitioned for a determination whether challenging the amendment on grounds of duress and undue influence by the daughter would constitute a contest, and petitioned for a writ of mandamus to vacate the trial court's order that a contest of both trusts would result. *Held*, plaintiff's proposed challenge, even if unsuccessful, would not be a challenge to the decedent's trust.

(a) The parties conceded that plaintiff's proposed challenge would constitute a challenge to the survivor's trust. If successful, the challenge would not forfeit his rights under the decedent's trust, but if unsuccessful, would forfeit his rights under the survivor's trust. (9 C.A.4th 169.)

(b) The daughter contended that the proposed challenge would be a direct attack on the surviving settlor's power to amend contained in the original trust agreement, and thus would violate the original no contest clause. Plaintiff contended that the amendment occurred improperly, i.e., by the exercise of duress or undue influence, not that the surviving settlor lacked the power to amend. Thus, the proposed contest of the amendment to the survivor's trust would not be a challenge to the power to amend and would not forfeit plaintiff's interest in the decedent's trust. (9 C.A.4th 170.)

(c) While the surviving settlor has the right to amend the survivor's trust, she lacks the power to amend the provisions of the original trust agreement, including the no contest clause, as to the decedent's trust. She can neither enlarge nor diminish the rights and penalty provisions under the original no contest clause by adding a no contest clause to the survivor's trust. (9 C.A.4th 170.)

A challenge on the ground of duress or undue influence is now a "direct contest." (See *Prob.C. 21300(b)*, *supra*, §561.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised no contest clause statutes: In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.) A contest on the ground of menace, duress, fraud, or undue influence is now set forth in *Prob.C. 21310(b)(4)*.



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11. Procedural Challenges.

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[§ 575] Procedural Challenges.

(1) *Challenge to Jurisdiction*. A challenge to the jurisdiction of the court, on the ground that probate should take place in another state, is not an attack on the will. (*Estate of Hill* (1917) 176 C. 619, 621, 169 P. 371; *Estate of Crisler* (1950) 97 C.A.2d 198, 200, 217 P.2d 470.)

(2) *Request for Continuance*. A request for a continuance for the purpose of making a written response or objection is not itself a response or objection. (*Prob.C. 1043(c)*, supra, §378.) "In the context of a will contest, this provision means that a potential contestant is not deemed to have contested the will merely because of a request for a continuance for the purpose of determining whether to contest the will." (Law Rev. Com. Comment.)

(3) *Determination Whether Particular Act Constitutes Contest*. A determination under *Prob.C. 21320* whether a proposed motion, petition, or act violates a no contest clause may not be made if a determination of the merits of the motion, petition, or act is required. (*Prob.C. 21320(c)*.) (See *Prob.C. 21320(d)* [determination whether *Prob.C. 21306* or *21307* would apply in particular case may not be made under *Prob.C. 21320*].)

Estate of Kaila (2001) 94 C.A.4th 1122, 114 C.R.2d 865, involved a petition under *Prob.C. 21320* to determine the meaning and intent of a no contest clause. The trial court determined that the admission of extrinsic evidence to interpret the no contest clause would require a determination of the proposed action on the merits and precluded declaratory relief under the statute. *Held*, reversed.

Generally, extrinsic evidence of a testator's intent is admissible if relevant to show a meaning to which language is reasonably susceptible. Thus, extrinsic evidence may be admissible to show the testator's intended meaning of a no contest clause in a *Prob.C. 21320* proceeding. (94 C.A.4th 1134, citing *Burch v. George* (1994) 7 C.4th 246, 27 C.R.2d 165, 866 P.2d 92, supra, §573.) However, consideration of extrinsic evidence in a *Prob.C. 21320* proceeding does not necessarily require a determination of the merits. (94 C.A.4th 1135.) One justice dissented. (94 C.A.4th 1138.) (The court's further conclusion that the trial court could make a determination on the merits was overruled by the adoption of *Prob.C. 21320(c)* in 2002.)

SUPPLEMENT: [This section is current through the latest supplement]

(New) Revised no contest clause statutes: In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.)



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[§ 576] Public Policy Limitations.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Clause Revoking Gift to One Beneficiary If Another Contests Is Not Against Public Policy.* In *Tunstall v. Wells* (2006) 144 C.A.4th 554, 50 C.R.3d 468, a trust provided for final distribution to five siblings, three to receive \$ 50,000 each and two to receive half the remaining assets each. A no contest clause provided that a contest by any of the three general beneficiaries would trigger forfeiture of the gifts to all three. *Held*, in a case of first impression, the clause did not violate public policy.

(a) The fear that the trustee (one of the two residuary beneficiaries) might collude with one of the three general beneficiaries to institute a contest, which would deny the other general beneficiaries their gifts, does not make the clause against public policy. Any breach of the trustee's fiduciary duty to administer the trust solely in the interest of the beneficiaries may be challenged under *Prob.C. 21305(b)(6)* (see text, p. 664) without triggering the no contest clause. (144 C.A.4th 562.)

(b) In general, a settlor may make a gift subject to any lawful conditions, and a trust beneficiary has no right to the gift except subject to the conditions. Here, the intent of the settlor is clear, and the settlor could lawfully have given the three beneficiaries nothing. (144 C.A.4th 565.)

(c) The terms of the no contest clause are not "so unfair that they trump the traditional public policy of upholding the testator's intent." Unless a testamentary instrument violates public policy, the fairness of the instrument is not an issue for judicial review. (144 C.A.4th 565.) While the no contest clause here may appear mean-spirited, "mean-spiritedness in a testamentary instrument is not in itself illegal or against public policy" and there may be rational reasons why the settlor selected this approach. (144 C.A.4th 566.)

(5) *(New) Other Public Policy Claims.* In *Colburn v. Northern Trust Co.* (2007) 151 C.A.4th 439, 59 C.R.3d 828, the decedent's revocable living trust contained a detailed no contest clause ("a paradigm of clarity") (151 C.A.4th 448) that forced the decedent's former spouse and her children to elect between challenging the decedent's testamentary plan set forth in the trust and pursuing their remedies under the marital dissolution judgment. *Held*, in a safe harbor

proceeding under *Prob.C. 21320* (text, §562), filing creditor claims would trigger the no contest clause, and public policy considerations favoring the enforcement of spousal and child support would not bar enforcement of the clause. The clause does not deprive the former spouse and the children of their right to support under the dissolution judgment or hinder their right to pursue those claims at their option. But it would be unfair to allow them to accept the decedent's trust to the extent it confers a benefit and at the same time attack it to the extent it does not. They would thus receive a windfall to the detriment of other beneficiaries. (*151 C.A.4th 451.*)



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[§ 576] Public Policy Limitations.

(1) *Statutory List.* As a matter of public policy, the following proceedings do not violate a no contest clause "notwithstanding anything to the contrary in any instrument":

(a) *Modification of Trust.* A pleading seeking relief under *Prob.C. 15400* et seq. (modification and termination of trusts; see 13 *Summary* (10th), *Trusts*, §195 et seq.). (*Prob.C. 21305(b)(1).*)

(b) *Conservatorship.* A pleading under *Prob.C. 1800* et seq. (conservatorship proceedings; see *infra*, §932 et seq.). (*Prob.C. 21305(b)(2).*)

(c) *Power of Attorney.* A pleading under *Prob.C. 4100* et seq. (powers of attorney; see *infra*, §839 et seq.). (*Prob.C. 21305(b)(3).*)

(d) *Annulment.* A pleading regarding an order annulling the marriage of the person who executed the instrument containing the no contest clause. (*Prob.C. 21305(b)(4).*)

(e) *Management of Conservatorship or Guardianship Estate.* A pleading under *Prob.C. 2403* (confirmation or instruction concerning management of conservatorship estate or guardianship estate; see *infra*, §1001). (*Prob.C. 21305(b)(5).*)

(f) *Exercise of Fiduciary Power.* A pleading challenging the exercise of a fiduciary power. (*Prob.C. 21305(b)(6).*) This provision does not apply if the court finds that filing the pleading is a direct contest of an instrument or any of its terms. (*Prob.C. 21305(e).*) (See *Prob.C. 21300(b)*, *supra*, §561 ["direct contest" defined].)

(g) *Appointment or Removal of Fiduciary.* A pleading regarding the appointment of a fiduciary or the removal of a fiduciary. (*Prob.C. 21305(b)(7).*)

(h) *Accounting of Fiduciary.* A pleading regarding an accounting or report of a fiduciary. (*Prob.C. 21305(b)(8).*)

(i) *Interpretation of Instrument.* A pleading regarding the interpretation of the instrument containing the no contest clause or a document identified in the no contest clause. (*Prob.C. 21305(b)(9)*.) This provision does not apply if the court finds that filing the pleading is a direct contest of an instrument or any of its terms. (*Prob.C. 21305(e)*.) (See *Prob.C. 21300(b)*, supra, §561 ["direct contest" defined].)

(j) *Approval of Settlement or Compromise.* A pleading regarding the approval of a settlement or compromise whether or not it affects the terms of an instrument. (*Prob.C. 21305(b)(10)*.)

(k) *Reformation of Instrument.* A pleading regarding the reformation of an instrument to carry out the intention of the person creating the instrument. (*Prob.C. 21305(b)(11)*.) This provision does not apply if the court finds that filing the pleading is a direct contest of an instrument or any of its terms. (*Prob.C. 21305(e)*.) (See *Prob.C. 21300(b)*, supra, §561 ["direct contest" defined].)

(l) *Compelling Report or Accounting of Fiduciary.* A petition to compel an accounting or report of a fiduciary, if the accounting or report is not waived by the instrument. If the accounting or report is waived, a petition to determine if *Prob.C. 16064(a)* (invalid waiver of trustee accounting requirement; see 13 *Summary* (10th), *Trusts*, §89) applies is not a violation of a no contest clause. (*Prob.C. 21305(b)(12)*.)

For purposes of *Prob.C. 21305(b)*, a pleading includes a petition, complaint, response, objection, or other document filed with the court "that expresses the position of a party to the proceedings." (*Prob.C. 21305(f)*.)

(2) *Effective Date.* *Estate of Hoffman* (2002) 97 C.A.4th 1436, 1445, 119 C.R.2d 248, involving a proposed action to remove an executor, held that the public policy provisions of *Prob.C. 21305(b)* apply to instruments executed before January 1, 2001, the effective date of the statute. However, the holding is subject to a later statutory limitation. Under *Prob.C. 21305(d)*, added in 2002, *Prob.C. 21305(b)* applies to instruments of decedents dying on or after January 1, 2001, and to documents that become irrevocable on or after that date. However, *Prob.C. 21305(b)(9)*, *21305(b)(11)*, and *21305(b)(12)* apply to instrument of decedents dying on or after January 1, 2003, and to documents that become irrevocable on or after that date. (See *Hermanson v. Hermanson* (2003) 108 C.A.4th 441, 444, 133 C.R.2d 486 [*Prob.C. 21305(b)(7)* did not apply to trust that became irrevocable in December 2000].)

(3) *Prior Case Law.* Decisions before the enactment of the statute reached similar results in holding that various actions involving estate property or the representative did not attack the will and thus did not violate the no contest clause. (See *Estate of Seipel* (1933) 130 C.A. 273, 277, 19 P.2d 808 [action against executors for accounting]; *Estate of Miller* (1963) 212 C.A.2d 284, 298, 27 C.R. 909, citing the text; *Estate of Miller* (1964) 230 C.A.2d 888, 902, 41 C.R. 410 [seeking removal of executor-trustee]; *Estate of Bullock* (1968) 264 C.A.2d 197, 200, 70 C.R. 239 [petition by beneficiaries for instructions on whether action to remove testamentary trustees would bring forfeiture clause into operation]; *Estate of Kruse* (1970) 7 C.A.3d 471, 476, 86 C.R. 491 [action by charitable remainderperson under testamentary trust for accounting by executor]; *Estate of Lewy* (1974) 39 C.A.3d 729, 734, 113 C.R. 674 [pleading challenging capacity of executor to act and alleging that purported will offered for probate was altered copy because two pages were not part of original and had been substituted after attestation was not contest, even though entitled "contest of will"; pleading did not attack validity of will and sought to establish, rather than frustrate, testator's intent].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Revised no contest clause statutes:* In 2008, the existing no contest clause statutes (*Prob.C. 21300* et seq.) were repealed and new statutes (*Prob.C. 21310* et seq.), operative on January 1, 2010, were adopted. (See Supp., supra, §560A.) The enforcement of no contest clauses has been narrowed and the statutory list of public policy limitations has been eliminated.(4) (New) *Clause Revoking Gift to One Beneficiary If Another Contests Is Not Against Public Policy.* In *Tunstall v. Wells* (2006) 144 C.A.4th 554, 50 C.R.3d 468, a trust provided for final distribution to five siblings, three to receive \$ 50,000 each and two to receive half the remaining assets each. A no contest clause provided that a contest by any of the three general beneficiaries would trigger forfeiture of the gifts to all three. *Held*, in a case of first impression, the clause did not violate public policy.

(a) The fear that the trustee (one of the two residuary beneficiaries) might collude with one of the three general beneficiaries to institute a contest, which would deny the other general beneficiaries their gifts, does not make the clause against public policy. Any breach of the trustee's fiduciary duty to administer the trust solely in the interest of the beneficiaries may be challenged under *Prob.C. 21305(b)(6)* (see text, p. 664) without triggering the no contest clause. (144 C.A.4th 562.)

(b) In general, a settlor may make a gift subject to any lawful conditions, and a trust beneficiary has no right to the gift except subject to the conditions. Here, the intent of the settlor is clear, and the settlor could lawfully have given the three beneficiaries nothing. (144 C.A.4th 565.)

(c) The terms of the no contest clause are not "so unfair that they trump the traditional public policy of upholding the testator's intent." Unless a testamentary instrument violates public policy, the fairness of the instrument is not an issue for judicial review. (144 C.A.4th 565.) While the no contest clause here may appear mean-spirited, "mean-spiritedness in a testamentary instrument is not in itself illegal or against public policy" and there may be rational reasons why the settlor selected this approach. (144 C.A.4th 566.)

(5) (New) *Other Public Policy Claims.* In *Colburn v. Northern Trust Co.* (2007) 151 C.A.4th 439, 59 C.R.3d 828, the decedent's revocable living trust contained a detailed no contest clause ("a paradigm of clarity") (151 C.A.4th 448) that forced the decedent's former spouse and her children to elect between challenging the decedent's testamentary plan set forth in the trust and pursuing their remedies under the marital dissolution judgment. *Held*, in a safe harbor proceeding under *Prob.C. 21320* (text, §562), filing creditor claims would trigger the no contest clause, and public policy considerations favoring the enforcement of spousal and child support would not bar enforcement of the clause. The clause does not deprive the former spouse and the children of their right to support under the dissolution judgment or hinder their right to pursue those claims at their option. But it would be unfair to allow them to accept the decedent's trust to the extent it confers a benefit and at the same time attack it to the extent it does not. They would thus receive a windfall to the detriment of other beneficiaries. (151 C.A.4th 451.)



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3. Procedure.

a. Contest Before Probate.

1. Objection, Summons, and Response.

Witkin Sum. Cal. Law Wills § 577

[§ 577] Objection, Summons, and Response.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Objection.*

(New) Filing fee: Generally, the fee for filing an objection to a will or codicil under *Prob.C. 8250* is \$ 320. (See *Govt.C. 70650(c)*, Supp., infra, §585.)



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a. Contest Before Probate.

1. Objection, Summons, and Response.

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[§ 577] Objection, Summons, and Response.

(1) *In General.* Former Prob.C. 370 et seq. set forth in detail the procedure governing will contests. (See *Swift v. Superior Court* (1952) 39 C.2d 358, 362, 247 P.2d 6; *Estate of Robinson* (1961) 192 C.A.2d 847, 854, 13 C.R. 842 [right to contest lost by delaying while another contest was heard].) The current statute is less detailed. Under Prob.C. 8004(b), where a petition to administer an estate has been filed, the will may be contested, and the applicable procedure is that provided by Prob.C. 8250 et seq. (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §§10:26 et seq., 10:56 et seq.; 96 Am.Jur. Trials, Will Contests §1 et seq.)

(2) *Objection.* When a will is contested under Prob.C. 8004 (infra, §586), the contestant must file an objection to probate of the will. (Prob.C. 8250(a).) The contestant's petition, like the complaint in a civil action, must allege ultimate facts, not conclusions of law and evidentiary facts. (See *Estate of Bixler* (1924) 194 C. 585, 589, 229 P. 704; *Estate of Archer* (1987) 193 C.A.3d 238, 245, 239 C.R. 137, citing the text; 4 Cal. Proc. (4th), Pleading, §339; Rutter Group, 2 Cal. Practice Guide: Probate §15:1 et seq., Form 15:A et seq.; on filing fee, see infra, §585.)

(3) *Summons.* The summons is issued and served, with a copy of the objection, on those persons required by Prob.C. 8110 (infra, §588) to be served with notice of a hearing on a petition for administration. The summons is issued and served as provided in C.C.P. 413.10 et seq. (see 3 Cal. Proc. (4th), Actions, §919 et seq.). The summons must direct the person summoned to file a written pleading responding to the contest within 30 days of service of the summons. (Prob.C. 8250(a).) The Judicial Council has approved a form for a probate summons. (See Judicial Council Form No. DE-125 [Summons (Probate)].)

(4) *Who May Respond.* The petitioner or any other interested person may jointly or separately answer the objection or demur to the objection within the time prescribed in the summons. (Prob.C. 8251(a); see Prob.C. 48 ["interested person" defined].)

"A person named as executor in the will is under no duty to defend a contest until the person is appointed personal representative." (Prob.C. 8250(b).) However, the executor, though neither a beneficiary nor an heir, may resist the contest. (*Estate of Ronayne* (1951) 103 C.A.2d 852, 855, 230 P.2d 423.)

(5) *Demurrer*. A demurrer may be made on any grounds of demurrer available in a civil action. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 15 days, within which to amend the objection. If the demurrer is overruled, the petitioner and any other interested person may answer within 15 days. (*Prob.C. 8251(b).*)

(6) *Effect of Failure To Respond*. *Prob.C. 8251(c)* sets forth the consequences if a person fails to timely respond to the summons:

(a) The case is at issue and may proceed on the petition and other documents filed by the time of the hearing; no further pleadings by other persons are necessary. (*Prob.C. 8251(c)(1).*)

(b) The person may not participate further in the contest, but his or her interest in the estate is not otherwise affected. However, nothing in this provision precludes further participation by the petitioner. (*Prob.C. 8251(c)(2).*)

(c) The person is bound by the decision in the proceeding. (*Prob.C. 8251(c)(3).*)

West's Key Number Digest, Wills k.277, 280.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Objection*.

(*New*) *Filing fee*: Generally, the fee for filing an objection to a will or codicil under *Prob.C. 8250* is \$ 350. (See *Govt.C. 70650(b)*, as amended in 2008; Supp., *infra*, §585.)

Allegation of ultimate facts:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §378.



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2. Trial.

14 Witkin Sum. Cal. Law Wills § 578

[§ 578] Trial.

(1) *No Right to Jury Trial*. Under the former statute, the parties were entitled to a jury trial on issues of fact, unless they waived the right. (See *Estate of Black* (1926) 199 C. 257, 262, 248 P. 1015; *Swift v. Superior Court* (1952) 39 C.2d 358, 361, 247 P.2d 6; 7 Cal. Proc. (4th), Trial, §106.)

Prob.C. 8252(b) eliminates the jury trial: "The court shall try and determine any contested issue of fact that affects the validity of the will." The Law Revision Commission Comment states: "There is a high percentage of reversals on appeal of jury verdicts, with the net result that the whole jury and appeal process serves mainly to postpone enjoyment of the estate, enabling contestants as a practical matter to force compromise settlements to which they would not otherwise be entitled." (See *Estate of Gardner* (1991) 1 C.A.4th 995, 1000, 2 C.R.2d 664 [*Prob.C. 8252* was applicable to will contest filed before but heard after operative date of statute].)

(2) *Burden of Proof*. The proponents of the will have the burden of proof of due execution. (On presumption of due execution, see *supra*, §147.) The contestants of the will have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. If the will is opposed by a petition for probate of a later will revoking the former, whether the later will is entitled to probate is determined first. (*Prob.C. 8252(a)*, based on *Unif.Prob.C. §3-407*.) Nothing in *Prob.C. 8252(a)* precludes consolidation for trial of two wills offered for probate. (Law Rev. Com. Comment.) (See *Estate of Wong* (1995) 40 C.A.4th 1198, 1205, 47 C.R.2d 707 [where question is whether document shows testamentary intent, *Prob.C. 8252* is not applicable].)

A mistake does not preclude admission of a will to probate unless the mistake vitiates execution of the will or the formation of testamentary intent. For this purpose, "testamentary intent" means a general intent to make a disposition of property effective on death, not an intention regarding a particular disposition of property. (*Estate of Smith* (1998) 61 C.A.4th 259, 270, 71 C.R.2d 424 [contestant did not carry burden of proving that properly signed and witnessed will disinheriting daughter and granddaughter in favor of husband was executed by mistake].)

(3) *Witnesses*. At trial, each subscribing witness must be produced and examined. (*Prob.C. 8253*.) (On proof where subscribing witnesses are unavailable, see *Prob.C. 8253*, *supra*, §546.)

(4) *Trial Preference for Party 70 Years of Age or Older*. C.C.P. 36(a), giving preference in a civil trial on the motion of a party who has reached the age of 70, is applicable to a will contest. (*Swaithes v. Superior Court* (1989) 212 C.A.3d 1082, 1086, 1088, 261 C.R. 41, 7 Cal. Proc. (4th), Trial, §79.)

West's Key Number Digest, Wills k.307 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *No Right to Jury Trial*.

Cross-Reference: 7 Cal. Proc. (5th), Trial, §96.(4) *Trial Preference for Party 70 Years of Age or Older*.

Swaithes case:

Cross-Reference: 7 Cal. Proc. (5th), Trial, §69.



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3. Orders and Judgment.

14 Witkin Sum. Cal. Law Wills § 579

[§ 579] Orders and Judgment.

(1) *In General*. "The court may make appropriate orders, including orders sustaining or denying objections, and shall render judgment either admitting the will to probate or rejecting it, in whole or in part, and appointing a personal representative." (*Prob.C. 8254.*) (See 53 *A.L.R.4th* 561 [summary judgment in will probate or contest].) Relief from the judgment may be available under *C.C.P. 473* (see 8 *Cal. Proc. (4th)*, *Attack on Judgment in Trial Court*, §152). (Law Rev. Com. Comment to *Prob.C. 8251.*)

An order admitting a will to probate or refusing to admit a will to probate is appealable. (*Prob.C. 1303(b)*; *supra*, §411; see *Estate of Jamison (1951) 107 C.A.2d 483, 486, 237 P.2d 546*; on appellate review, see 6 *Stanf. L. Rev.* 91.)

The contest of a will is a proceeding in rem, and upholding the will on appeal benefits all interested persons, not just the appealing legatee. (See *Estate of Sanderson (1960) 183 C.A.2d 740, 742, 6 C.R. 893* [only one beneficiary appealed, but reversal was "with directions to admit the will to probate"].)

(2) *Dismissal*. Unless the Probate Code provides otherwise, the rules of practice applicable to civil actions apply to probate proceedings. (*Prob.C. 1000*, *supra*, §371.) Hence, decisions applying the dismissal statutes to probate proceedings should be applicable to will contests.

(a) *Voluntary dismissal under C.C.P. 581*: The contestant has the right to enter a voluntary dismissal. (*Estate of Cook (1928) 205 C. 581, 587, 271 P.2d 1083*; see 6 *Cal. Proc. (4th)*, *Proceedings Without Trial*, §253 et seq.) However, where the contestant instead of filing a request with the clerk, makes a motion to dismiss, the court has discretion to deny the motion on the ground that dilatory tactics might otherwise be permitted. (*Estate of Matthiessen (1935) 10 C.A.2d 323, 328, 52 P.2d 248*; see 24 *Cal. L. Rev.* 742; 6 *Cal. Proc. (4th)*, *Proceedings Without Trial*, §275 et seq.) And if others have become contestants by filing petitions in intervention, the original contestant cannot terminate the proceeding by dismissing the petition. (*Voyce v. Superior Court (1942) 20 C.2d 479, 487, 127 P.2d 536.*)

(b) *Discretionary dismissal under C.C.P. 581(l)* (failure to appear): The proceeding may be dismissed where the contestant fails to appear. (*Estate of Daniels (1953) 120 C.A.2d 284, 287, 260 P.2d 991*; see 6 *Cal. Proc. (4th)*,

Proceedings Without Trial, §460.)

(c) *Mandatory dismissal under C.C.P. 583.110 (delay in prosecution)*: The statute authorizing dismissal for failure to bring a case to trial applies to will contests. (*Estate of Morrison* (1932) 125 C.A. 504, 507, 14 P.2d 102; see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §330 et seq.) However, because of the difference between a summons and a probate citation (now a probate summons), it was held that the statute authorizing dismissal for delay in service does not apply to a will contest. (*Horney v. Superior Court* (1948) 83 C.A.2d 262, 270, 188 P.2d 552; see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §287 et seq.)

A dismissal by the court on the ground of the original contestant's lack of interest does not defeat the right of an intervener. (*Estate of Harootenian* (1951) 38 C.2d 242, 246, 238 P.2d 992 [following rule on voluntary dismissal in *Voyce*].)

West's Key Number Digest, Wills k.339 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

Relief from judgment:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144 et seq.

(2) *Dismissal*.

(a) *Voluntary dismissal under C.C.P. 581*:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §283 et seq.

Discretion to deny:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §311.(b) *Discretionary dismissal under C.C.P. 581(l) (failure to appear)*:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §§475, 476.

(c) *Mandatory dismissal under C.C.P. 583.110 (delay in prosecution)*:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §358 et seq.

Dismissal for delay in service:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §319 et seq.



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b. Revocation of Probate.

1. Former Statutes and Case Law.

14 Witkin Sum. Cal. Law Wills § 580

[§ 580] Former Statutes and Case Law.

(1) *In General.* Under former Prob.C. 380 et seq., an interested person, except a party to a contest before probate or one with actual knowledge of the prior contest, could petition to revoke probate within 4 months after admission of the will to probate (later changed to 120 days after date of admission to probate recorded in minutes). The procedure was similar to that for contests before probate. (See *Estate of Logan* (1915) 171 C. 357, 362, 153 P. 388; *Los Angeles First Nat. Trust & Savings Bank v. Superior Court* (1928) 94 C.A. 79, 81, 270 P. 710 [on delay in serving citation, court has discretion to dismiss petition or relieve contestant from default]; *Estate of Jenkinson* (1931) 115 C.A. 319, 321, 1 P.2d 551 [even though will is admitted following contest before probate, it may be attacked after probate on same grounds by other parties]; *Estate of Hoover* (1934) 139 C.A. 753, 759, 35 P.2d 188 [dismissal of contest before probate without trial does not bar contest after probate]; *Fisher v. Superior Court* (1937) 23 C.A.2d 528, 531, 73 P.2d 892 [right is purely statutory, and is strictly limited to statutory procedure]; *Estate of Walters* (1949) 89 C.A.2d 797, 798, 202 P.2d 89 [interested person seeking to intervene must follow statutory intervention procedure; document seeking joinder in petition without leave of court held neither contest nor intervention, and stricken]; *Estate of Walters* (1950) 99 C.A.2d 552, 555, 222 P.2d 100 [intervention]; *Estate of Hart* (1951) 107 C.A.2d 58, 60, 236 P.2d 891 [award of costs after appeal]; *Estate of Hart* (1953) 119 C.A.2d 310, 312, 259 P.2d 703 [same]; *Estate of Robertson* (1968) 266 C.A.2d 866, 72 C.R. 396, supra, §180 [probate of earlier will is not contest, and not subject to time limitations]; *Wolfson v. Superior Court* (1976) 60 C.A.3d 153, 159, 160, 131 C.R. 265, supra, §549 [before amendment; period began to run on date of formal order, not minute order]; *Estate of Horn* (1990) 219 C.A.3d 67, 73, 268 C.R. 41 [contest filed and will admitted in same week; preprobate contest under former Prob.C. 370 treated as postprobate contest under former Prob.C. 380].)

(2) *Effect of Limitation Period.* Under former Prob.C. 384, the order admitting a will to probate was conclusive except as to persons under a disability, who had an additional 4 months after removal of their disabilities. This raised several problems:

(a) If an appeal is taken from the order admitting the will to probate, the statute of limitations is suspended until the order is finally sustained on appeal: i.e., the statutory period begins to run on the filing of the remittitur. (*Scott v. Superior Court* (1932) 125 C.A. 513, 521, 14 P.2d 99.)

(b) If a petition is filed in time, it may be amended to cure defective allegations after the statutory period. But it has been held that a wholly new cause of action cannot be belatedly stated in the guise of an amendment. In *Estate of Black* (1943) 56 C.A.2d 796, 799, 133 P.2d 673, the original petition merely challenged the procedure under which the will was admitted to probate, and was totally ineffective as a contest of the will. Then, after the limitation period had expired, an amended petition setting forth proper grounds of contest was offered. *Held*, the order striking the amended petition was proper. "It attempted to substitute a contest of the execution of the will for a contest of the procedure of the probate of the will. These proceedings are so different in both form and substance that the substitution of the one for the other is a substitution of a new and different cause of action." (56 C.A.2d 801.) (For modern liberal rule on amendments changing cause of action, see 5 Cal. Proc. (4th), *Pleading*, §1167.)

(c) A successful contest within the statutory period sets aside the will in its entirety; the probate is wholly revoked and the will is void as to all persons. (*Estate of Golden* (1937) 9 C.2d 647, 648, 72 P.2d 113.) Hence, where the contest is filed within the period, an interested party may intervene afterwards, and the statute of limitations is not a bar. (*Estate of Butzow* (1937) 21 C.A.2d 96, 98, 68 P.2d 374; *Estate of Harootenian* (1951) 38 C.2d 242, 246, 238 P.2d 992.)

But a successful contest after the statutory period, by a minor or incompetent, has a different effect. If an attack by such a person could set the entire will aside, it would inure to the benefit of other heirs not under disability who had lost their rights, and it would render uncertain the title to property purchased from the estate or a distributee until such time as all disabilities were removed from persons interested in the estate. To avoid this consequence, the statute is construed in much the same manner as the pretermitted heir provision (supra, §280): The probate in 4 months is conclusive as to all persons except one under disability; a successful contest avoids it only as far as the contestant's interests are concerned, so that the contestant takes the share he or she would have had on intestacy, and the will stands as to the remainder of its provisions. (*Security Trust & Savings Bank v. Superior Court* (1937) 21 C.A.2d 551, 554, 69 P.2d 921.)

West's Key Number Digest, Wills k.221

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Effect of Limitation Period.*

Amendment changing cause of action:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §1235.



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2. Petition, Summons, and Response.

Witkin Sum. Cal. Law Wills § 581

[§ 581] Petition, Summons, and Response.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition.*

(New) Filing fee: Generally, the fee for filing a petition to revoke probate of a will or codicil under *Prob.C. 8270* is \$ 320. (See *Govt.C. 70650(c)*, Supp., infra, §585.)



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[§ 581] Petition, Summons, and Response.

(1) *Petition.* Within 120 days after a will is admitted to probate, any interested person, other than a party to a will contest or a person who had actual notice of a will contest in time to have joined the contest, may petition the court to revoke the probate of the will. The petition must include objections setting forth written grounds for objection. (*Prob.C. 8270(a)*; on filing fee, see *infra*, §585.) (See *Prob.C. 48* ["interested person" defined].) A will is admitted to probate when it is recorded by the clerk under *Prob.C. 8225* (*supra*, §548). (Law Rev. Com. Comment.) Notwithstanding *Prob.C. 8270(a)*, a person who was a minor or was incompetent and had no guardian or conservator at the time the will was admitted to probate may petition to revoke probate at any time before entry of an order for final distribution. (*Prob.C. 8270(b)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §§10:31 et seq., 10:63 et seq.; 48 *A.L.R.4th* 1094 [fraud as extending time for will contest].)

(2) *Meaning of "Actual Notice."* In *Estate of Meyer (1953) 116 C.A.2d 498, 501, 251 P.2d 430*, the court construed the *actual notice* requirement of the prior statute to mean not merely actual notice of the pendency of the contest, but also knowledge of interest and right to contest. Decedent's son filed the contest before probate. The son's wife and daughter attended the trial, and testified as witnesses. But they were not heirs of decedent, and did not know they had an interest until the second day of trial, when a prior will making provision for them, previously in the custody of the executor, was offered in evidence. *Held*, reversing the lower court, they were entitled to bring a contest after probate. It was clear that under the appellate court's interpretation they had no "effective notice" (knowledge of their interest) in time to join in the institution of the contest. And in answer to the contention that they had time to join while it was pending, the court pointed to the obvious prejudice which would be suffered by a contestant confined to this partial trial; e.g., loss of right to participate in selection of jury, loss of opening statement, loss of right of prompt cross-examination of adverse witnesses, loss of right to pretrial deposition taking, and perhaps the loss of vital witnesses. (*116 C.A.2d* 502.)

(3) *Summons.* When a petition for revocation is filed, a summons is directed to the personal representative and to the heirs and devisees of the decedent, "so far as known to the petitioner." The summons directs the persons summoned to file a written pleading in response to the petition within 30 days after service. (*Prob.C. 8271(a)*.) The summons is issued and served, with a copy of the petition, as in the case of a contest of the will (see *supra*, §577). (*Prob.C. 8271(b)*.)

It may be directed to minors or incompetent persons or to the personal representative of a deceased person. (Law Rev. Com. Comment.) The Judicial Council has approved a form for a probate summons. (See Judicial Council Form No. DE-125 [Summons (Probate)].)

(4) *Response.* A person served may respond by filing a written pleading in response within 30 days. (*Prob.C. 8271(a)*.) If a person fails to timely respond to the summons:

(a) The case is at issue and may proceed on the petition and other documents filed by the time of the hearing; no further pleadings by other persons are necessary. (*Prob.C. 8271(c)(1)*.)

(b) The person may not participate further in the contest, but the person's interest in the estate is not otherwise affected. (*Prob.C. 8271(b)*, (c)(2).)

(c) The person is bound by the decision in the proceeding. (*Prob.C. 8271(c)(3)*.)

West's Key Number Digest, Wills k.268, 269

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition.*

(*New*) *Filing fee:* Generally, the fee for filing a petition to revoke probate of a will or codicil under *Prob.C. 8270* is \$ 350. (See *Govt.C. 70650(b)*, as amended in 2008; Supp., *infra*, §585.)



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CHAPTER XXI - Wills and Probate

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XI. ESTATE ADMINISTRATION

B. Contest of Will.

3. Procedure.

b. Revocation of Probate.

3. Hearing and Determination.

14 Witkin Sum. Cal. Law Wills § 582

[§ 582] Hearing and Determination.

(1) *Procedure*. The proceedings are had "as in the case of a contest of the will." (*Prob.C. 8271(b)*.) (On procedure in will contest, see *supra*, §577 et seq.)

(2) *Order*. "If it appears on satisfactory proof that the will should be denied probate, the court shall revoke probate of the will." (*Prob.C. 8272(a)*.) Relief from the judgment may be available under *C.C.P. 473* (see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152). (Law Rev. Com. Comment to *Prob.C. 8271*.)

(3) *Effect of Revocation*. Revocation of probate terminates the powers of the personal representative. However, the personal representative is not liable for "any otherwise proper act done in good faith before the revocation," and no transaction is void by reason of the revocation "if entered into with a third person dealing in good faith and for value." (*Prob.C. 8272(b)*.)

West's Key Number Digest, Wills k.331(2)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Order*.

Relief from judgment:

Cross-Reference: 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.



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C. Opening Estate Administration.
1. Petition for Administration.
a. Who May Petition.

14 Witkin Sum. Cal. Law Wills § 583

[§ 583] Who May Petition.

(1) *In General.* At any time after a decedent's death, an interested person may commence proceedings for administration of the estate of the decedent by a petition for an order determining the date and place of the decedent's death and for either appointment of a personal representative, or probate of the decedent's will, or both. (*Prob.C. 8000(a).*) (See *Prob.C. 48* ["interested person" defined].) A petition for probate may be made regardless of whether the will is in the petitioner's possession, lost, destroyed, or beyond the jurisdiction of the state. (*Prob.C. 8000(b).*) (On appointment of representative, see *supra*, §433 et seq.; on probate of will, see *supra*, §543 et seq.) (See *Estate of Edwards* (1908) 154 C. 91, 94, 97 P. 23 [creditor is interested person]; *Estate of Hume* (1918) 179 C. 338, 341, 176 P. 681 [will may be offered for probate at any time after testator's death].)

(2) *Failure of Named Executor To Petition.* Unless good cause for delay is shown, a named executor who fails to petition for administration of the estate within 30 days after having knowledge of the death and that he or she is named as executor "may be held to have waived the right to appointment." (*Prob.C. 8001.*) (See *Estate of Alfrey* (1938) 12 C.2d 255, 83 P.2d 291; *Estate of Miller* (1931) 115 C.A. 109, 111, 300 P. 975 [excusable delay for time spent studying legal authorities on validity]; *Estate of Schwartz* (1945) 67 C.A.2d 512, 521, 155 P.2d 76 [coexecutor failed to apply, and also contested will]; 45 A.L.R.2d 916 [loss of right to be appointed executor by delay in presenting will for probate or seeking letters].) "It is within the discretion of the court whether to hold the person named as executor to have waived the right to appointment. If the court so holds, the court may appoint another competent person as personal representative." (Law Rev. Com. Comment to *Prob.C. 8001.*) (On appointment of administrator with will annexed, see *Prob.C. 8440*, *supra*, §430.)

The court has discretion to excuse even a long delay. In *Estate of Fiddymont* (1946) 74 C.A.2d 72, 168 P.2d 61, appellant, 5 years after the testator's death, petitioned for letters of administration, and respondents, two executors named in the will, objected and petitioned for letters testamentary. One explained that she did not know of the existence of the will, and the other relied on the understanding of decedent's attorney that all of decedent's property had been placed in trust before his death and that nothing was left to administer. *Held*, the probate court properly granted letters testamentary; the delay was explained and no prejudice appeared. (74 C.A.2d 78.)

(3) *Effect of Filing.* The petition commences a proceeding in rem, and the petitioner, unlike the plaintiff in a civil

action, cannot enter a voluntary dismissal under *C.C.P.* 581. The same policy that requires production of the will (*supra*, §543) prevents its suppression after production. (*Estate of Raymond* (1940) 38 C.A.2d 305, 308, 100 P.2d 1085, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §261.)

There is uncertainty concerning tort liability where a will contains nondispositive defamatory language (see 5 *Summary* (10th), *Torts*, §575), and there is similar uncertainty about the power of the court to admit the will after excising the objectionable provisions. (See 1 *U.C.L.A. L. Rev.* 575; 12 Cal. Western L. Rev. 491 [The Sleeping Tort: Testamentary Libel].)

SUPPLEMENT: [This section is current through the latest supplement]
(3) *Effect of Filing*.

Estate of Raymond:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §292.



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C. Opening Estate Administration.

1. Petition for Administration.

b. Content and Attachments.

14 Witkin Sum. Cal. Law Wills § 584

[§ 584] Content and Attachments.

(1) *Content.* The petition must contain the following information:

(a) The date and place of the decedent's death. (*Prob.C. 8002(a)(1).*)

(b) The decedent's residence address at the time of death. (*Prob.C. 8002(a)(2).*)

(c) "The name, age, address, and relation to the decedent of each heir and devisee of the decedent, so far as known to or reasonably ascertainable by the petitioner." (*Prob.C. 8002(a)(3).*)

(d) "The character and estimated value of the property in the estate." (*Prob.C. 8002(a)(4).*)

(e) "The name of the person for whom appointment as personal representative is petitioned." (*Prob.C. 8002(a)(5).*)

(f) If the decedent left a will, a statement whether the named executor consents to act or waives the right to appointment. (*Prob.C. 8002(b)(3).*) (On waiver by failure to petition, see *Prob.C. 8001*, supra, §583.)

(2) *Form.* The Judicial Council has approved a form for the petition. (See Judicial Council Form No. DE-111 [Petition for Probate (Probate--Decedents' Estates)].) (See C.E.B., 1 Decedent Estate Practice, §7.44 et seq.)

(3) *Attachments.* If the decedent left a will, the petitioner must attach a photographic copy to the petition. If the will is holographic or if material provisions are handwritten, the petitioner must also attach a typed copy. (*Prob.C. 8002(b)(1).*) If the will is in a foreign language, the petitioner must attach an English translation. On admission of the will to probate, the court certifies a correct translation into English, which must be filed with the will. (*Prob.C. 8002(b)(2).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §9:17 [certification of translation of will].)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Petition for Administration.
c. Filing Fee.

Witkin Sum. Cal. Law Wills § 585

[§ 585] Filing Fee.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* As part of a comprehensive enactment of uniform civil fees in 2005, *Govt.C. 26827* was amended and renumbered as *Govt.C. 70650*.

(2) *Computation of Graduated Fee.* *Govt.C. 70650(a)* sets forth the following graduated fees:

- (a) \$ 320 for estates or trusts under \$ 250,000.
- (b) \$ 385 for estates or trusts at least \$ 250,000 and less than \$ 500,000.
- (c) \$ 485 for estates or trusts at least \$ 500,000 and less than \$ 750,000.
- (d) \$ 635 for estates or trusts at least \$ 750,000 and less than \$ 1,000,000.
- (e) \$ 1,135 for estates or trusts at least \$ 1,000,000 and less than \$ 1,500,000.
- (f) \$ 2,135 for estates or trusts at least \$ 1,500,000 and less than \$ 2,000,000.
- (g) \$ 2,635 for estates or trusts at least \$ 2,000,000 and less than \$ 2,500,000.
- (h) \$ 3,635 for estates or trusts at least \$ 2,500,000 and less than \$ 3,500,000.

(i) \$ 3,635 plus 2% of the amount over \$ 3,500,000 for estates or trusts of \$ 3,500,000 or more. *Estimated value:* *Govt.C. 26827(b)* was renumbered *Govt.C. 70650(b)* in 2005. The payment procedure was revised in 2007. The following provisions now apply:

(a) The full fee for a petition for letters in a decedent's estate proceeding is based on the final appraised value of the estate without reference to encumbrances or other obligations on the estate property. The petitioner pays \$ 320 at the time the petition is filed and the general personal representative pays any balance of the fee no later than the date the

general personal representative files a final account or report and petition for settlement or for final distribution. (*Govt.C. 70650(b)(1)*, (*b)(2)*.)

(b) The full fee for a trust is based on the value of the trust shown in the first account and paid when the first account is filed. (*Govt.C. 70650(b)(3)*.)

(3) *When Graduated Fee Is Applicable.* Under *Govt.C. 70650(a)*, the graduated fee applies to the following:

(a) The first petition for letters of administration or letters testamentary.

(b) The first petition for special letters of administration with the powers of a general personal representative.

(c) The first account of the trustee of a testamentary trust subject to continuing jurisdiction.

(4) *When Fixed Fee Is Applicable.* Under *Govt.C. 70650(c)*, the following fees are applicable:

(a) \$ 320 for the first objection to a will or codicil under *Prob.C. 8250* (see text, §577).

(b) \$ 320 for the first petition for revocation of probate of a will or codicil under *Prob.C. 8270* (see text, §581).

(c) \$ 40 for the first petition for special letters of administration without the powers of a general personal representative (incorporating the fee provided by *Govt.C. 70657.5*).

(5) *Duration of Graduated Fee.* In 2005, the graduated fee was made permanent by the repeal of the expiration date in former *Govt.C. 26827.7* (*New Subsequent and Multiple Petitions*). For a subsequent petition or objection of a type described in *Govt.C. 70650(a)* filed in the same proceeding by a person other than the original petitioner or contestant, the filing fee is \$ 320. For a subsequent petition or objection of a type described in *Govt.C. 70650(c)* filed in the same proceeding by a person other than the original petitioner or contestant, the filing fee is the same as that set forth in *Govt.C. 70650(c)*. (*Govt.C. 70650(d)*.) However, only the fee provided by *Govt.C. 70650(d)* is charged where an objection to probate or a petition to revoke probate is filed with a petition to appoint a successor personal representative. (*Govt.C. 70650(c)*.)

If a petition for special letters of administration without the powers of a general personal representative is filed with a petition for the appointment of an administrator with general powers under *Govt.C. 70650(a)* or *Govt.C. 70650(d)* by the same person, the person filing the petitions must pay the fees applicable to both petitions. (*Govt.C. 70650(e)*.)

The fee for an objection or other paper in opposition to a petition described in *Govt.C. 70650(a)* is \$ 320. (*Govt.C. 70651(a)*.) However, if an objection or other paper in opposition is filed with a petition under *Govt.C. 70650(d)* by the same person, only the fee in *Govt.C. 70650(d)* is charged to that person. (*Govt.C. 70651(a)*.)



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C. Opening Estate Administration.
1. Petition for Administration.
c. Filing Fee.

14 Witkin Sum. Cal. Law Wills § 585

[§ 585] Filing Fee.

(1) *In General.* Traditionally, a fixed fee, set forth in *Govt.C. 26827*, was required for filing papers in proceedings under the Probate Code. The fee was set at \$ 182 in 1992 and raised to \$ 185 in 1997. As part of a general increase in court fees that took effect as an urgency measure in 2003, a graduated filing fee, based on the value of the estate, was adopted for designated proceedings under the Probate Code, while the fixed fee was retained for other proceedings. Various additional fees, e.g., a library fee, apply in particular counties. (On filing fees generally, see 4 *Cal. Proc.* (4th), *Pleading*, §16 et seq.)

(2) *Computation of Graduated Fee.* *Govt.C. 26827(a)* sets forth the following graduated fees:

- (a) \$ 185 for estates under \$ 250,000.
- (b) \$ 250 for estates at least \$ 250,000 and less than \$ 500,000.
- (c) \$ 350 for estates at least \$ 500,000 and less than \$ 750,000.
- (d) \$ 500 for estates at least \$ 750,000 and less than \$ 1,000,000.
- (e) \$ 1,000 for estates at least \$ 1,000,000 and less than \$ 1,500,000.
- (f) \$ 2,000 for estates at least \$ 1,500,000 and less than \$ 2,000,000.
- (g) \$ 2,500 for estates at least \$ 2,000,000 and less than \$ 2,500,000.
- (h) \$ 3,500 for estates at least \$ 2,500,000 and less than \$ 3,500,000.
- (i) \$ 3,500 plus 2% of the amount over \$ 3,500,000 for estates of \$ 3,500,000 or more.

The petitioner must estimate the value of the estate in the petition and determine the fee based on the estimate. If the appraised value of the estate would result in a different fee than the fee actually paid, an adjustment is made at the

time of the final account. For a trust, the fee is based on the value of the trust shown in the first account. (*Govt.C. 26827(b)*.) The final account or report must contain a separate schedule of graduated fee information. C.R.C., Rule 7.552 specifies detailed requirements for graduated fee adjustments and includes a sample schedule of graduated fee information.

(3) *When Graduated Fee Is Applicable.* Under *Govt.C. 26827(a)*, the graduated fee applies to the following:

(a) The first petition for letters of administration.

(b) A petition for special letters of administration.

(c) A petition for letters testamentary.

(d) The first account of the testamentary trustee of a trust subject to continuing jurisdiction under *Prob.C. 17300* et seq. (see 13 *Summary* (10th), *Trusts*, §237).

(4) *When Fixed Fee Is Applicable.* Under *Govt.C. 26827(c)*, a filing fee of \$ 185 applies to the following:

(a) The first petition for letters of guardianship.

(b) A petition for letters of conservatorship.

(c) A petition for the compromise of a minor's claim.

(d) A petition under *Prob.C. 13151* (determining succession to real property; see *infra*, §814).

(e) A petition under *Prob.C. 13650* (determining property passing to surviving spouse; see *infra*, §829), except as provided by *Prob.C. 13652* (no additional fee if administration proceeding is pending).

(f) A petition to contest a will or codicil.

For a subsequent petition of a type described in *Govt.C. 26827(a)* or (c) filed in the same proceeding by a person other than the original petitioner, the filing fee is \$ 185. (*Govt.C. 26827(d)*.)

(5) *Duration of Graduated Fee.* The graduated fee provisions of *Govt.C. 26827* expire on July 1, 2006, and the fixed fee of \$ 185 is restored for all proceedings on that date, unless the expiration date is deleted or extended. (*Govt.C. 26827(e)*.)

(6) *Reimbursement of Graduated Fee.* Where multiple petitions for appointment of a general personal representative are filed, a later successful petitioner must reimburse an earlier unsuccessful petitioner for a portion of the filing fee. C.R.C., Rule 7.151 specifies the procedure for calculating and paying the reimbursement.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* As part of a comprehensive enactment of uniform civil fees in 2005, *Govt.C. 26827* was amended and renumbered as *Govt.C. 70650*.

Filing fees generally:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §19 et seq.

(*New*) *Graduated filing fee is unconstitutional:* In *Estate of Claeysens (2008) 161 C.A.4th 465, 74 C.R.3d 304*, an estate administration proceeding, decedent's executor paid a graduated filing fee under protest and petitioned for a refund. *Held*, the fee is unconstitutional.

(a) In 1982, the California Inheritance Tax Law was repealed by initiative. Rev.C. 13301, added by initiative, generally prohibits gift, estate, inheritance, and other taxes on gifts, estates, or transfers occurring by reason of death. (161 C.A.4th 468, 469; see 9 Summary (10th), *Taxation*, §327.) Under Cal. Const., Art. II, §10(c), an initiative measure, such as Rev.C. 13301, may not be amended or repealed without the approval of the voters. (161 C.A.4th 470.)

(b) The graduated fee statute adds to or takes away from an existing initiative statute and is, in effect, an amendment. (161 C.A.4th 470.) The fee statute was enacted during a budget crisis for revenue purposes, and the fee, based on the value of estate assets in an in rem proceeding (probate), operates as an ad valorem tax. A graduated probate fee was invalidated on that basis in *Fatjo v. Pfister* (1897) 117 C. 83, 48 P. 1012. (161 C.A.4th 471, 472.) To call the tax here a "court user fee" would be a "transparent evasion" of the constitutional requirement for voter approval. (161 C.A.4th 473.)

(2) *Computation of Graduated Fee.* As amended in 2005, Govt.C. 70650(a) set forth the following graduated fees:

- (a) \$ 320 for estates or trusts under \$ 250,000.
- (b) \$ 385 for estates or trusts at least \$ 250,000 and less than \$ 500,000.
- (c) \$ 485 for estates or trusts at least \$ 500,000 and less than \$ 750,000.
- (d) \$ 635 for estates or trusts at least \$ 750,000 and less than \$ 1,000,000.
- (e) \$ 1,135 for estates or trusts at least \$ 1,000,000 and less than \$ 1,500,000.
- (f) \$ 2,135 for estates or trusts at least \$ 1,500,000 and less than \$ 2,000,000.
- (g) \$ 2,635 for estates or trusts at least \$ 2,000,000 and less than \$ 2,500,000.
- (h) \$ 3,635 for estates or trusts at least \$ 2,500,000 and less than \$ 3,500,000.
- (i) \$ 3,635 plus 2% of the amount over \$ 3,500,000 for estates or trusts of \$ 3,500,000 or more.

In 2008, in response to *Estate of Claeysens*, *supra*, the graduated fee was eliminated and the uniform fee was raised. (See *infra*, this section.) *Estimated value:* Govt.C. 26827(b) was renumbered Govt.C. 70650(b) in 2005, and the payment procedure was revised in 2007. In 2008, the graduated fee was eliminated and Govt.C. 70650(b) was repealed.

The rules governing graduated fee adjustments were revised in 2008. C.R.C., Rule 7.552 applies to estates commenced before January 1, 2008. C.R.C., Rule 7.553 applies to estates commenced on or after January 1, 2008.

(3) *When Graduated Fee Is Applicable.* In 2008, the graduated fee was eliminated.

(4) *When Fixed Fee Is Applicable.* The following fees are now applicable:

- (a) \$ 350 for the first petition for letters of administration or letters testamentary. (Govt.C. 70650(a).)
- (b) \$ 350 for the first petition for special letters of administration with the powers of a general personal representative. (Govt.C. 70650(a).)
- (c) \$ 350 for the first objection to a will or codicil under *Prob.C. 8250* (see text, §577). (Govt.C. 70650(b).)
- (d) \$ 350 for the first petition for revocation of probate of a will or codicil under *Prob.C. 8270* (see text, §581). (Govt.C. 70650(b).)
- (e) \$ 200 for the first petition for special letters of administration without the powers of a general personal

representative (incorporating the fee provided by *Govt.C. 70657.5*). (*Govt.C. 70650(b)*.)

On fees in other Probate Code proceedings, see Supp., supra, §380A et seq.

(5) *Duration of Graduated Fee*. In 2005, the graduated fee was made permanent by the repeal of the expiration date in former *Govt.C. 26827*. The graduated fee was eliminated in 2008.(7) (*New*) *Subsequent and Multiple Petitions*. For a subsequent petition or objection of a type described in *Govt.C. 70650(a)* filed in the same proceeding by a person other than the original petitioner or contestant, the filing fee is \$ 350. For a subsequent petition or objection of a type described in *Govt.C. 70650(b)* filed in the same proceeding by a person other than the original petitioner or contestant, the filing fee is the same as that set forth in *Govt.C. 70650(b)*. (*Govt.C. 70650(c)*.) However, only the fee provided by *Govt.C. 70650(c)* is charged where an objection to probate or a petition to revoke probate is filed with a petition to appoint a successor personal representative. (*Govt.C. 70650(b)*.)

If a petition for special letters of administration is filed with a petition for letters testamentary or letters of administration under *Govt.C. 70650(a)* or *Govt.C. 70650(c)* by the same person, the person filing the petitions must pay the fees applicable to both petitions. (*Govt.C. 70650(d)*.)

The fee for an objection or other paper in opposition to a petition described in *Govt.C. 70650(a)* is \$ 350. (*Govt.C. 70651(a)*.) However, if an objection or other paper in opposition is filed with a petition under *Govt.C. 70650(c)* by the same person, only the fee in *Govt.C. 70650(c)* is charged to that person. (*Govt.C. 70651(a)*.)



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1. Petition for Administration.
d. Contest.

14 Witkin Sum. Cal. Law Wills § 586

[§ 586] Contest.

(1) *Contest of Appointment of Personal Representative.* If appointment of a personal representative is contested, the grounds for opposition may include a challenge to the competency of the representative or the right to appointment. If the contest asserts the right of another person to appointment, the contestant must file a petition and serve notice as provided by *Prob.C. 8110* et seq. (infra, §588) and the court must hear the two petitions together. (*Prob.C. 8004(a)*.) (On competency and right to appointment of personal representative, see *supra*, §433 et seq.)

(2) *Contest of Will.* If a will is contested, the applicable procedure is that provided by *Prob.C. 8250* et seq. (*supra*, §577 et seq.). (*Prob.C. 8004(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Opening Estate Administration.
2. Notice of Hearing.
a. Content and Form.

Witkin Sum. Cal. Law Wills § 587

[§ 587] Content and Form.

SUPPLEMENT: [This section is current through the latest supplement]

Judicial Council Form No. DE-121 has been renamed: Notice of Petition to Administer Estate (Probate--Decedents' Estates).



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2. Notice of Hearing.
a. Content and Form.

14 Witkin Sum. Cal. Law Wills § 587

[§ 587] Content and Form.

The petitioner must serve and publish notice of the hearing on the petition as provided by *Prob.C. 8100* et seq. (*Prob.C. 8003(b)*.) The petitioner, not the clerk, has the duty to give notice. (Law Rev. Com. Comment.) *Prob.C. 8100* sets forth a single form for notice of the hearing, whether served under *Prob.C. 8110* et seq. (infra, §588) or published under *Prob.C. 8120* et seq. (infra, §589). The Judicial Council has approved a form incorporating the statutory language. (See Judicial Council Form No. DE-121 [Notice of Petition to Administer Estate].)

SUPPLEMENT: [This section is current through the latest supplement]
Judicial Council Form No. DE-121 has been renamed: Notice of Petition to Administer Estate (Probate--Decedents' Estates).



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C. Opening Estate Administration.
2. Notice of Hearing.
b. Service of Notice.

14 Witkin Sum. Cal. Law Wills § 588

[§ 588] Service of Notice.

(1) *Persons Who Must Be Served.* At least 15 days before the hearing on the petition for administration of a decedent's estate, the petitioner must serve notice of the hearing, by mail or personal delivery, on (a) each heir of the decedent, as far as known or reasonably ascertainable by the petitioner, and (b) each devisee, executor, and alternate executor named in any will, "regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument." (*Prob.C. 8110.*) (See *Farmers & Merchants Nat. Bank of Los Angeles v. Superior Court* (1945) 25 C.2d 842, 846, 155 P.2d 823 [failure to serve heirs is jurisdictional defect, but is cured by general appearance].)

Estate of Carter (2003) 111 C.A.4th 1139, 4 C.R.3d 490, involved the application of *Prob.C. 8110* to unusual facts. After final distribution of the decedent's estate, two women claiming to be decedent's out-of-wedlock daughters petitioned to set aside the order for final distribution for failure to be served with notice of administration as "known or reasonably ascertainable" heirs under *Prob.C. 8110*. Decedent's brother, the administrator, had determined that the women were not decedent's heirs (apparently, concluding that decedent had not received them into his home and held them out as his natural children; see *supra*, §94) and thus did not notify them of the proceeding. *Held*, the set aside motion was properly granted. The phrase "reasonably ascertainable" must be broadly construed to include individuals whose identities are known and who "reasonably might be" heirs. "Only then can a *neutral* decision maker adjudicate the merits of their claim to heirship." (111 C.A.4th 1142.) Here, the factual determination of holding out necessary for status as an heir must be made in court, not by an administrator with a personal financial interest acting as the trier of fact. (111 C.A.4th 1152.)

(2) *Service on Attorney General.* If the will involves or may involve a testamentary trust for charitable purposes without a designated California trustee or a devise for charitable purposes without an identified devisee, notice of the hearing and a copy of the petition and the will must be served on the Attorney General as provided in *Prob.C. 1209* (*supra*, §390). (*Prob.C. 8111.*)

(3) *Notice to Creditors and Public Entity Claimants.* A general personal representative must give notice of administration of the estate to creditors under *Prob.C. 9050* et seq. (*infra*, §614) and to public entities under *Prob.C. 9200* et seq. (*infra*, §621). (*Prob.C. 8112.*)

(4) *Notice Involving Foreign Citizen.* "If a citizen of a foreign country dies without leaving a will or leaves a will without naming an executor, or if it appears that property will pass to a citizen of a foreign country, notice shall be given to a recognized diplomatic or consular official of the foreign country maintaining an office in the United States." (*Prob.C. 8113.*) Diplomatic and consular representation may be ascertained from the United States Department of State. (Law Rev. Com. Comment.)

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C. Opening Estate Administration.
2. Notice of Hearing.
c. Publication of Notice.

14 Witkin Sum. Cal. Law Wills § 589

[§ 589] Publication of Notice.

(1) *Requirement.* In addition to service of the notice under *Prob.C. 8110* et seq. (supra, §588), notice of the hearing of a petition to administer the estate must be published under *Prob.C. 8120* et seq. (*Prob.C. 8120.*) The petition may not be heard unless an affidavit showing due publication has been filed. The affidavit must contain a copy of the notice and state the date of publication. (*Prob.C. 8124.*) The caption must be in 8-point type or larger and the text in 7-point type or larger. (*Prob.C. 8123.*) After the notice is published and an affidavit is filed, subsequent publication of the notice ordered by the court may omit the information for creditors and contingent creditors. (*Prob.C. 8125.*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §9:18.)

Publication and service of notice of a petition to administer an estate are sufficient notice of an instrument offered for probate that is filed with the petition and specifically referred to in the petition. Any other instrument must be presented in an amended petition, and a new notice must be published and served. (C.R.C., Rule 7.54.)

(2) *Time of Publication.* "The first publication date of the notice shall be at least 15 days before the hearing. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient." (*Prob.C. 8121(a).*)

(3) *Place of Publication.* Notice must be published in a newspaper of general circulation in the city where the decedent resided at the time of death, or where the decedent's property is located if the court has jurisdiction under *Prob.C. 7052* (nondomiciliary decedents; see supra, §353). If there is no such newspaper, or if the decedent did not reside in a city, or if the property is not located in a city, the notice must be published in a newspaper of general circulation in the county that is circulated in the area of the county in which the decedent resided or the property is located. If there is no such newspaper, notice must be published in a newspaper of general circulation in California nearest to the county seat of the county in which the decedent resided or the property is located that is circulated in the area of the county in which the decedent resided or the property is located. (*Prob.C. 8121(b)*; see *Prob.C. 8121(c)* ["city" defined].)

(4) *Good Faith Compliance.* Substantial compliance with *Prob.C. 8121* is sufficient. "The Legislature ... recognizes the possibility that in unusual cases due to confusion over jurisdictional boundaries or oversight such notice may

inadvertently be published in a newspaper that does not satisfy" *Prob.C. 8121*. Thus, notice published in a good faith attempt to comply "is sufficient to provide notice of hearing and to establish jurisdiction if the court expressly finds that the notice was published in a newspaper of general circulation published within the county and widely circulated within a true cross-section of the area of the county in which the decedent resided or the property was located in substantial compliance" with *Prob.C. 8121*. (*Prob.C. 8122*.)

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3. Hearing and Determination.

14 Witkin Sum. Cal. Law Wills § 590

[§ 590] Hearing and Determination.

(1) *Setting Petition for Hearing.* The hearing on the petition is set not fewer than 15 nor more than 30 days after the petition is filed. However, at the petitioner's request at the time of filing, the hearing may be set for a day not fewer than 30 nor more than 45 days after the petition is filed. The court may not shorten the time for giving the notice. (*Prob.C. 8003(a).*)

(2) *Matters Considered.* The court may examine and compel any person to attend as a witness concerning (a) the time, place, and manner of the decedent's death, (b) the place of the decedent's domicile and residence at the time of death, (c) the character and value of the decedent's property, and (d) whether or not the decedent left a will. (*Prob.C. 8005(a).*)

(3) *Matters Established.* The court must establish the jurisdictional facts, including the date and place of the decedent's death, that the decedent was domiciled in California or left property in California at the time of death, and the publication of notice under *Prob.C. 8120* et seq. (supra, §589). The court must also establish the existence or nonexistence of the decedent's will, and that notice was served as provided by *Prob.C. 8110* et seq. (supra, §588). (*Prob.C. 8005(b).*)

(4) *Continuance.* In appropriate circumstances, the court may order a continuance. (See *Estate of Edwards* (1908) 154 C. 91, 96, 97 P. 23 [continuance until validity of will was determined in another proceeding]; *Estate of Johnson* (1937) 20 C.A.2d 735, 739, 67 P.2d 1079 [continuance to remedy defect in giving notice].)

(5) *Order.* If the court finds that the time, place, and manner of the decedent's death are established, the court makes an order determining the time and place of the decedent's death and the jurisdiction of the court. "Where appropriate and on satisfactory proof," the order admits the decedent's will to probate and appoints a personal representative. The date the will is admitted to probate must be included in the order. (*Prob.C. 8006(a).*) (On minute order admitting will to probate, see *Prob.C. 8225*, supra, §548; on conclusive effect of determination of jurisdiction, see *Prob.C. 8007*, supra, §§351, 353.)

(6) *Correction of Errors.* "If through defect of form or error" the time, place, and manner of the decedent's death are incorrectly stated in the petition but actually are established, the court retains jurisdiction to correct the defect or

error at any time. "No such defect or error makes void an order admitting the will to probate or appointing a personal representative or an order made in any subsequent proceeding." (*Prob.C. 8006(b).*)

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D. Inventory and Appraisal.

1. In General.

a. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 591

[§ 591] Statutory Development.

(1) *Original Statutes.* Former Prob.C. 600 et seq. governed the inventory and appraisal of probate estates. Liquid assets were appraised at fair market value by the personal representative. Other assets were appraised by an "inheritance tax referee" appointed by the court. The referee was entitled to actual expenses and a commission equal to a percentage of the value of the appraised property, subject to a statutory minimum and maximum. The name was changed to "probate referee" after repeal of the California inheritance tax in 1982.

(2) *Law Revision Commission Report.* In 1987, the California Law Revision Commission made its Recommendation Relating to Inventory and Appraisal (19 Cal. Law Rev. Com. Reports, p. 741), proposing replacement of the existing law (former Prob.C. 600 et seq. and 1300 et seq.). The major changes involved the role of probate referees, and the Report (p. 745) gives the following background:

"The Commission has devoted substantial resources to investigating the functioning of the probate referee system, including reviewing material from legislative hearings concerning probate referees, surveying inventory and appraisal systems in other jurisdictions, and considering the views of the probate bar (including the State Bar, Los Angeles County Bar, Beverly Hills Bar, and other bar associations), as well as communications from many interested individuals and groups (including the California Probate Referees' Association, California Bankers Association, California Appraisers Council, and American Institute of Real Estate Appraisers). The Commission has also allocated substantial public meeting time to presentations by interested persons."

"The Commission considered removing the probate referee from decedent estate administration entirely, relying instead on appraisal by the personal representative. It has been argued that this would save money for most estates by eliminating the probate referee's fees and would simplify estate administration by eliminating an unneeded third party, with its attendant delays, from the process."

"The Commission's investigation reveals that the cost to the estate of the probate referee appraisal is relatively small. The referee's fee is a statutory commission of one-tenth of one percent of the value of the estate, plus actual expenses. This costs the estate substantially less than an independent appraisal by a private appraiser where such an appraisal is needed for tax or other reasons, and is one of the smaller costs associated with probate."

"If an appraisal is not otherwise needed, however, the probate referee's fee is an unnecessary cost to the estate. The Commission recommends, below, a number of changes directed at this problem, relating to assets that may be appraised by the personal representative and procedures for waiver of a probate referee appraisal and reduction of fees."

"The Commission's investigation also reveals that the probate referee's involvement causes little complexity or delay in the ordinary case. The probate referee's appraisal is fairly expeditious in the ordinary case. Usually, any delay caused is not due to the referee's appraisal but to time spent by the personal representative in preparing the inventory."

"There are cases in which a particular probate referee is dilatory or not performing up to standards. The Commission recommends, below, procedures to force expeditious appraisals in such cases, including sanctions against and procedures for removal of inadequate probate referees."

"The probate bar generally believes the probate referee system works efficiently and expedites and facilitates the probate process in the usual case. Most judges and practitioners think the referee provides a useful and ordinarily high quality service at modest cost to the estate, and that the referee system should be retained. Problems in the system should be resolved by attacking the problems directly, not by scrapping what is a basically sound system. The Commission concurs with these views, and recommends the following changes to cure problems in the probate referee system."

(3) *Current Statutory Framework.* The following statutes now govern the inventory and appraisal:

(a) *Prob.C. 400* et seq. (appointment, removal, and powers of probate referee; see *infra*, §594 et seq.).

(b) *Prob.C. 8800* et seq. (general provisions governing inventory and appraisal; see *infra*, §592).

(c) *Prob.C. 8850* et seq. (inventory; see *infra*, §598 et seq.).

(d) *Prob.C. 8900* et seq. (appraisal, including appraisal by probate referee; see *infra*, §601 et seq.).

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1. In General.

b. Requirement of Inventory and Appraisal.

14 Witkin Sum. Cal. Law Wills § 592

[§ 592] Requirement of Inventory and Appraisal.

(1) *In General.* The personal representative must file with the court clerk an inventory of the property to be administered in the decedent's estate and an appraisal of the property in the inventory. (*Prob.C. 8800(a)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:1 et seq.; C.E.B., 1 Probate Workflow Manual, §11.1 et seq.; C.E.B., 1 Decedent Estate Practice, §11.1 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §6:56 et seq.; on inventory and appraisal requirement where decedent's estate is disposed of without administration, see *Prob.C. 6608*, infra, §783; *Prob.C. 13103*, infra, §798; *Prob.C. 13152*, infra, §814; *Prob.C. 13200*, infra, §808; *Prob.C. 13658*, infra, §832.)

(2) *Time of Filing.* The inventory and appraisal must be filed within 4 months after letters are first issued to a general personal representative, although the court may allow further time for filing "as is reasonable under the circumstances of the particular case." (*Prob.C. 8800(b)*.) "A further time might be reasonable, for example, in an estate for which a federal estate tax return is necessary and additional time is required in order to insure that the property is valued consistently." (Law Rev. Com. Comment.) Partial inventories and appraisals are authorized "when appropriate under the circumstances of the particular case," but all inventories and appraisals must be filed before expiration of the time allowed. (*Prob.C. 8800(c)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:74 [application for order extending time to file], §12:75 [order extending time to file].)

(3) *Supplemental Inventory and Appraisal.* A personal representative who acquires knowledge of property to be administered that is not included in a prior inventory and appraisal must file a supplemental inventory and appraisal of the property in the manner prescribed for an original inventory and appraisal. The supplemental inventory and appraisal must be filed within 4 months after the representative acquires knowledge of the property. The court may allow further time for filing a supplemental inventory and appraisal as is "reasonable under the circumstances of the particular case." (*Prob.C. 8801*.)

(4) *Form.* "The inventory and appraisal shall separately list each item and shall state the fair market value of the item at the time of the decedent's death in monetary terms opposite the item." (*Prob.C. 8802*.) The inventory and appraisal must be combined in a single document. (*Prob.C. 8800(a)*.)

The Judicial Council has approved two forms for the inventory and appraisal: (a) a cover page containing various declarations, the total valuation and required signatures, and (b) an attachment page containing an itemized description and valuation of particular assets. (See Judicial Council Form No. DE-160 [Inventory and Appraisal]; Judicial Council Form No. DE-161 [Inventory and Appraisal Attachment].)

(5) *Special Notice of Filing.* A copy of the inventory and appraisal and any supplemental inventory and appraisal must be mailed, pursuant to *Prob.C. 1252* (supra, §396), to those who have requested special notice. (*Prob.C. 8803.*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:76.)

(6) *Change of Ownership Statement.* Before or when the inventory and appraisal are filed, the personal representative must file a change of ownership statement with the county recorder or assessor in each county in which the decedent owned real property at the time of death "that is subject to probate proceedings." (Rev.C. 480(b), (e); see 9 *Summary* (10th), *Taxation*, §229.) Concurrent with the inventory and appraisal, the personal representative must file a certificate of compliance with Rev.C. 480. The statement must certify that a change of ownership statement has been filed in each county in which the decedent owned real property or that the decedent owned no real property in California. (*Prob.C. 8800(d).*)

(7) *Sufficiency of Bond.* Every inventory and appraisal must contain one of these statements: (a) "Bond is waived." (b) "Bond has been filed in the amount of \$ (*specify amount*) and is insufficient." (c) "Bond has been filed in the amount of \$ (*specify amount*) and is sufficient." (C.R.C., Rule 7.501(a).) If the bond is insufficient, the fiduciary or the attorney for the fiduciary must make an ex parte application under C.R.C., Rule 7.204 (supra, §449) for an order increasing the amount of the bond. (C.R.C., Rule 7.501(b).) The statement must be signed by the attorney of record for the fiduciary or by the fiduciary, if not represented. (C.R.C., Rule 7.501(c).)

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1. In General.

c. Effect of Failure To File.

14 Witkin Sum. Cal. Law Wills § 593

[§ 593] Effect of Failure To File.

If the personal representative refuses or negligently fails to file an inventory and appraisal within the time required, an interested person may petition the court to do the following:

(1) Compel the personal representative to file the inventory and appraisal under the procedure provided by *Prob.C. 11050* et seq. (compelling account; see *infra*, §713). (*Prob.C. 8804(a).*)

(2) Remove the personal representative from office. (*Prob.C. 8804(b).*) (On removal, see *Prob.C. 8500* et seq., *supra*, §459.)

(3) Impose personal liability on the representative for injury to the estate or an interested person that directly results from the refusal or failure. In the court's discretion, the liability may include attorneys' fees, and the damages awarded are a liability on the bond of the personal representative. (*Prob.C. 8804(c).*) The liability of the personal representative and the sureties on the bond is joint and several. (Law Rev. Com. Comment.)

The Law Revision Commission Comment adds: "Section 8804 is limited to negligent or willful noncompliance by a personal representative and is not intended to apply where the personal representative was unable to file the appraisal due to the probate referee's delay, or where the personal representative made a good faith effort to file but was unable to due to circumstances beyond the personal representative's control." (For delay caused by probate referee, see *Prob.C. 8940*, *infra*, §608.)

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D. Inventory and Appraisal.

2. Probate Referees.

a. Appointment and Qualifications.

14 Witkin Sum. Cal. Law Wills § 594

[§ 594] Appointment and Qualifications.

(1) *Appointment.* The State Controller appoints at least one person in each county to act as a probate referee for the county. (*Prob.C. 400(a).*)

(2) *Qualifications.* The appointment of probate referees must be from among persons passing a qualifying examination, and must be "on the basis of merit." One who passes is eligible for appointment for 5 years from the date of the examination. (*Prob.C. 401.*) The examination is held at times and places determined by the controller, who may contract with another agency to administer it. Applicants must pay an examination fee, and the list of successful applicants is a public record. (*Prob.C. 402.*)

(3) *Term of Office.* Probate referees serve 4-year terms. (*Prob.C. 403.*)

(4) *Termination of Authority.* A probate referee's authority terminates "immediately upon expiration of the person's term of office, revocation of the person's appointment, or other termination pursuant to law." (*Prob.C. 406(a).*) "Other termination" includes resignation. (Law Rev. Com. Comment.) When a referee's authority ceases, the controller notifies the court of the county for which the referee was appointed. On receipt of the notice, "or if it otherwise comes to the attention of the court" that the referee's authority has ceased, the court must reassign an estate for which the person has been designated probate referee. (*Prob.C. 406(b).*)

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2. Probate Referees.

b. Prohibited Political Activity.

14 Witkin Sum. Cal. Law Wills § 595

[§ 595] Prohibited Political Activity.

(1) *Definition.* For purposes of *Prob.C. 407*, "prohibited political activity" means "directly or indirectly soliciting, receiving, or contributing, or being in any manner involved in soliciting, receiving, or contributing" (a) an assessment, subscription, or contribution to a party, committee, incumbent, or candidate exceeding \$ 200 in a calendar year for any partisan office, or (b) an assessment, subscription, contribution, or political service in any amount for a campaign for the office of controller. (*Prob.C. 407(a).*)

(2) *Criminal Penalty.* "A person shall not engage in prohibited political activity during the time the person is an applicant for appointment or reappointment, or during the person's tenure as a probate referee." A violation is a misdemeanor. (*Prob.C. 407(d).*)

(3) *Disclosure Statement.* On appointment and in January of each year of the referee's tenure, the referee must file a verified statement with the controller indicating whether the referee has engaged in prohibited political activity during the preceding 2 calendar years. (*Prob.C. 407(b).*)

(4) *Restrictions on Appointment.* A person who has engaged in prohibited political activity within the preceding 2 calendar years may not be appointed or reappointed as a probate referee. The appointment is void and must be revoked. The controller must also revoke the appointment of a referee who engages in prohibited political activity during his or her tenure in office. However, acts performed before the revocation that are not otherwise invalid are valid. (*Prob.C. 407(c).*)

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c. Revocation of Appointment.

14 Witkin Sum. Cal. Law Wills § 596

[§ 596] Revocation of Appointment.

(1) *Revocation for Violation of Standards.* The controller establishes standards of training, performance, and ethics for probate referees. The standards are a public record. (*Prob.C. 404(a)*.) The controller may revoke a referee's appointment for noncompliance with any standard of training, performance, or ethics established under *Prob.C. 404(a)*. The revocation may be without notice or a hearing but is subject to review by mandamus in a court of competent jurisdiction. (*Prob.C. 404(b)*.)

(2) *Revocation for Prohibited Political Activity.* The appointment of a referee who engages in prohibited political activity must be revoked. (*Prob.C. 407(c)*, *supra*, §595.)

(3) *Revocation Under General Authority.* Notwithstanding *Prob.C. 404*, the controller may, "at the Controller's pleasure," revoke the appointment of a probate referee. (*Prob.C. 405*.)

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2. Probate Referees.

d. Powers of Probate Referee.

14 Witkin Sum. Cal. Law Wills § 597

[§ 597] Powers of Probate Referee.

(1) *General Powers.* On designation by the court, the probate referee has the powers of a referee of the superior court and all other powers provided by *Prob.C. 450* et seq. (*Prob.C. 450*.) (On referees generally, see *C.C.P. 638* et seq.; 2 *Cal. Proc. (4th)*, *Courts*, §351; 6 *Cal. Proc. (4th)*, *Proceedings Without Trial*, §58 et seq.)

(2) *Compelling Appearance.* "For the purpose of appraisal of property in the estate, the probate referee may require, and may issue a subpoena to compel, the appearance before the referee of the personal representative, guardian, conservator, or other fiduciary, an interested person, or any other person the referee has reason to believe has knowledge of the property." (*Prob.C. 451(a)*.) The subpoena is subject to *C.C.P. 2020.010* et seq. (deposition subpoenas; see 2 *Cal. Evidence (4th)*, *Discovery*, §42 et seq.). (*Prob.C. 451(b)*.)

(3) *Enforcement of Order To Appear.* On petition of the probate referee, the court may make an order to show cause why a person who is required but fails to appear before the probate referee should not be compelled to do so. The referee must mail notice of the hearing to the person at least 15 days before the date set for the hearing. (*Prob.C. 453(b)*.)

(4) *Examination, Testimony, and Production of Documents.* The probate referee may examine and take the testimony under oath of a person appearing before the referee, or require the person to produce a document in the person's possession or control, concerning the value of any property in the estate, and issue a subpoena to compel production. (*Prob.C. 452(a)*.) The subpoena is subject to *C.C.P. 2020.010* et seq. (deposition subpoenas; see 2 *Cal. Evidence (4th)*, *Discovery*, §42 et seq.). (*Prob.C. 452(b)*.)

(5) *Protective Orders.* On petition of a person required to appear before a probate referee, the court may make a protective order to protect the person from "annoyance, embarrassment, or oppression." The petitioner must mail notice of the hearing on the petition to the probate referee and the personal representative, guardian, conservator, or other fiduciary at least 15 days before the date set for the hearing. A subpoena issued by the probate referee is stayed during the pendency of the petition. (*Prob.C. 453(a)*.)

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(1) *General Powers.*

Cross-References: 2 *Cal. Proc.* (5th), *Courts*, §346; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §63 et seq.



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D. Inventory and Appraisal.

3. Inventory.

a. Contents.

14 Witkin Sum. Cal. Law Wills § 598

[§ 598] Contents.

The inventory, including partial and supplemental inventories, must include all property to be administered in the decedent's estate. (*Prob.C. 8850(a)*.) It must show, to the extent ascertainable by the personal representative, the portions of the property that are community, quasi-community, and separate property of the decedent. (*Prob.C. 8850(c)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §§12:17 et seq., 12:66 et seq.) The inventory must particularly specify the following:

(a) Money owed to the decedent, including debts, bonds, and notes. The inventory must include (1) the name of each debtor, (2) the date, (3) the sum originally payable, (4) endorsements and their dates, (5) security, including mortgages and deeds of trust, and (6) if the security is real property, the recording reference or, if not recorded, a legal description of the property. (*Prob.C. 8850(b)(1)*.)

(b) A statement of the decedent's interest in a partnership, appraised as a single item. (*Prob.C. 8850(b)(2)*.)

(c) Money and other cash items of the decedent. (*Prob.C. 8850(b)(3)*; see *Prob.C. 8901*, *infra*, §602 ["cash items" defined].)

(d) A debt or demand of the decedent discharged or devised in the decedent's will. The discharge of a debt or demand is not valid against creditors of the decedent and may, if necessary, be applied to payment of the decedent's debts. The discharge is a specific devise of the debt or demand which, if not applied to the payment of debts, is distributed in the same manner and proportion as other specific devises. (*Prob.C. 8851*.)

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3. Inventory.

b. Verification.

14 Witkin Sum. Cal. Law Wills § 599

[§ 599] Verification.

The personal representative "shall take and subscribe an oath that the inventory contains a true statement of the property to be administered in the decedent's estate of which the personal representative has knowledge, and particularly of money of the decedent and debts or demands of the decedent against the personal representative." The oath is endorsed on or attached to the inventory. (*Prob.C. 8852(a)*.) The Judicial Council form for the inventory contains a place for the personal representative's verification. (See Judicial Council Form No. DE-160 [Inventory and Appraisal].)

If there is more than one personal representative, each must take the oath and if they are unable to agree on what property is to be included in the inventory, any of them may petition for an order determining whether the property is to be administered, either under *Prob.C. 850* et seq. (*supra*, §356 et seq.) or, if there is an issue of property belonging or passing to a surviving spouse, under *Prob.C. 13650* et seq. (*infra*, §829 et seq.). (*Prob.C. 8852(b)*.)

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3. Inventory.

c. Discovery of Decedent's Property.

14 Witkin Sum. Cal. Law Wills § 600

[§ 600] Discovery of Decedent's Property.

(1) *Petition and Citation.* The personal representative or an interested person may petition for an order "that a citation be issued to a person to answer interrogatories, or to appear before the court and be examined under oath, or both," concerning allegations that (a) "the person has wrongfully taken, concealed, or disposed of property in the estate of the decedent," or (b) the person has knowledge or possession of (1) a "deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the decedent to property," (2) a claim of the decedent, or (3) a lost will of the decedent. (*Prob.C. 8870(a).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:64.)

If the person does not reside in the county in which the estate is being administered, the superior court in either the county of residence or the county of administration may issue the citation. (*Prob.C. 8870(b).*)

Disobedience of a citation may be punished as a contempt of the issuing court. (*Prob.C. 8870(c).*)

(2) *Notice.* Notice of a proceeding under *Prob.C. 8870* must be given to the personal representative as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). Notice to persons requesting special notice must be given as provided in *Prob.C. 1252* (*supra*, §396). (*Prob.C. 8870(d).*)

(3) *Interrogatories.* Written interrogatories may be put to a person cited to answer interrogatories pursuant to *Prob.C. 8870*. The answers must be signed under penalty of perjury by the person cited, and the interrogatories and answers must be filed with the court. (*Prob.C. 8871.*)

(4) *Examination and Order.* At an examination, witnesses may be produced and examined on either side. (*Prob.C. 8872(a).*) If it appears that the allegations of the petition are true, the court may order the person to disclose his or her knowledge of the facts to the personal representative. (*Prob.C. 8872(b).*) If it appears that the allegations are not true, "the person's necessary expenses, including a reasonable attorney's fee, shall be charged against the petitioner or allowed out of the estate, in the discretion of the court." (*Prob.C. 8872(c).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:65.)

(5) *Citation To Appear and Account*. "On petition by the personal representative, the court may issue a citation to a person who has possession or control of property in the decedent's estate to appear before the court and make an account under oath of the property and the person's actions with respect to the property." (*Prob.C. 8873(a)*.) Disobedience of the citation may be punished as a contempt of the issuing court. (*Prob.C. 8873(b)*.) (On liability for wrongful taking, see *Prob.C. 8874*.)

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a. In General.

14 Witkin Sum. Cal. Law Wills § 601

[§ 601] In General.

(1) *Persons Who May Appraise.* The appraisal of property in the inventory is made by the personal representative (see *infra*, §602), the probate referee (see *infra*, §603) or an independent expert (see *infra*, §604). (*Prob.C. 8900.*)

(2) *Verification.* A person who appraises property must sign the appraisal as to property appraised by that person and must "take and subscribe an oath that the person has truly, honestly, and impartially appraised the property to the best of the person's ability." (*Prob.C. 8905.*) The Judicial Council form for the appraisal contains a place for the verification. (See Judicial Council Form No. DE-160 [Inventory and Appraisal].)

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b. Appraisal by Personal Representative.

14 Witkin Sum. Cal. Law Wills § 602

[§ 602] Appraisal by Personal Representative.

(1) *Property Appraised by Personal Representative.* The personal representative appraises the following property, "excluding items whose fair market value is, in the opinion of the personal representative, an amount different from the face value of the property":

(a) Money and other cash items. The term "cash item" includes "a check, draft, money order, or similar instrument issued on or before the date of the decedent's death that can be immediately converted to cash." (*Prob.C. 8901(a).*)

(b) Checks issued after the date of death for (1) wages earned before death, or (2) refunds (including tax, utility, medical insurance, and health care payments). (*Prob.C. 8901(b).*)

(c) Accounts in financial institutions. (*Prob.C. 8901(c).*) (See *Prob.C. 21* ["account" defined]; *Prob.C. 40* ["financial institution" defined].)

(d) Cash deposits and money market mutual funds, "whether in a financial institution or otherwise, including a brokerage cash account." (*Prob.C. 8901(d).*) (See *Prob.C. 9730*, supra, §481 ["money market mutual fund" defined].)

(e) Proceeds of insurance policies, retirement plans, and annuities payable on death in lump sum amounts. (*Prob.C. 8901(e).*)

(2) *No Extraordinary Fee for Appraisal.* "Neither the personal representative nor the attorney for the personal representative is entitled to receive compensation for extraordinary services by reason of appraising any property in the estate." (*Prob.C. 8907.*) This restriction does not affect estate tax work performed by the attorney. (Law Rev. Com. Comment.)

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c. Appraisal by Probate Referee.

14 Witkin Sum. Cal. Law Wills § 603

[§ 603] Appraisal by Probate Referee.

(1) *Property Appraised by Probate Referee.* Except as otherwise provided by statute, the probate referee appraises all property not appraised by the personal representative (see *supra*, §602). (*Prob.C. 8902(b).*) (On appraisal by independent expert, see *Prob.C. 8904*, *infra*, §604; on waiver of appraisal by probate referee, see *Prob.C. 8903*, *infra*, §605.)

(2) *Delivery of Inventory and Supporting Data.* Except as otherwise provided by statute, the personal representative delivers to the probate referee designated by the court the inventory and supporting data to enable the probate referee to appraise the property to be appraised by the probate referee. (*Prob.C. 8902(a).*)

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d. Appraisal by Independent Expert.

14 Witkin Sum. Cal. Law Wills § 604

[§ 604] Appraisal by Independent Expert.

(1) *Property Appraised by Independent Expert.* "A unique, artistic, unusual, or special item of tangible personal property that would otherwise be appraised by the probate referee may, at the election of the personal representative, be appraised by an independent expert qualified to appraise the item." (*Prob.C. 8904(a).*)

(2) *Election and Objection.* The personal representative makes the election by a notation on the inventory indicating the property to be appraised by an independent expert. The probate referee may, within 5 days after delivery of the inventory, petition for a court determination whether that property is a unique, artistic, unusual, or special item of tangible personal property. If the petition fails and the court determines that the petition was made "without substantial justification," the court must award litigation expenses, including reasonable attorneys' fees, against the probate referee. (*Prob.C. 8904(b).*)

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e. Waiver of Appraisal by Referee.

14 Witkin Sum. Cal. Law Wills § 605

[§ 605] Waiver of Appraisal by Referee.

(1) *Petition for Waiver.* For good cause, the court may waive appraisal by the probate referee. (*Prob.C. 8903(a).*) The personal representative may apply for waiver in a separate petition or with another petition (e.g., the petition for appointment) but may not do so later than the time the inventory is delivered to the probate referee, if one has been designated. A copy of the proposed inventory and appraisal and a statement of the good cause justifying the waiver must be attached to the petition. (*Prob.C. 8903(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:35 et seq. [procedure], §12:56 [petition for waiver of appraisal], §12:57 [order waiving appraisal].)

(2) *Hearing and Notice.* The hearing on the waiver may be held no sooner than 15 days after the petition is filed. Notice of the hearing, with a copy of the petition and the proposed inventory and appraisal, is given as provided by *Prob.C. 1220* (mailed notice; supra, §391) to (a) each person listed in *Prob.C. 1220*, (b) known heirs and devisees whose interest in the estate would be affected by the waiver, (c) the Attorney General (at the Sacramento office), if any portion of the estate will escheat and the state's interest would be affected by the waiver, and (d) the probate referee, if one has been designated. (*Prob.C. 8903(c).*)

(3) *Referee's Opposition.* The probate referee may oppose the waiver. If the opposition fails and the court determines that the opposition was without substantial justification, the court must award litigation expenses, including reasonable attorneys' fees, against the probate referee. If the opposition succeeds, the court must designate a different probate referee to appraise the property. (*Prob.C. 8903(d).*)

(4) *Filing of Inventory.* If the petition is granted, the inventory and appraisal attached to the petition must be filed pursuant to *Prob.C. 8800* (supra, §592). (*Prob.C. 8903(e).*)

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f. Designation of Referee.

14 Witkin Sum. Cal. Law Wills § 606

[§ 606] Designation of Referee.

(1) *Designation by Court.* The court may designate the probate referee from among those appointed by the controller to act as probate referees for the county (see *Prob.C. 400*, supra, §594). (*Prob.C. 8920.*) However, the court has "authority and discretion not to designate a particular person as probate referee" even though appointed to act as a probate referee for the county. (*Prob.C. 8922.*) If there is no person available to act or the court does not designate a person appointed for the county, the court may designate a probate referee from another county. (*Prob.C. 8920.*)

"The court may, but is not required to, designate probate referees in rotation from the panel for the county, or may use any other system of designation. The court may refuse to designate a particular person as probate referee if experience with that person is unsatisfactory, if experience with that person's office or staff (including office or staff shared with other probate referees) is generally unsatisfactory, or for other proper reasons in the court's discretion. Among the proper reasons for refusal to designate a particular person as probate referee is that the person is habitually unduly slow in making appraisals, due to overwork or otherwise. This example is given by way of illustration and is not intended as a comprehensive listing of reasons." (Law Rev. Com. Comment to *Prob.C. 8922.*)

(2) *Designation at Request of Personal Representative.* The court may designate a person requested by the personal representative as probate referee, on a showing by the personal representative of good cause for the designation. (*Prob.C. 8921.*) The following circumstances are included within the meaning of good cause:

(a) "The probate referee has recently appraised the same property that will be appraised in the administration proceeding." (*Prob.C. 8921(a).*)

(b) "The probate referee will be making related appraisals in another proceeding." (*Prob.C. 8921(b).*)

(c) "The probate referee has recently appraised similar property in another proceeding." (*Prob.C. 8921(c).*)

(3) *Prohibited Designation.* The court may not designate as probate referee (a) the court clerk, (b) the spouse or a partner or employee of the judge or commissioner who orders the designation, or (c) a person or the spouse of a person related within the third degree to the judge or commissioner who orders the designation or his or her spouse. (*Prob.C.*

8923.)

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g. Removal of Referee.

14 Witkin Sum. Cal. Law Wills § 607

[§ 607] Removal of Referee.

(1) *Removal for Cause.* The court must remove the designated probate referee if the personal representative shows cause "that in the opinion of the court warrants removal of the probate referee." This includes incompetence or undue delay in making the appraisal. The showing is made at a hearing on a petition of the personal representative, who must mail notice to the probate referee at least 15 days before the date set for the hearing. (*Prob.C. 8924(a)(1).*) Removal is also authorized for "any other cause provided by statute," e.g., failure to make a timely appraisal or report (see *Prob.C. 8941*, *infra*, §608). (*Prob.C. 8924(a)(3).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:59 [petition to remove referee for cause], §12:60 [order removing referee for cause].)

(2) *Removal as of Right.* The personal representative has the right to remove the first probate referee designated by the court without a showing of cause. The personal representative may exercise the right at any time before the personal representative delivers the inventory to the probate referee. The personal representative exercises the right by filing an affidavit or declaration under penalty of perjury with the court and mailing a copy to the probate referee. Thereupon, the court removes the probate referee "without any further act or proof." (*Prob.C. 8924(a)(2).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:61 [declaration to remove referee without cause], §12:62 [order removing referee without cause].)

(3) *Designation of Successor.* On removal of the probate referee, the court designates another under *Prob.C. 8920* (*supra*, §606). (*Prob.C. 8924(b).*)

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h. Time for Referee Appraisal.

14 Witkin Sum. Cal. Law Wills § 608

[§ 608] Time for Referee Appraisal.

(1) *Time for Appraisal or Status Report.* "The probate referee shall promptly and with reasonable diligence appraise the property scheduled for appraisal by the probate referee in the inventory that the personal representative delivers to the referee." (*Prob.C. 8940(a)*.) Not later than 60 days after delivery of the inventory, the probate referee must return the completed inventory to the personal representative or report on the status of the appraisal. The report must show the reason why the property has not been appraised and give an estimate of the time needed to complete the appraisal. The report is delivered to the personal representative and filed with the court. (*Prob.C. 8940(b)*.)

If the probate referee does not report on the status of the appraisal within the time required, "the court shall, on petition of the personal representative or may, on its own motion," cite the probate referee to appear and show why the property has not been appraised. (*Prob.C. 8941(b)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:73.)

(2) *Hearing and Order.* On the petition of the probate referee or the personal representative, or on its own motion, the court hears the report of the status of the appraisal. The court may issue a citation to compel the personal representative or the probate referee to attend the hearing. (*Prob.C. 8941(a)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §12:72.) The court may order any of the following:

(a) "That the appraisal be completed within a time that appears reasonable." (*Prob.C. 8941(c)(1)*.)

(b) That the probate referee be removed. On removal, the court designates another referee under *Prob.C. 8920* (*supra*, §606). (*Prob.C. 8941(c)(2)*.)

(c) That the probate referee's commission be reduced "by an amount the court deems appropriate," regardless of whether the commission otherwise allowed would be reasonable compensation for the services rendered. (*Prob.C. 8941(c)(3)*.)

(d) That the personal representative deliver to the probate referee all necessary information to allow the probate referee to complete the appraisal. Failure to comply with the order is grounds for removal of the personal representative. (*Prob.C. 8941(c)(4)*.)

(e) Other appropriate orders. (*Prob.C. 8941(c)(5).*)

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i. Referee's Appraisal Report and Data.

14 Witkin Sum. Cal. Law Wills § 609

[§ 609] Referee's Appraisal Report and Data.

A probate referee who appraises property in an estate must retain possession of appraisal reports and backup data used to appraise the property for 3 years after the appraisal is filed. During the 3-year period, the probate referee must offer the reports and data to the personal representative and deliver them to the personal representative on request. Reports and data not requested by the personal representative may be destroyed at the end of the 3-year period without further notice. (*Prob.C. 8909.*) The Law Revision Commission Comment points out that backup data might include, e.g., a list of comparable sales used in the appraisal.

On demand by the personal representative or by a beneficiary, a probate referee who appraises property must do the following:

(1) Provide any appraisal report or backup data in the probate referee's possession, without charge. The cost of providing the appraisal report or backup data is not allowed as an expense of appraisal but is included in the commission for services of the probate referee. (*Prob.C. 8908(a).*)

(2) Justify the appraisal of an item of property if the appraisal is contested, whether by objection under *Prob.C. 8906* (*infra*, §610), by tax audit, or otherwise. The probate referee may be entitled to an additional fee for services provided to justify the appraisal, to be agreed on by the personal representative or beneficiary and the referee. If they are unable to agree, the court determines what fee, if any, is appropriate. (*Prob.C. 8908(b).*)

The probate referee may not disclose information that is required by law to be confidential. (*Prob.C. 8908(a).*) The Law Revision Commission Comment points out that confidential information that may not be disclosed includes tax assessor information obtained by the probate referee.

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j. Objection to Appraisal.

14 Witkin Sum. Cal. Law Wills § 610

[§ 610] Objection to Appraisal.

(1) *Filing Objection.* "At any time before the hearing on the petition for final distribution of the estate, the personal representative or an interested person may file with the court a written objection to the appraisal." (*Prob.C. 8906(a)*.) (See *Prob.C. 48* ["interested person" defined].)

(2) *Hearing and Notice.* The clerk sets a time for the hearing on the objection not less than 15 days after the objection is filed. (*Prob.C. 8906(b)*.) The objecting person must give notice of the hearing, together with a copy of the objection, as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). If the appraisal was made by a probate referee, the objecting person must also mail notice of the hearing and a copy of the objection to the probate referee at least 15 days before the date set for the hearing. (*Prob.C. 8906(c)*.)

(3) *Burden of Proof.* The objecting person has the burden of proof. (*Prob.C. 8906(d)*.)

(4) *Order.* On completion of the hearing, the court makes appropriate orders. "If the court determines the objection was filed without reasonable cause or good faith, the court may order that the fees of the personal representative and attorney and any costs incurred for defending the appraisal be made a charge against the person filing the objection." (*Prob.C. 8906(e)*.)

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k. Referee's Commission and Expenses.

14 Witkin Sum. Cal. Law Wills § 611

[§ 611] Referee's Commission and Expenses.

(1) *Payment in Course of Administration.* The probate referee's commission and expenses are paid from the estate. (*Prob.C. 8960(a).*) They are an expense of administration, entitled to priority of payment under *Prob.C. 11420* (*infra*, §649), and are paid in the course of administration. (*Prob.C. 8960(c).*) "The probate referee may not withhold the appraisal until the commission and expenses are paid, but shall deliver the appraisal to the personal representative promptly upon completion." (*Prob.C. 8960(b).*)

(2) *Amount of Commission.* The probate referee is entitled to a commission of one-tenth of one percent of the value of the appraised property, excluding property appraised by the personal representative or an independent expert. (*Prob.C. 8961(a).*) However, the commission may not be less than \$ 75 or more than \$ 10,000, unless a commission in excess of \$ 10,000 is allowed by the court on a determination that the "reasonable value of the referee's services exceeds that amount." (*Prob.C. 8963*; see *Prob.C. 8963(b)* [notice of hearing].)

(3) *Expenses.* The probate referee is entitled to actual and necessary expenses. The referee must file a verified account of expenses with the inventory and appraisal. (*Prob.C. 8961(b).*)

(4) *Division of Commission Between Referees.* "If more than one probate referee appraises or participates in the appraisal of property in the estate, each is entitled to the share of the commission agreed upon by the referees or, absent an agreement, that the court allows. In no case shall the total commission for all referees exceed the maximum commission that would be allowable for a single referee." (*Prob.C. 8964.*)

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E. Claims of Creditors.

1. Filing Requirement.

a. In General.

Witkin Sum. Cal. Law Wills § 612

[§ 612] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Development.*

(New) Who is creditor: As used in *Prob.C. 7000* et seq., the term "creditor" means "a person who may have a claim against estate property." (*Prob.C. 9000(c)*, added in 2007.) *Correction:* Page 697, eighth line of section, citation to creditor claim statutes applicable to trusts should be *Prob.C. 19000* et seq.



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1. Filing Requirement.

a. In General.

14 Witkin Sum. Cal. Law Wills § 612

[§ 612] In General.

(1) *Statutory Development.* The original creditor claim statutes (former Prob.C. 700 et seq.) were adopted in 1931. Following an extensive review by the California Law Revision Commission (see Recommendation Relating to Creditor Claims Against Decedent's Estate, 19 Cal. Law Rev. Com. Reports, p. 299), revised statutes (*Prob.C. 9000* et seq.) were adopted in 1987, effective July 1, 1988. Parallel provisions apply to the payment of claims and expenses from the assets of a revocable trust of which the decedent was the settlor. (See *Prob.C. 9000* et seq., 13 *Summary* (10th), *Trusts*, §260 et seq.)

(2) *Nature of Filing Requirement.* Even though the statute of limitations may provide a relatively lengthy time to file an action, probate statutes generally require the filing of claims within a shorter time known as the nonclaim period. The purpose of the requirement is to give the personal representative an opportunity to ascertain speedily the obligations against the estate and the method of payment. (See *Unif.Prob.C. §3-803* and Comment; *Rupp v. Kahn* (1966) 246 C.A.2d 188, 193, 55 C.R. 108; 31 *Am.Jur.2d* (2002 ed.), *Executors and Administrators* §564 et seq.; C.E.B., 2 Probate Workflow Manual, §12.1 et seq.; C.E.B., 1 Decedent Estate Practice, §12.1 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §8:1 et seq.)

Except as otherwise provided by statute, claims must be filed "in the manner and within the time provided" by *Prob.C. 9000* et seq., and a claim that is not so filed is barred. (*Prob.C. 9002*; for statutory exceptions, see *Prob.C. 9154*, infra, §639 [waiver of formal defects]; *Prob.C. 9390*, infra, §631 [claim covered by insurance]; *Prob.C. 9391*, infra, §632 [action to enforce security interest].)

(3) *Failure To File.* Timely presentation of a claim is necessary before the personal representative is obligated or entitled to pay, and failure in this regard is an absolute bar to enforcement of the claim. (See *Morrison v. Land* (1915) 169 C. 580, 585, 147 P. 259; *O'Malley v. Carrick* (1930) 108 C.A. 520, 522, 291 P. 871; *Estate of Erwin* (1953) 117 C.A.2d 203, 204, 255 P.2d 97; *Estate of Smith* (1953) 122 C.A.2d 216, 217, 264 P.2d 638; *Estate of Middleton* (1963) 215 C.A.2d 324, 329, 30 C.R. 155; *Wilkison v. Wiederkehr* (2002) 101 C.A.4th 822, 833, 124 C.R.2d 631, citing the text [following *Morrison*; action for damages for breach of agreement to make specific bequest in will was barred for failure to file creditor's claim]; 12 *So. Cal. L. Rev.* 430.) Thus:

(a) The requirement is not tolled by minority. (*Billups v. Tiernan* (1970) 11 C.A.3d 372, 376, 90 C.R. 246; *Glass v. Benkert* (1971) 18 C.A.3d 322, 328, 95 C.R. 735.)

(b) A complaint on a claim that fails to allege filing is subject to a general demurrer. (*Hays v. Bank of America* (1945) 71 C.A.2d 301, 304, 162 P.2d 679.)

(c) The same policy that prevents the personal representative from waiving the statute of limitations precludes waiver of the nonclaim period. (*Hurlimann v. Bank of America* (1956) 141 C.A.2d 801, 806, 297 P.2d 682; see *Pearson v. Norton* (1964) 230 C.A.2d 1, 16, 40 C.R. 634.)

The procedural act of filing a timely claim (infra, §636 et seq.) may be excused. Thus, a personal representative who pays in good faith without a claim is protected, if the debt was justly due and the estate was solvent. (See *Estate of Houston* (1928) 205 C. 276, 282, 270 P. 939; cf. *Estate of Grant* (1935) 2 C.2d 661, 664, 43 P.2d 266 [not entitled to credit if estate is insolvent].)

But timeliness cannot be thus excused; the rule is the same as that governing the statute of limitations. In *Estate of Erwin* (1953) 117 C.A.2d 203, 255 P.2d 97, the court observed that "the *Houston* case deals with the payment of a debt of the decedent, presumably before the time for presenting claims has expired." In *Erwin*, however, the claim, for the expense of decedent's last illness, was admittedly late, and counsel for the administrator urged payment if it could be done without personal liability of the administrator. *Held*, the mandatory language of the nonclaim statute precluded waiver of the nonclaim period by either the personal representative or the court. (117 C.A.2d 205.) (See *Estate of Sturm* (1988) 201 C.A.3d 14, 18, 246 C.R. 852 [following *Erwin*].)

Estate of Smith (1953) 122 C.A.2d 216, 264 P.2d 638, is to the same effect. The administrator, with approval of the probate judge, allowed the claim 6 months late. On the hearing of the petition for settlement of the final account, an heir filed an objection. *Held*, order settling the account reversed. "The allowance and approval of the claim are both indefensible." (122 C.A.2d 217.)

There is a conflict in the decisions whether the defect is waived if not raised in the trial court or may be raised for the first time on appeal. (See *Salinas Nat. Bank v. Cook* (1950) 101 C.A.2d 423, 426, 225 P.2d 253 [waived if not raised below]; *Halbert v. Berlinger* (1954) 127 C.A.2d 6, 15, 273 P.2d 274 [dictum; defect is fatal to cause of action and may be raised for first time on appeal]; *Agnew v. Parks* (1958) 164 C.A.2d 837, 839, 331 P.2d 184 [following *Halbert*; plaintiff's appeal dismissed as to executor].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Development.*

(New) *Who is creditor:* As used in *Prob.C. 7000* et seq., the term "creditor" means "a person who may have a claim against estate property." (*Prob.C. 9000(c)*, added in 2007.) *Correction:* Page 697, eighth line of section, citation to creditor claim statutes applicable to trusts should be *Prob.C. 19000* et seq.



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E. Claims of Creditors.

1. Filing Requirement.

b. Estoppel and Waiver.

14 Witkin Sum. Cal. Law Wills § 613

[§ 613] Estoppel and Waiver.

Estoppel has been recognized as the basis for a narrow exception to the nonclaim rule (see *supra*, §612). In *Katz v. A.J. Ruhlman & Co.* (1945) 69 C.A.2d 541, 159 P.2d 426, a former executor agreed to a compromise and mistakenly advised the creditor that it did not have to file a claim. *Held*, a successor administrator was estopped to repudiate the compromise after the time to file had expired. (69 C.A.2d 546.) (Cf. *Hurlimann v. Bank of America* (1956) 141 C.A.2d 801, 806, 297 P.2d 682, *infra*, §620 [no estoppel from conduct of decedent].)

In *Satterfield v. Garmire* (1967) 65 C.2d 638, 56 C.R. 102, 422 P.2d 990, plaintiff father and children sued for wrongful death of the wife and mother and personal injuries to the father. The tortfeasor had died before the complaint was filed. Defendant executor published notice to creditors September 11, 1963. The period for filing claims expired March 11, 1964. The formal claim was filed on April 2, 1964. The trial judge, on demurrer, determined that the nonclaim statute could not be avoided by waiver or estoppel. *Held*, judgment of dismissal reversed.

(a) The purposes of the statute were satisfied here. Negotiations for settlement between decedent's insurer and plaintiffs' attorney began promptly; the insurer's agent represented that liability would be admitted, and made a settlement offer; thereafter the parties agreed that plaintiffs should file an action to minimize delay in getting a trial date; defendant's answer denied liability but did not assert failure to file a claim; and negotiations continued and the settlement offer was made again. Thus, defendant received notice of the claim before the action was filed, needless litigation did not result, and formal presentation of a claim would merely have caused further delay. (65 C.2d 642.)

(b) The statute can be waived. The rule against waiver is based on the fiduciary capacity of the personal representative, who must protect the estate by asserting valid defenses even against a barred claim. Here, however, no fiduciary duty would be violated, for there was no valid defense. All that was waived was the right to formal presentation of a claim, as in *Katz*. (65 C.2d 645.)

(c) "We reiterate that generally it is not within the authority of an executor or administrator to waive formal presentation of a claim. But we conclude he may do so where this congeries of circumstances exists prior to the expiration of the period for filing a claim: he has knowledge of the claim and concedes its merit save only as to the specific sum; the estate is protected by insurance coverage exceeding the amount of the claim; and waiver results in

relinquishment of no substantial benefit of or causes no detriment to the heirs or legatees." (65 C.2d 645.) (See 55 Cal. L. Rev. 1169; *Segovia v. Superior Court* (1976) 55 C.A.3d 464, 467, 127 C.R. 501 [annulling order allowing late filing, for further proceedings below to show estoppel or waiver within *Satterfield* rule].)

In *Estate of Johnson* (1966) 240 C.A.2d 742, 50 C.R. 147, decedent died leaving surviving his mother, his brother J, a sister, and a daughter whose whereabouts were unknown. J, believing that the mother would be sole distributee (and that eventually he would inherit from her), paid the funeral expenses. He also caused a search to be made for the daughter; she was found and became sole distributee. J sought reimbursement for the funeral director's bill, \$ 433.48, and the Public Administrator objected because of failure to file a claim. *Held*, the probate court's order requiring reimbursement was proper. The elastic doctrine of subrogation (see 13 *Summary* (10th), *Equity*, §183 et seq.) could be applied without a claim, for several reasons: (a) The estate would otherwise be unjustly enriched. (b) The administrator could pay a just debt without a claim being filed. (c) J reasonably believed that the payment was necessary for protection of his own interests (the daughter had not been heard from for 16 years, and J honestly believed the estate would go to his mother and from her to him). (d) J's expenses for detectives who located the daughter were not (and could not be) reimbursed. The lower court's decision, however, "did do justice between the real parties to this litigation which a decent measure of gratitude on the daughter's part, wholly apart from some manifestation of respect for her deceased father, would doubtless have obviated." (240 C.A.2d 748.)

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- 2. Notice to Creditors.
- a. Requirement of Notice.

14 Witkin Sum. Cal. Law Wills § 614

[§ 614] Requirement of Notice.

(1) *In General.* In addition to the publication of notice of the administration of a decedent's estate required by *Prob.C. 8120* (supra, §589), the personal representative must give notice under *Prob.C. 1215* (notice by mail or personal delivery; supra, §392) to "known or reasonably ascertainable" creditors of the decedent. (*Prob.C. 9050.*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §13:7 et seq.)

(2) *Known or Ascertainable Creditors.* For purposes of the notice requirement, "a personal representative has knowledge of a creditor of the decedent if the personal representative is aware that the creditor has demanded payment from the decedent or the estate." (*Prob.C. 9050.*) (See *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Narula* (1995) 33 C.A.4th 1140, 1147, 39 C.R.2d 752 [no evidence that personal representative "knew" or could have "reasonably ascertained" identity of creditor in absence of evidence that plaintiff sent demand or notice of claim within claims period].)

(3) *Affirmative Duty To Search for Creditors.* "A personal representative has a duty to make reasonably diligent efforts to identify reasonably ascertainable creditors of the decedent." (*Prob.C. 9053(d).*)

(4) *When Notice Is Not Required.* Notwithstanding *Prob.C. 9050*, the personal representative need not give notice to a known creditor if the creditor has filed a claim as provided by *Prob.C. 9000* et seq., or the creditor has demanded payment and the personal representative elects to treat the demand as a claim under *Prob.C. 9154* (waiver of formal defects; infra, §639). (*Prob.C. 9054.*) (See 70 A.L.R.3d 784 [validity of claim filed before publication of notice].)

(5) *Time for Giving Notice.* The notice must be given within 4 months after the date letters are first issued or within 30 days after the personal representative first has knowledge of the creditor, whichever is later. (*Prob.C. 9051.*) Failure of the personal representative to give notice does not preclude a creditor from filing a claim. (Law Rev. Com. Comment.)

(6) *Form of Notice.* *Prob.C. 9052* sets forth a statutory form for the notice to creditors. The Judicial Council has approved a form for the notice. (See Judicial Council Form No. DE-157 [Notice of Administration to Creditors].)

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b. Sufficiency of Notice.

14 Witkin Sum. Cal. Law Wills § 615

[§ 615] Sufficiency of Notice.

(1) *In General.* Publishing notice under *Prob.C. 8120* (supra, §589) and giving notice under *Prob.C. 9050* et seq. (mail or actual delivery; see supra, §614) constitute notice to creditors of the requirements of *Prob.C. 9000* et seq. (*Prob.C. 9001(a)*.) However, nothing in *Prob.C. 9001(a)* affects a notice or request to a public entity required by *Prob.C. 9200* et seq. (infra, §621). (*Prob.C. 9001(b)*.)

(2) *Notice by Publication Alone Is Insufficient.* In *Tulsa Professional Collection Services v. Pope* (1988) 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, 2 Cal. Proc. (4th), Jurisdiction, §257, the rule of *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, requiring actual notice to known or reasonably ascertainable beneficiaries, was applied to the nonclaim provision of Oklahoma's Probate Code. The Court held that publication alone is insufficient to satisfy the requirements of due process in such cases; actual notice, by mail or other means, is required. (See *Clark v. Kerby* (1992) 4 C.A.4th 1505, 1514, 6 C.R.2d 440 [actual knowledge of death is not equivalent to constructive knowledge of administration required by *Tulsa*]; *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Narula* (1995) 33 C.A.4th 1140, 1145, 39 C.R.2d 752 [*Prob.C. 9050* and *Prob.C. 9103* (infra, §635), allowing latitude in filing late claims, comply with constitutional due process required by *Tulsa*]; 56 A.L.R.4th 458 [validity of nonclaim statute providing for notice by publication].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Notice by Publication Alone is Insufficient.*

Tulsa Professional Collection Services case:

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §266.



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c. Immunity for Good Faith Acts or Omissions.

14 Witkin Sum. Cal. Law Wills § 616

[§ 616] Immunity for Good Faith Acts or Omissions.

(1) *No Liability for Giving Notice.* If the personal representative believes that notice to a particular creditor is or may be required by *Prob.C. 9050* et seq. and gives notice based on that belief, the personal representative is not liable to any person for giving the notice, whether required or not. (*Prob.C. 9053(a).*)

(2) *Limited Liability for Failure To Give Notice.* The personal representative is not liable to any person for failing to give notice unless a creditor establishes all of the following:

(a) The failure was in bad faith. (*Prob.C. 9053(b)(1).*)

(b) The creditor did not have "actual knowledge" of the administration of the estate before expiration of the time for filing a claim, and payment would have been made on the creditor's claim in the course of administration if the claim had been properly filed. (*Prob.C. 9053(b)(2).*)

(c) Within 16 months after letters were first issued to a general personal representative, the creditor (1) filed a petition with the court in which the estate was administered for an order determining the liability of the personal representative under *Prob.C. 9053(b)*, and (2) at least 30 days before the hearing on the petition, caused notice of the hearing and a copy of the petition to be served on the personal representative as provided by *C.C.P. 413.10* et seq. (see *3 Cal. Proc. (4th), Actions*, §919 et seq.). (*Prob.C. 9053(b)(3).*) (See *Cal. Civil Practice*, 2 Probate and Trust Proceedings, §13:53.)

The Law Revision Commission Comment offers an illustration: "[W]here a creditor's bill is accidentally lost so that failure to give the creditor notice is purely inadvertent, subdivision (b) provides an immunity from liability."

(3) *Liability of Estate.* Nothing in *Prob.C. 9053* affects any liability of the estate for a creditor's claim, and the personal representative is not liable for the claim to the extent it is paid out of the estate or could be paid out of the estate under *Prob.C. 9103* (late claims; *infra*, §635). (*Prob.C. 9053(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Limited Liability for Failure To Give Notice.*

Service of notice:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1001 et seq.



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d. Liability of Distributee to Known or Ascertainable Creditors.

14 Witkin Sum. Cal. Law Wills § 617

[§ 617] Liability of Distributee to Known or Ascertainable Creditors.

(1) *In General.* Under *Tulsa Professional Collection Services v. Pope* (1988) 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, supra, §615, the rights of a known or reasonably ascertainable creditor who does not receive actual notice are not cut off by the nonclaim statute. In 1990, in response to *Tulsa*, the Legislature added *Prob.C.* 9392, which "is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors." (Law Rev. Com. Comment.) (See Recommendation Relating to Notice to Creditors in Estate Administration, 20 Cal. Law Rev. Com. Reports, p. 507.) The Law Revision Commission Comment points out that an omitted creditor may also have a cause of action against a personal representative who in bad faith failed to give notice to a known creditor. (See *Prob.C.* 9053, supra, §616.)

(2) *Conditions for Liability.* Subject to *Prob.C.* 9392(b), a distributee of property is personally liable for the claim of a creditor, "without a claim first having been filed," if all the following conditions are satisfied:

(a) The creditor's identity was known or reasonably ascertainable by a general personal representative within 4 months after the date letters were first issued, and the claim was not "merely conjectural." (*Prob.C.* 9392(a)(1).)

(b) The creditor was not given notice of administration under *Prob.C.* 9050 et seq. and "neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the estate before the time the court made an order for final distribution of the property." (*Prob.C.* 9392(a)(2).)

(c) The statute of limitations applicable to the claim under *C.C.P.* 366.2 (supra, §517) has not expired at the time of commencement of an action under *Prob.C.* 9392. (*Prob.C.* 9392(a)(3).)

(3) *Limitation on Liability.* Personal liability under *Prob.C.* 9392, "is applicable only to the extent the claim of the creditor cannot be satisfied out of the estate of the decedent and is limited to a pro rata portion of the claim of the creditor, based on the proportion that the value of the property distributed to the person out of the estate bears to the total value of all property distributed to all persons out of the estate." Personal liability for all claims of all creditors may not exceed the value of the property distributed to the person out of the estate. For purposes of *Prob.C.* 9392, the value of the property is the fair market value on the date of the order for distribution less any liens or encumbrances on the

property at that time. (*Prob.C. 9392(b).*)

(4) *Good Faith Purchasers and Encumbrancers Are Protected.* Nothing in *Prob.C. 9392* "affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable" under *Prob.C. 9392*. (*Prob.C. 9392(c).*)

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a. In General.

14 Witkin Sum. Cal. Law Wills § 618

[§ 618] In General.

Prob.C. 9000, based on *Unif.Prob.C. §1-201(4)*, defines "claim" for purposes of *Prob.C. 7000* et seq. (administration of estates). The term refers to a demand for payment of any of the following, "whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated":

(1) "Liability of the decedent, whether arising in contract, tort, or otherwise." (*Prob.C. 9000(a)(1)*.) (On liability arising from contract, see *infra*, §619; on liability arising in tort, see *infra*, §620.)

(2) "Liability for taxes incurred before the decedent's death, whether assessed before or after the decedent's death, other than property taxes and assessments secured by real property liens." (*Prob.C. 9000(a)(2)*.)

(3) "Liability of the estate for funeral expenses of the decedent." (*Prob.C. 9000(a)(3)*.) (On former statute using identical language, see *Seitz v. Engert* (1936) 13 C.A.2d 302, 303, 56 P.2d 1242 [monument included in funeral expenses]; *Estate of Silverstein* (1984) 159 C.A.3d 221, 227, 205 C.R. 294 [expenses of memorial plaque and postdeath prayers were not included in funeral expenses]; and see 17 A.L.R.4th 530 [claims for funeral expenses and expenses of last illness].)

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b. Contract Claims.

14 Witkin Sum. Cal. Law Wills § 619

[§ 619] Contract Claims.

Prob.C. 9000 (supra, §618) applies to claims for liability of the decedent arising in contract, "whether due, not due, accrued or not accrued, or contingent." Because this language is nearly identical to former *Prob.C. 707* ("claims arising upon contract, whether they are due, not due, or contingent"), cases decided under the former statute remain relevant. (See *Morrison v. Land* (1915) 169 C. 580, 585, 147 P. 259 [claims arising from breach of alleged contract to make will]; *Southern Pac. Co. v. Catucci* (1941) 47 C.A.2d 596, 599, 118 P.2d 494 [enforcement where claim is not due]; *Pay Less Drug Stores v. Bechdolt* (1979) 92 C.A.3d 496, 501, 155 C.R. 58, *infra*, §630 [action for restitution after rescission is not claim arising on contract]; *Borba Farms v. Acheson* (1988) 197 C.A.3d 597, 602, 242 C.R. 880 [claim for contribution from co-obligors on note, including decedent, is not claim arising on contract]; *Wilkison v. Wiederkehr* (2002) 101 C.A.4th 822, 833, 124 C.R.2d 631, citing the text [following *Morrison*; action for damages for breach of agreement to make specific bequest in will was barred for failure to file creditor's claim].)

The controlling word is not "contract" but "claims." Thus, some courts have pointed out that, as used in the statute, the word is similar in meaning to "debt," and that only money demands, i.e., such claims as result from the relationship of debtor and creditor, are included. (See *Erickson v. Boothe* (1947) 79 C.A.2d 266, 277, 179 P.2d 611; *Wright v. Superior Court* (1948) 85 C.A.2d 151, 153, 192 P.2d 511.)

In *Hays v. Bank of America* (1945) 71 C.A.2d 301, 305, 162 P.2d 679, plaintiff, an employee, sued the administrator of his deceased employer, to recover overtime wages, liquidated damages, and attorneys' fees under the federal Fair Labor Standards Act. *Held*, the cause of action was one "arising on" or "sounding in" contract, and was barred for failure to file a claim. The court relied in part on federal decisions holding that the statutory provision for liquidated damages is compensatory and not penal in nature, and reasoned that the statutory liability became a part of the contract of employment. The opinion also, somewhat inconsistently, characterized the claim as "quasi-contractual," created by statute but based on the contract of employment and increasing the contractual liability. (See 3 *Cal. Proc.* (4th), *Actions*, §135.)

The conventional quasi-contract claim for the reasonable value of services performed on request is clearly within the statute. (See *Murdock v. Swanson* (1948) 85 C.A.2d 380, 388, 193 P.2d 81.)

A typical example of a claim "not due," i.e., liquidated in amount but not yet matured, is future rent under a lease. (*Lesser v. Pomin* (1934) 3 C.A.2d 117, 120, 39 P.2d 451; see *Jacobson v. Mead* (1936) 12 C.A.2d 75, 78, 55 P.2d 285 [suit to rescind contract and recover money paid]; *Dabney v. Dabney* (1942) 54 C.A.2d 695, 699, 129 P.2d 470 [child support under separation agreement]; 99 A.L.R.2d 275 [unmatured payments under land contract]; 22 A.L.R.3d 814 [rent accruing after lessee's death as expense of administration].)

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SUPPLEMENT: [This section is current through the latest supplement]

Quasi-contractual actions:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §140.



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c. Tort Claims.

14 Witkin Sum. Cal. Law Wills § 620

[§ 620] Tort Claims.

Prob.C. 9000 (supra, §618) applies to claims for liability of the decedent arising in tort. The Law Revision Commission Comment, in language nearly identical to former *Prob.C. 707*, states that this provision includes "claims for damages for injuries to or death of a person or injury to property and all claims against the personal representative of a decedent who in his or her lifetime has wasted, destroyed, taken or carried away, or converted to his or her own use, the property of another person or committed any trespass on the real property of another person." Thus, cases decided under the former statute remain relevant. (See *Casey v. Katz* (1952) 114 C.A.2d 391, 393, 250 P.2d 291 [malicious prosecution]; *Halbert v. Berlinger* (1954) 127 C.A.2d 6, 12, 273 P.2d 274 [wrongful death and personal injuries]; *Agnew v. Parks* (1958) 164 C.A.2d 837, 839, 331 P.2d 184 [tort action seeking damages and punitive damages]; *Los Angeles v. McNeil* (1958) 160 C.A.2d Supp. 867, 870, 326 P.2d 29 [injury to property from airplane crash]; 22 A.L.R.3d 493 [tort claim as within nonclaim statute].)

The subrogation claim of an employer's insurance carrier against a third-party tortfeasor for reimbursement of compensation paid to an injured employee (*Lab.C. 3852*; 2 *Summary* (10th), *Workers' Compensation*, §69) is one for "injury to property," and requires the filing of a claim. (*Fidelity & Cas. Co. of New York v. McMurry* (1963) 217 C.A.2d 767, 769, 32 C.R. 243.)

Where the cause of action is concealed by the decedent or is otherwise not discoverable in time by the plaintiff, the claim requirement has a harsh effect, which nullifies the liberalization accomplished by the survival statutes. Thus, in *Hurlimann v. Bank of America* (1956) 141 C.A.2d 801, 297 P.2d 682, plaintiffs pleaded a cause of action for medical malpractice occurring in 1951 and discovered in 1954. The excuse of late discovery would have satisfied the statute of limitations under the postponed accrual theory (see 3 *Cal. Proc.* (4th), *Actions*, §533 et seq.). But the doctor died, notice to creditors was published in September 1953, and the claim was not filed until May 1954. *Held*, judgment on demurrer affirmed; any extension of the nonclaim period must come from the *Legislature*. (141 C.A.2d 804.) (The nonclaim period was later extended to specified situations; see *infra*, §635.)

In *Pitzer v. Smith* (1981) 123 C.A.3d 73, 176 C.R. 407, the court examined the case law and concluded that the Legislature intended former *Prob.C. 720*, authorizing a late claim for personal injury or death, to apply only where a cause of action arose prior to the decedent's death. Hence, where tort liability arose after the decedent's death, no claim

was required. (123 C.A.3d 77, 78, 80, 82.)

Nunez v. Superior Court (1983) 143 C.A.3d 476, 191 C.R. 893, came to the opposite conclusion. Mr. and Mrs. M were in an airplane piloted by Mr. M. The plane crashed, Mr. M died a short time thereafter, and Mrs. M died 3 days later. Mrs. M's heirs brought a wrongful death action against the estate of Mr. M, but did not file a claim. The trial judge, relying on *Pitzer*, denied defendant's motion for judgment on the pleadings. *Held*, mandamus issued to compel granting of the motion.

(a) *Pitzer* relied on dicta in prior opinions, and on a construction of former Prob.C. 720. (143 C.A.3d 479.) The controlling section, however, was former Prob.C. 707, referring to "all claims for damages for injuries to or death of a person." The term "all claims" includes a wrongful death claim arising after the death of the tortfeasor. (143 C.A.3d 481.)

(b) Including postdeath tort claims carries out the purposes of the claims requirement: Whether an action arises before or after the death of the testator has no effect on presuit settlement opportunities. "A contrary conclusion results in wholly capricious distinctions, turning, for example, on the happenstance of discovery of a malpractice claim" as in *Hurlimann*, or a fraud claim as in *Estate of Hoertkorn* (1979) 88 C.A.3d 461, 151 C.R. 806, or here, the "fortuitous sequence" of the Ms' deaths. (143 C.A.3d 481.)

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SUPPLEMENT: [This section is current through the latest supplement]
Postponed accrual:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §578 et seq.



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d. Claims by Public Entities.

1. Filing Requirement.

14 Witkin Sum. Cal. Law Wills § 621

[§ 621] Filing Requirement.

(1) *Former Case Law.* Statutory obligations were formerly outside the claim filing requirement. (See *People v. Hochwender* (1942) 20 C.2d 181, 183, 124 P.2d 823 [tax claim]; *Department of Social Welfare v. Stauffer* (1943) 56 C.A.2d 699, 702, 133 P.2d 692 [double amount improperly received by person under old age security law]; *Los Angeles v. Security First Nat. Bank of Los Angeles* (1948) 84 C.A.2d 575, 579, 191 P.2d 78 [claim of county for reimbursement for aid furnished to decedent]; *Department of Mental Hygiene v. Rosse* (1960) 187 C.A.2d 283, 286, 9 C.R. 589 [state's claim for support of decedent's daughter in state hospital]; *Department of Mental Hygiene v. Brock* (1961) 198 C.A.2d 82, 83, 18 C.R. 31 [same].)

(2) *Statutory Requirement.* A claim by a public entity must be filed within the statutory claim period, except as provided by *Prob.C. 9200* et seq. "A claim not so filed is barred, including any lien imposed for the claim." (*Prob.C. 9200(a)*.) (For exceptions, see *Prob.C. 9201*, infra, §622.) However, *Prob.C. 9200* et seq. do not apply to "liability for the restitution for amounts illegally acquired through the means of a fraudulent, false, or incorrect representation, or a forged or unauthorized endorsement." (*Prob.C. 9205*.)

(3) *"Public Entity" Defined.* For purposes of *Prob.C. 9200* et seq., "public entity" has the meaning provided in *Govt.C. 811.2*, and includes "an officer authorized to act on behalf of the public entity." (*Prob.C. 9200(b)*.) Under *Govt.C. 811.2*, the term includes "the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State." The Law Revision Commission Comment points out that *Prob.C. 9200* does not govern obligations owed to the United States, which are governed by federal law.

(4) *Priority of Claims Is Not Affected.* Nothing in *Prob.C. 9200* et seq. "shall be construed to affect the order of priority of claims provided for under other provisions of law." (*Prob.C. 9204*.)

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SUPPLEMENT: [This section is current through the latest supplement]



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[§ 622] Claims Under Specific Statutes.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Notice to Director of Health Services. Prob.C. 9202* was subdivided in 2005 and the provision discussed in the text is now in *Prob.C. 9202(a)*. The provision was amended in 2007 to refer to the Director of Health Care Services.

See *Shewry v. Arnold* (2004) 125 C.A.4th 186, 197, 22 C.R.3d 488 [under Welf.C. 14009.5(b) and 42 U.S.C., §1396p(b), Department of Health Services could not enforce claim for reimbursement of Medi-Cal expenses from remaining assets of decedent's special needs trust, where assets were distributed as part of decedent's estate to decedent's adult child who was permanently and totally disabled].

(4) *(New) Notice to Director of California Victim Compensation and Government Claims Board.* Within 90 days after the date letters are first issued to a general personal representative, the personal representative or the estate attorney must give the Director of the California Victim Compensation and Government Claims Board notice of the decedent's death in the manner provided by *Prob.C. 216* (Supp., supra, §16) if the personal representative has reason to believe that an heir of the decedent is incarcerated. The director has 4 months after the notice is given in which to pursue collection of a restitution fine or order. (*Prob.C. 9202(b)*, added in 2005.)

(5) *(New) Notice to Franchise Tax Board.* Within 90 days after the date letters are first issued to a general personal representative, the personal representative or the estate attorney must give the Franchise Tax Board notice of administration of the estate in the manner provided by *Prob.C. 1215* (text, §392). (*Prob.C. 9202(c)*, added in 2007.)



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[§ 622] Claims Under Specific Statutes.

(1) *Statutory List. Prob.C. 9201(b)* lists the following statutes, which are governed by special form and notice requirements:

- (a) Sales and Use Tax Law (Rev.C. 6001 et seq.): Rev.C. 6487.1.
- (b) Bradley-Burns Uniform Local Sales and Use Tax Law (Rev.C. 7200 et seq.): Rev.C. 6487.1.
- (c) Transactions and Use Tax Law (Rev.C. 7251 et seq.): Rev.C. 6487.1.
- (d) Motor Vehicle Fuel License Tax Law (Rev.C. 7301 et seq.): Rev.C. 7675.1.
- (e) Use Fuel Tax Law (Rev.C. 8601 et seq.): Rev.C. 8782.1.
- (f) Administration of the Franchise and Income Tax Law (Rev.C. 18401 et seq.): Rev.C. 19517.
- (g) Cigarette Tax Law (Rev.C. 30001 et seq.): Rev.C. 30207.1.
- (h) Alcoholic Beverage Tax Law (Rev.C. 32001 et seq.): Rev.C. 32272.1.
- (i) Unemployment Insurance Code: *Unemp.Ins.C. 1090*.
- (j) State Hospitals for the Mentally Disordered (Welf.C. 7200 et seq.): Welf.C. 7277.1.
- (k) Medi-Cal Act (Welf.C. 14000 et seq.): *Prob.C. 9202*.
- (l) Waxman-Duffy Prepaid Health Plan Act (Welf.C. 14200 et seq.): *Prob.C. 9202*.

(2) *Special Form and Notice Requirements.* Notwithstanding any other statute, if a claim of a public entity arises under a law, act, or code listed in *Prob.C. 9201(b)*, the following rules apply:

(a) "The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code." (*Prob.C. 9201(a)(2).*)

(b) The public entity may provide a form for the written notice or request to the entity. When appropriate, the form may require the decedent's Social Security number, if known. (*Prob.C. 9201(a)(1).*)

The Law Revision Commission Comment points out that *Prob.C. 9201* applies notwithstanding the statute of limitations on actions by or against decedents. (See *C.C.P. 366.1* and *C.C.P. 366.2*; *supra*, §§516, 517.)

(3) *Notice to Director of Health Services.* Within 90 days after the date letters are first issued to a general personal representative, the personal representative or the estate attorney must give the Director of Health Services notice of the decedent's death in the manner provided by *Prob.C. 215* (*supra*, §16) if the personal representative has reason to believe that the decedent received health care under *Welf.C. 14000 et seq.* (health care for persons qualified to receive state benefits) or *Welf.C. 14200 et seq.* (prepaid health plan coverage for persons qualified to receive state benefits) or was the surviving spouse of a person who received that health care. The director has 4 months after the notice is given in which to file a claim. (*Prob.C. 9202.*) (See *Kizer v. Hanna* (1989) 48 C.3d 1, 255 C.R. 412, 767 P.2d 679 [*Welf.C. 14009.5*, authorizing claim by Department of Health Services against estate for benefits paid to decedent, applied to benefits paid before effective date of statute where recipient died after that date]; *Bonta v. Burke* (2002) 98 C.A.4th 788, 793, 120 C.R.2d 72 [under *Welf.C. 14009.5*, department could enforce claim for reimbursement of Medi-Cal expenses paid to decedent against real property conveyed to beneficiaries during life where decedent retained life interest in property and had right to revoke remainder interest]; *Cal. Civil Practice*, 1 Probate and Trust Proceedings, §2:27; on fraudulent failure to give notice, see *infra*, §623.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Notice to Director of Health Services.* *Prob.C. 9202* was subdivided in 2005 and the provision discussed in the text is now in *Prob.C. 9202(a)*. The provision was amended in 2007 to refer to the Director of Health Care Services.

See *Shewry v. Arnold* (2004) 125 C.A.4th 186, 197, 22 C.R.3d 488 [under *Welf.C. 14009.5(b)* and 42 U.S.C., §1396p(b), Department of Health Services could not enforce claim for reimbursement of Medi-Cal expenses from remaining assets of decedent's special needs trust, where assets were distributed as part of decedent's estate to decedent's adult child who was permanently and totally disabled].

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[§ 623] Effect of Failure To Give Notice.

(1) *Administration Proceedings Are Not Affected.* Failure to give the written notice or request to a public entity required by *Prob.C. 9200* et seq. does not affect the validity of any proceeding under the Probate Code concerning the administration of estates. (*Prob.C. 9203(a).*)

(2) *Claim Against Distributees.* If property in the estate is distributed before expiration of the time within which a public entity may file a claim, the entity has a claim against the distributees "to the full extent of the public entity's claim, or each distributee's share of the distributed property, whichever is less." The entity's claim includes (a) interest from the date of distribution or the date the claim is filed, whichever is later, at a rate equal to that specified in *Rev.C. 19521*, and (b) "other accruing costs as in the case of enforcement of a money judgment." (*Prob.C. 9203(b).*)

(3) *Claim Against Personal Representative for Fraudulent Failure To Give Notice.* In *Estate of Starkweather* (1998) 64 C.A.4th 580, 75 C.R.2d 766, the decedent's personal representative fraudulently failed to notify the Department of Health Services that the decedent had received Medi-Cal benefits, the department failed to file a claim, and the estate was distributed. The department then attempted to enforce its claim against the personal representative and her surety. *Held*, the personal representative and surety were liable.

(a) *Prob.C. 9203(b)* clearly provides a remedy to the department where an estate is distributed without notice. As to negligent or other failure to give notice that would not amount to extrinsic fraud, "we have no doubt" that the remedy is adequate and exclusive. However, the statute does not address fraudulent failure to give notice, and in that circumstance, any appropriate common law remedy is available. (64 C.A.4th 593.)

(b) Here, the personal representative wilfully represented a fact she knew to be false with the intent of misleading the court into ordering final distribution without notice to the department and discharge of its valid claim. This conduct was a breach of her fiduciary duty. (64 C.A.4th 594.) She and the surety are liable based on that breach and under the doctrine of extrinsic fraud. Any other resolution of this issue "would enable personal representatives (and their sureties) to commit fraud such as occurred here with impunity." (64 C.A.4th 595.)

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1. Claim on Cause of Action.

14 Witkin Sum. Cal. Law Wills § 624

[§ 624] Claim on Cause of Action.

(1) *Filing Requirement.* An action may not be commenced against a decedent's personal representative on a cause of action against the decedent unless a claim is filed under *Prob.C. 9000* et seq. and is rejected in whole or in part. (*Prob.C. 9351.*) The Law Revision Commission Comment notes that this provision does not affect actions against persons other than the personal representative who may be liable for the decedent's debts, e.g., one who collects the decedent's property by affidavit under *Prob.C. 13109* (infra, §804), a surviving spouse under *Prob.C. 13550* et seq. (infra, §823), or an insurer under *Prob.C. 550* et seq. (supra, §515).

(2) *Scope of Provisions.* *Prob.C. 9350* et seq. apply to "any claim other than a claim on an action or proceeding pending against the decedent at the time of death." (*Prob.C. 9350.*) (For procedure in actions on rejected claims, see infra, §645 et seq.)

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2. Claim on Pending Action or Proceeding.

14 Witkin Sum. Cal. Law Wills § 625

[§ 625] Claim on Pending Action or Proceeding.

(1) *Former Statute and Case Law.* Under former Prob.C. 709, if an action on a presentable claim was pending at the decedent's death, a claim was required as in other cases. (See *Pearson v. Parsons* (1916) 173 C. 336, 338, 159 P. 1173; *Thomas v. Fursman* (1918) 39 C.A. 278, 286, 178 P. 870 [proper practice is to file supplemental complaint alleging presentation]; *Salinas Nat. Bank v. Cook* (1950) 101 C.A.2d 423, 426, 225 P.2d 253 [failure to allege presentation of claim was waived by failure of defendant to raise question in trial court]; *Lewis v. O'Brien* (1967) 248 C.A.2d 628, 630, 56 C.R. 749 [if personal representative is substituted as party to action, claim presentation requirement is satisfied]; *Wood v. Brown* (1974) 39 C.A.3d 232, 236, 114 C.R. 63.)

(2) *Conditions for Continuing Pending Action.* An action pending against the decedent at the time of death may not be continued against the personal representative unless all of the following conditions are satisfied:

(a) A claim is filed under Prob.C. 9000 et seq. and is rejected in whole or in part. (Prob.C. 9370(a)(1), (a)(2).)

(b) Within 3 months after notice of rejection, the plaintiff applies to the court in which the action is pending for an order to substitute the personal representative in the action. This requirement applies only if the notice of rejection states that the plaintiff has 3 months in which to apply for a substitution order. (Prob.C. 9370(a)(3).) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §14:37.)

(3) *Proof of Compliance With Requirements.* No recovery is allowed against property in the decedent's estate without proof of compliance with the requirements of Prob.C. 9370. (Prob.C. 9370(b).)

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f. Claims Established by Judgment.

1. Former Statutes and Revision.

14 Witkin Sum. Cal. Law Wills § 626

[§ 626] Former Statutes and Revision.

Former Prob.C. 730 et seq. generally precluded the enforcement of judgments rendered against a decedent or the decedent's estate, requiring them instead to be presented as claims and paid in the course of administration. (See *United States Gypsum Co. v. Shaffer* (1936) 7 C.2d 454, 458, 60 P.2d 998 [suggesting that where appeal is taken, and executor is substituted, though informally, claim may not be necessary]; *Corporation of America v. Marks* (1937) 10 C.2d 218, 221, 73 P.2d 1215; *Taylor v. George* (1949) 34 C.2d 552, 557, 212 P.2d 505; *Grisinger v. Shaeffer* (1938) 25 C.A.2d 5, 8, 76 P.2d 149 [money judgment was conclusive on validity of claim]; *Silva v. Superior Court* (1948) 83 C.A.2d 521, 527, 189 P.2d 314; *Estate of Dow* (1957) 149 C.A.2d 47, 58, 308 P.2d 475.)

In *Millar v. Millar* (1921) 51 C.A. 718, 729, 197 P. 811, the claims statute was held inapplicable to an alimony decree. In *Pelser v. Pelser* (1960) 177 C.A.2d 228, 2 C.R. 259, the court came to the opposite conclusion, without mentioning *Millar*. A divorce decree based on a property agreement provided for payments to plaintiff wife for alimony and child support until her death or remarriage or the children coming of age. The husband died while in arrears. Plaintiff, who failed to file a claim, sought to bring herself within the holding of *United States Gypsum Co.* on the theory that a divorce court retains jurisdiction to modify support orders and to enforce them. Accordingly, she made a motion in the divorce action to substitute the husband's administrator in place of the husband as defendant. The judge granted the motion and the administrator appealed. *Held*, reversed; there was no pending action. "The requirement for the presentation and filing of claims is a necessity in order that estates of decedents may be handled promptly and properly. There is no sound reason therefore why a divorce judgment should not be treated upon the same basis as any other judgment." (177 C.A.2d 232.)

In a 1979 study, the California Law Revision Commission recommended that existing statutory provisions on enforcement be clarified and that judicially developed rules be codified. (See 15 Cal. Law Rev. Com. Reports, pp. 1327, 1331.) The 1980 Legislature, following the recommendation, repealed and reenacted former Prob.C. 730 et seq. As part of the Probate Code revision of 1987, the revised statutes were restated without substantive change in *Prob.C. 9300* et seq. (*infra*, §627 et seq.).

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2. Money and Nonmoney Judgments.

14 Witkin Sum. Cal. Law Wills § 627

[§ 627] Money and Nonmoney Judgments.

(1) *Enforcement of Money Judgment.* Generally, a money judgment against the decedent or the personal representative on a claim against the decedent or the estate is payable in the course of administration and is not enforceable against property in the estate under the Enforcement of Judgments Law (*C.C.P. 680.010* et seq.; see 8 *Cal. Proc. (4th), Enforcement of Judgment*, §9 et seq.). (*Prob.C. 9300(a).*) The statute applies to both state and federal judgments. (Law Rev. Com. Comment.)

(2) *Property Subject to Execution Lien.* If property of the decedent is subject to an execution lien at the time of death, enforcement against the property may proceed under the Enforcement of Judgments Law to satisfy the judgment. The levying officer must account to the personal representative for any surplus. If the judgment is not satisfied, the balance of the judgment remaining unsatisfied is payable in the course of administration. (*Prob.C. 9303.*)

(3) *Filing and Effect of Money Judgment.* When a money judgment against a personal representative in a representative capacity becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment must provide that it is payable out of the property in the decedent's estate in the course of administration, and an abstract of the judgment must be filed in the administration proceeding. (*Prob.C. 9301.*) Subject to *Prob.C. 9301*, a judgment on a claim against the decedent or the estate is filed in the same manner as other claims. (*Prob.C. 9300(b).*)

(4) *Nonmoney Judgment.* Notwithstanding the death of the decedent, a judgment for possession or sale of property may be enforced under the Enforcement of Judgments Law. However, nothing in this provision authorizes enforcement under the Enforcement of Judgments Law against any property in the estate other than property described in the judgment for possession or sale. (*Prob.C. 9302(a).*) After the death of the decedent, a demand for money that is not satisfied from the property described in a judgment for sale of property must be filed as a claim in the same manner as other claims and is payable in the course of administration. (*Prob.C. 9302(b).*)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Enforcement of Money Judgment.*

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §18 et seq.



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3. Conversion of Attachment Lien to Judgment Lien.

14 Witkin Sum. Cal. Law Wills § 628

[§ 628] Conversion of Attachment Lien to Judgment Lien.

(1) *When Conversion Is Authorized.* An attachment lien may be converted into a judgment lien on property in the estate subject to the attachment lien with the same priority as the attachment lien in either of two circumstances:

(a) "Where the judgment debtor dies after entry of judgment in an action in which the property was attached."
(*Prob.C. 9304(a)(1).*)

(b) "Where a judgment is entered after the death of the defendant in an action in which the property was attached."
(*Prob.C. 9304(a)(2).*)

(2) *Conversion Procedure.* To convert an attachment lien into a judgment lien, the levying officer must do one of the following after entry of judgment and before the expiration of the attachment lien:

(a) "Serve an abstract of the judgment, and a notice that the attachment lien has become a judgment lien, on the person holding property subject to the attachment lien." (*Prob.C. 9304(b)(1).*)

(b) "Record or file, in any office where the writ of attachment and notice of attachment are recorded or filed, an abstract of the judgment and a notice that the attachment lien has become a judgment lien. If the attached property is real property, the plaintiff or the plaintiff's attorney may record the required abstract and notice with the same effect as if recorded by the levying officer." (*Prob.C. 9304(b)(2).*)

(3) *Claim of Exemption.* Any member of a decedent's family supported in whole or in part by the decedent, or the personal representative on behalf of members of the decedent's family, may claim an exemption under *C.C.P. 487.020* (see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §82) for property levied on under the writ of attachment if the right to the exemption exists at the time the exemption is claimed. The claim may be made at any time before the abstract and notice are served, recorded, or filed under *Prob.C. 9304(b)* with respect to the property claimed to be exempt. The claim is made in the same manner as an exemption is claimed under *C.C.P. 482.100* (see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §224). (*Prob.C. 9304(c).*)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Claim of Exemption.*

Claim of exemption for support:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §83.

Manner of making claim:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §222.



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4. Claims That Need Not Be Filed.

a. Claim to Specific Property.

14 *Witkin Sum. Cal. Law Wills* § 629

[§ 629] Claim to Specific Property.

(1) *Former Case Law.* A person who claims specific property as the owner is not a creditor seeking to enforce an indebtedness of the estate; the claimant is demanding possession of something that does not belong to the estate. Hence, he or she need not file a claim prior to bringing suit. (See *Estate of Dutard* (1905) 147 C. 253, 256, 81 P. 519; 12 So. Cal. L. Rev. 432.) The following are examples:

(a) *Trust.* Action based on an express trust (*Kroger v. Truitt* (1945) 27 C.2d 288, 294, 163 P.2d 735); action to enforce a resulting trust (*Back v. Farnsworth* (1938) 25 C.A.2d 212, 220, 77 P.2d 295); action to enforce a constructive trust (*Trower v. Young* (1940) 40 C.A.2d 539, 547, 105 P.2d 160).

In cases involving alleged agreements by decedents to compensate for services rendered before death, a distinction should be noted. If the decedent agreed to leave property to the plaintiff, and the action is for quasi-specific performance through the medium of a constructive trust, no claim is necessary. (*Trower v. Young*, *supra*; *Walker v. Calloway* (1950) 99 C.A.2d 675, 683, 222 P.2d 455.) But if the agreement was merely to pay for the services, or the action is brought in quasi-contract for the reasonable value of services, the claim is one "arising upon contract" and must be filed. (See *v. Joughin* (1937) 18 C.A.2d 414, 419, 64 P.2d 149; *Morrison v. Land* (1915) 169 C. 580, 147 P. 259; see *supra*, §619.)

(b) *Equitable Lien or Assignment.* Action to enforce an equitable lien (*Grant v. de Otte* (1954) 122 C.A.2d 724, 728, 265 P.2d 952); equitable assignment of part of a special fund (*McKay v. Security-First Nat. Bank of Los Angeles* (1939) 35 C.A.2d 349, 355, 96 P.2d 376); an assignment of an undivided interest in money from the rental or sale of lands (*Arguello Estate Protective Assn. v. Crofton* (1953) 118 C.A.2d 511, 514, 258 P.2d 97).

(c) *Specific Performance.* In *Estate of Bailey* (1941) 42 C.A.2d 509, 109 P.2d 356, the decedent agreed to sell land to petitioner and to clear the title by satisfying a trust deed. Petitioner, without filing a claim, sought an order from the probate court directing the personal representative to pay her the amount due on the encumbrance and to convey the property. *Held*, the order could properly be made. Petitioner was not claiming the money as a creditor, but was seeking specific performance of a contract to transfer property, and the money payment was merely incidental to the required performance. (42 C.A.2d 511.) (See *Erickson v. Boothe* (1947) 79 C.A.2d 266, 276, 179 P.2d 611 [specific performance of agreement to renew lease]; *Wright v. Superior Court* (1948) 85 C.A.2d 151, 153, 192 P.2d 511 [same].)

(2) *Codification.* A claim for purposes of *Prob.C. 9000* et seq. does not include "a dispute regarding title of a decedent to specific property alleged to be included in the decedent's estate." (*Prob.C. 9000(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Claim for Restitution After Rescission.

14 Witkin Sum. Cal. Law Wills § 630

[§ 630] Claim for Restitution After Rescission.

In *Pay Less Drug Stores v. Bechdolt* (1979) 92 C.A.3d 496, 155 C.R. 58, plaintiff made a contract to purchase land from decedent, but building regulations prevented construction. In this action, plaintiff sought a judicial declaration of rescission and restitution of the purchase price. *Held*, despite failure to file a claim, the action could be maintained. *Jacobson v. Mead* (1936) 12 C.A.2d 75, 78, 55 P.2d 285, 1267 is seemingly on point, but the opinion gives no reasoned analysis of the issue and is not persuasive. The controlling cases are those dealing with specific performance, quiet title, enforcement of trusts, and claims to specific property. (92 C.A.3d 499, 500, citing the text; see *supra*, §629.) It would be incongruous to require a creditor's claim in rescission cases and not in specific performance cases. (92 C.A.3d 500.)

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CHAPTER XXI - Wills and Probate

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XI. ESTATE ADMINISTRATION

E. Claims of Creditors.

4. Claims That Need Not Be Filed.

c. Action on Claim Covered by Insurance.

14 Witkin Sum. Cal. Law Wills § 631

[§ 631] Action on Claim Covered by Insurance.

(1) *Former Statutes.* Application of the claims requirement to tort claims (see *supra*, §620) created a serious problem for personal injury plaintiffs in actions defended by insurance companies. Death of the defendant was often unknown to counsel for the plaintiff and not disclosed by the defense. The result was that a meritorious action might be lost for failure to file the claim, even though the object of the claims statute was in no way contravened, for recovery was sought from the insurer and not the assets of the estate. Criticism of this practice led to several changes:

(a) Under former Prob.C. 709, when an insurer was defending an action pending at death, no claim was required for amounts within the insurance coverage.

(b) Under former Prob.C. 721, where an action against the estate was commenced after death, no claim was required for amounts within the insurance coverage.

(c) Under former Prob.C. 707, where an action for injury or death, or on a judgment in such an action, was brought against the estate, no claim was required for amounts within the insurance coverage if the insurer was served with a copy of the complaint and the estate qualified for summary administration.

(2) *Revision.* Former Prob.C. 707, 709, and 721 were replaced by *Prob.C. 550* et seq. (*supra*, §515) and *Prob.C. 9390* in 1988. The Law Revision Commission Comment makes the following points:

(a) "The new provisions apply uniformly to actions pending at the death of the decedent and actions commenced after the decedent's death."

(b) "The new provisions apply in any case where there is a claim for damages for which the decedent was insured, whether for injury to or death of a person caused by the wrongful act or neglect of the decedent, or otherwise."

(c) "The new provisions excuse a claim in probate only where the plaintiff is proceeding under Section 550, whether or not the insurer has otherwise accepted the defense of the cause or an appearance has been made on behalf of the decedent."

(3) *No Claim Is Required for Recovery Within Policy Limits.* An action to establish a decedent's liability for which the decedent was protected by insurance may be commenced or continued against the estate without joining the personal representative, although the personal representative may be substituted as the defendant for good cause. (*Prob.C. 550, 552, supra, §515.*) The action may be commenced or continued and a judgment enforced against the insurer without first filing a claim under *Prob.C. 9000. (Prob.C. 9390(a).)*

(4) *Claim Is Required for Recovery Beyond Policy Limits.* Unless the personal representative is joined and the plaintiff files a claim, recovery is restricted to the limits or coverage of the insurance. (*Prob.C. 554, supra, §515; Prob.C. 9390(b).*)

(5) *Claim Is Required for Reimbursement of Insurer.* If the insurer seeks reimbursement for any liability of the decedent (including deductible amounts in the insurance coverage, and costs or attorneys' fees for which the decedent is liable under the contract), the insurer must file a claim under *Prob.C. 9000 et seq.* Failure to do so waives reimbursement under the contract for any liability of the decedent. (*Prob.C. 9390(c).*) The Law Revision Commission Comment points out that *Prob.C. 9390(c)* is not an independent authorization for the reimbursement of costs and fees but only a procedure for recovering costs and fees for which the decedent is otherwise liable.

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d. Action To Enforce Security Interest.

14 Witkin Sum. Cal. Law Wills § 632

[§ 632] Action To Enforce Security Interest.

(1) *Former Statute and Case Law.* Under former Prob.C. 716, the holder of a mortgage or lien on property in the estate could enforce the security interest without filing a claim if recourse against other property in the estate was expressly waived in the complaint. (See *Shlaudeman v. Grubel* (1936) 15 C.A.2d 499, 504, 59 P.2d 873; *Schwartz v. Edmunds* (1937) 20 C.A.2d 530, 533, 67 P.2d 351; *Salinas Nat. Bank v. Cook* (1950) 101 C.A.2d 423, 424, 225 P.2d 253.)

The same principle applied to a judgment lien. In *Corporation of America v. Marks* (1937) 10 C.2d 218, 73 P.2d 1215, plaintiff procured judgments against a debtor, and abstracts were filed in a county in which he owned real property, resulting in judgment liens. Thereafter the debtor died, but plaintiff did not learn of this until it was too late to file a claim. Plaintiff then brought an equitable action against the devisees who had the property to foreclose its judgment liens, within 5 years after entry of the judgments. *Held*, the action was proper. (a) Death of the debtor terminates the right to levy execution on the judgment, and failure to file a claim destroys the priority of the judgment lien. But the lien itself remained. (10 C.2d 220.) (b) Because mortgages or other "liens" may be enforced without filing claims, so may a judgment lien, by an action to foreclose it against those who have succeeded to the property covered by the lien, without recourse, however, to other property in the event of a deficiency. (10 C.2d 221.)

(2) *Current Statute.* Except as provided in Prob.C. 10361 (application of proceeds of sale of encumbered property; see *infra*, §706), the holder of a mortgage or other lien on property in the decedent's estate, including a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien, without filing a claim, "if in the complaint the holder of the lien expressly waives all recourse against other property in the estate." C.C.P. 366.2 (*supra*, §517) does not apply to the action. (Prob.C. 9391.) (See *Grothe v. Cortlandt Corp.* (1992) 11 C.A.4th 1313, 1318, 15 C.R.2d 38 [judgment lien was unenforceable against surviving joint tenant where judgment debtor joint tenant died before execution sale was completed]; *Cosentino v. Coastal Const. Co.* (1994) 30 C.A.4th 1712, 1715, 36 C.R.2d 444 [Prob.C. 9391 did not apply to private nonjudicial foreclosure instituted under power of sale in deed of trust; exercise of power of sale is not "action" within meaning of statute].)

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5. Time for Filing Claim.
a. Time Period.

Witkin Sum. Cal. Law Wills § 633

[§ 633] Time Period.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*(b) *Sixty-day period:* *Prob.C. 9100(a)(2)* was amended in 2007 to refer to 60 days after "notice of administration is mailed or personally delivered to the creditor."

(5) *Effect of Timely Filing Claim.* *Prob.C. 9102* was amended in 2007 to add "for filing claims" to the end of the provision quoted in the text.



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a. Time Period.

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[§ 633] Time Period.

(1) *In General.* A creditor must file a claim before expiration of the later of the following times:

(a) Four months after the date letters are first issued to a general personal representative. (*Prob.C. 9100(a)(1)*.) The Law Revision Commission Comment observes that (1) if letters are issued by more than one court or subsequent letters are issued by the same court, the 4-month period commences at the first issuance of letters to a general personal representative; and (2) if a special administrator is granted the powers of a general personal representative, the period commences at the first issuance of letters reciting the general powers. (See *Varney v. Superior Court* (1992) 10 C.A.4th 1092, 1102, 12 C.R.2d 865, supra, §571 [Court of Appeal had power to stay 4-month period as to petitioner who sought declaration whether his creditor's claim violated will's no contest provision, and then sought review of adverse ruling and stay before expiration of period].)

(b) Sixty days after the creditor is given notice of administration. However, this provision does not extend the time provided in C.C.P. 366.2 (supra, §517). (*Prob.C. 9100(a)(2)*.)

A reference in another statute to the time for filing a claim means the 4-month period provided in *Prob.C. 9100(a)(1)*. (*Prob.C. 9100(b)*.)

(2) *Time for Filing Claim Is Not Tolloed Indefinitely Where Creditor Has Actual Knowledge of Administration.* In *Venturi v. Taylor* (1995) 35 C.A.4th 16, 41 C.R.2d 272, defendants, administrators of an estate, contacted plaintiff, decedent's nephew, concerning his business transactions with decedent and his claim to be decedent's creditor. At his request, they sent him a copy of the petition for probate, but never gave formal notice of administration pursuant to *Prob.C. 9050*. Plaintiff filed a creditor's claim more than 4 months after letters of administration were first issued, and the claim was rejected. Plaintiff then sued for breach of contract, and the trial court granted summary judgment for defendants, finding that the claim was barred for failure to timely file either a creditor's claim or a petition to file a late claim. *Held*, affirmed.

Failure to give formal notice of administration does not toll the time to file a claim indefinitely where the creditor has actual knowledge of the administration of the estate by other means. There is no "bright line" rule that the statute of

limitations for filing a claim does not commence until the personal representative gives formal notice to the creditor pursuant to *Prob.C. 9050*. If notice is not given, the remedy is not to judicially engraft on the statutory scheme an open-ended period in which to file a claim. The creditor's remedy when a claim is denied as untimely is to petition the court to file a late claim under *Prob.C. 9103* (infra, §635). (35 C.A.4th 20.)

(3) *Time for Filing Claim Does Not Extend Statute of Limitations*. Nothing in *Prob.C. 9100* may be interpreted to extend or toll any other statute of limitations or to revive a claim that is barred by any statute of limitations, including C.C.P. 366.2 (see supra, §517). (*Prob.C. 9100(c)*.)

(4) *Vacancy Does Not Extend Time for Filing Claim*. "A vacancy in the office of the personal representative that occurs before expiration of the time for filing a claim does not extend the time." (*Prob.C. 9101*.)

(5) *Effect of Timely Filing Claim*. "A claim that is filed before expiration of the time for filing the claim is timely even if acted on by the personal representative or by the court after expiration of the time." (*Prob.C. 9102*.) (See *Prob.C. 9352(a)*, infra, §646 [filing claim tolls statute of limitations until claim is allowed, approved, or rejected].)

West's Key Number Digest, Executors and Administrators k.225(1) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.(b) *Sixty-day period*: *Prob.C. 9100(a)(2)* was amended in 2007 to refer to 60 days after "notice of administration is mailed or personally delivered to the creditor."

(5) *Effect of Timely Filing Claim*. *Prob.C. 9102* was amended in 2007 to add "for filing claims" to the end of the provision quoted in the text.



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b. Amended and Revised Claims.

Witkin Sum. Cal. Law Wills § 634

[§ 634] Amended and Revised Claims.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Time Limit.* The 1-year period for amendment or revision does not authorize the allowance or approval of a claim barred by *C.C.P.* 366.2 (text, §517) or extend the time provided in that statute. (*Prob.C.* 9104(c), as amended in 2007.)



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[§ 634] Amended and Revised Claims.

(1) *Former Case Law.* Case law recognized the right of a claimant to amend a timely claim to correct a defect or uncertainty after expiration of the statutory period. (See *United States Gypsum Co. v. Shaffer* (1936) 7 C.2d 454, 457, 60 P.2d 998.) Even where the claim had been rejected, in a proper case a new claim could be filed correcting doubtful or uncertain statements. (*McNeal v. Foreman* (1931) 117 C.A. 155, 160, 3 P.2d 583; *Stark v. McAllister* (1944) 65 C.A.2d 577, 579, 151 P.2d 162.)

In *United States Gypsum Co.*, the court approved a writing not even intended as a claim. Plaintiff obtained judgment against decedent in her lifetime, and the latter appealed and filed a stay bond. Within the time for filing claims, but without knowledge of her death, plaintiff served on decedent's attorney, who was an executor of her will, a notice of motion to require a new bond. The attorney did not disclose the fact of death. After the statutory period had passed, plaintiff filed an amended claim for payment of the judgment. *Held*, this was proper. The prior notice of motion informed the executor of the claim, and was a sufficient basis for the amendment later filed. (7 C.2d 457.) (But see *Bank of America v. Gesler* (1967) 252 C.A.2d 565, 567, 60 C.R. 657 [rejecting amendment to add verification].)

A strict application of the requirement was made in *Nathanson v. Superior Court* (1974) 12 C.3d 355, 115 C.R. 783, 525 P.2d 687. Petitioner, the former wife of the decedent, filed a petition individually and as guardian of decedent's child, for a family allowance, alleging that a creditor's claim would be filed (1) on behalf of the child for \$ 6,650 arrears in child support, and (2) on her own behalf for \$ 75,000 based on alleged failure of decedent to maintain a property agreement made a part of the interlocutory judgment. She also filed a request for special notice as "creditor of this estate." Objections were filed by the executor, in which she stated that if a creditor's claim were filed it would be rejected. The probate court granted the family allowance. Then, 2 weeks after expiration of the 4-month period for filing claims, a verified creditor's claim in proper form was filed; later, counsel filed a petition for an order authorizing the filing of a late claim, alleging mistake and inadvertence (miscalendaring) as the cause of delay. The executor rejected the claim and the judge denied the petition. The Court of Appeal issued mandamus to compel granting of permission to file an amended claim, and the Supreme Court granted a hearing. *Held*, writ denied.

(a) A long line of cases has held claims barred for failure to file within the required time. (12 C.3d 362.) An inconsistency arose, however, when *United States Gypsum Co.* permitted an amendment to cure an insufficient claim,

and it was followed by *Bernstein v. Rubin* (1957) 152 C.A.2d 51, 312 P.2d 755, and *Estate of Vose* (1970) 4 C.A.3d 454, 84 C.R. 347. In each of these cases, notice to the representative was held sufficient to excuse compliance. (12 C.3d 367.)

(b) The notice approach is unsound. The claim requirement, designed to promote speedy distribution, cannot be waived by the representative; and the right to amend is limited to cases in which there is a claim, though it may be defective or informal. (12 C.3d 365.) *United States Gypsum Co.*, *Bernstein*, and *Vose*, are disapproved in this respect. (12 C.3d 370.)

(c) The petition for a family allowance in the instant case was not a claim, and the recital of claims "anticipated to be filed" was not a claim. (12 C.3d 368.)

(d) The opinion concludes with a summary of the holding: "(1) [E]xcept as otherwise provided by statute ... , a probate court has no power to permit the filing of a creditor's claim after expiration of the statutory period for filing and presenting claims; (2) under proper circumstances, a creditor's claim which has been filed or presented within the statutory period may be amended after such period has run; (3) whether a claim has in fact been filed or presented within the statutory period so as to be the subject of an amendment depends upon the circumstances of the particular case; and (4) mere notice to the estate, in the sense of imparting knowledge of the underlying debt to the representative, does not constitute a sufficient claim or demand which can be the basis of an amendment." (12 C.3d 369.) (See *Heywood v. Municipal Court* (1988) 198 C.A.3d 1438, 1443, 244 C.R. 435 [following *Nathanson*; mailing notice of remittitur and declaration in support of fees in pending action to litigation counsel was insufficient notice of claim against estate].)

(2) *Statutory Authorization*. If a claim is filed within the time provided by *Prob.C. 9100* et seq., it may later be amended or revised. (*Prob.C. 9104(a)*.) However, the amendment or revision may not increase the amount of the claim after the time for filing claims has expired. An amendment or revision to specify the amount of a claim that was contingent, was not due, or was not yet ascertainable at the time of filing is not an increase in amount within the meaning of this provision. (*Prob.C. 9104(b)*.) The amendment or revision must be filed in the same manner as the claim. (*Prob.C. 9104(a)*.)

(3) *Time Limit*. An amendment or revision may not be made for any purpose after the earlier of (a) the time the court orders final distribution, or (b) 1 year after letters are first issued to a general personal representative. (*Prob.C. 9104(c)*.)

West's Key Number Digest, Executors and Administrators k.225(1) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Time Limit*. The 1-year period for amendment or revision does not authorize the allowance or approval of a claim barred by *C.C.P. 366.2* (text, §517) or extend the time provided in that statute. (*Prob.C. 9104(c)*, as amended in 2007.)



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c. Petition To File Late Claim.

Witkin Sum. Cal. Law Wills § 635

[§ 635] Petition To File Late Claim.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Time Limit on Late Claim.* In 2007, the portion of *Prob.C. 9103(b)* referring to the statute of limitations was moved to *Prob.C. 9103(f)* and expanded to provide that nothing in *Prob.C. 9103* authorizes the allowance or approval of a claim barred by *C.C.P. 366.2* or extends the time provided in that statute.



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14 *Witkin Sum. Cal. Law Wills* § 635

[§ 635] Petition To File Late Claim.

(1) *Former Statutes and Case Law.* Under the former statutes, late claims were authorized by three separate provisions:

(a) Where an action was pending at the decedent's death, former Prob.C. 709 authorized a petition for the late filing of a claim based on the action if neither the claimant nor the attorney had actual knowledge of the decedent's death. (See *Satterfield v. Garmire* (1967) 65 C.2d 638, 642, 56 C.R. 102, 422 P.2d 990.)

(b) Where no action was pending, former Prob.C. 720 authorized a petition for the late filing of a claim for personal injury or death. (See *Estate of Hoertkorn* (1979) 88 C.A.3d 461, 465, 466, 151 C.R. 806 [fraud committed by decedent is injury to a person for purposes of former Prob.C. 720]; *Pitzer v. Smith* (1981) 123 C.A.3d 73, 77, 176 C.R. 407; *Nunez v. Superior Court* (1983) 143 C.A.3d 476, 480, 191 C.R. 893; *Clark v. Kerby* (1992) 4 C.A.4th 1505, 1513, 6 C.R.2d 440 [brief period for filing late claims under former Prob.C. 720 did not satisfy notice requirement of *Tulsa Professional Collection Services v. Pope* (1988) 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565, supra, §615].)

(c) Under former Prob.C. 707, a claimant who was out of the state and thus did not receive notice could file a late claim.

(2) *Current Statute.* Prob.C. 9103 combines and generalizes the late claim provisions of former Prob.C. 707, 709, and 720.

(3) *Conditions for Authorizing Late Filing of Claim.* The court, on the petition of a creditor or the personal representative, may allow a claim to be filed after the expiration of the 4-month period provided by Prob.C. 9100 if either of the following conditions is satisfied:

(a) "The personal representative failed to send proper and timely notice of administration of the estate to the creditor, and that petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate." (Prob.C. 9103(a)(1).)

(b) "The creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30

days prior to the time for filing a claim as provided in" *Prob.C. 9100*, and the petition is filed within 60 days after the creditor has "actual knowledge" of both the administration of the estate and the "existence of the facts reasonably giving rise to the existence of the claim." (*Prob.C. 9103(a)(2)*.)

A creditor has knowledge of administration within the meaning of *Prob.C. 9103(a)(2)* if he or she has actual knowledge through receipt of notice under *Prob.C. 9050* (supra, §614) or otherwise, such as information from a newspaper clipping service. Constructive knowledge through publication of a notice of death or other information that does not come to the creditor's attention is not knowledge for purposes of *Prob.C. 9103(a)(2)*. (Law Rev. Com. Comment.) (See *Gertner v. Superior Court* (1993) 20 C.A.4th 927, 932, 25 C.R.2d 47 [creditor had "actual knowledge" under *Prob.C. 9103(a)* when notice was mailed to creditor's address; trial judge lacked discretion to authorize late claim where delay in delivery to creditor's legal department was caused by creditor's internal mail processing system].)

The court may condition the claim on terms that are "just and equitable," and may require the appointment or reappointment of a personal representative if necessary. (*Prob.C. 9103(c)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §13:55 [petition for order allowing late filing], §13:56 [order allowing late filing].) Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; supra, §391). (*Prob.C. 9103(e)*.)

(4) *Time Limit on Late Claim*. Notwithstanding *Prob.C. 9103(a)*, the court may not allow a claim to be filed after the court orders final distribution of the estate. However, this provision does not "authorize allowance or approval of a claim barred by" *C.C.P. 366.2* (supra, §517) or extend the time provided by that statute. (*Prob.C. 9103(b)*.) A late claim should not be permitted if the statute of limitations has run on the claim. (Law Rev. Com. Comment.)

(5) *Effect of Prior Distributions and Payments*. "The court may deny the creditor's petition if a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause or tend to cause unequal treatment among creditors." (*Prob.C. 9103(c)*.) "Regardless of whether the claim is later established in whole or in part, payments otherwise properly made before a claim is filed" under *Prob.C. 9103*, "are not subject to the claim." Except to the extent provided in *Prob.C. 9392* (liability of distributee of estate property; see supra, §617) and subject to *Prob.C. 9053* (immunity of personal representative; see supra, §616), "the personal representative or payee is not liable on account of the prior payment." However, nothing in this provision "limits the liability of a person who receives a preliminary distribution of property to restore to the estate an amount sufficient for payment of the distributee's proper share of the claim, not exceeding the amount distributed." (*Prob.C. 9103(d)*.)

West's Key Number Digest, Executors and Administrators k.225(1) et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Time Limit on Late Claim*. In 2007, the portion of *Prob.C. 9103(b)* referring to the statute of limitations was moved to *Prob.C. 9103(f)* and expanded to provide that nothing in *Prob.C. 9103* authorizes the allowance or approval of a claim barred by *C.C.P. 366.2* or extends the time provided in that statute.



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6. Procedure for Filing Claim.

a. How Claim Is Filed.

14 Witkin Sum. Cal. Law Wills § 636

[§ 636] How Claim Is Filed.

(1) *Who May File Claim.* A claim may be filed by the creditor or a person acting on the creditor's behalf. (*Prob.C. 9150(a).*) A person acting on the creditor's behalf may include the creditor's personal representative or guardian or conservator of the estate. (Law Rev. Com. Comment.)

(2) *Where Claim Is Filed.* A claim must be filed with the court and a copy must be served on the personal representative, or on a person who is later appointed as personal representative. (*Prob.C. 9150(b).*) Service on the personal representative must be made within (a) 30 days after filing the claim, or (b) 4 months after letters are issued to a personal representative with general powers, whichever is later. Service is not required after the claim has been allowed or rejected. (*Prob.C. 9150(c).*) A claim that is not filed with the court and served on the personal representative as provided in *Prob.C. 9150* "shall be invalid." (*Prob.C. 9150(d).*)

The Law Revision Commission Comment makes two points:

(a) The requirement for a formal claim "would not preclude application of estoppel or other equitable doctrines if warranted under the facts of the case."

(b) "The court clerk must accept the claim when and as received, and must not attempt to reject the claim on the basis of formal defects."

SUPPLEMENT: [This section is current through the latest supplement]



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6. Procedure for Filing Claim.

b. Form and Content.

14 Witkin Sum. Cal. Law Wills § 637

[§ 637] Form and Content.

(1) *Case Law*. The purpose of the requirement of presentation is to advise the personal representative of the nature of the claim, so that he or she may be able to determine whether to pay or reject it; and, if the claim is uncertain, the representative may call for clarification. No particular form is prescribed, and the description and recital of details concerning the obligation are not tested by the rules of pleading. Earlier cases holding that variance between the "cause of action" set forth in the claim and in the complaint was a defense (see, e.g., *Etchas v. Orena* (1900) 127 C. 588, 592, 60 P. 45) have been overruled. (*Syler v. Katzer* (1938) 12 C.2d 348, 350, 84 P.2d 137; *Tabata v. Murane* (1944) 24 C.2d 221, 230, 148 P.2d 605 [claim for "moneys held in trust, moneys had and received," stating date and amount]; *Lundberg v. Katz* (1941) 44 C.A.2d 38, 41, 111 P.2d 917 [claim framed on theory of oral agreement to devise property was sufficient to support action for reasonable value of services]; *Toney v. Security First Nat. Bank of Los Angeles* (1951) 108 C.A.2d 161, 165, 238 P.2d 645; see 27 Cal. L. Rev. 608.)

However, although a filed claim may be amended or revised (*supra*, §634), mere notice of a claim is not a substitute for actual filing. (*Nathanson v. Superior Court* (1974) 12 C.3d 355, 369, 115 C.R. 783, 525 P.2d 687, *supra*, §634.)

(2) *Judicial Council Form*. The Judicial Council has adopted a form for a creditor's claim. (See Judicial Council Form No. DE-172 [Creditor's Claim]; *Prob.C.* 9153.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Supporting Documents.

14 Witkin Sum. Cal. Law Wills § 638

[§ 638] Supporting Documents.

(1) *Affidavit*. A claim must be supported by an affidavit of the creditor or one filing the claim on the creditor's behalf, stating the following:

(a) "The claim is a just claim." (*Prob.C. 9151(a)(1).*)

(b) "If the claim is due, the facts supporting the claim, the amount of the claim, and that all payments on and offsets to the claim have been credited." (*Prob.C. 9151(a)(2).*)

(c) "If the claim is not due or contingent, or the amount is not yet ascertainable, the facts supporting the claim." (*Prob.C. 9151(a)(3).*)

(d) "If the affidavit is made by a person other than the creditor, the reason it is not made by the creditor." (*Prob.C. 9151(a)(4).*) (See *Valente v. Sica* (1934) 1 C.A.2d 478, 480, 36 P.2d 1086 [decided under former statute; affidavit by attorney where creditor was absent].)

(2) *Voucher*. The personal representative may require satisfactory vouchers or proof to be produced to support the claim. An original voucher may be withdrawn after a copy is provided. If a copy is provided, the copy must be attached to the claim. (*Prob.C. 9151(b).*)

(3) *Claim Based on Written Instrument*. If a claim is based on a written instrument, either the original or a copy (with all endorsements) must be attached to the claim. If a copy is attached, the original must be exhibited to the personal representative or the court on demand unless lost or destroyed, in which case the fact that it is lost or destroyed must be stated in the claim. (*Prob.C. 9152(a).*)

(4) *Secured Claim*. If the claim or a part of the claim is secured by a mortgage, deed of trust, or other lien that is recorded in the county in which the property subject to the lien is located, it is sufficient to describe the mortgage, deed of trust, or lien and the recording reference for the instrument that created it. (*Prob.C. 9152(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Procedure for Filing Claim.

d. Waiver of Formal Defects.

14 Witkin Sum. Cal. Law Wills § 639

[§ 639] Waiver of Formal Defects.

If a creditor makes a written demand for payment within 4 months from the date letters are first issued to a general personal representative, the personal representative may, in specified circumstances, waive formal defects in the demand and treat it as a claim filed and established under *Prob.C. 9000* et seq. by paying the amount demanded within 30 days after the 4-month period expires. The debt must be justly due and paid in good faith, the amount paid must be the "true amount of the indebtedness over and above all payments and offsets," and the estate must be solvent. (*Prob.C. 9154(a)*.) Nothing in this provision limits application of the doctrines of waiver, estoppel, laches, or detrimental reliance, or of any other equitable principle. (*Prob.C. 9154(b)*.)

Prob.C. 9154 authorizes the personal representative to waive technical requirements in appropriate cases. "This may be useful, for example, for regular bills received by the personal representative in the ordinary course of business concerning which there is no dispute. This authority enables the personal representative to avoid the need for additional notice to the creditor." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Allowance and Rejection.

a. Allowance or Rejection by Personal Representative.

Witkin Sum. Cal. Law Wills § 640

[§ 640] Allowance or Rejection by Personal Representative.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Content.*(h) *Time to act on rejected claim:* In 2007, *Prob.C.* 9250(c) was amended to change the time to act from 3 months to 90 days.



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a. Allowance or Rejection by Personal Representative.

14 Witkin Sum. Cal. Law Wills § 640

[§ 640] Allowance or Rejection by Personal Representative.

(1) *In General.* When a claim is filed, the personal representative must allow or reject the claim, in whole or in part. (*Prob.C. 9250(a), 9255(a)* [claim may be allowed in part].) Information about claims and their disposition must be provided in the personal representative's petition for final distribution. (C.R.C., Rule 7.403.)

(2) *Content.* The allowance or rejection of a claim must be in writing. (*Prob.C. 9250(b)*; see C.R.C., Rule 7.401 [even if acting under the Independent Administration of Estates Act, personal representative must allow or reject claim, in whole or in part, in writing].) Under *Prob.C. 9250(c)*, the allowance or rejection must contain the following:

- (a) The name of the creditor.
- (b) The total amount of the claim.
- (c) The date of issuance of letters.
- (d) The date of the decedent's death.
- (e) The estimated value of the decedent's estate.
- (f) The amount allowed or rejected. (See *Prob.C. 9255(a)* [partial allowance must state amount allowed].)

(g) A statement whether the personal representative is authorized to act under the Independent Administration of Estates Act (*Prob.C. 10400 et seq.*; *infra*, §745 et seq.).

- (h) A statement that the creditor has 3 months to act on a rejected claim.

(3) *Judicial Council Form.* The Judicial Council may prescribe an allowance or rejection form, which may be part of the claim form. Use of the Judicial Council form is deemed to satisfy the requirements of *Prob.C. 9250*. (*Prob.C. 9250(d)*.) (See Judicial Council Form No. DE-174 [Allowance or Rejection of Creditor's Claim].)

(4) *Filing, Notice, and Service.* The personal representative must file the allowance or rejection with the court and give notice to the creditor as provided by *Prob.C. 1200* et seq. (supra, §385), together with a copy of the allowance or rejection. (*Prob.C. 9250(b).*) (See C.R.C., Rule 7.401 [personal representative must serve copy of allowance or rejection on creditor and creditor's attorney, and must file copy and proof of service with court].) Part of the Judicial Council form for allowance or rejection is an affidavit of proof of mailing or personal delivery.

(5) *Effect of Failure To Act.* If the personal representative refuses or neglects to act on a claim within 30 days after the claim is filed, "the refusal or neglect may, at the option of the creditor, be deemed equivalent to giving a notice of rejection on the 30th day." (*Prob.C. 9256.*)

(6) *Waiver of Formal Defects.* *Prob.C. 9250* does not apply to a demand the personal representative elects to treat as a claim under *Prob.C. 9154* (waiver of formal defects; supra, §639). (*Prob.C. 9250(e).*)

West's Key Number Digest, Executors and Administrators k.234

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Content.(h) Time to act on rejected claim:* In 2007, *Prob.C. 9250(c)* was amended to change the time to act from 3 months to 90 days.

(3) *Judicial Council Form.* Judicial Council Form No. DE-174 has been renamed: Allowance or Rejection of Creditor's Claim (Probate--Decedents' Estates).



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b. Approval or Rejection by Court.

14 Witkin Sum. Cal. Law Wills § 641

[§ 641] Approval or Rejection by Court.

(1) *Claims Presented to Court.* Claims are directly presented to the court for approval in the following circumstances:

(a) *Estate is not subject to independent administration.* If the personal representative is not authorized to act under the Independent Administration of Estates Act (*Prob.C. 10400* et seq.; *infra*, §745 et seq.), the clerk must present the claim to the court for approval or rejection. The court may, in its discretion, examine the creditor and others on oath and receive evidence relevant to the validity of the claim. The court must note on the claim whether it is approved or rejected and the date. (*Prob.C. 9251.*)

(b) *Personal representative or attorney is creditor.* If the personal representative or the attorney is a creditor of the decedent, the clerk must present the claim to the court for approval or rejection. The court may, in its discretion, require the creditor to file a petition and give notice of hearing. (*Prob.C. 9252(a).*)

(2) *Claims Not Presented to Court.* Except as to claims of the personal representative or the attorney, if the personal representative has authority to act under the Independent Administration of Estates Act, the court may not act on the personal representative's allowance or rejection of a creditor's claim unless good cause is shown. (C.R.C., Rule 7.402.)

(3) *Partial Approval.* The court may approve a claim in part, and the approval must state the amount approved. (*Prob.C. 9255(a).*)

(4) *Effect of Failure To Act on Claim.* If the court refuses or neglects to act on a claim within 30 days after the claim is filed, "the refusal or neglect may, at the option of the creditor, be deemed equivalent to giving a notice of rejection on the 30th day." (*Prob.C. 9256.*)

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c. Barred Claims Must Be Rejected.

14 *Witkin Sum. Cal. Law Wills* § 642

[§ 642] Barred Claims Must Be Rejected.

The usual statutes of limitations are applicable to causes of action against a decedent, and no claim can successfully be filed, nor can suit be brought on it, after it is barred. Thus, under *Prob.C.* 9253, a claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court. (Cf. *Unif.Prob.C.* §3-802 [representative may waive defense if estate is solvent and successors consent]; see *Fontana Land Co. v. Laughlin* (1926) 199 C. 625, 637, 250 P. 669; *Bryson v. Hill* (1930) 107 C.A. 158, 160, 290 P. 52 [former statute; action was barred though executor failed to plead statute]; 8 *A.L.R.2d* 660 [waiver or tolling of statute of limitations by personal representative], 3 *A.L.R.3d* 1234 [running of statute as affected by doctrine of relation back to appointment of administrator].) However, where there is doubt as to the applicability of the statute of limitations, the representative can, subject to statutory limits, compromise a claim. (*Kroger v. Truitt* (1945) 27 C.2d 288, 294, 163 P.2d 735; see *Prob.C.* 9830 et seq., *supra*, §507.)

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d. Contest of Allowed and Approved Claims.

14 Witkin Sum. Cal. Law Wills § 643

[§ 643] Contest of Allowed and Approved Claims.

The validity of an allowed or approved claim, other than a claim established by a judgment, may be contested by any interested person "at any time before settlement of the report or account of the personal representative in which it is first reported as an allowed or approved claim." The burden of proof is on the personal representative if the personal representative has acted under the Independent Administration of Estates Act (*Prob.C. 10400* et seq.; *infra*, §745 et seq.) and on the contestant if the personal representative has not. (*Prob.C. 9254.*) (See *Prob.C. 48* ["interested person" defined].)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Status of Approved Claims.

14 Witkin Sum. Cal. Law Wills § 644

[§ 644] Status of Approved Claims.

A claim established under *Prob.C. 9000* et seq. must be included among the debts to be paid in the course of administration. (*Prob.C. 9003; Prob.C. 9252(b)* [approved claim of personal representative or attorney].) However, even though allowed and approved, a claim is not the equivalent of a judgment:

(1) It is not a lien on property of the estate. (*Federal Farm Mortg. Corp. v. Sandberg* (1950) 35 C.2d 1, 3, 215 P.2d 721.)

(2) Its validity may be contested at any time before settlement of the account in which it is reported. (*Prob.C. 9254*, supra, §643.)

(3) Even when approved, a claim other than a priority debt is not paid until payment has been ordered by the court. (*Prob.C. 11421, 11422*, infra, §650.)

(4) Interest on a debt not based on a written contract accrues only from the date payment is ordered. (*Prob.C. 11423*, infra, §651.)

SUPPLEMENT: [This section is current through the latest supplement]



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8. Action on Rejected Claim.

a. Right To Bring Action.

Witkin Sum. Cal. Law Wills § 645

[§ 645] Right To Bring Action.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action on Rejected Claim*. The exclusive method for enforcing a creditor's claim that has been rejected by the court is filing a separate action on the rejected claim under *Prob.C. 9352(c)*. The order rejecting the claim is not an appealable order. (*McDonald v. Structured Asset Sales, LLC* (2007) 154 C.A.4th 1068, 1074, 65 C.R.3d 366 [creditor's claim by personal representative].)



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a. Right To Bring Action.

14 Witkin Sum. Cal. Law Wills § 645

[§ 645] Right To Bring Action.

(1) *Action on Rejected Claim.* If a claim has been filed and rejected, in whole or in part, an action on the claim may be commenced against the personal representative. (*Prob.C. 9351*, supra, §624.) (See *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Narula* (1995) 33 C.A.4th 1140, 1147, 39 C.R.2d 752 [action on claim rejected as untimely requires prior petition to file late claim under *Prob.C. 9103*, supra, §635].)

If a claim by the personal representative or the attorney has been rejected (see *Prob.C. 9252(a)*, supra, §641), the representative or attorney may bring an action against the estate. The summons is served on the judge, who appoints an attorney at the expense of the estate to defend the action. (*Prob.C. 9252(c)*.)

(2) *Action on Approved Claim.* A creditor who refuses to accept the amount allowed or approved in satisfaction of the claim may bring an action on the claim under *Prob.C. 9350* et seq. (supra, §624). (*Prob.C. 9255(b)*.)

(3) *Rights of Creditor of Heir or Devisee.* A creditor of an heir or devisee, unlike a transferee, cannot have his or her rights determined and property distributed in the probate proceedings. The creditor must assert a claim in a separate action against the heir or distributee. (See *McGee v. Allen* (1936) 7 C.2d 468, 471, 60 P.2d 1026.) This does not mean, however, that the creditor is without protection:

(a) The creditor may levy attachment or execution on personal property of the heir or devisee. (*Estate of Bennett* (1939) 13 C.2d 354, 366, 90 P.2d 84; *Estate of Lind* (1934) 1 C.2d 291, 292, 34 P.2d 486.) The levy reaches only the personalty then in the personal representative's hands, and not after-acquired or converted property. (*Estate of Troy* (1934) 1 C.A.2d 732, 735, 37 P.2d 471.) It is the duty of the court to order distribution to the heir or legatee, but to direct that, when the decree becomes final, the property be delivered to the officer making the levy, subject to the claim of the heir or devisee. (*C.C.P. 488.485*; see 6 Cal. Proc. (4th), *Provisional Remedies*, §182.)

(b) The creditor may also levy execution on real property. (*Martinovich v. Marsicano* (1902) 137 C. 354, 355, 70 P. 459; *Martinovich v. Marsicano* (1907) 150 C. 597, 600, 89 P. 333.) The decree may then expressly reserve the creditor's rights (*McGee v. Allen*, supra); but, even if distribution is ordered without regard to the levy, the creditor's lien will remain good, because the creditor is not a party to the probate proceedings and the court has no jurisdiction to

determine the creditor's rights. (*Noble v. Beach* (1942) 21 C.2d 91, 96, 130 P.2d 426; *Martinovich v. Marsicano*, supra.) (On levy of execution on real property, see *C.C.P.* 700.015, 8 Cal. Proc. (4th), *Enforcement of Judgment*, §110 et seq.)

(4) *Recovery Is Not Limited to Amount of Claim.* In *Orth v. Superior Court* (1966) 244 C.A.2d 474, 53 C.R. 156, O was injured in an automobile accident by the alleged negligence of D, who was killed. O filed a timely claim against D's estate in peculiar form, asking \$ 25,000, for damages "not covered or provided for by liability insurance." The claim was rejected in toto, and O filed her personal injury action seeking damages of \$ 100,000. Then: (1) In the trial department of the personal injury suit, defendant moved to limit recovery to \$ 25,000; (2) the probate judge denied leave to O to amend her probate claim to state the amount of \$ 100,000; and (3) the trial department made its order limiting the amount. O appealed from the probate order denying amendment, and sought mandamus to require the judge to allow amendment. The court disposed of this procedural foul-up as follows:

(a) The order was not appealable; hence, mandamus was a possible remedy. But, because the amendment was sought after expiration of the 6-month period of *C.C.P.* 473, the probate judge correctly held that he lacked jurisdiction to allow it. (244 C.A.2d 478.)

(b) Because defendant rejected the claim in toto, the amount sought should not have been taken as a limitation on the amount recoverable in the damage suit. The cases on claims against public entities point out that such a limitation would encourage filing excessive claims. The same reasoning applies to a tort claim against an estate. Hence, the trial judge may permit a modification of the limiting order, or may disregard it at the trial. (244 C.A.2d 481.) (See 25 A.L.R.3d 1356 [amount of claim filed as limiting amount recoverable in action against estate].)

West's Key Number Digest, Executors and Administrators k.242 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Action on Rejected Claim.* The exclusive method for enforcing a creditor's claim that has been rejected by the court is filing a separate action on the rejected claim under *Prob.C.* 9352(c). The order rejecting the claim is not an appealable order. (*McDonald v. Structured Asset Sales, LLC* (2007) 154 C.A.4th 1068, 1074, 65 C.R.3d 366 [creditor's claim by personal representative].)(3) *Rights of Creditor of Heir or Devisee.*

Levy on personal property:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §181.

Levy on real property:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §118 et seq.



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- b. Statute of Limitations.

Witkin Sum. Cal. Law Wills § 646

[§ 646] Statute of Limitations.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *When Action Must Be Commenced*. In 2007, both provisions of *Prob.C.* 9353(a) were amended to change the time to act from 3 months to 90 days.



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14 Witkin Sum. Cal. Law Wills § 646

[§ 646] Statute of Limitations.

(1) *Statute Extended by Death.* Under C.C.P. 366.2 (supra, §517), if a person against whom an action may be brought dies before expiration of the applicable limitations period and the cause of action survives, an action may be commenced within 1 year after the date of death. (See 3 *Cal. Proc.* (4th), *Actions*, §652.)

(2) *When Statute Is Tolloed.* Filing a claim or a petition to file a late claim under *Prob.C. 9103* (supra, §635) "tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection." (*Prob.C. 9352(a).*) "The allowance or approval of a claim in whole or in part further tolls the statute of limitations during the administration of the estate as to the part allowed or approved." (*Prob.C. 9352(b).*)

(3) *When Action Must Be Commenced.* Regardless of whether the statute of limitations otherwise applicable to a claim will expire before or after the following times, a claim rejected in whole or in part is barred as to the part rejected unless, within the following times, the creditor commences an action on the claim or the matter is referred to a referee or to arbitration:

(a) "If the claim is due at the time the notice of rejection is given, three months after the notice is given." (*Prob.C. 9353(a)(1).*)

(b) "If the claim is not due at the time the notice of rejection is given, three months after the claim becomes due." (*Prob.C. 9353(a)(2).*)

In determining the period under *Prob.C. 9353(a)*, time in which the office of personal representative is vacant is excluded. (*Prob.C. 9353(b).*) (See *Anderson v. Anderson* (1995) 41 C.A.4th 135, 138, 48 C.R.2d 642, citing the text [action filed within 3 months after claim was rejected was timely under *Prob.C. 9353(a)* even though 1-year statute otherwise applicable to claim had expired]; 36 A.L.R.4th 684 [what constitutes rejection of claim for purposes of statute of limitations applicable to rejected claims]; Cal. Civil Practice, 2 Probate and Trust Proceedings, §13:63 [demurrer for failure to file timely action on rejected claim].)

Because the former statutes were comparable, cases decided under those provisions remain relevant:

(a) *Rejected claim due.* (See *San Francisco Bank v. St. Clair* (1941) 47 C.A.2d 194, 198, 117 P.2d 703; *Stark v. McAllister* (1944) 65 C.A.2d 577, 581, 151 P.2d 162 [if claimant files second claim in good faith within nonclaim period to correct defects in earlier claim, statute begins to run at time of second rejection]; *Lobrovich v. Georgison* (1956) 144 C.A.2d 567, 572, 301 P.2d 460 [failure to file formal written rejection of claim does not prevent running of time on action where creditor receives written notice of rejection]; *Anderson v. McNally* (1957) 150 C.A.2d 778, 783, 310 P.2d 975 [wrongful death suit brought 3 months and 10 days after receipt of notice; dismissed]; *Los Angeles v. McNeil* (1958) 160 C.A.2d Supp. 867, 870, 326 P.2d 29 [unliquidated tort claim for damages for injury to property is claim due]; *Zapata v. Meyers* (1974) 41 C.A.3d 268, 271, 115 C.R. 854 [action filed within 1 year after issuance of letters but more than 3 months after notice of rejection of claim was barred]; *Fox v. Dehn* (1974) 42 C.A.3d 165, 173, 116 C.R. 786 [breach of contract, giving rise to immediate cause of action for damages]; *Estate of Moore* (1974) 43 C.A.3d 334, 340, 117 C.R. 571; cf. *Plumlee v. Poag* (1984) 150 C.A.3d 541, 546, 198 C.R. 66 [suit was timely even though caption named executors individually rather than in their representative capacity].)

(b) *Rejected claim contingent or not due.* (See *Luders v. Security Trust & Savings Bank* (1934) 140 C.A. 725, 726, 35 P.2d 1045 [contractual claim that was absolute at decedent's death could not be made contingent, so as to justify belated action, merely by suing on different theory]; *Southern Pac. Co. v. Catucci* (1941) 47 C.A.2d 596, 598, 118 P.2d 494 [action may not be brought until claim is due].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statute Extended by Death.*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §718.

(3) *When Action Must Be Commenced.* In 2007, both provisions of Prob.C. 9353(a) were amended to change the time to act from 3 months to 90 days.



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8. Action on Rejected Claim.

c. Procedure.

14 Witkin Sum. Cal. Law Wills § 647

[§ 647] Procedure.

(1) *Venue*. In addition to any other county in which an action may be commenced, an action on a claim may be commenced in the county in which the proceeding for administration is pending. (*Prob.C. 9354(a)*; see *C.C.P. 395.1* [county that has jurisdiction of estate is proper county for trial of action against personal representative in representative capacity]; 3 *Cal. Proc. (4th), Actions*, §728.)

(2) *Lis Pendens*. The plaintiff must file a notice of the pendency of the action with the court clerk in the estate proceeding with proof of giving a copy of the notice to the personal representative as provided by *Prob.C. 1215* (supra, §392). "Personal service of a copy of the summons and complaint on the personal representative is equivalent to the filing and giving of the notice." (*Prob.C. 9354(b)*.) (See *Independent Bankers Trust Co. v. Superior Court* (1982) 138 *C.A.3d* 238, 242, 188 *C.R. 14* [former statute; notice of pendency is not substitute for service of summons and complaint; personal representative could not be served in representative capacity after discharge].)

(3) *Prior Payments and Distributions Are Not Affected by Action*. "Any property distributed under court order, or any payment properly made, before the notice is filed and given is not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment." (*Prob.C. 9354(b)*.)

(4) *Costs*. "The prevailing party in the action shall be awarded court costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party shall be awarded reasonable litigation expenses, including attorney's fees." (*Prob.C. 9354(c)*.) However, a creditor who refuses to accept the amount allowed or approved in satisfaction of a claim may not recover costs unless he or she recovers an amount greater than the amount allowed or approved. (*Prob.C. 9255(b)*.)

West's Key Number Digest, Executors and Administrators k.251

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Venue*.

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §805.



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F. Payment of Debts and Expenses.
1. In General.

14 Witkin Sum. Cal. Law Wills § 648

[§ 648] In General.

Prob.C. 11400 et seq. provide for the payment of debts and expenses during estate administration. The following definitions govern the construction of *Prob.C. 11400* et seq. "[u]nless the provision or context otherwise requires":

(1) *Debt*. "Debt" means (a) a claim established under *Prob.C. 9000* et seq. (creditor claims; supra, §612 et seq.), (b) a claim otherwise payable in the course of administration, (c) an expense of administration, and (d) a charge against the estate, including taxes, the expenses of the decedent's last illness, and a family allowance. (*Prob.C. 11401*.) The term includes debts payable under the Independent Administration of Estates Act (*Prob.C. 10400* et seq., infra, §745 et seq.), and other debts paid even though not presented through the formal claims procedure. (Law Rev. Com. Comment.)

(2) *Wage Claim*. A "wage claim" is a claim for wages not exceeding \$ 2,000 of a decedent's employee for work or personal services performed within 90 days before the decedent's death. (*Prob.C. 11402*.)

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SUPPLEMENT: [This section is current through the latest supplement]



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F. Payment of Debts and Expenses.
2. Priority Among Claimants.

14 Witkin Sum. Cal. Law Wills § 649

[§ 649] Priority Among Claimants.

(1) *Statutory Priority.* *Prob.C. 11420* sets forth the following order of priority for the payment of classes of debts:

(a) *Expenses of administration.* With respect to obligations secured by a mortgage, deed of trust, or other lien, "only those expenses of administration incurred that are reasonably related to the administration of that property by which obligations are secured shall be given priority over these obligations." (*Prob.C. 11420(a)(1).*) A number of Probate Code provisions identify expenses of administration, including the following:

(1) Compensation and expenses of public administrator in preserving estate. (See *Prob.C. 7604.*)

(2) Fee for bond of public administrator. (See *Prob.C. 7621.*)

(3) Commission and expenses of probate referee. (See *Prob.C. 8960.*)

(4) Compensation and expenses of personal representative in preserving property later determined not to be part of estate. (See *Prob.C. 9651.*)

(5) Storage, delivery, and shipping costs for distribution of tangible personal property to distributees. (See *Prob.C. 11754.*)

(b) *Secured obligations.* Obligations secured by a mortgage, deed of trust, or other lien (including a judgment lien) have preference in the order of their priority, "so far as they may be paid out of the proceeds of the property subject to the lien." If the proceeds are insufficient, the unsatisfied portion of the obligation is a general debt. (*Prob.C. 11420(a)(2).*) (See *Estate of McDougald* (1905) 146 C. 196, 201, 79 P. 875 [deficiency on secured claim classed as general claim].)

(c) *Funeral expenses.* (*Prob.C. 11420(a)(3).*) (See *Health & Saf. C. 7101* [reasonable cost of funeral, internment, plot, and memorial and its care are part of funeral expenses].)

(d) *Expenses of last illness.* (*Prob.C. 11420(a)(4).*)

(e) *Family allowance.* (Prob.C. 11420(a)(5).)

(f) *Wage claims.* (Prob.C. 11420(a)(6); see Prob.C. 11402, supra, §648 ["wage claim" defined].) (See 52 A.L.R.3d 940 [construction of statute giving priority for wage claims].)

(g) *General debts.* These include judgments not secured by lien and "all other debts not included in a prior class." (Prob.C. 11420(a)(7).) (See *Estate of Smith* (1936) 16 C.A.2d 239, 243, 60 P.2d 574 [money lent to executors to continue business was proper charge but not expense of administration entitled to priority]; *Estate of Allen* (1941) 42 C.A.2d 346, 358, 108 P.2d 973 [goods sold to administrator on credit to continue business was proper charge but not expense of administration entitled to priority]; 83 A.L.R.2d 1406 [obligations incurred in carrying on business]; 22 A.L.R.3d 814 [postdeath rentals].)

(2) *Exception for Debts to Federal and State Government.* Debts owed to the United States or to California that have preference under the laws of the United States or of California must be given the preference required by those laws. (Prob.C. 11420(a).) (See Rev.C. 6756 [tax claims under Sales and Use Tax Law are satisfied first where estate is insufficient to pay all debts]; Rev.C. 19516 [tax claims under Personal Income Tax Law have priority over secured obligations and general debts]; *Estate of Jacobs* (1943) 61 C.A.2d 152, 156, 142 P.2d 454 [preference of state sales tax claim]; *Estate of Muldoon* (1954) 128 C.A.2d 284, 285, 275 P.2d 597 [preference of federal tax claim]; *Estate of Silberman* (1995) 39 C.A.4th 1533, 1538, 46 C.R.2d 610 [priority of federal tax lien where estate is insolvent].)

(3) *Payment.* "Except as otherwise provided by statute, the debts of each class are without preference or priority one over another. No debt of any class may be paid until all those of prior classes are paid in full. If property in the estate is insufficient to pay all debts of any class in full, each debt in that class shall be paid a proportionate share." (Prob.C. 11420(b).)

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3. Time and Procedure for Payment.
a. Time for Payment.

14 Witkin Sum. Cal. Law Wills § 650

[§ 650] Time for Payment.

(1) *Immediate Payment of Priority Debts.* Subject to *Prob.C. 11420* (priority for payment of debts; *supra*, §649), as soon as the personal representative has sufficient funds, with a reserve to pay the expenses of administration, he or she must pay (a) funeral expenses, (b) expenses of the decedent's last illness, (c) a family allowance, and (d) wage claims. (*Prob.C. 11421.*) (On similar prior statute, see *Estate of Morris (1940) 37 C.A.2d 155, 157, 99 P.2d 294* [taxing statutes construed to require prompt payment to avoid interest and penalties]; *Estate of Cole (1951) 106 C.A.2d 823, 826, 236 P.2d 206*; *Estate of Kemmerrer (1952) 114 C.A.2d 810, 813, 251 P.2d 345* [allowing subrogation claim by decedent's mother who paid burial expenses before appointment of personal representative]; *Estate of Cornitius (1957) 154 C.A.2d 422, 430, 316 P.2d 438.*)

(2) *Payment of Other Debts Under Court Order.* Except as provided in *Prob.C. 11421*, the personal representative is not required to pay a debt until payment has been ordered by the court. (*Prob.C. 11422(a).*) (See *Lewis v. O'Brien (1967) 248 C.A.2d 628, 631, 56 C.R. 749* [representative is under no personal liability to pay until ordered to do so].) On the settlement of an account of the personal representative, the court orders payment of debts, "as the circumstances of the estate permit." If property in the estate is insufficient to pay all of the debts, the order specifies the amount to be paid to each creditor. (*Prob.C. 11422(b).*) Nothing in this provision precludes settlement of an account for payment of a debt made without prior court authorization. (*Prob.C. 11422(d).*) (On payment of debts that are disputed, contingent, or not due, see *Prob.C. 11460 et seq.*, *infra*, §654.)

(3) *Liability of Personal Representative.* "The personal representative shall pay a debt to the extent of the order for payment of the debt, and is liable personally and on the bond, if any, for failure to make the payment." (*Prob.C. 11424.*)

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b. Interest.

14 Witkin Sum. Cal. Law Wills § 651

[§ 651] Interest.

(1) *Contractual Debts*. In the case of a debt based on a written contract, "interest accrues at the rate and in accordance with the terms of the contract." By court order, the personal representative may pay all or a part of accumulated and unpaid interest at any time there are sufficient funds to do so, whether or not the debt is then due. (*Prob.C. 11423(b)*.)

(2) *Statutory Debts*. In the case of a debt for unpaid taxes or a debt for which interest is expressly provided by statute, "interest accrues at the rate and in accordance with the terms of the statute." (*Prob.C. 11423(c)*.)

(3) *Funeral Expenses*. A special rule applies to claims for funeral expenses (paid without court order). Interest accrues 60 days after the date of death. (*Health & Saf.C. 7101*.)

(4) *Other Debts*. In the case of other debts, interest accrues at the legal rate on judgments from the date the court orders payment until the date the debt is paid. (*Prob.C. 11423(a)*.) (See *Estate of Adams (1959) 174 C.A.2d 505, 507, 345 P.2d 106* [payment of approved debt was delayed for years; despite hardship, interest was not allowed until date of order for payment]; for legal rate on judgments, see *C.C.P. 685.010, 8 Cal. Proc. (4th), Enforcement of Judgment, §35*.)

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(4) *Other Debts*. *Legal rate on judgments*:

Cross-Reference: 8 Cal. Proc. (5th), Enforcement of Judgment, §42.



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14 Witkin Sum. Cal. Law Wills § 652

[§ 652] Rights of Unpaid Creditor.

Where the personal representative's account has been settled and an order for payment of debts and distribution of the estate has been made, an unpaid creditor, whether or not included in the payment order, has no right of contribution from other creditors or distributees except to the extent provided in *Prob.C. 9392* (liability of distributee of estate property; *supra*, §617). (*Prob.C. 11429*.) However, this provision does not preclude an unpaid creditor's recovery against the personal representative or on the representative's bond, subject to *Prob.C. 9053* (immunity of personal representative; *supra*, §616). (*Prob.C. 11429(b)*.)

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d. Deposit for Missing Creditor.

14 Witkin Sum. Cal. Law Wills § 653

[§ 653] Deposit for Missing Creditor.

(1) *Order*. If an estate is ready to be closed, but "it appears to the satisfaction of the court, on affidavit or evidence taken in open court, that a debt has not been and cannot be paid because the creditor cannot be found," the court must make an order fixing the amount of the payment and directing the personal representative to deposit the payment with the county treasurer. (*Prob.C. 11428(a)*.) The amount of the deposit includes interest from the date payment is ordered. (Law Rev. Com. Comment.)

(2) *Receipt*. The county treasurer must give a receipt, which is to be treated by the court "in favor of the personal representative with the same force and effect as if executed by the creditor." (*Prob.C. 11428(b)*.)

(3) *Treatment of Deposit*. A deposit with the county treasurer is "received, accounted for, and disposed of" as provided by *C.C.P. 1444* (transfer of unclaimed funds to State Treasury after 1 year). A deposit in the State Treasury is deemed to be made under *C.C.P. 1440* et seq. (unclaimed property of decedents). (*Prob.C. 11428(c)*.)

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e. Disputed, Contingent, and Not Due Debts.

14 Witkin Sum. Cal. Law Wills § 654

[§ 654] Disputed, Contingent, and Not Due Debts.

Prob.C. 11460 et seq. eliminate the payment into court of disputed, contingent, and not due debts and authorize other procedures for holding property until the debt is absolute, established, or due.

(1) *Definitions.* The following definitions apply:

(a) *Contingent.* A debt is contingent if the debt is established under *Prob.C. 9000* et seq. (supra, §612 et seq.), in either a fixed or uncertain amount, and will become absolute on the occurrence of a stated event other than the passage of time. The term includes a secured obligation for which there may be recourse against property in the estate if the security is insufficient. (*Prob.C. 11460(a)*.)

(b) *Disputed.* A debt is disputed if it is a claim rejected, in whole or in part, under *Prob.C. 9000* et seq. (supra, §612 et seq.) and the part rejected is not barred under *Prob.C. 9353* (supra, §646). (*Prob.C. 11460(b)*.)

(c) *Not due.* A debt is not due if the debt is established under *Prob.C. 9000* et seq. (supra, §612 et seq.) and will become due on the passage of time. The term includes a debt payable in installments. (*Prob.C. 11460(c)*.)

(2) *Deposit in Financial Institution.* The court may order an appropriate amount deposited in a financial institution, subject to withdrawal only when authorized by the court, to be paid to the creditor when the debt becomes absolute, established, or due, or to be distributed as provided in *Prob.C. 11642* (after-acquired property; infra, §732) if the debt does not become absolute or established. (*Prob.C. 11463*.) (On deposit procedure, see *Prob.C. 9700* et seq.; supra, §480.)

(3) *Payment to Trustee.* The court may appoint a trustee to receive and invest the present value of the debt and to pay the debt as the court orders. Excess earnings are distributed as provided in *Prob.C. 11642* (after-acquired property; infra, §732). (*Prob.C. 11465*.)

(4) *Distribution to Beneficiary Who Posts Bond.* The court may order property distributed to the person entitled to it under the final order of distribution if that person gives a bond to secure payment of the debt if it becomes absolute or established. The amount of the bond may not exceed the fair market value of the property received, less liens and

encumbrances. Where the debt is disputed or litigation is required to establish the contingency, the cost of the bond is recoverable from the unsuccessful party as a cost of litigation. (*Prob.C. 11466.*)

(5) *Distribution to Beneficiary Who Files Assumption of Liability.* The court may order property distributed to the person entitled to it under the final order of distribution if that person files a signed and acknowledged agreement assuming personal liability for the debt if it becomes absolute or established. Personal liability may not exceed the fair market value of the property received, less liens and encumbrances. The court may impose additional conditions, including a requirement that the distributee give a security interest or post a bond. (*Prob.C. 11464(a), (b)*; on enforcement against distributees, see *Prob.C. 11464(c)*; on statute of limitations, see *Prob.C. 11464(d)*.)

(6) *Order That Administration Continue.* The court may order that administration of the estate continue until the contingency, dispute, or passage of time is resolved. (*Prob.C. 11467.*)

(7) *Agreement of Parties.* Notwithstanding any other provision of *Prob.C. 11460* et seq., if all interested parties agree to the manner of providing for the debt, if the agreement protects all interested persons, and if the agreement will not unreasonably extend administration of the estate, the court must approve the agreement. (*Prob.C. 11462.*)

(8) *Procedure.* When all other debts have been paid and the estate is in a condition to be closed, an interested person may petition the court for appropriate orders under *Prob.C. 11460* et seq. Notice of the hearing on the petition is given as provided in *Prob.C. 1220* (mailed notice; supra, §391) to the creditor and to the persons provided in *Prob.C. 11601* (infra, §721). (*Prob.C. 11461.*)

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4. Allocation Between Estate and Spouse.
a. In General.

14 Witkin Sum. Cal. Law Wills § 655

[§ 655] In General.

(1) *Statutory Framework.* *Prob.C. 11440* et seq. govern the allocation of debts between the estate of the decedent and the decedent's surviving spouse. Comparable provisions apply to the allocation of debts between a deceased settlor's living trust and the decedent's surviving spouse. (See *Prob.C. 19324*, 13 *Summary* (10th), *Trusts*, §285.)

(2) *Petition for Order.* "If it appears that a debt of the decedent has been paid or is payable in whole or in part by the surviving spouse, or that a debt of the surviving spouse has been paid or is payable in whole or in part from property in the decedent's estate, the personal representative, the surviving spouse, or a beneficiary may, at any time before an order for final distribution is made, petition for an order to allocate the debt." (*Prob.C. 11440.*)

The petition must state (a) all known debts of the decedent and the surviving spouse alleged to be subject to allocation and whether paid in whole or in part or unpaid, (b) the reason why the debts should be allocated, and (c) the proposed allocation and the basis for the allocation. (*Prob.C. 11441.*)

The Law Revision Commission Comments to these provisions note that the term "debt" is used more broadly than in *Prob.C. 11401* (supra, §648), and that a petition for allocation may be made even though the creditor has not made a claim and the debt has not been established under *Prob.C. 9000* et seq. (supra, §612 et seq.)

Funeral and last illness expenses may not be allocated. (*Prob.C. 11446*, infra, §657.)

(3) *Inventory and Appraisal.* "If it appears from the petition that allocation would be affected by the value of the separate property of the surviving spouse and any community property and quasi-community property not administered in the estate and if an inventory and appraisal of the property has not been provided by the surviving spouse, the court shall make an order to show cause why the information should not be provided." (*Prob.C. 11442.*)

(4) *Notice of Hearing.* The petitioner must give notice of the hearing as provided in *Prob.C. 1220* (mailed notice; supra, §391), with a copy of the petition and any order to show cause. (*Prob.C. 11443.*)

(5) *Agreement Between Parties.* The personal representative and the surviving spouse may agree on an allocation which may be ordered by the court "on a determination by the court that the agreement substantially protects the rights

of interested persons." (*Prob.C. 11444(a).*) In the absence of an agreement, allocation rules are specified by *Prob.C. 11444(b)* (*infra*, §656).

(6) *Order Implementing Allocation.* On determining proper allocation, the court directs the personal representative to make payments of the amounts allocated to the estate by payment to the surviving spouse or creditors, and to charge the amount allocated to the surviving spouse against any property or interest of the surviving spouse in the possession or control of the personal representative. To the extent that property or interest is insufficient to satisfy the allocation, the order must direct the surviving spouse to pay the allocation to the personal representative. (*Prob.C. 11445.*)

(7) *Damages and Expenses.* If either the personal representative or the surviving spouse incurs damages or expenses, including attorneys' fees, because of the nonpayment of a debt that was allocated to the other party under *Prob.C. 11444(b)*, or as the result of a misallocation due to fraud or intentional misrepresentation by that party, the damaged party is entitled to receive reasonable damages and expenses from the other party. (*Prob.C. 11444(e).*)

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b. Allocation Rules.

14 Witkin Sum. Cal. Law Wills § 656

[§ 656] Allocation Rules.

(1) *Characterization of Debts.* In the absence of an allocation agreement (supra, §655), debts subject to allocation are first characterized as separate or community, using the law applicable to marital dissolution. (*Prob.C. 11444(b).*)

(2) *General Allocation of Debts.* Separate debts are allocated to the appropriate spouse's separate assets, and community debts are allocated to community assets. (*Prob.C. 11444(b)(1).*)

(3) *Secured Separate Debt Insufficient.* If a spouse's separate asset is subject to a secured debt that is characterized as that spouse's separate debt, and the net equity in the asset is less than the secured debt, the unsatisfied portion of the debt is treated as an unsecured separate debt and allocated to that spouse's other separate assets. (*Prob.C. 11444(b)(2).*)

(4) *Unsecured Separate Debt Insufficient.* If the net value of a spouse's separate assets is less than that spouse's unsecured separate debts, the unsatisfied portion of the debts is allocated first to that spouse's share of community assets and then to the other spouse's share of community assets. (*Prob.C. 11444(b)(3).*)

(5) *Secured Community Debt Insufficient.* If a community asset is subject to a secured debt that is characterized as a community debt, and the net equity in the asset is less than the secured debt, the unsatisfied portion of the debt is treated as an unsecured community debt and allocated to other community assets. (*Prob.C. 11444(b)(4).*)

(6) *Unsecured Community Debt Insufficient.* If the net value of community assets is less than unsecured community debts, the unsatisfied portion of the debts is first allocated equally between the separate assets of the decedent and the separate assets of the surviving spouse. If the net value of either spouse's separate assets is less than that spouse's share of unsecured community debts, the remaining unsecured community debts are allocated to the other spouse's separate assets. (*Prob.C. 11444(b)(5).*)

(7) *Net Value.* The net value of a spouse's separate asset is the fair market value on the date of the decedent's death, minus the date-of-death balance of liens and encumbrances on that asset that are characterized as that spouse's separate debts. (*Prob.C. 11444(c)(1).*) The net value of a community asset is the fair market value on the date of the decedent's death, minus the date-of-death balance of liens and encumbrances on that asset that are characterized as community

debts. (*Prob.C. 11444(c)(2).*)

(8) *Nonrecourse Debt*. In the case of a nonrecourse debt, the amount of the debt is limited to the net equity in the collateral available to satisfy the debt, based on the fair market value of the collateral on the date of the decedent's death. (*Prob.C. 11444(c)(3).*)

(9) *Different Allocation by Court Order*. Notwithstanding any provision of *Prob.C. 11444*, a different allocation may be ordered if the court finds that allocation to be "equitable under the circumstances." (*Prob.C. 11444(d).*)

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5. Liability for Funeral Expenses.

14 Witkin Sum. Cal. Law Wills § 657

[§ 657] Liability for Funeral Expenses.

(1) *Order of Liability.* Unless otherwise directed by the decedent, the right to control the disposition of the decedent's remains and liability for the cost of disposition devolves on the following "competent" persons in the following order: (a) an agent under a power of attorney for health care, (b) the surviving spouse, (c) the sole surviving adult child or the majority of surviving adult children, (d) the surviving parent or parents, (e) the sole surviving adult sibling or the majority of surviving adult siblings, (f) the surviving adult or the majority of surviving adults in the next degree of kinship, and (g) the public administrator. If more than one person survives in one of these classes, the rights and duties of the statute apply to fewer than all those in the class if reasonable efforts are used to notify other class members and the notifying person is unaware of opposition. An agent under a power of attorney for health care is liable for the costs of disposition only if (1) the agent makes a specific agreement to pay the costs, or (2) the agent makes decisions that incur costs and the decedent's estate or other appropriate funds are insufficient. (*Health & Saf.C. 7100(a).*) (See *Benbough Mortuary v. Barney* (1961) 196 C.A.2d Supp. 861, 864, 16 C.R. 811 [estate insolvent and surviving spouse bankrupt; minor children not liable under statute]; 13 *Summary* (10th), *Personal Property*, §5.)

(2) *Joint and Several Liability.* Liability "devolves jointly and severally upon all kin of the decedent in the same degree of kinship and upon the estate of the decedent." (*Health & Saf.C. 7100(d).*)

(3) *Payment as Expense of Administration.* Funeral and last illness expenses are preferred claims against the estate, payable by the personal representative as soon as funds are available. (*Prob.C. 11421*, supra, §650.) Thus, a solvent estate is the normal source of payment, with recourse to the surviving spouse or other relatives only if the estate is insufficient. In *Estate of Dennis* (1952) 110 C.A.2d 667, 243 P.2d 579, decedent wife, having received an interlocutory decree of divorce, left separate property of \$ 18,000, with a legacy of \$ 3,000 to her husband. The will made no mention of funeral expenses, and a mortician's bill of \$ 563.38 and mausoleum charge of \$ 776.42 were ordered deducted from the husband's legacy. *Held*, this was error. "[T]he estate of a deceased wife, if reasonably ample, should be charged with the reasonable expense of interment, by whatever method, including all items which are customarily regarded as funeral expenses. It would be incongruous from the standpoint of law, reason and convention, to divide the responsibility between the relatives and the estate." (110 C.A.2d 671.)

The rule of *Dennis* has been codified. "Notwithstanding any other statute, funeral expenses and expenses of last illness shall be charged against the estate of the decedent and shall not be allocated to, or charged against the

community share of, the surviving spouse, whether or not the surviving spouse is financially able to pay the expenses and whether or not the surviving spouse or any other person is also liable for the expenses." (*Prob.C. 11446*.)

(4) *Excessive Charges*. In *Estate of Malgor (1947)* 77 C.A.2d 535, 176 P.2d 66, decedent died intestate, survived by nonresident heirs in occupied France (represented by counsel designated by the Alien Property Custodian), and leaving an estate worth about \$ 23,000. A friend was appointed special administrator and arranged a funeral costing \$ 3,101, including items such as a \$ 2,500 cast iron casket with velvet interior, a director and four assistants, and a car and driver for the special administrator. *Held*, order approving account reversed. The court took note of the fact that decedent, a rancher, had lived in a trailer, doing his own cooking, and had accumulated his estate by frugal living. It termed the arrangements "lavish," "ostentatious," "extravagant," and "grossly in excess of what would have been a fair and reasonable expense of funeral services and burial of the decedent, considering his manner of living, his station in society, and the condition of his estate." (77 C.A.2d 540.) The court "should of its own motion take action to disallow unreasonably large claims for funeral expenses. The relatives of a decedent would naturally be reluctant to offer objections, even though the amount charged was manifestly excessive." (77 C.A.2d 541.) (See 4 A.L.R.2d 995 [amount of funeral expenses allowable against estate].)

(5) *Voluntary Payment*. A relative or friend may assume the duty of paying interment and funeral expenses. (*Health & Saf.C. 7101*.) In *Sinai Temple v. Kaplan (1976)* 54 C.A.3d 1103, 127 C.R. 80, Martin Kaplan died. His father, Morris Kaplan, made funeral arrangements with plaintiff and signed the contracts without consulting Gloria, who was the divorced wife of the deceased, guardian of Alisa, their 6-year-old child, and also the administrator. Plaintiff was granted a summary judgment for funeral expenses against the estate and against Morris if the estate proved to have inadequate assets. *Held*, reversed.

(a) *Health & Saf.C. 7100* establishes liability of the kin and the estate. *Health & Saf.C. 7101* authorizes any relative or friend, i.e., a volunteer, to pay and discharge the obligation; and former Prob.C. 950 and 951 impose the obligation on the estate. "As we understand these code provisions, for the person who has performed the services, there exists the absolute liability of the estate to pay the reasonable expenses *unless a volunteer has satisfied the obligation*. Likewise, we conclude that the person who has performed the funeral services may seek recompense from a volunteer who has assumed the duty of paying for such services. The result of these conclusions is as follows: Where a volunteer has *assumed the duty*, he is primarily liable; however, in the absence of satisfaction of the debt, the estate is secondarily and absolutely liable. ... The net effect of these provisions, then, has been to impose upon a solvent estate a *primary* liability with recourse to surviving kin only where an estate is insufficient to pay for such expenses." (54 C.A.3d 1107, 1108, citing the text.)

(b) The factual issue remains: Was Morris a volunteer who assumed the duty, so that the estate must pay for the services despite the fact that decedent's daughter and her guardian were not consulted? (54 C.A.3d 1108.) "[T]hough there is an obligation imposed by law upon the estate to recompense Sinai (within limits) for its services, the estate itself nevertheless has a right of reimbursement as against a volunteer who has assumed the burden of paying those costs (without that assumption being *on behalf of the estate*) providing it has paid them. Also, any charges exceeding the limits of costs imposed upon the estate are solely collectible against the volunteer." (54 C.A.3d 1109.) (See *Estate of Kemmerrer (1952)* 114 C.A.2d 810, 815, 251 P.2d 345 [decedent's mother, who paid funeral expenses, was not volunteer and was entitled, under subrogation principle, to reimbursement from estate]; *Estate of Cornitius (1957)* 154 C.A.2d 422, 430, 316 P.2d 438 [decedent's wife, who paid under threat of attachment, was entitled to reimbursement, particularly where will directed that expense be paid out of estate]; cf. *Walker v. Konitzer (1963)* 217 C.A.2d 654, 660, 31 C.R. 906 [no recovery for disinterment and reburial in family plot where will gave no directions]; 35 A.L.R.2d 1399 [reimbursement of funeral expenses paid by person other than spouse or personal representative].)

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Witkin Summary of California Law
XI. ESTATE ADMINISTRATION
F. Payment of Debts and Expenses.
6. Abatement of Shares of Beneficiaries.
a. In General.

14 Witkin Sum. Cal. Law Wills § 658

[§ 658] In General.

(1) *Statutory Development.* The original abatement statutes (former Prob.C. 750 et seq.) were applicable to wills. The California Law Revision Commission recommended extending the statutes to trusts and other donative instruments and suggested other clarifying changes in its 1987 Recommendation Relating to Abatement (19 Cal. Law Rev. Com. Reports, p. 869). The Legislature adopted the changes, effective July 1, 1989. *Prob.C. 21400* et seq. apply to gifts made on or after July 1, 1989. Prior law applies to gifts made before that date. (*Prob.C. 21406.*) For purposes of this provision, a gift by will is made on the date of the decedent's death. (*Prob.C. 21406(b).*)

(2) *Nature of Abatement.* Where a will, trust, or other instrument makes provision for particular persons, but the grantor's property is not sufficient to pay all debts in full, some of the devises must be reduced to meet the debts. This reduction or abatement is provided for by *Prob.C. 21400* et seq.

(3) *Testator's Intent Governs.* Notwithstanding any other provision of *Prob.C. 21400* et seq., "if the instrument provides for abatement, or if the transferor's plan or if the purpose of the transfer would be defeated by abatement" as provided in *Prob.C. 21400* et seq., the shares of beneficiaries abate "as is necessary to effectuate the instrument, plan, or purpose." (*Prob.C. 21400*, based on Unif.Prob.C. §3-902.) (See 70 A.L.R.3d 726 [construction and effect of provision affecting payment of property or income taxes].)

(4) *Scope of Statutory Rules.* The shares of beneficiaries abate as provided in *Prob.C. 21400* et seq. for all purposes, including payment of debts, expenses, and charges, the satisfaction of gifts, and the payment of expenses on specifically devised property, without any priority as between real and personal property, except as provided in *Prob.C. 21612* (omitted spouse; supra, §273), *Prob.C. 21623* (omitted children; supra, §280), and *Prob.C. 20100* et seq. (proration of taxes; infra, §662 et seq.) (*Prob.C. 21401.*)

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b. Order of Abatement.

14 Witkin Sum. Cal. Law Wills § 659

[§ 659] Order of Abatement.

(1) *Former Statutes and Case Law.* Under former Prob.C. 750 et seq., for the payment of debts, expenses of administration, and family allowance, resort was first made to property not disposed of by will; next, to property given to residuary devisees; and thereafter to all other property devised, in proportion to value or amount. (See *Estate of Hall* (1920) 183 C. 61, 63, 190 P. 364 [where residuary legacy or devise lapses by death, subject matter is property not disposed of by will]; *Estate of Kelleher* (1928) 205 C. 757, 761, 272 P. 1060 [same]; *Estate of Nesbitt* (1958) 158 C.A.2d 630, 633, 323 P.2d 474; *Estate of Stauffer* (1959) 53 C.2d 124, 129, 346 P.2d 748; cf. *Estate of Haselbud* (1938) 26 C.A.2d 375, 381, 79 P.2d 443 [property passing to surviving pretermitted spouse is not subject to abatement]; *Estate of Marinos* (1940) 39 C.A.2d 1, 4, 102 P.2d 443 [no distinction between realty and personalty in order of application].)

The abatement rule was subject to the following exceptions:

(a) Under former Prob.C. 750, specific devises were exempt from abatement if it appeared to the court necessary to carry out the testator's intent and there was other sufficient estate. (See *Estate of Bacigalupi* (1930) 105 C.A. 578, 581, 288 P. 122; *Estate of Marinos*, *supra* [devise of all real or all personal property is general, not specific].)

(b) Under former Prob.C. 750 and 752, if the will expressly directed the source of payment or the manner of abatement, the directions had to be followed.

(c) For purposes of former Prob.C. 750, property tax and insurance payable during administration were not debts or expenses chargeable to the residue of the estate. (*Estate of Reichel* (1972) 28 C.A.3d 156, 159, 103 C.R. 836 [family home devised to widow who lived there rent-free during administration; expenses held directly attributable to property devised].)

(d) Under former Prob.C. 752, subject to a different intention expressed in the will, (1) abatement took place in any class only between legacies of that class, and (2) legacies to a spouse or kindred abated only after abatement of legacies to strangers. (See *Estate of Fairfield* (1936) 12 C.A.2d 30, 31, 54 P.2d 739 [testator could indicate that strangers were to be preferred over relatives]; *Estate of Flint* (1940) 40 C.A.2d 132, 134, 104 P.2d 516 [testator could indicate that all

legacies in class, whether to kindred or strangers, would abate ratably]; *Estate of De Santi* (1942) 53 C.A.2d 716, 719, 128 P.2d 434 [specific devise to strangers with residue to relatives; former Prob.C. 750 controlled and residue abated first]; *Estate of Stevens* (1945) 27 C.2d 108, 118, 162 P.2d 918 [kindred also preferred where abatement is for payment of debts]; *Estate of Lynn* (1952) 109 C.A.2d 468, 470, 240 P.2d 1001 [testator could indicate that strangers were to be preferred over relatives]; *Estate of Wever* (1936) 12 C.A.2d 237, 241, 55 P.2d 279; *Estate of Buck* (1948) 32 C.2d 372, 376, 196 P.2d 769; cf. *Estate of Luckel* (1957) 151 C.A.2d 481, 493, 312 P.2d 24 [annuity for widow preferred over legacy to granddaughter, as testator's intent]; *Estate of Jenanyan* (1982) 31 C.3d 703, 711, 712, 183 C.R. 525, 646 P.2d 196 [unless testator's contrary intention clearly indicated, specific devise cannot be abated to satisfy general legacy].)

The abatement doctrine applied only to proceedings during administration of an estate. It could not be invoked after a decree of distribution had established a testamentary trust, and the trust estate had depreciated, leaving less for the beneficiaries, on termination, than the trust instrument specified. In that situation, trust principles governed, as in the case of any inter vivos trust; the beneficiaries who were kindred were not favored over other beneficiaries (such as charities), and all suffered the loss ratably unless the trust instrument provided otherwise. (*Estate of Loring* (1946) 29 C.2d 423, 434, 175 P.2d 524.)

(2) *Statutory Order.* Prob.C. 21402(a) sets forth the following order of abatement:

- (a) Property not disposed of by the instrument.
- (b) Residuary gifts.
- (c) General gifts to persons other than the transferor's relatives.
- (d) General gifts to the transferor's relatives.
- (e) Specific gifts to persons other than the transferor's relatives.
- (f) Specific gifts to the transferor's relatives.

(3) *Relatives.* For purposes of Prob.C. 21402, a "relative" of the transferor is a person to whom property would pass from the transferor under Prob.C. 6401 or 6402 (intestate succession; see supra, §74 et seq.), if the transferor died intestate and no other person had priority. (Prob.C. 21402(b).) The Law Revision Commission Comment notes that "relatives" includes the following: (a) blood relatives other than those who may not take by intestate succession because of adoption; (b) a spouse; (c) persons who are not blood relatives but who are considered children or parents of the transferor by virtue of adoption, foster and stepparent relationships. (See 2 A.L.R.2d 607 [priority of surviving spouse over other devisees and creditors]; 36 A.L.R.2d 291 [who bears loss occasioned by election against will].)

(4) *General and Specific Gifts.* "Gifts of annuities and demonstrative gifts are treated as specific gifts to the extent they are satisfied out of the fund or property specified in the gift and as general gifts to the extent they are satisfied out of property other than the fund or property specified in the gift." (Prob.C. 21403(b).)

(5) *Abatement Within Class.* Subject to the definition of general and specific gifts in Prob.C. 21403(b), shares of beneficiaries abate pro rata within each class specified in Prob.C. 21402. (Prob.C. 21403(a).)

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14 Witkin Sum. Cal. Law Wills § 660

[§ 660] Contribution for Abatement.

(1) *Determining Contribution.* "In any case in which there is abatement when a distribution is made during estate administration, the court shall fix the amount each distributee must contribute for abatement. The personal representative shall reduce the distributee's share by that amount." (*Prob.C. 21405(a).*) The Law Revision Commission Comment notes that contribution may be required for abatement for any purpose, including sale of property to pay debts, expenses, or family allowance. (See *Estate of Reinhertz (1947) 82 C.A.2d 156, 159, 185 P.2d 858* [former statute; contribution determined only at time of final distribution, not on petition to determine succession].)

(2) *Abatement of Specific Gift.* If a specific gift must be abated, the beneficiary of that gift may satisfy the contribution out of the beneficiary's property other than the property subject to the specific gift. (*Prob.C. 21405(b).*)

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14 Witkin Sum. Cal. Law Wills § 661

[§ 661] Exoneration of Devise.

(1) *Former Case Law.* If the testator devises land that is subject to a mortgage, deed of trust, or other lien, does the devisee take the land thus encumbered, or is the donee entitled to have the mortgage debt paid out of the assets of the estate and the property exonerated? Otherwise stated, the question is whether the testator intended to devise the land or only the testator's equity in it, and the will may and should state this intention expressly. But, in the absence of any expressed intention to the contrary, the common law rule, followed in California, was that, where the debt was one for which the testator was personally liable, any property not specifically devised or bequeathed could be sold for the purpose of exoneration. (See *Estate of De Bernal* (1913) 165 C. 223, 235, 131 P. 375; *Estate of Metcalfe* (1926) 199 C. 716, 251 P. 202; *Estate of Matthiessen* (1937) 23 C.A.2d 608, 610, 73 P.2d 1267 [extrinsic evidence of contrary intent rejected, where will itself disclosed no such intent]; *Estate of Morse* (1928) 95 C.A. 652, 654, 273 P. 130; 40 Cal. L. Rev. 457, 461.)

In *Estate of Brown* (1966) 240 C.A.2d 818, 50 C.R. 78, the court pointed out that the modern trend is against the doctrine, for in today's financing it is unrealistic to presume the testator's intent to give encumbered property free of a trust deed which the testator himself had not thought of discharging. (240 C.A.2d 820.) The precise holding, however, was in accord with the traditional approach. The property was encumbered by a purchase money deed of trust, and, under California law, the trustor (testator) was not subject to a deficiency judgment. Because the testator was not personally liable for the debt, exoneration was not required. (240 C.A.2d 820.)

In *Estate of Dolley* (1968) 265 C.A.2d 63, 71 C.R. 56, the doctrine was again held inapplicable to a purchase money mortgage. (265 C.A.2d 74.) An additional reason for its inapplicability was that the property had been held by the testator and his wife in joint tenancy, and the wife took not as a devisee but as the surviving joint tenant. In this circumstance, there is no exoneration unless the will clearly states that intention, e.g., by such language as "free and clear"; a mere direction to pay debts is not a sufficient statement of such intention. (265 C.A.2d 72.)

(2) *Current Statute.* The common law right of exoneration has been eliminated, and exoneration is now subject to the following provisions:

(a) *Specific devise is not exonerated by general direction to pay debts.* A specific gift passes the property transferred subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of

exoneration, regardless of a general direction in the instrument to pay debts. (*Prob.C. 21131*, based on *Unif.Prob.C. §2-609*.) This rule applies in the absence of a contrary intention of the transferor indicated by the instrument. (*Prob.C. 21102*; see *supra*, §244.)

(b) *One specific gift does not abate to exonerate another.* "If an instrument requires property that is the subject to a specific gift to be exonerated from a mortgage, deed of trust, or other lien, a specific gift of other property does not abate for the purpose of exonerating the encumbered property." (*Prob.C. 21404*.) (See *Estate of Porter* (1903) 138 C. 618, 624, 72 P. 173 [same rule under former statute]; 72 A.L.R.2d 383 [right of specific devisee of mortgaged real property to contribution or other relief from specific devisee of other property].) This provision is also subject to any contrary intent expressed by the transferor. (*Prob.C. 21400*.)

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a. In General.

14 Witkin Sum. Cal. Law Wills § 662

[§ 662] In General.

(1) *Statutory Development.* The original proration statutes (former Prob.C. 970 et seq.) were adopted in 1943. In response to substantial changes in federal and state estate tax statutes, the California Law Revision Commission recommended various revisions. (See Recommendation Relating to Proration of Estate Taxes; 18 Cal. Law Rev. Com. Reports, p. 1127.) The 1986 Legislature followed the Commission's recommendations in adopting *Prob.C. 20100* et seq.

(2) *Nature and Purpose of Statutes.* The purpose of these statutes is to allocate equitably the burden of the tax among those who receive interests that are taxable, and only property that has contributed to the tax bears its impact. "[O]nly the value of property actually taxed may be considered; and the proration must be predicated solely on the property of the decedent included in the gross estate for federal estate tax purposes and on the parts thereof which devolved to the several legatees and devisees on the death of the testator, excluding from consideration benefits received from the decedent which are not included in the taxable estate." (*Estate of Buckhantz* (1953) 120 C.A.2d 92, 99, 260 P.2d 794; *Estate of Neider* (1966) 243 C.A.2d 102, 107, 52 C.R. 47; see *Estate of Resler* (1954) 43 C.2d 726, 737, 278 P.2d 1; *Security-First Nat. Bank of Los Angeles v. Wellslager* (1948) 88 C.A.2d 210, 213, 198 P.2d 700; *Estate of Welsh* (1948) 89 C.A.2d 43, 52, 200 P.2d 139; *Estate of Cummings* (1965) 236 C.A.2d 659, 661, 46 C.R. 491 [proration does not begin until taxing authorities fix estate tax]; *Estate of Dark* (1974) 38 C.A.3d 890, 892, 113 C.R. 727 [order of preliminary distribution does not impliedly conclude issue of proration]; *Estate of Lock* (1981) 122 C.A.3d 892, 901, 176 C.R. 358 [proration statutes are not applicable to state and federal gift taxes paid by estate]; *Estate of McManus* (1983) 140 C.A.3d 62, 67, 189 C.R. 304 [abatement of inheritance tax bequest and proration of estate tax where residue was insufficient to pay both].)

(3) *Definitions.* The following definitions govern the construction of *Prob.C. 20100* et seq., except where the context otherwise requires:

(a) *Estate tax* means a tax imposed under federal or California estate tax law, and includes interest and penalties on any deficiency. (*Prob.C. 20100(a)*.)

(b) *Person interested in the estate* means any person, including a personal representative, who has received or is

entitled to receive property or an interest in property from a decedent while alive or by reason of the death of the decedent. (*Prob.C. 20100(b)*.) The term includes persons who receive property by nonprobate transfer, such as a surviving joint tenant or the beneficiary of a trust. (Law Rev. Com. Comment.)

(c) *Personal representative* includes a guardian, conservator, trustee, or other person "charged with the responsibility of paying the estate tax." (*Prob.C. 20100(c)*.)

(d) *Property* means property included in the gross estate for federal estate tax purposes. (*Prob.C. 20100(d)*.) The term includes property transferred by the decedent during life, if it is included in the gross estate for federal estate tax purposes. (Law Rev. Com. Comment.)

(e) *Value* means fair market value for federal estate tax purposes. (*Prob.C. 20100(e)*.) Where alternative valuation is elected, the term means the fair market value as of the alternative valuation date for federal estate tax purposes. (Law Rev. Com. Comment.)

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b. Equitable Proration.

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[§ 663] Equitable Proration.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Allowances and Charges*. See *Klein v. Hughes* (2005) 133 C.A.4th 121, 127, 34 C.R.3d 613 [in prorating estate taxes, trial court has no authority to impose current charges in order to ameliorate estimated future income tax consequences, although consequences reasonably ascertainable at time of distribution may be accounted for in separate adjustment in appropriate circumstances].



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[§ 663] Equitable Proration.

(1) *General Rule and Exceptions.* An estate tax must be equitably prorated among the persons interested in the estate in the manner prescribed by *Prob.C. 20110* et seq., except to the extent (a) the decedent provides otherwise in an "instrument disposing of property" or (b) federal law provides otherwise. (*Prob.C. 20110*; on decedent's direction otherwise, see *infra*, §664.) (See 68 *A.L.R.3d* 714 [burden of estate taxes in absence of statute, will, or other provision]; 69 *A.L.R.3d* 122 [construction and effect of provision expressly relating to burden of death taxes]; 70 *A.L.R.3d* 630 [language not expressly mentioning taxes]; 70 *A.L.R.3d* 691 [provision in nontestamentary instrument]; 71 *A.L.R.3d* 247 [construction and application of proration statutes]; 71 *A.L.R.3d* 371 [remedies and practice under proration statutes]; 56 *A.L.R.5th* 133 ["pay-all-taxes" provision as including liability of nontestamentary property for estate and inheritance taxes].)

(2) *Manner of Proration.* Subject to *Prob.C. 20110* et seq., proration is made "in the proportion that the value of the property received by each person interested in the estate bears to the total value of all property received by all persons interested in the estate." (*Prob.C. 20111*.) The Law Revision Commission Comment observes that (a) proration is based on fair market value as determined for federal estate tax purposes even though the tax may be based on a special value, and (b) adjustments for interest and penalties may be made on an equitable basis.

(3) *Allowances and Charges.* *Prob.C. 20112*, provides for charges and allowances as follows:

(a) "In making a proration of the federal estate tax, allowances shall be made for credits allowed for state or foreign death taxes in determining the federal tax payable and for exemptions and deductions allowed for the purpose of determining the taxable estate." (*Prob.C. 20112(a)*.)

(b) "In making a proration of the California estate tax, allowances shall be made for (1) credits (other than the credit for state death taxes paid) allowed by the federal estate tax law and attributable to property located in this state, and (2) exemptions and deductions allowed by the federal estate tax law for the purpose of determining the taxable estate attributable to property located in this state." (*Prob.C. 20112(b)*.)

(c) "In making a proration of an estate tax, interest on extension of taxes and interest and penalties on any

deficiency shall be charged to equitably reflect the benefits and burdens of the extension or deficiency and of any tax deductions associated with the interest and penalties." (*Prob.C. 20112(c)*.)

(4) *Temporary Interests and Remainders*. "If a trust is created, or other provision made whereby a person is given an interest in the income of, an estate for years or for life in, or other temporary interest in, any property, the estate tax on both the temporary interest and on the remainder thereafter shall be charged against and paid out of the corpus of the property without apportionment between remainders and temporary estates." (*Prob.C. 20113*.) (See *Estate of Malpas* (1992) 7 C.A.4th 1901, 1907, 9 C.R.2d 806 [under *Prob.C. 20113*, estate tax allocated to residence devised in trust but subject to life estate was charge against residence itself, not against liquid assets in residuary trust, even though payment might require sale of residence]; *Simpson v. White* (1997) 57 C.A.4th 814, 821, 67 C.R.2d 361 [under *Prob.C. 20113*, interest on delinquent estate tax was properly paid from corpus of residuary estate, not from income during administration; antiproration provision in will applied only to specific devises]; 67 A.L.R.3d 273 [liability of income beneficiary of trust for proportionate share of estate tax].)

(5) *Extension of Payment*. "Where the payment of any portion of the federal estate tax is extended under the provisions of the federal estate tax law, the amount of extended tax shall be a charge against the persons who receive the specific property that gives rise to the extension." (*Prob.C. 20115*.) *Prob.C. 20115* "makes clear that where a decedent's estate consists of a closely held business with respect to which estate taxes may be extended, the deferred tax and interest thereon follow the business. If the persons who receive the property fail to pay the tax when due and the tax is collected from persons other than the persons to whom the tax is prorated, the persons from whom the tax is collected have a right of reimbursement against the persons to whom the tax is prorated." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Allowances and Charges*. See *Klein v. Hughes* (2005) 133 C.A.4th 121, 127, 34 C.R.3d 613 [in prorating estate taxes, trial court has no authority to impose current charges in order to ameliorate estimated future income tax consequences, although consequences reasonably ascertainable at time of distribution may be accounted for in separate adjustment in appropriate circumstances].



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14 Witkin Sum. Cal. Law Wills § 664

[§ 664] Decedent's Direction Otherwise.

(1) *In General.* The statutory proration rule is not applicable where the decedent, in a written instrument disposing of property, specifically directs that the property be applied to the satisfaction of the estate tax or that the estate tax be prorated as provided in the instrument. (*Prob.C. 20110(b)(1).*) Decisions under the former, more-generally-worded statute have held that no particular wording is required and that any language that clearly shows that intention is sufficient. (See *Estate of Pearson (1949)* 90 C.A.2d 436, 439, 203 P.2d 52 [devise of land "free and clear of all liens of any kind and character and description ... at the time of my death"]; *Estate of Hotaling (1946)* 74 C.A.2d 898, 901, 170 P.2d 111 ["so that said bequests, devises and benefits ... shall be paid and delivered in full and without deduction"]; *Estate of Parker (1950)* 98 C.A.2d 393, 396, 220 P.2d 580 [similar direction]; *Estate of Allen (1954)* 125 C.A.2d 502, 505, 270 P.2d 510 [intention not to prorate held "fairly indicated"]; *Estate of McAuliffe (1955)* 132 C.A.2d 476, 479, 282 P.2d 541 [direction "that all expenses and taxes payable by reason of my demise, be paid by my estate and not chargeable to the beneficiaries"]; *Estate of McLaughlin (1966)* 243 C.A.2d 516, 518, 52 C.R. 543 [bequest of \$ 40,000, "but not in excess of five (5%) per cent of the distributable assets of my estate"]; *Estate of Stokley (1980)* 108 C.A.3d 461, 468, 471, 166 C.R. 587; *Estate of Steele (1980)* 113 C.A.3d 106, 114, 117, 118, 169 C.R. 635; *California First Bank v. Townsend (1981)* 124 C.A.3d 922, 177 C.R. 723 [in estate plan establishing marital deduction and bypass trusts, provision that death taxes were to be paid from funds available in bypass trust showed intent to maximize marital deduction, not intent to relieve specific beneficiaries from payment of pro rata share of death taxes]; *Estate of Silveira (1983)* 149 C.A.3d 604, 609, 197 C.R. 121 ["charges" construed to include estate tax].)

In *Estate of Dark (1974)* 38 C.A.3d 890, 113 C.R. 727, the provision "[a]ny and all costs, expenses and inheritance taxes that may arise from the probating of this Will shall be paid from the residue of my estate," was held sufficiently comprehensive to include federal estate taxes. "No reason appears why Dark would undertake to relieve his specific beneficiaries (relatives, employees and friends) of the lesser burden of administrative costs and inheritance taxes but continue to hold them subject to the greater burden of federal estate taxes." (38 C.A.3d 893.)

In *Estate of Armstrong (1961)* 56 C.2d 796, 17 C.R. 138, 366 P.2d 490, decedent and her husband made an inter vivos trust for two nieces. Her will left her entire estate of \$ 40,498 to B and his wife. Because the trust was revocable, its assets (\$ 198,215) were part of decedent's taxable estate, with the result that estate and inheritance taxes would consume the entire distributable estate unless apportioned. *Held*, reversing the trial judge, the tax should be prorated.

The direction to pay "out of my estate ... all estate and inheritance taxes ... without limitation to property passing under my will" was not conclusive. The ambiguous term "my estate," construed in accordance with the policy favoring equitable allocation of the tax burden, meant the entire taxable estate, including the assets of the trust. A further factor justifying this interpretation was the basic intent of the testator to benefit only B and his wife; this intent would be wholly defeated if the tax were not apportioned. (56 C.2d 800.) (See *Estate of Anthony* (1964) 230 C.A.2d 766, 773, 41 C.R. 317; *Estate of Carley* (1979) 90 C.A.3d 582, 587, 153 C.R. 528 [direction to pay taxes "out of my estate" meant taxable estate, not probate estate; following *Estate of Armstrong*].)

(2) *Use of Extrinsic Evidence.* *Estate of Hendricks* (1970) 11 C.A.3d 204, 208, 89 C.R. 748, precluded the use of extrinsic evidence to establish an intention not to prorate, requiring a clear, unambiguous direction in the will. Later cases have allowed extrinsic evidence. In *Estate of Lindner* (1978) 85 C.A.3d 219, 149 C.R. 331, the will, drawn by an attorney, contained a direction that all "specific bequests" be exonerated from payment of inheritance or estate taxes. In another paragraph, the will stated: "I give and devise" certain improved real property in trust. *Held*, the trial court correctly ruled that the devise was free from tax liability.

(a) Some cases have treated the terms "legacy, bequest and devise" as equivalent in meaning when this is necessary to carry out the testator's overall intent; and, on this basis alone, the trial court's determination was correct. (85 C.A.3d 224.)

(b) As an independent and more fundamental basis for affirmance, extrinsic evidence supported this conclusion as to the testator's intent: (1) The will in its principal dispositive provisions used the term "give" interchangeably with the technical terms "bequeath" and "devise." This created a facial uncertainty as to the meaning of the provision relating to tax relief. (85 C.A.3d 224.) (2) Extrinsic evidence may be considered to show that an ambiguity exists and to resolve it. (85 C.A.3d 225; see *supra*, §185.) (3) A letter of decedent, prepared shortly before execution of the will and addressed to the devisee, proposed creation of a living trust similar to that set forth in the will, and added that taxes should not be the responsibility of the beneficiaries. Read together, the documents clearly manifested the decedent's dominant purpose to make specific tax-free gifts, overriding any contrary implication from the use of technical terminology. (85 C.A.3d 226, 227.) (See *Hoover v. Hartman* (1982) 136 C.A.3d 1019, 1026, 1028, 186 C.R. 669, quoting the text [allowing extrinsic evidence and refusing to follow *Hendricks*]; *Estate of Wathen* (1997) 56 C.A.4th 48, 51, 64 C.R.2d 805 [court properly considered extrinsic evidence to resolve ambiguity in directions against proration in will and living trust executed as part of integrated estate plan].)

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d. Qualified Real Property.

14 Witkin Sum. Cal. Law Wills § 665

[§ 665] Qualified Real Property.

Prob.C. 20114 provides for proration of the tax on "qualified real property" as follows:

(a) "Qualified real property" means qualified real property as defined in 26 U.S.C., §2032A. (*Prob.C. 20114(a).*)

(b) If an election is made pursuant to 26 U.S.C., §2032A, "the proration shall be based upon the amount of federal estate tax that would be payable but for the election. The amount of the reduction in federal estate tax resulting from an election ... shall reduce the tax that is otherwise attributable to the qualified real property that is the subject of the election. If the tax that is otherwise attributable to the qualified real property is reduced to zero pursuant to this subdivision, any excess amount of reduction shall reduce the tax otherwise payable with respect to the other property, this amount to be equitably prorated in accordance with" *Prob.C. 20111*. (*Prob.C. 20114(b).*)

(c) If additional federal estate tax is imposed under 26 U.S.C., §2032A(c) "by reason of early disposition or cessation of qualified use, the additional tax shall be a charge against the portion of the qualified real property to which the additional tax is attributable, and shall be equitably prorated among the persons interested in that portion of the qualified real property in proportion to their interests." (*Prob.C. 20114(c).*)

The Law Revision Commission Comment states:

"Where an election is made to specially value qualified real property under Internal Revenue Code Section 2032A, the qualified heirs who receive the qualified real property receive the entire benefit of the estate tax reduction resulting from the election, and are likewise liable for the entire amount of any additional tax subsequently imposed on the property. For example, assume an estate in which, absent a special valuation election, each beneficiary receives property of equal value and shares equally in the prorated estate taxes. If one beneficiary makes a special valuation election that reduces the total estate tax, the amount of the reduction must be allocated entirely to that beneficiary, and the others must pay the amount they would have been liable for absent the special valuation election."

"To illustrate the operation of Section 20114, assume the decedent dies in 1986, leaving an estate consisting of \$ 500,000 cash and real property having a fair market value of \$ 500,000 (and a value under Internal Revenue Code

Section 2032A of \$ 250,000). The decedent's will leaves the real property to A and the cash to B."

"(1) If no election is made under Section 2032A, the taxable estate is \$ 1,000,000. The estate tax is \$ 190,000, which is prorated \$ 95,000 to A and \$ 95,000 to B."

"(2) If an election is made under Section 2032A, the taxable estate is \$ 750,000. The estate tax is \$ 92,500; the reduction in estate tax is \$ 97,500. A is credited with \$ 95,000 against the fair market value proration. (This represents the amount of the reduction in tax resulting from the election, to the extent of the tax that would be attributable to the qualified real property but for the election.) A pays no tax and B pays the full tax of \$ 92,500, which represents a reduction of B's tax liability by \$ 2,500."

"Subdivision (b) ensures that A receives the benefit of the tax relief under Section 2032A, up to the amount of tax that would have been prorated to the fair market value of the qualified real property. B also benefits from the election, but no further compensating adjustment is required, except that if B shares the devise with other persons, the tax obligation of each of the others is reduced by a proportionate share of the \$ 2,500 savings."

"Subdivision (c) provides that any additional tax under Internal Revenue Code Section 2032A(c) will be imposed only upon those who received the qualified real property and benefited from the election. If A causes the full additional tax to be assessed under Internal Revenue Code Section 2032A(c), the entire additional tax of \$ 97,500 will be prorated to A. This is true even though B also benefited from the election under Section 2032A."

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14 Witkin Sum. Cal. Law Wills § 666

[§ 666] Excess Retirement Accumulations.

If the federal estate tax is increased under 26 U.S.C., §4980A because of excess retirement accumulation, the increase is a charge against the persons who receive the excess retirement accumulation that gives rise to the increase; and it must be equitably prorated among all those who receive interests in qualified employer plans and individual retirement plans to which the excess accumulation is attributable. (*Prob.C. 20114.5.*)

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f. Contribution and Reimbursement.

14 Witkin Sum. Cal. Law Wills § 667

[§ 667] Contribution and Reimbursement.

(1) *Duty of Personal Representative To Collect.* "If all property does not come into the possession of the personal representative, the personal representative is entitled, and has the duty, to recover from the persons interested in the estate the proportionate amount of the estate tax with which the persons are chargeable" under *Prob.C. 20100* et seq. (*Prob.C. 20116(a)*.) Failure to make a good faith effort to collect taxes prorated against a person is a breach of the personal representative's fiduciary duty for which the personal representative is liable personally and on any bond. (Law Rev. Com. Comment.)

(2) *Proration of Uncollected Amount.* "If the personal representative cannot collect from any person interested in the estate the amount of an estate tax apportioned to the person, the amount not recoverable shall be equitably prorated among the other persons interested in the estate who are subject to proration." (*Prob.C. 20116(b)*.)

(3) *Right of Reimbursement.* "If a person is charged with or required to pay an estate tax greater than the amount prorated to that person because another person does not pay the amount of estate tax prorated to the other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person." (*Prob.C. 20117(a)*.)

(4) *Enforcement of Reimbursement Right.* A right of reimbursement may be enforced through the personal representative or directly by the person charged with or required to pay the greater amount. For the purpose of direct enforcement, the person charged is subrogated to the position of the personal representative. (*Prob.C. 20117(b)*.) The right may be enforced in a proceeding governed by the provisions of *Prob.C. 20120* et seq. (infra, §668) "with changes necessary to make the provisions appropriate for application to the proceeding." The court order in the proceeding is an enforceable judgment. (*Prob.C. 20117(c)*.)

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g. Judicial Proceedings.

14 Witkin Sum. Cal. Law Wills § 668

[§ 668] Judicial Proceedings.

(1) *In General.* The personal representative or any person interested in the estate may commence a proceeding to have a court determine the proration of estate taxes. (*Prob.C. 20120(a).*) If a proceeding for administration is pending, the proration proceeding must be combined with it, and no additional filing fee may be imposed. (*Prob.C. 20120(c).*) If a proceeding for administration is not pending, the proration proceeding must be commenced where the estate was administered or, if there has been no administration, in any county where the estate could be administered. (*Prob.C. 20120(b).*)

(2) *Petition.* A proration proceeding is commenced by filing a petition setting forth the jurisdictional facts and other facts necessary for the court to determine the proration of the tax. (*Prob.C. 20121.*)

(3) *Notice and Process.* At least 30 days before the hearing, the petitioner must (a) cause notice of the hearing and a copy of the petition to be mailed to the personal representative and to interested persons against whom prorated amounts may be charged, and (b) cause a summons and a copy of the petition to be served on interested persons who may be directed to make payments of prorated amounts. The form and manner of service are that prescribed in *C.C.P. 410.10* et seq. (see 3 *Cal. Proc. (4th), Actions*, §919 et seq.). (*Prob.C. 20122.*)

(4) *Order.* On determining proration, the court (a) orders the personal representative to charge prorated amounts against those to whom the amounts have been prorated to the extent that the personal representative is in possession of property or interests of those persons, and (b) directs other persons against whom amounts have been prorated to pay the prorated amounts to the personal representative. (*Prob.C. 20123(a).*) On petition of the personal representative or an interested person, the court must modify an order whenever it appears that the amount of tax actually determined is different from the amount on which the order was based. (*Prob.C. 20124.*) This provision does not provide a limitation period for modification; the matter is left to laches and other equitable doctrines within the discretion of the court. (Law Rev. Com. Comment.) The order is a judgment enforceable against persons against whom the tax has been prorated. (*Prob.C. 20123(b).*)

(5) *Action To Enforce Out-of-State Proration.* A personal representative acting or residing in another state may bring an action in California against a person who resides or owns property in California to recover federal or

out-of-state estate or death tax apportioned to that person. (*Prob.C. 20125(a).*) The action may be commenced in any county in which administration of the estate of the decedent would be proper or, if none, in which any defendant resides. (*Prob.C. 20125(b).*) For purposes of the action, the apportionment by the court having jurisdiction of the administration of the decedent's estate is prima facie correct. (*Prob.C. 20125(c).*)

SUPPLEMENT: [This section is current through the latest supplement]
(3) *Notice and Process.*

Form and manner of service:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1001 et seq.



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14 Witkin Sum. Cal. Law Wills § 669

[§ 669] Taxes on Generation-Skipping Transfer.

Prob.C. 20200 et seq. provide for the proration of taxes on generation-skipping transfers. The provisions are substantially similar to the statutes governing proration of estate taxes (*Prob.C. 20100* et seq., supra, §662 et seq.), with variations based on the differences between the two taxes. The following topics are covered:

- (a) *Definitions.* (*Prob.C. 20200.*)
- (b) *Transitional provision.* (*Prob.C. 20201.*)
- (c) *Equitable proration and exceptions.* (*Prob.C. 20210.*)
- (d) *Manner of proration.* (*Prob.C. 20211.*)
- (e) *Allowances and charges.* (*Prob.C. 20212.*)
- (f) *Temporary interests.* (*Prob.C. 20213.*)
- (g) *Collection and reimbursement.* (*Prob.C. 20214, 20215.*)
- (h) *Judicial proceedings.* (*Prob.C. 20220* et seq.)

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a. Former Law and Revision.

14 Witkin Sum. Cal. Law Wills § 670

[§ 670] Former Law and Revision.

(1) *Former Statutes and Case Law.* Former Prob.C. 750 et seq. governed the sale of estate assets, generally authorizing (a) the personal representative to sell assets to pay debts, legacies, family allowances, and expenses, and (b) the court to order a sale in appropriate circumstances. A personal representative was liable for a fraudulent sale contrary to the statute. (See *Estate of Sherman* (1956) 46 C.2d 534, 538, 297 P.2d 425 [general power to manage and control property is not implied power to sell so as to dispense with statutory requirements governing manner of sale]; *Estate of George* (1932) 123 C.A. 733, 736, 12 P.2d 86 [duty and authority to sell when necessary]; *Estate of Mautner* (1940) 38 C.A.2d 523, 525, 101 P.2d 518 [testator directed sale to pay debts; executor may seek instructions where will is uncertain]; *Liuzza v. Bell* (1940) 40 C.A.2d 417, 431, 104 P.2d 1095 [order for sale is not exclusive remedy for creditor with judgment lien]; *Estate of Da Roza* (1947) 82 C.A.2d 550, 553, 186 P.2d 725 [authorizing sale for best interests of estate; objection of one of five heirs was not valid ground for opposition]; *Estate of Feeney* (1983) 139 C.A.3d 812, 819, 189 C.R. 84 [court order to act].)

In *Estate of Canfield* (1951) 107 C.A.2d 682, 238 P.2d 67, the petition for approval of the sale of an apartment house to a stranger specified that the sale was necessary in order to "liquidate the estate for distribution." But the estate was ready for distribution, there was ample cash, and one distributee wanted to buy the property. *Held*, approval of the sale was error. (a) The mere desire of the executor to liquidate assets and distribute cash is not a proper ground for sale. (107 C.A.2d 686.) (b) Under former Prob.C. 1100 et seq. (now Prob.C. 11950 et seq.), where two or more distributees have undivided interests, and have not agreed on an allotment, partition is mandatory on demand of any one of them. The statutory purpose is to protect owners from a sale of their property for less than they consider it to be worth. "If the property is such that it can be partitioned without great prejudice to the owners, or can be conveniently allotted to any one party, the court has no authority to order a sale rather than to partition." (107 C.A.2d 687.)

(2) *Revision.* In 1986, the California Law Revision Commission proposed amendments to clarify and simplify the estate sale statutes. (See 19 Cal. Law Rev. Com. Reports, p. 22.) Prob.C. 10000 et seq. were added in 1987, following the Commission's recommendation. (See generally C.E.B., 2 Probate Workflow Manual, §13.1 et seq.; C.E.B., 1 Decedent Estate Practice, §13.1 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §13:1 et seq.)

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b. When Property May Be Sold.

14 Witkin Sum. Cal. Law Wills § 671

[§ 671] When Property May Be Sold.

Subject to the "limitations, conditions, and requirements" of *Prob.C. 10000* et seq. (see infra, §672 et seq.), the personal representative may sell real or personal property of the estate in the following circumstances:

(1) "Where the sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes." (*Prob.C. 10000(a).*)

(2) "Where the sale is to the advantage of the estate and in the best interest of the interested persons." (*Prob.C. 10000(b).*) (See *Prob.C. 48* ["interested person" defined].)

(3) "Where the property is directed by the will to be sold." (*Prob.C. 10000(c).*)

(4) "Where authority is given in the will to sell the property." (*Prob.C. 10000(d).*)

West's Key Number Digest, Executors and Administrators k.319 et seq.

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c. Petition To Compel Sale.

14 Witkin Sum. Cal. Law Wills § 672

[§ 672] Petition To Compel Sale.

If the personal representative neglects or refuses to sell property, any interested person may petition the court for an order requiring the personal representative to do so in any of the following circumstances:

(1) "Where the sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes." (*Prob.C. 10001(a)(1).*)

(2) "Where the sale is to the advantage of the estate and in the best interest of the interested persons." (*Prob.C. 10001(a)(2).*)

(3) "Where the property is directed by the will to be sold." (*Prob.C. 10001(a)(3).*)

Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) and must be given to the personal representative by citation served at least 5 days before the hearing. (*Prob.C. 10001(b)*, (c).)

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d. Discretion of Representative.

14 Witkin Sum. Cal. Law Wills § 673

[§ 673] Discretion of Representative.

(1) *In General.* If estate property is required or permitted to be sold, the personal representative may do the following:

- (a) Use discretion as to which property to sell first. (*Prob.C. 10003(a).*)
- (b) Sell the estate's entire interest or a lesser interest in the property. (*Prob.C. 10003(b).*)
- (c) Sell the property at either public auction or private sale. (*Prob.C. 10003(c).*)

(2) *Limitations.* The representative's authority under *Prob.C. 10003* is subject to *Prob.C. 21400* et seq. (abatements; supra, §658 et seq.), *Prob.C. 10001* (petition to compel sale; supra, §672), and *Prob.C. 10002* (directions in will concerning sale; infra, §674). (*Prob.C. 10003.*)

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e. Directions in Will.

14 Witkin Sum. Cal. Law Wills § 674

[§ 674] Directions in Will.

If the will gives directions for the mode of selling or the particular property to be sold, the personal representative must comply with those directions. (*Prob.C. 10002(a)*.) However, the court may relieve the personal representative of the duty to comply if the court determines that noncompliance "would be to the advantage of the estate and in the best interest of the interested persons." (*Prob.C. 10002(b)*.) The Law Revision Commission Comment offers an illustration: The court may order noncompliance, for example, "where the property directed to be sold to pay the decedent's debts has greatly increased in value since the will was executed and there is sufficient cash in the estate to pay the debts and paying the debts with cash would not adversely affect any of the interested persons."

The personal representative or an interested person may petition for a noncompliance order, which must specify the mode, terms, and conditions of the sale, or the particular property to be sold, or both. Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 10002(b)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:3 [petition], §16:4 [order].)

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f. Appraisal and Sale as Unit.

14 Witkin Sum. Cal. Law Wills § 675

[§ 675] Appraisal and Sale as Unit.

(1) *Appraisal as One Unit.* Where the personal representative determines that, "by use or relationship," assets of the estate, whether real or personal, constitute a unit for purposes of sale, the property may be appraised as a unit. (*Prob.C. 10004(a).*)

(2) *Sale as One Unit.* Whether or not appraised as a unit, assets may be sold as a unit and under one bid if the court finds that the sale is to the advantage of the estate. (*Prob.C. 10004(b).*)

(3) *Minimum Sale Price.* A private sale as a unit may not be for less than 90% of (a) the appraised value, if appraised as a unit, or (b) the sum of the appraised value of personal property and the appraised value of real property, if appraised separately. (*Prob.C. 10004(c).*)

(4) *Manner of Sale.* If assets sold as a unit include real property, the sale must be in the manner provided for real property, and the bid and sale are subject to the limitations and restrictions applicable to the sale of real property. If assets sold as a unit are all personal property, the sale must be in the manner provided for personal property. (*Prob.C. 10004(d).*)

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g. Excess Profit or Loss on Sale.

14 Witkin Sum. Cal. Law Wills § 676

[§ 676] Excess Profit or Loss on Sale.

(1) *Duty To Account for Excess Profits.* If property in the estate is sold for more than the appraised value, the personal representative must account for the proceeds, including the excess over the appraised value. (*Prob.C. 10005(a).*)

(2) *No Liability for Losses.* If property in the estate is sold for less than the appraised value and the sale has been made "in accordance with law," the personal representative is not responsible for the loss. (*Prob.C. 10005(b).*)

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h. Sale of Undivided Interest.

14 Witkin Sum. Cal. Law Wills § 677

[§ 677] Sale of Undivided Interest.

If property of the estate is to be sold as an undivided interest in a cotenancy, the other cotenants may file their written consent to have their interests sold under *Prob.C. 10000* et seq. Thereafter, the court's orders under *Prob.C. 10000* et seq. are "as binding on the consenting cotenants as on the personal representative." (*Prob.C. 10006*.)

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2. Contract With Agent, Broker, or Auctioneer.

a. Nature of Contract.

1. Agent or Broker.

14 Witkin Sum. Cal. Law Wills § 678

[§ 678] Agent or Broker.

(1) *Authorized Contracts.* *Prob.C. 10150(a)* authorizes a personal representative to contract in writing with agents and brokers to obtain a purchaser as follows:

(a) *Real property.* The personal representative may contract with a licensed real estate broker to secure a purchaser. The broker may associate other licensed brokers and may use a multiple listing service. (*Prob.C. 10150(a)(1).*) (On licensing of real estate brokers, see *B. & P.C. 10130* et seq., 3 *Summary* (10th), *Agency and Employment*, §51 et seq.)

(b) *Personal property.* The personal representative may contract with one or more agents or brokers to secure a purchaser. "If the particular property to be sold or the particular manner of sale requires that the agent or broker be licensed, the contract may be made only with an agent or broker that is so licensed." (*Prob.C. 10150(a)(2).*)

(2) *Exclusive Right To Sell.* The contract may grant the exclusive right to sell the property for a period not to exceed 90 days if, before execution of the contract granting the exclusive right to sell, the personal representative obtains permission of the court to enter into the contract on a showing of necessity and advantage to the estate. The court may also grant permission to extend the exclusive right to sell for additional periods each not to exceed 90 days on a showing of necessity and advantage to the estate of the extension. (*Prob.C. 10150(c).*)

Approval of an exclusive right to sell may be granted when the personal representative is appointed or at any subsequent time on an ex parte application. (*Prob.C. 10150(c).*) (See Rutter Group, 1 Cal. Practice Guide: Probate, Form 13:F.)

The petition for approval of an exclusive right to sell must describe the property, name the broker, summarize the terms of the listing agreement or include a copy of it, and contain a detailed statement of the facts supporting the "necessity and the advantage" to the estate of having the exclusive listing. (C.R.C., Rule 7.453.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:75 [petition], §16:76 [order].)

(3) *Liability.* The contract may provide for the payment of a fee, commission, or other compensation out of the

proceeds of the sale, but the contract is binding and valid against the estate only for the amount allowed by the court under *Prob.C. 10160* et seq. (infra, §680). The estate incurs no liability of any kind under the contract unless the sale is confirmed by the court, except as to a purchaser of personal property where title passes without court confirmation or approval under *Prob.C. 10259* (infra, §688). The personal representative is not personally liable on the contract by reason of its execution. (*Prob.C. 10150(b)*.)

Decisions under the former statute are instructive on the issue of liability. (See *Estate of Mitchell* (1942) 20 C.2d 48, 50, 123 P.2d 503 [contract was binding on estate when sale was confirmed by court; personal representative was not liable for commission]; *Estate of Rule* (1944) 25 C.2d 1, 15, 152 P.2d 1003 [contract to pay commission is valid, though bid is already made, if prior to confirmation]; *Batson v. Strehlow* (1968) 68 C.2d 662, 676, 68 C.R. 589, 441 P.2d 101 [fraud of real estate broker]; *Harm v. Frasher* (1960) 181 C.A.2d 405, 422, 5 C.R. 367 [estate was liable for breach of contract of sale, entered into by executors and approved by court, where executors failed to perform].)

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a. Nature of Contract.

2. Auctioneer.

14 Witkin Sum. Cal. Law Wills § 679

[§ 679] Auctioneer.

(1) *Authorized Contract.* A personal representative may contract with an auctioneer, in writing, to conduct a public auction sale within or outside California to secure purchasers for personal property of the estate. The contract must be legally enforceable under the law of the jurisdiction where the contract is made. (*Prob.C. 10151.*)

(a) *Auction within California.* For a sale in California, the personal representative must contract with an auctioneer qualified under C.C. 1812.600 et seq. (*Prob.C. 10151(a)(1).*)

(b) *Auction outside California.* For a sale outside California pursuant to an order made under *Prob.C. 10254* (infra, §685), the personal representative must contract with an auctioneer legally permitted in the jurisdiction where the sale will be held to conduct a public auction sale. (*Prob.C. 10151(a)(2).*)

(2) *Compensation.* The contract may provide for the payment of a fee, commission, or other compensation out of the proceeds of the sale and for the reimbursement of expenses. (*Prob.C. 10151(c).*) Whether or not there is a contract between the auctioneer and the personal representative, the auctioneer's fees, compensation, and expenses must be in an amount that the court determines to be reasonable for the auctioneer's services. (*Prob.C. 10167(a).*) However, if there is a contract, the auctioneer's compensation may not exceed the amount provided by the contract. (*Prob.C. 10167(b).*)

(3) *Liability.* The estate is not liable to an auctioneer under a contract for the sale of property or for any fee, commission, or other compensation or expense unless (a) an actual sale is made, (b) the sale is consummated, and (c) if court confirmation or approval is required, the sale is confirmed or approved. (*Prob.C. 10160.*) The contract is binding and valid against the estate only for the amount allowed by the court under *Prob.C. 10167*, and the estate incurs no liability of any kind under the contract unless the sale is confirmed or approved, except as to a purchaser of personal property where title passes without court confirmation or approval under *Prob.C. 10259* (infra, §688). (*Prob.C. 10151(c).*) The personal representative is not personally liable on the contract by reason of its execution. (*Prob.C. 10151(c).*)

(4) *Property From More Than One Estate.* "The contract may provide that personal property of two or more estates

being administered by the same personal representative may be sold at the same public auction sale. Items of personal property may be sold separately or in a lot with other items from the same estate." (*Prob.C. 10151(d).*)

(5) *Manner of Sale.* "A sale pursuant to the contract shall be with reserve. The auctioneer shall comply with the instruction of the personal representative with respect to withdrawal of items, risk of loss, place of delivery, warranties, and other matters." (*Prob.C. 10151(d).*)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Compensation of Agent or Broker.

1. Requirements for Liability.

Witkin Sum. Cal. Law Wills § 680

[§ 680] Requirements for Liability.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Sale Required.* See *Sullivan v. Dorsa* (2005) 128 C.A.4th 947, 956, 27 C.R.3d 547 [in partition action subject to Prob.C. 10160, commission was improper where sale was neither confirmed nor consummated].



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b. Compensation of Agent or Broker.

1. Requirements for Liability.

14 Witkin Sum. Cal. Law Wills § 680

[§ 680] Requirements for Liability.

(1) *Sale Required.* The estate is not liable to an agent or broker under a contract for the sale of property or for any fee, commission, or other compensation or expense unless (a) an actual sale is made, (b) the sale is consummated, and (c) if court confirmation or approval is required, the sale is confirmed or approved. (*Prob.C. 10160.*) "In the case of real property, the requirement that an actual sale be made and be consummated requires that the estate receive the purchase price and that a deed be given to the purchaser and a mortgage or deed of trust be taken for payments due in the future." (Law Rev. Com. Comment.) (See *Estate of Lopez* (1992) 8 C.A.4th 317, 322, 10 C.R.2d 67 [because commission was not due under *Prob.C. 10160* until sale was consummated, broker whose license had lapsed when sale was arranged but had been renewed when sale was approved by court was entitled to commission].)

(2) *Conditions of Representation.* Unless the contract grants the exclusive right to sell the property, an agent or broker is not entitled to any fee, commission, or other compensation for services in connection with the sale unless (a) the agent or broker produces the original bid that is returned to the court for confirmation, or (b) the property is sold on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by the agent or broker. (*Prob.C. 10161(b).*)

(3) *No Compensation Where Broker Has Interest.* The estate is not liable to an agent or broker under a contract for the sale of property or for any fee, commission, or other compensation or expenses in connection with the sale if (a) the agent or broker, directly or indirectly, is the purchaser, or (b) the agent or broker representing the purchaser to whom the sale is confirmed has any interest in the purchaser. (*Prob.C. 10160.5.*) "This section extends to the situation where there is not complete identity between broker and purchaser but the broker does have an interest in the purchasing entity, whether the interest is substantial or insubstantial. Thus, for example, the broker would not be entitled to a commission if the purchaser is a corporation in which the broker owns stock." (Law Rev. Com. Comment.) (For cases under former law, see *Estate of Toy* (1977) 72 C.A.3d 392, 394, 396, 140 C.R. 183 [agent purchasing for himself was not entitled to commission]; *Estate of Levinthal* (1980) 105 C.A.3d 691, 699, 164 C.R. 628 [agent with interest in corporate purchaser].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Sale Required.* See *Sullivan v. Dorsa* (2005) 128 C.A.4th 947, 956, 27 C.R.3d 547 [in partition action subject to Prob.C. 10160, commission was improper where sale was neither confirmed nor consummated].



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b. Compensation of Agent or Broker.

2. Limitations on Amount.

14 Witkin Sum. Cal. Law Wills § 681

[§ 681] Limitations on Amount.

(1) *Reasonable Compensation Fixed by Court.* Subject to *Prob.C. 10160* et seq., the fee, commission, and other compensation of a broker or agent must be in an amount the court determines to be reasonable for the services provided. (*Prob.C. 10161(a)*.) The Law Revision Commission Comment notes that the court has "considerable flexibility" in determining compensation. "Subject to the provisions of this article, compensation may be fixed, for example, as a percentage of the amount of the bid returned to the court for confirmation ... or as a percentage of the amount for which the sale is confirmed. ... The court may use one percentage (*e.g.*, six percent) for improved property and another (*e.g.*, ten percent) for unimproved property. Or the court may use a schedule with the percentage decreasing as the value of the property increases (*e.g.*, six percent for the first \$ 100,000; five percent for amounts in excess of \$ 100,000). The percentage or percentages or other method of computing the compensation may be prescribed by court rule, but the court rule must not conflict with the provisions of this article. Nothing in this article precludes the court from fixing the compensation using a different method than a percentage of the amount bid or the amount for which the sale is confirmed."

(2) *Compensation Limited by Contract.* If there is a contract between the personal representative and a broker or agent, the compensation may not exceed the amount provided by the contract. (*Prob.C. 10161(c)*.)

(3) *Compensation Specified in Bid.* Even though a bid contains a condition that a certain amount of the bid is to be paid to an agent or broker by the personal representative, only compensation proper under *Prob.C. 10160* et seq. may be allowed. "Acceptance of the bid by the court binds the bidder even though the compensation allowed by the court is less than that specified by the condition." (*Prob.C. 10166*.)

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b. Compensation of Agent or Broker.

3. Compensation in Absence of Exclusive Contract.

14 Witkin Sum. Cal. Law Wills § 682

[§ 682] Compensation in Absence of Exclusive Contract.

If no agent or broker has an exclusive contract to sell the property, the court allows compensation determined under *Prob.C. 10161* (supra, §681) as follows:

(1) *Sale to Original Bidder Represented by Broker.* If (a) the original bid is made by a purchaser represented by an agent or broker, and (b) the court confirms the sale to that purchaser on the original bid or on an increased bid made at the hearing on the petition for confirmation, compensation is determined on the full amount for which the sale is confirmed. (*Prob.C. 10162.3.*)

(2) *Sale to Increased Bidder Represented by Broker.* If (a) the original bid is made by a purchaser not represented by an agent or broker, and (b) the court confirms the sale to a purchaser represented by an agent or broker on an increased bid made at the hearing on the petition for confirmation, compensation is subject to *Prob.C. 10162*. (*Prob.C. 10163(b).*) The compensation of the agent or broker may not exceed "one-half the difference between the amount of the bid in the original return and the amount of the successful bid." (*Prob.C. 10162.*)

(3) *Sale to Increased Bidder Not Represented by Broker.* If (a) the original bid is made by a person represented by an agent or broker, and (b) the court confirms the sale to a purchaser not represented by an agent or broker on an increased bid made at the hearing on the petition for confirmation, compensation is determined on the amount of the original bid and paid to the agent or broker who procured the original bid. (*Prob.C. 10164(a), (b).*)

(4) *Sale to Increased Bidder: Both Bidders Represented.* If (a) the original bid is made by a person represented by an agent or broker, and (b) the court confirms the sale to a purchaser represented by another agent or broker on an increased bid made at the hearing on the petition for confirmation, compensation is determined on the full amount for which the sale is confirmed. (*Prob.C. 10165(a)(1).*) The broker procuring the original bid is entitled to one-half the compensation on the original bid. (*Prob.C. 10165(c)(2).*) The broker procuring the increased bid is entitled to one-half the compensation on the amount of the original bid and all of the compensation on the difference between the original bid and the increased bid. (*Prob.C. 10165(b).*) (See *Melikian v. Aquila, Ltd. (1998) 63 C.A.4th 1364, 1370, 74 C.R.2d 739* [broker for successful overbid must share commission with broker for original bid in amount equal to one-half

commission on original bid]; 6 *Pacific L. J.* 149 [effect of sale to new bidder also produced by agent].)

(5) *Agreement Between Cooperating Agents and Brokers. Prob.C. 10160 et seq.* "does not supersede any agreement cooperating agents or brokers may have among themselves to divide the compensation payable under" *Prob.C. 10160 et seq. (Prob.C. 10168.)*

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b. Compensation of Agent or Broker.

4. Compensation Under Exclusive Contract.

14 Witkin Sum. Cal. Law Wills § 683

[§ 683] Compensation Under Exclusive Contract.

If an agent or broker has the exclusive right to sell the property, the court allows compensation determined under *Prob.C. 10161* (supra, §681) as follows:

(1) *Sale to Original Bidder Not Represented.* If (a) the original bid is made by a purchaser not represented by an agent or broker, and (b) the court confirms the sale to that purchaser on that bid, the exclusive broker is entitled to compensation determined on the full amount for which the sale is confirmed. (*Prob.C. 10162.5(a)(1).*)

(2) *Sale to Original Bidder Represented by Exclusive Broker.* If (a) the original bid is made by a purchaser represented by the exclusive broker, and (b) the court confirms the sale to that purchaser on an increased bid made at the hearing on the petition for confirmation, the exclusive broker is entitled to compensation determined on the full amount for which the sale is confirmed. (*Prob.C. 10162.5(a)(2).*)

(3) *Sale to Original Bidder Represented by Another Broker.* If (a) the original bid is made by a purchaser represented by another agent or broker, and (b) the court confirms the sale to that purchaser on that bid or on an increased bid made at the hearing on the petition for confirmation, compensation is determined on the full amount for which the sale is confirmed. (*Prob.C. 10162.7(a), (b).*)

The compensation allowed by the court is divided between the exclusive broker and the broker procuring the confirmed bid as provided in any agreement between them. If there is no agreement between them, the compensation on the amount of the original bid is divided equally, and the procuring broker is entitled to any compensation on the difference between the original bid and the confirmed bid. (*Prob.C. 10162.7(b).*)

(4) *Sale to Increased Bidder Not Represented.* If (a) the original bid is made by a purchaser not represented by an agent or broker or represented by the exclusive broker, and (b) the court confirms the sale to a purchaser not represented by an agent or broker on an increased bid made at the hearing on the petition for confirmation, the exclusive broker is entitled to compensation determined on the amount of the original bid. (*Prob.C. 10162.5(b).*)

(5) *Sale to Increased Bidder Not Represented: Original Bidder Represented by Another Broker.* If (a) the original bid is made by a purchaser represented by another agent or broker, and (b) the court confirms the sale to a purchaser not represented by an agent or broker on an increased bid made at the hearing on the petition for confirmation, compensation is determined on the amount of the original bid. The compensation is divided between the exclusive broker and the broker procuring the original bid as provided in any agreement between them. In the absence of an agreement, the compensation is divided equally. (*Prob.C. 10164(a), (c).*)

(6) *Sale to Increased Bidder Represented by Exclusive Broker.* If (a) the original bid is made by a purchaser not represented by an agent or broker, and (b) the court confirms the sale to a purchaser represented by the exclusive broker on an increased bid made at the hearing on the petition for confirmation, the exclusive broker is entitled to compensation determined on the full amount for which the sale is confirmed. (*Prob.C. 10163(a).*) This provision is subject to *Prob.C. 10162* (limitation on compensation of broker or agent representing successful overbidder; *supra*, §682). (*Prob.C. 10163.*)

(7) *Sale to Increased Bidder Represented by Another Broker: Original Bidder Not Represented or Represented by Exclusive Broker.* If (a) the original bid is made by a purchaser represented by the exclusive broker or by a purchaser not represented by an agent or broker, and (b) the court confirms the sale to a purchaser represented by another agent or broker on an increased bid made at the hearing on the petition for confirmation, compensation is determined on the full amount for which the sale is confirmed. (*Prob.C. 10165(a)(2).*)

The exclusive broker is entitled to one-half the compensation on the amount of the original bid. (*Prob.C. 10165(c)(1), (c)(4).*) The broker procuring the increased bid is entitled to one-half the compensation on the amount of the original bid and all the compensation on the difference between the original bid and the amount for which the sale is confirmed. (*Prob.C. 10165(b).*)

(8) *Sale to Increased Bidder: Original and Increased Bidders Represented by Different Brokers.* If (a) the original bid is made by a person represented by an agent or broker, and (b) the court confirms the sale to a purchaser represented by another agent or broker on an increased bid made at the hearing on the petition for confirmation, compensation is determined on the full amount for which the sale is confirmed. (*Prob.C. 10165(a)(1).*)

The broker procuring the original bid and the exclusive broker divide one-half of the compensation on the amount of the original bid, as provided by any agreement between them. In the absence of an agreement, the one-half is divided equally. (*Prob.C. 10165(c)(3).*) However, if the exclusive broker is the broker procuring the increased bid, the broker procuring the original bid is entitled to the entire one-half of the compensation on the original bid. (*Prob.C. 10165(c)(5).*) The broker procuring the increased bid is entitled to one half the compensation on the amount of the original bid and all of the compensation on the difference between the original bid and the amount for which the sale is confirmed. (*Prob.C. 10165(b).*)

(9) *Sale to Purchaser Named in Contract.* If the contract provides that no compensation is payable to the agent or broker holding the contract if the sale is confirmed to a named purchaser, the following rules apply:

(a) If the court confirms the sale to the named purchaser, whether on the original bid or an increased bid, the compensation of agents and brokers involved in the sale is determined under *Prob.C. 10160* et seq., except that no compensation is payable to the agent or broker holding the contract. (*Prob.C. 10162.6(a), (b).*)

(b) If the sale is confirmed to a purchaser other than the named purchaser, whether on the original bid or an increased bid, the compensation of agents and brokers involved in the sale, including the agent or broker holding the contract, is determined under *Prob.C. 10160* et seq. as if the limitation in the contract does not exist. (*Prob.C. 10162.6(a), (c).*)

(c) *Prob.C. 10162.5, 10162.7, 10163* and *10165* are subject to *Prob.C. 10162.6.*

(10) *Agreement Between Cooperating Agents and Brokers. Prob.C. 10160 et seq.* "does not supersede any agreement cooperating agents or brokers may have among themselves to divide the compensation payable under" *Prob.C. 10160 et seq. (Prob.C. 10168.)*

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3. Manner of Sale.

a. Personal Property.

1. Notice of Sale.

14 Witkin Sum. Cal. Law Wills § 684

[§ 684] Notice of Sale.

(1) *When Notice of Sale Is Not Required.* Personal property may be sold with or without notice, as the personal representative may determine, in any of the following circumstances:

(a) Where the will directs the property to be sold. (*Prob.C. 10252(a).*)

(b) Where the will gives authority to sell the property. (*Prob.C. 10252(b).*)

(c) "Where the property is perishable, will depreciate in value if not disposed of promptly, or will incur loss or expense by being kept." (*Prob.C. 10252(c).*)

(d) Where the sale is necessary to provide for the payment of a family allowance (see *infra*, §774 et seq.) pending receipt of other sufficient funds. (*Prob.C. 10252(d).*)

The Law Revision Commission Comment points out that the will need not specifically grant authority to sell without notice. If the will directs or authorizes sale, whether or not notice should be given is within the personal representative's discretion. However, the sale must still be confirmed under *Prob.C. 10260* (*infra*, §690), unless another statute dispenses with the need for confirmation.

The following types of personal property may be sold without notice in specified circumstances:

(a) Securities. (See *Prob.C. 10200*, *infra*, §700.)

(b) Accounts in financial institutions. (See *Prob.C. 10201*, *infra*, §701.)

(c) Subscription rights. (See *Prob.C. 10202*, *infra*, §700.)

(2) *When Notice of Sale Is Required.* Subject to *Prob.C. 10252*, and except as otherwise provided by statute, personal property of the estate may be sold only after notice of sale is given by the personal representative. (*Prob.C.*

10250.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:53; Rutter Group, 1 Cal. Practice Guide: Probate, Form 13:C.) Notice must be given by either or both of the following methods, as the personal representative may determine:

(a) *Posting*. Posting at the county courthouse in the county where the proceedings are pending at least 15 days before (1) the date specified in the notice of sale as the day on or after which the sale is to be made, in the case of a private sale, or (2) the day of the auction, in the case of a public auction sale. (*Prob.C. 10250(a)*.)

(b) *Publication*. Publication pursuant to *Govt.C. 6063a* in a newspaper in the county where the proceedings are pending, completed before (1) the date specified in the notice of sale as the day on or after which the sale is to be made, in the case of a private sale, or (2) the day of the auction, in the case of a public auction sale. (*Prob.C. 10250(b)*.)

(3) *Shortening Time for Notice*. If it is to the advantage of the estate, the court may shorten the time of notice of sale to not less than 5 days. (*Prob.C. 10251(a)*.) If an order shortening time is made, notice must be given by either or both of the following methods, "as the personal representative may determine":

(a) *Posting*. Posting as provided by *Prob.C. 10250*, except for at least 5 days rather than 15 days. (*Prob.C. 10251(b)(1)*.)

(b) *Publication*. Publication as provided by *Prob.C. 10250*, except pursuant to *Govt.C. 6061* rather than *Govt.C. 6063a*. (*Prob.C. 10251(b)(2)*.)

(4) *Contents of Notice*. The notice must include (a) a statement whether the sale is to be a private sale or a public auction sale, (b) in the case of a private sale, the place where bids or offers will be received and the day on or after which the sale will be made, (c) in the case of a public auction sale, the time and place of sale, and (d) a brief description of the property to be sold. (*Prob.C. 10253(a)*.) The notice may include other matters, including the terms and conditions of the sale. (*Prob.C. 10253(b)*.)

(5) *Sale of Specifically Devised Property*. An ex parte application for authority to sell or surrender tangible or intangible personal property must state whether the property is specifically devised. If so, the written consent of the devisee to the sale or surrender must be filed. (C.R.C., Rule 7.454.)

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- 2. Sale at Public Auction.

14 Witkin Sum. Cal. Law Wills § 685

[§ 685] Sale at Public Auction.

(1) *Place of Sale.* On petition of the personal representative or an interested person, the court may order that a sale of personal property at public auction be made at any place within or without the United States. (*Prob.C. 10254(b)(1).*) The Law Revision Commission Comment offers an illustration: "The court may order, for example, that rare art works be sold in some other country when to do so will afford a better market." If the court does not so order, the sale must be within California at (a) the courthouse door, (b) an auction house, (c) a public place, or (d) the residence of the decedent. (*Prob.C. 10254(a)(1).*)

(2) *Presence of Personal Property.* On petition of the personal representative or an interested person, the court may order that tangible personal property need not be present at the time of sale. (*Prob.C. 10254(b)(2).*) If the court does not so order, tangible personal property must be present at the time of sale. (*Prob.C. 10254(a)(2).*)

(3) *Postponement.* The personal representative may postpone the sale if all of the following conditions are satisfied:

(a) "The personal representative believes that the postponement is to the advantage of the estate." (*Prob.C. 10254(c)(1).*)

(b) "Notice of the postponement is given by public declaration at the time and place appointed for the sale." (*Prob.C. 10254(c)(2).*)

(c) "The postponement, together with previous postponements of sale of the property, does not exceed three months." (*Prob.C. 10254(c)(3).*)

(4) *Bids.* Bids must substantially comply with the terms specified in the notice of sale. (*Prob.C. 10256.*)

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a. Personal Property.

3. Private Sale.

14 Witkin Sum. Cal. Law Wills § 686

[§ 686] Private Sale.

(1) *Time of Sale.* "A private sale of personal property may not be made before the day stated in the notice of sale as the day on or after which the sale will be made, nor later than one year after that day." (*Prob.C. 10255(a).*)

(2) *Bids.* Bids must substantially comply with the terms specified in the notice of sale. (*Prob.C. 10256.*) Bids or offers must be in writing and must be (a) left at the place designated in the notice of sale, or (b) "delivered to the personal representative personally or to the person specified in the notice of sale, at any time after the first publication or posting of notice of sale and before the making of the sale." (*Prob.C. 10255(b).*)

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a. Personal Property.

4. Sale on Credit.

14 Witkin Sum. Cal. Law Wills § 687

[§ 687] Sale on Credit.

(1) *Deposit and Security.* Personal property may be sold for cash or on credit. (*Prob.C. 10257(a).*) If a sale is on credit, unless the court provides otherwise, at least 25% must be paid in cash at the time of sale, and the personal representative must either (a) take the purchaser's note for the balance of the purchase price with a security interest in the property to secure payment, or (b) enter into a conditional sale contract under which title is retained until the balance is paid. (*Prob.C. 10257(b).*) The terms of the note and security interest or the conditional sale contract must be approved by the court when the sale is confirmed. (*Prob.C. 10257(c).*)

(2) *Sale of Partial Interest.* Where property sold for part cash and part deferred payments consists of an undivided interest or any other interest less than the entire ownership and the owners of the remaining interests join in the sale, the note and security interest may be made to the personal representative and the other owners. The interest of the personal representative in the note and security interest must be in the same interest and in the same proportions as the estate's interest in the property prior to the sale. (*Prob.C. 10257(d).*)

(3) *Modification of Terms.* On petition of the personal representative, the court may authorize a cash payment of less than 25% of the purchase price or may waive or modify security requirements, "where it is shown that the terms are to the advantage of the estate and the property to be sold is of such a nature that it is impracticable to sell the property for a larger cash payment at the time of sale or to retain a security interest or other lien in the property." The court's order must fix the terms and conditions of sale. (*Prob.C. 10258(a).*) Modification may be appropriate, e.g., for the sale of an insurance business, a liquor license, the goodwill of a business, or a merchant's stock in trade. (Law Rev. Com. Comment.)

Notice of the hearing on the petition must be (a) posted as provided by *Prob.C. 1230* (supra, §394), and (b) given as provided by *Prob.C. 1220* (mailed notice; supra, §391) to persons listed in *Prob.C. 1220* and known heirs and devisees whose interest in the estate would be affected by the sale. (*Prob.C. 10258(b).*)

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- 5. Passage of Title Without Confirmation.

14 Witkin Sum. Cal. Law Wills § 688

[§ 688] Passage of Title Without Confirmation.

Certain personal property passes without court confirmation or approval:

(1) Property that is perishable, that will depreciate in value if not disposed of promptly, or that will incur loss or expense by being kept: Title passes on sale. (*Prob.C. 10259(a)(1).*)

(2) Property sold to provide for the payment of a family allowance pending receipt of other sufficient funds: Title passes on sale. (*Prob.C. 10259(a)(2).*)

(3) Property sold at public auction: Title passes on receipt of the purchase price and delivery to the purchaser of either (a) tangible personal property, or (b) an instrument that transfers title to intangible personal property. (*Prob.C. 10259(b).*)

The personal representative is responsible for the actual value of this property unless the sale is reported to and approved by the court. (*Prob.C. 10259(c).*)

The following personal property may also be sold without confirmation in specified circumstances:

(a) Securities. (See *Prob.C. 10200*, *infra*, §700.)

(b) Accounts in financial institutions. (See *Prob.C. 10201*, *infra*, §701.)

(c) Subscription rights. (See *Prob.C. 10202*, *infra*, §700.)

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- a. Personal Property.
- 6. Report and Hearing.

14 Witkin Sum. Cal. Law Wills § 689

[§ 689] Report and Hearing.

(1) *Requirement and Exceptions.* Generally, a sale of personal property must be reported to and confirmed by the court before title to the property passes to the purchaser, even though the will directs that the property be sold or gives the personal representative authority to sell. (*Prob.C. 10260.*) However, the confirmation requirement is subject to the following statutes:

- (a) *Prob.C. 10200* (securities; *infra*, §700).
- (b) *Prob.C. 10201* (accounts in financial institutions; *infra*, §701).
- (c) *Prob.C. 10202* (subscription rights; *infra*, §700).
- (d) *Prob.C. 10259* (passage of title without confirmation; *supra*, §688).
- (e) *Prob.C. 10503* (sale under Independent Administration of Estates Act; *infra*, §752).

The Judicial Council has approved a form for approval. (See Judicial Council Form No. DE-275 [Ex Parte Petition for Approval of Sale of Personal Property and Order].)

(2) *Filing Report.* If the personal representative fails to file the report and a petition for confirmation within 30 days after the sale, the purchaser may do so. (*Prob.C. 10260(b).*)

(3) *Notice of Hearing.* Notice of the hearing on the petition for confirmation must be (a) given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) and (b) posted as provided by *Prob.C. 1230* (*supra*, §394). (*Prob.C. 10260(c).*)

(4) *Conduct of Hearing.* At the hearing on the petition for confirmation, the court must "examine into the necessity for the sale or the advantage to the estate and the benefit to the interested persons in making the sale" unless the decedent's will authorizes or directs the property to be sold. (*Prob.C. 10261(a).*) (On confirmation under former statute,

see *Lass v. Eliassen* (1928) 94 C.A. 175, 178, 270 P. 745; *Estate of George* (1932) 123 C.A. 733, 736, 12 P.2d 86 [petition for confirmation is sufficient if it alleges general conclusion of necessity and advantage]; *Wood v. Roach* (1932) 125 C.A. 631, 636, 14 P.2d 170 [petition for confirmation need not set forth facts showing necessity, advantage or purpose of sale].) The court may not proceed on a petition to confirm the sale of property unless the petitioner's attorney (or the petitioner, if not represented) is present. (C.R.C., Rule 7.452.)

(5) *Objections.* Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections. (*Prob.C. 10261(b).*)

(6) *Refusal To Show Property to Prospective Purchasers.* On a showing that the fiduciary has denied a bona fide prospective purchaser or the purchaser's broker an opportunity to inspect the property, the court may not confirm the sale but must continue the sale to allow inspection, unless good cause to confirm the sale is shown. (C.R.C., Rule 7.451.)

(7) *Sale of Partnership Interest.* Before confirming the sale of a partnership interest, whether to a surviving partner or to any other person, the court must inquire into the condition of the partnership affairs and examine any surviving partner resident in California at the time of the hearing and able to be present in court. The court may issue a citation to compel a surviving partner to attend. (*Prob.C. 10261(c).*)

(8) *Proof of Notice of Sale.* If notice of the sale was required, before an order is made confirming the sale, it must be proved to the satisfaction of the court that the notice was given as required by *Prob.C. 10250* et seq. (supra, §684). The confirmation order must show that proof was made. (*Prob.C. 10263.*)

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7. Overbid and Confirmation.

14 Witkin Sum. Cal. Law Wills § 690

[§ 690] Overbid and Confirmation.

(1) *Authority To Accept Overbid or Order New Sale.* Except for a sale of property under *Prob.C. 10259* (passage of title without confirmation; *supra*, §688), in specified circumstances the court has discretion to (a) accept an overbid and confirm the sale to the offeror, or (b) order a new sale. (*Prob.C. 10262(a), (c).*) The court may do so if:

(a) A written offer to purchase the property for at least 10% more than the reported amount is made at the confirmation hearing. (*Prob.C. 10262(a).*)

(b) The original bid is more than \$ 100 or, if less than \$ 100, the new bid is at least \$ 100 more than the original bid. (*Prob.C. 10262(a)(1).*)

(c) The new bid is made by a responsible person. (*Prob.C. 10262(a)(2).*)

(d) The new bid complies with all provisions of law. (*Prob.C. 10262(a)(3).*)

(2) *Multiple Overbids.* If more than one offer satisfies these requirements, the court must accept the highest offer and confirm the sale to that offeror or order a new sale. (*Prob.C. 10262(b).*)

(3) *Compensation of Agent or Broker.* On its own motion or on the request of the personal representative, the agent or broker, or an interested person, made at the confirmation hearing or at another time, the court fixes the compensation of the agent or broker as provided by *Prob.C. 10160* et seq. (*supra*, §680 et seq.). (*Prob.C. 10261(d).*)

(4) *Effect of Irregularity.* An omission, error, or irregularity in the proceedings does not impair or invalidate the proceedings or the sale pursuant to an order under *Prob.C. 10250* et seq. (*Prob.C. 10264.*) This provision does not limit the court's authority under *C.C.P. 473* to set aside an order made through mistake, inadvertence, surprise, or excusable neglect. (Law Rev. Com. Comment.) (See *Estate of Dargie* (1939) 33 C.A.2d 148, 155, 91 P.2d 126 [former statute; substantial compliance with requirements was sufficient].)

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1. Notice of Sale.

14 Witkin Sum. Cal. Law Wills § 691

[§ 691] Notice of Sale.

(1) *When Notice of Sale Is Not Required.* Real property may be sold with or without notice, as the personal representative may determine, where the will directs or authorizes the property to be sold. (*Prob.C. 10303.*)

The Law Revision Commission Comment points out that the will need not specifically grant authority to sell without notice. If the will directs or authorizes sale, whether or not notice should be given is within the personal representative's discretion. However, the sale must still be confirmed under *Prob.C. 10308* (infra, §695).

(2) *When Notice of Sale Is Required.* Ordinarily, real property of an estate may be sold only after notice of sale has been given under *Prob.C. 10300*. However, this general requirement is subject to *Prob.C. 10301*, providing alternative rules where the property is valued at less than \$ 5,000, and to *Prob.C. 10503* (sale under Independent Administration of Estates Act; infra, §752). A special statute applies to grazing property. (See *Prob.C. 10207.*)

(3) *Manner of Notice.* Notice must be published pursuant to *Govt.C. 6063a* in a newspaper published in the county in which all or part of the property is located, or, if there is no such paper, in another newspaper as the court directs. (*Prob.C. 10300(a).*) Publication must be completed before (a) the date specified in the notice of sale as the day on or after which the sale is to be made, in the case of a private sale, or (b) the day of the auction, in the case of a public auction sale. (*Prob.C. 10300(b).*) (See Rutter Group, 1 Cal. Practice Guide: Probate, Form 13:E.)

(4) *Shortening Time for Notice.* If it is to the advantage of the estate, the court may shorten the time of notice of sale to not less than 5 days. (*Prob.C. 10302(a).*) The notice must be published as provided by *Prob.C. 10300*, pursuant to *Govt.C. 6061*. (*Prob.C. 10302(b).*)

(5) *Contents of Notice.* The notice must state (a) whether the sale is to be a private sale or a public auction sale, (b) in the case of a private sale, the place where bids or offers will be received and the date on or after which the sale will be made, (c) in the case of a public auction sale, the time and place of sale, and (d) the street address or other common designation or, if none, a legal description of the property to be sold. (*Prob.C. 10304(a).*) The notice may include other matters, including the terms and conditions of sale. (*Prob.C. 10304(b).*) (See Cal. Civil Practice, 2 Probate and Trust

Proceedings, §16:31.)

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- 2. Sale at Public Auction.

14 Witkin Sum. Cal. Law Wills § 692

[§ 692] Sale at Public Auction.

(1) *Place of Sale.* A sale of real property at public auction must be in the county in which the property is located. If located in two or more counties, the property may be sold in any of them. (*Prob.C. 10305(a).*)

(2) *Time of Sale.* The sale must be between 9 a.m. and 9 p.m. on the day specified in the notice of sale, unless the sale is postponed. (*Prob.C. 10305(b).*)

(3) *Postponement.* The personal representative may postpone the sale if all of the following conditions are satisfied:

(a) "The personal representative believes that the postponement is to the advantage of the estate." (*Prob.C. 10305(c)(1).*)

(b) "Notice of the postponement is given by public declaration at the time and place appointed for the sale." (*Prob.C. 10305(c)(2).*)

(c) "The postponement, together with previous postponements of sale of the property, does not exceed three months in all." (*Prob.C. 10305(c)(3).*)

(4) *Bids.* Bids must substantially comply with any terms specified in the notice of sale. (*Prob.C. 10307.*)

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3. Private Sale.

14 Witkin Sum. Cal. Law Wills § 693

[§ 693] Private Sale.

(1) *Time of Sale.* A private sale of real property may not occur before the date stated in the notice of sale as the date on or after which the sale will be made, or later than one year after that date. (*Prob.C. 10306(a).*)

(2) *Bids.* Bids must substantially comply with any terms specified in the notice of sale. (*Prob.C. 10307.*) Bids must be in writing and must be (a) left at the place designated in the notice of sale, or (b) delivered to the personal representative personally or to a person specified in the notice. Bids may be made at any time after the first publication or posting of the notice and before the sale is made. (*Prob.C. 10306(b).*)

(3) *Minimum Price.* A sale of real property at a private sale must be for an amount equal to at least 90% of the appraised value, based on an appraisal within 1 year before the date of the confirmation hearing (see *infra*, §695) and a valuation date within that period. (*Prob.C. 10309(a).*) A special statute applies to grazing property. (See *Prob.C. 10207.*)

(4) *Appraisal and Reappraisal.* The property is appraised if (a) the property has not been previously appraised, (b) the property has not been appraised within 1 year before the date of the confirmation hearing, (c) the valuation date used in the latest appraisal is more than 1 year before the date of the confirmation hearing, or (d) the court is satisfied that the latest appraisal is too high or too low. (*Prob.C. 10309(b).*)

If the original appraisal was not by a probate referee, the new appraisal need not be by a probate referee. If the original appraisal was by a probate referee, the new appraisal may be by the same referee without further order. If the original referee is dead, removed, or unable to act, or if there is other reason to appoint another referee, a new referee must be appointed, using the same procedure as for appointment of the original referee. (*Prob.C. 10309(c).*) (On appointment of probate referee, see *Prob.C. 8920 et seq.*, *supra*, §606.)

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4. Sale on Credit.

14 Witkin Sum. Cal. Law Wills § 694

[§ 694] Sale on Credit.

(1) *Security.* If a sale is made on credit, the personal representative must take the note of the purchaser for the unpaid portion of the purchase money, with a mortgage or deed of trust on the property to secure payment. The mortgage or deed of trust may be subject only to encumbrances existing at the date of sale and "such other encumbrances as the court may approve." (*Prob.C. 10315(a).*)

(2) *Sale of Partial Interest.* Where property sold for part cash and part deferred payments consists of an undivided interest or any other interest less than the entire ownership and the owners of the remaining interests join in the sale, the note and deed of trust or mortgage may be made to the personal representative and the other owners. The interest of the personal representative in the note and deed of trust or mortgage must be in the same interest and in the same proportions as the estate's interest in the property prior to the sale. (*Prob.C. 10315(b).*)

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[§ 695] Report and Hearing.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement and Exceptions.* Judicial Council Form No. DE-260 has been renamed: Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships).



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14 Witkin Sum. Cal. Law Wills § 695

[§ 695] Report and Hearing.

(1) *Requirement and Exceptions.* Except as provided by *Prob.C. 10503* (sale under Independent Administration of Estates Act; *infra*, §752), a sale of real property must be reported to and confirmed by the court before title to the property passes to the purchaser, whether the sale is a private sale or a public auction sale and even though the will directs the property to be sold or gives the personal representative authority to do so. (*Prob.C. 10308(a).*)

The Judicial Council has approved a form for the report and petition. (See Judicial Council Form No. DE-260 [Report of Sale and Petition for Order Confirming Sale of Real Property].)

(2) *Filing Report.* If the personal representative fails to file the report and a petition for confirmation within 30 days after the sale, the purchaser may do so. (*Prob.C. 10308(b).*)

(3) *Notice of Hearing.* Notice of the hearing on the petition for confirmation must be (a) given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) to the persons designated in *Prob.C. 1220* and to the purchaser named in the petition, and (b) posted as provided by *Prob.C. 1230* (*supra*, §394). (*Prob.C. 10308(c).*)

(4) *Conduct of Hearing.* At the hearing on the petition for confirmation, the court must "examine into the necessity for the sale or the advantage to the estate and the benefit to the interested persons in making the sale" unless the decedent's will authorizes or directs the property to be sold. (*Prob.C. 10310(a).*) The court must also "examine into the efforts of the personal representative to obtain the highest and best price for the property reasonably attainable." (*Prob.C. 10310(b).*) The court may not proceed on a petition to confirm the sale of property unless the petitioner's attorney (or the petitioner, if not represented) is present. (C.R.C., Rule 7.452.)

(5) *Objections.* Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections. (*Prob.C. 10310(c).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:33.)

(6) *Refusal To Show Property to Prospective Purchasers.* On a showing that the fiduciary has denied a bona fide

prospective purchaser or the purchaser's broker an opportunity to inspect the property, the court may not confirm the sale but must continue the sale to allow inspection, unless good cause to confirm the sale is shown. (C.R.C., Rule 7.451.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement and Exceptions*. Judicial Council Form No. DE-260 has been renamed: Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships).



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14 Witkin Sum. Cal. Law Wills § 696

[§ 696] Overbid Procedure.

(1) *Conditions for Overbid.* In specified circumstances, the court must accept an overbid and confirm the sale to the offeror or order a new sale. (*Prob.C. 10311(a), (c).*) (On special rule for grazing property, see *Prob.C. 10207.*) The court must do so if:

(a) A written offer to purchase the property is made at the hearing on the petition for confirmation. (*Prob.C. 10311(a).*)

(b) The offer is at least 10% more on the first \$ 10,000 of the original bid and 5% more on the amount of the original bid in excess of \$ 10,000. (*Prob.C. 10311(a)(1).*) The amount of the original bid and the offer are determined without regard to any commission or payment to a broker or agent. (*Prob.C. 10311(e).*)

(c) The offer is made by a responsible person. (*Prob.C. 10311(a)(2).*)

(d) The offer complies with all provisions of law. (*Prob.C. 10311(a)(3).*)

Decisions under the comparable provisions of the former statutes are illustrative. (See *Estate of Sinclair (1953) 121 C.A.2d 181, 183, 262 P.2d 625* [bid that does not exceed statutory percentages need not be accepted]; *Estate of Greer (1968) 261 C.A.2d 827, 830, 68 C.R. 344* [oral bid merely preliminary to written offer; only written offer can be basis for confirmed sale]; *Estate of Quackenbush (1975) 53 C.A.3d 751, 756, 125 C.R. 832* [sale was subject to bidding provisions even though made pursuant to power of sale contained in decedent's will]; *Estate of Sampo (1985) 171 C.A.3d 767, 774, 217 C.R. 713*, citing the text [only written bid is binding, despite local rule authorizing oral overbids]; *Estate of Barthelmess (1988) 198 C.A.3d 728, 740, 243 C.R. 832* [credit bid relying on assignment of devisee's share of estate rejected].) (See also *Estate of Roberts (1990) 225 C.A.3d 1017, 1021, 1022, 275 C.R. 575*, citing the text [oral overbid was not reduced to writing by tender of cashier's checks]; Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:34.)

(2) *Multiple Overbids.* If more than one offer satisfies these requirements, the court must accept the highest offer

and confirm the sale to that offeror or order a new sale. (*Prob.C. 10311(b), (c).*)

(3) *When Overbid Must Be Acceptable to Personal Representative.* "If the sale returned for confirmation is on credit and the higher offer is for cash or on credit, whether on the same or different credit terms, or the sale returned for confirmation is for cash and the higher offer is on credit, the court may not consider the higher offer unless the personal representative informs the court in person or by counsel prior to confirmation of sale that the higher offer is acceptable." (*Prob.C. 10311(d).*)

(4) *Procedure Where New Sale Is Ordered.* If a new sale is ordered, notice must be given and the sale must be conducted as if no previous sale had taken place. (*Prob.C. 10313(d).*)

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[§ 697] Confirmation or Vacation of Sale.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Confirmation of Sale*. Judicial Council Form No. DE-265 has been renamed: Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships).



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[§ 697] Confirmation or Vacation of Sale.

(1) *Confirmation of Sale.* If it appears to the court that the following requirements are satisfied, the court makes an order (a) confirming the sale to the person making the highest offer that satisfies the requirements of *Prob.C. 10300* et seq. (supra, §691), and (b) directing conveyances or assignments or both to be executed (see infra, §698):

(a) "Either the sale was authorized or directed to be made by the decedent's will or good reason existed for the sale." (*Prob.C. 10313(a)(1).*)

(b) If notice of the sale was required, the proof required by *Prob.C. 10312* has been made. (*Prob.C. 10313(a)(2).*) Under *Prob.C. 10312*, before a confirmation order is made, it must be proved to the satisfaction of the court that notice was given as required by *Prob.C. 10300* et seq. The confirmation order must show that proof was made.

(c) "The sale was legally made and fairly conducted." (*Prob.C. 10313(a)(3).*)

(d) "The amount for which the sale is to be confirmed is not disproportionate to the value of the property." (*Prob.C. 10313(a)(4).*)

(e) In the case of a private sale, the sale complied with the requirements of *Prob.C. 10309* (confirmation at or above 90% of appraised value; supra, §693). (*Prob.C. 10313(a)(5).*)

(f) If the sale is confirmed to the original bidder, it does not appear that a sum could be obtained exceeding the original bid by 10% more on the first \$ 10,000 of the original bid and 5% more on the excess over \$ 10,000 of the original bid, exclusive of the expenses of a new sale. (*Prob.C. 10313(a)(6).*)

The Judicial Council has approved a form for the order. (See Judicial Council Form No. DE-265 [Order Confirming Sale of Real Property].) (On confirmation under former statute, see *Baldwin v. Stewart* (1933) 218 C. 364, 368, 23 P.2d 283 [order of confirmation was conclusive against collateral attack]; *Estate of Vezina* (1953) 116 C.A.2d 438, 441, 254 P.2d 103 [validity of bid conditioned on payment of taxes and other enumerated claims against property]; *Estate of Herz* (1956) 147 C.A.2d 100, 106, 305 P.2d 278; *Estate of Shorr* (1981) 122 C.A.3d 775, 777, 176 C.R. 158

[determination at hearing that price was adequate could not be set aside on showing at later time that higher price could then be obtained]; on special rule for grazing property, see *Prob.C. 10207*.)

(2) *Compensation of Agent or Broker.* On its own motion or on the request of the personal representative, the agent or broker, or an interested person, made at the confirmation hearing or at another time, the court fixes the compensation of the agent or broker as provided by *Prob.C. 10160* et seq. (supra, §680 et seq.). (*Prob.C. 10313(b)*.)

(3) *Vacation of Sale and New Sale.* If it appears to the court that the requirements of *Prob.C. 10313(a)* are not satisfied, the court must vacate the sale and order a new sale. (*Prob.C. 10313(c)*.) If a new sale is ordered, notice must be given and the sale must be conducted as if no previous sale had taken place. (*Prob.C. 10313(d)*.)

(4) *Effect of Irregularity.* An omission, error, or irregularity in the proceedings does not impair or invalidate the proceedings or the sale pursuant to an order under *Prob.C. 10250* et seq. (*Prob.C. 10316*.) This provision does not limit the court's authority under *C.C.P. 473* to set aside an order made through mistake, inadvertence, surprise, or excusable neglect. (Law Rev. Com. Comment to *Prob.C. 10316*.) (On excusable mistake under former statute, see *Estate of Moreland* (1942) 49 C.A.2d 484, 487, 121 P.2d 867 [error in notice, resulting in failure of prospective bidders to appear]; *Estate of Lewy* (1976) 61 C.A.3d 635, 643, 131 C.R. 291 [showing insufficient].)

In *Estate of Maniscalco* (1992) 9 C.A.4th 520, 11 C.R.2d 803, the city of El Cajon notified the estate of its intention to submit an overbid on real property, but failed to attend the confirmation hearing because counsel for the administrator of the estate erroneously informed it that the hearing had been continued to a later date. After the trial judge confirmed a sale to Cenplex, the only party attending the hearing, the city, alleging excusable neglect, moved to vacate the confirmation order under *C.C.P. 473*. The trial judge granted the motion. *Held*, affirmed; the city was an interested party as defined in *Prob.C. 48(b)*, and had standing under *C.C.P. 473* to move to vacate.

(a) The trial judge accurately concluded that *Prob.C. 48(b)* required an evaluation of the underlying policy considerations regarding a specific probate proceeding in determining whether a person is sufficiently interested to intervene. He also accurately determined that the policy of obtaining finality in estate sales is outweighed by the policy of providing relief from mistake, especially a mistake induced by the misrepresentation of a party whose interests would be directly affected by the misled party's participation. Moreover, the judge's action furthers the underlying policy goal of maximizing the return for the estate. (9 C.A.4th 524.)

(b) Cenplex presented no statistical or evidentiary support for its argument that the broad construction of "interested party" adopted here will open the flood gates of moving parties seeking to vacate sale confirmation orders; its prediction of dire consequences was unsupported speculation. (9 C.A.4th 525.)

Procedural defects may be waived if there was no objection at the hearing. In *Estate of Connor* (1964) 227 C.A.2d 157, 38 C.R. 519, the administrator misappropriated the purchase money. On application of an heir, the judge vacated the sale on the ground that the petition for confirmation was unverified, even though the heir had not contested the confirmation. The purchaser, thus deprived of the property without reimbursement of his payment, appealed. *Held*, reversed; the defect was only one of pleading, was not jurisdictional, and was waived when not raised at the hearing. (227 C.A.2d 158.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Confirmation of Sale.* Judicial Council Form No. DE-265 has been renamed: Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships).



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b. Real Property.

8. Assignment or Conveyance.

14 Witkin Sum. Cal. Law Wills § 698

[§ 698] Assignment or Conveyance.

(1) *Assignment of Contract*. When a sale of the decedent's interest under a contract for the purchase of real property by the decedent is confirmed, and after any bond required by *Prob.C. 10206* (infra, §703) is furnished, the personal representative executes an assignment of the contract to the purchaser. (*Prob.C. 10314(b)*.) (See *Prob.C. 7261*, supra, §412 [instrument must give date of order and state that transaction is made by authority of order].)

The assignment vests in the purchaser all "right, title, or interest" of the estate, or of the persons entitled to the interest of the decedent, at the time of sale in the property assigned. The purchaser of the decedent's interest has the same rights and remedies against the vendor as the decedent would have had if living. (*Prob.C. 10314(d)*.) (See *Prob.C. 7262*, supra, §412 [transaction has same effect as if carried out by decedent while living with legal capacity to do so].)

(2) *Conveyance of Property*. Except as provided by *Prob.C. 10314(b)*, on confirmation of the sale, the personal representative executes a conveyance to the purchaser, which refers to the order confirming the sale and directing the conveyance (see supra, §695). (*Prob.C. 10314(a)*.) (See *Prob.C. 7261*, supra, §412 [instrument must give date of order and state that transaction is made by authority of order].) A certified copy of the order is recorded in the county in which all or part of the property lies. (*Prob.C. 10314(a)*.) (See *Prob.C. 7262*, supra, §412 [duty of personal representative to record certified copy of order].)

The conveyance vests in the purchaser all "right, title, or interest" the decedent had in the property at the time of death and the estate acquired, by operation of law or otherwise, prior to the sale. (*Prob.C. 10314(c)*.) (See *Prob.C. 7262*, supra, §412 [transaction has same effect as if carried out by decedent while living with legal capacity to do so].)

Under the former statute, it was held that the title conveyed by a sale relates back to the time of the death of the decedent, the purchaser taking free from any purported encumbrances, created subsequent to the death, of which he has no knowledge. (*Hamilton v. Elvidge* (1933) 132 C.A. 21, 25, 22 P.2d 239.) But where confirmation was long delayed during appeal, and the purchaser sought to recover rents and profits for the period after sale but before final confirmation, the court refused to apply the doctrine of relation back. (*Lass v. Eliassen* (1928) 94 C.A. 175, 178, 270 P. 745.)

In *Mains v. City Title Ins. Co.* (1949) 34 C.2d 580, 212 P.2d 873, after notice of private sale of real property, plaintiff administrator accepted a bid of \$ 11,450 from the purchaser. The conditions of the sale called for payment of taxes and assessments by the purchaser, but no mention was made of a note secured by a deed of trust on which \$ 3,800 was owing. Defendant escrow holder, acting without instructions, paid off the note and remitted only the balance of the purchase price to plaintiff. Plaintiff asserted that this deduction was improper, arguing that a probate sale, like a judicial sale, passes only the interest of the decedent as in a quitclaim deed; that the doctrine of caveat emptor applies and there is no implied warranty of freedom from encumbrances; and that, in consequence, the purchaser took subject to the deed of trust and defendant agent acted without authority in using part of the purchase price to satisfy it.

The Supreme Court held, however, that plaintiff was not entitled to recover, reasoning as follows: (a) The doctrine of caveat emptor applies to judicial sales, but probate sales are not judicial sales. (b) The notice of sale specified particular encumbrances (taxes and assessments); the purchaser was entitled to rely on an implied condition that there were no others. (c) The purchaser cannot readily ascertain the facts of the balance due on a secured note, and bidding would be greatly inhibited if the doctrine of caveat emptor applied. (d) Because plaintiff administrator was obligated to satisfy the note, she suffered no legal injury by reason of defendant escrow holder's unauthorized payment. (34 C.2d 583.) (See dissent, 34 C.2d 587; 2 *Stanf. L. Rev.* 599; 23 *So. Cal. L. Rev.* 604.)

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1. In General.

14 Witkin Sum. Cal. Law Wills § 699

[§ 699] In General.

Particular statutes govern the sale of the following kinds of property:

(1) *Securities*. (See *infra*, §700.)

(2) *Accounts in Financial Institutions*. (See *infra*, §701.)

(3) *Leasehold Interest*. (See *infra*, §702.)

(4) *Contract Right To Purchase Real Property*. (See *infra*, §703.)

(5) *Grazing Property*. (See *Prob.C. 10207*.)

(6) *Partnership Interest*. Property of the estate that consists of a partnership interest or an interest that belongs to an estate by virtue of a former partnership is sold in the same manner as other personal property. (*Prob.C. 10204*.) (On confirmation of sale of partnership interest, see *Prob.C. 10261*, *supra*, §689.)

(7) *Chose in Action*. A chose in action belonging to the estate is sold in the same manner as other personal property. (*Prob.C. 10205*.)

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2. Securities.

14 Witkin Sum. Cal. Law Wills § 700

[§ 700] Securities.

(1) *Definition.* Under *Prob.C. 70*, "security" includes "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing." For purposes of *Prob.C. 10200*, "securities" means a security as defined by *Prob.C. 70*, "land trust certificates, certificates of beneficial interest in trusts, investment trust certificates, mortgage participation certificates, or certificates of deposit for any of the foregoing." The term does not include notes secured by a mortgage or deed of trust unless the note has been authorized or permitted to be issued by the Commissioner of Corporations or has been made by a public utility subject to the Public Utilities Act (*Pub.Util.C. 201 et seq.*). (*Prob.C. 10200(a).*)

(2) *When Court Order Is Required.* When authorized by court order, securities may be sold or surrendered for redemption or conversion. Title to the securities passes without the need for subsequent court confirmation. (*Prob.C. 10200(b).*) However, subscription rights may be sold without prior court order, subsequent confirmation, or notice. (*Prob.C. 10202.*) (On exercise of option rights, see *Prob.C. 9734*, supra, §484; on exercise of subscription rights, see *Prob.C. 9737*, supra, §484.)

(3) *Petition.* To obtain an order for sale, redemption, or conversion, the personal representative or an interested person files a petition stating the terms and conditions of the proposed action and the advantage to the estate. (*Prob.C. 10200(c).*) The Judicial Council has approved a form for an ex parte petition. (See Judicial Council Form No. DE-270 [Ex Parte Petition for Authority to Sell Securities and Order].)

(4) *Sale of Specifically Devised Property.* An ex parte application for authority to sell or surrender tangible or intangible personal property must state whether the property is specifically devised. If so, the written consent of the devisee to the sale or surrender must be filed. (C.R.C., Rule 7.454.)

(5) *Notice.* Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; supra,

§391) and posted as provided by *Prob.C. 1230* (supra, §394), but the court may shorten the notice period or dispense with notice. (*Prob.C. 10200(d)*.) Under *Prob.C. 10200(e)*, notice need not be given if any of the following conditions are satisfied:

(a) The minimum selling price is fixed by the court.

(b) The securities are to be sold on an established stock or bond exchange.

(c) The securities to be sold are securities designated as a national market system security on an interdealer quotation system or subsystem, of the National Association of Securities Dealers, sold through a registered broker during the regular course of business.

(d) The securities are to be surrendered for redemption or conversion.

(6) *Order*. The court's order fixes the terms and conditions of sale, redemption, or conversion. (*Prob.C. 10200(c)*.) The Judicial Council has approved a form for the order. (See Judicial Council Form No. DE-270 [Ex Parte Petition for Authority to Sell Securities and Order].)

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3. Accounts In Financial Institutions.

14 Witkin Sum. Cal. Law Wills § 701

[§ 701] Accounts In Financial Institutions.

(1) *Definitions. Prob.C. 10201(a)* incorporates the following definitions from the Financial Code:

(a) *Federal association: Fin.C. 5102.*

(b) *Mutual capital certificate: Fin.C. 5111.*

(c) *Savings account: Fin.C. 5116.*

(d) *Savings association: Fin. C. 5102.*

(e) *Withdrawal value: Fin.C. 5124.*

(2) *When Notice, Order, and Confirmation Are Not Required.* Notwithstanding *Prob.C. 10200* (sale of securities; *supra*, §700), the sale or surrender for withdrawal by the personal representative of the following items, and passage of title, does not require notice, prior court order, or subsequent confirmation if the amount obtained on the sale or withdrawal is not less than the value or withdrawal value:

(a) Savings accounts and mutual capital certificates of a savings association or federal association. (*Prob.C. 10201(b).*)

(b) Credit union share accounts and certificates for funds. (*Prob.C. 10201(c).*)

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4. Leasehold Interest.

14 Witkin Sum. Cal. Law Wills § 702

[§ 702] Leasehold Interest.

(1) *Sale of Leasehold Interest as Real Property.* The sale of a leasehold interest is made as a sale of real property if the interest to be sold consists of any of the following:

(a) A leasehold interest in real property with an unexpired term of 10 years or longer. For this purpose, a leasehold interest is considered to have an unexpired term of 10 years or longer if the lessee has the right to extend the term, and the term, if extended, would exceed 10 years. (*Prob.C. 10203(b)(1).*)

(b) A leasehold interest in real property with an option to purchase all or part of the property. (*Prob.C. 10203(b)(2).*)

(c) A lease for the production of minerals, oil, gas, other hydrocarbon substances, or geothermal energy. (*Prob.C. 10203(b)(3).*)

(2) *Sale of Leasehold Interest as Personal Property.* Except as provided by *Prob.C. 10203(b)*, the sale of a leasehold is made as a sale of personal property. (*Prob.C. 10203(a).*)

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5. Contract Right To Purchase Real Property.

14 Witkin Sum. Cal. Law Wills § 703

[§ 703] Contract Right To Purchase Real Property.

(1) *Sale of Right as Real Property.* If, at the time of death, the decedent possessed a contract for the purchase of real property and the decedent's interest in the property and under the contract is to be sold, the sale is made as a sale of real property. (*Prob.C. 10206(a).*) The sale is subject to all payments due at the time of sale or which become due thereafter. (*Prob.C. 10206(b).*) The Law Revision Commission Comment points out that the statute is consistent with case law that generally treats a contract right to purchase real property as real property.

(2) *When Bond Is Required.* If there are payments due or to become due, the sale is not confirmed until the purchaser executes a bond to the personal representative. (*Prob.C. 10206(b).*) However, a bond need not be given if (a) no claim has been made against the estate on the contract and the time for filing claims has expired, or (b) the person entitled to payment under the contract waives all recourse to the assets of the estate for payment and releases the estate and the personal representative from liability for payment. (*Prob.C. 10206(d).*)

(3) *Terms and Conditions of Bond.* "The bond shall be for the benefit and indemnity of the personal representative and the persons entitled to the interest of the decedent in the real property contracted for. The amount of the bond shall be equal to the amount of payments then due and thereafter to become due on the contract, with such sureties as the court may approve. The bond shall be conditioned that the purchaser will (1) make all payments for the property which are then due or which become due after the date of the sale and (2) fully indemnify the personal representative and the person entitled to the interest of the decedent against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in the contract." (*Prob.C. 10206(c).*)

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4. Vacating Sale for Purchaser's Default.

a. Vacating Sale and Directing Resale.

14 Witkin Sum. Cal. Law Wills § 704

[§ 704] Vacating Sale and Directing Resale.

(1) *In General.* If the court confirms a sale of real or personal property and the purchaser later fails to comply with the terms of the sale, the court may vacate the confirmation order and order a resale of the property. (*Prob.C. 10350(a).*)

(2) *Petition and Notice of Hearing.* The personal representative may petition the court for the order. (*Prob.C. 10350(a).*) Notice of the hearing must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to the persons designated in *Prob.C. 1220*, and the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming the sale, but need not be given to a defaulting purchaser whose consent to the petition is filed before the hearing. (*Prob.C. 10350(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:36 [petition], §16:37 [order].)

(3) *Notice of Sale and Procedure.* Notice of the resale is given and proceedings after the notice are conducted as provided by *Prob.C. 10000* et seq. "for a sale of the property in the first instance." (*Prob.C. 10350(c), (d).*)

(4) *Liability of Defaulting Purchaser.* The court may award damages to the estate against the purchaser. (*Prob.C. 10350(a).*) If the property is resold, the defaulting purchaser is liable to the estate for damages equal to the sum of the following:

(a) "The difference between the contract price of the first sale and the amount paid by the purchaser at the resale." (*Prob.C. 10350(e)(1).*) The Law Revision Commission Comment points out that this measure of damages differs from the measure of damages for defaults generally, in which the resale price is merely some evidence of value.

(b) "Expenses made necessary by the purchaser's breach." (*Prob.C. 10350(e)(2).*) The Law Revision Commission Comment points out that expenses made necessary by the purchaser's breach may include expenses of resale to the extent they exceed expenses assumed by the estate under the breached contract.

(c) "Other consequential damages." (*Prob.C. 10350(e)(3).*) The Law Revision Commission Comment notes that, for real property, consequential damages may include sewer assessments, taxes, utility fees, insurance, security, storage, and pool and gardening expenses.

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SUPPLEMENT: [This section is current through the latest supplement]

(4) *Liability of Defaulting Purchaser.* See *Estate of Felder (2008) 167 C.A.4th 518, 521, 84 C.R.3d 220* [on subsequent sale of real property in which estate had undivided one-half interest, estate was entitled to retain defaulting purchaser's entire deposit as damages where difference between contract price of estate's interest and sale price of estate's interest exceeded amount deposited].



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4. Vacating Sale for Purchaser's Default.
- b. Vacating Sale and Confirming New Sale.

14 Witkin Sum. Cal. Law Wills § 705

[§ 705] Vacating Sale and Confirming New Sale.

(1) *Petition To Confirm Sale to New High Bidder.* The court may vacate an order confirming a sale of real or personal property and make an order confirming the sale to the "new high bidder" if the sale has not been vacated under *Prob.C. 10350* (supra, §704), and a petition filed within 60 days after confirmation shows that the purchaser failed to complete the purchase and "a bid has been made for the property in the same or a higher amount, on the same or better terms, and in the manner prescribed in the original notice of sale." (*Prob.C. 10351(a)*.) If the report and confirmation of the second sale are not filed within 60 days of the confirmation of the first sale, the property may be resold only as provided by *Prob.C. 10350* (supra, §704). (*Prob.C. 10351(c)*.) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §16:38 [petition], §16:39 [order].)

(2) *Notice of Hearing.* Notice of the hearing must be given as provided in *Prob.C. 1220* (mailed notice; supra, §391) to the persons designated in *Prob.C. 1220*, and the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming the sale, but need not be given to a defaulting purchaser whose consent to the vacation of the confirmation order is filed before the hearing. (*Prob.C. 10351(b)*.)

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5. Sale of Encumbered Property.
a. In General.

14 Witkin Sum. Cal. Law Wills § 706

[§ 706] In General.

(1) *Definitions.* The following definitions apply to the sale of encumbered property under *Prob.C. 10360* et seq.

(a) *Amount secured by the lien* includes interest, costs and charges secured by the lien. (*Prob.C. 10360(a).*)

(b) *Encumbered property* means real or personal property subject to a lien for a secured debt that has been allowed or approved as a valid claim against the estate. (*Prob.C. 10360(b).*)

(c) *Lien* means a mortgage, deed of trust, or other lien. (*Prob.C. 10360(c).*)

(2) *Application of Purchase Money.* The purchase money from the sale of encumbered property is applied in the following order:

(a) Expenses of administration "reasonably related to the administration of the property sold." (*Prob.C. 10361(a)(1).*)

(b) Expenses of the sale. (*Prob.C. 10361(a)(2).*)

(c) The amount secured by the lien if payment and satisfaction are required under the terms of sale. (*Prob.C. 10361(a)(3).*) The Law Revision Commission Comment notes that this provision permits property to be sold subject to a lien, and that such a result might be beneficial to the estate if the terms of existing financing are better than can be obtained at the time of the sale. The application of the purchase money to satisfy the amount secured by the lien must be made without delay. (*Prob.C. 10361(b).*)

(d) Application in the course of administration. (*Prob.C. 10361(a)(4).*)

(3) *Payment to Clerk of Court.* If encumbered property is sold, the purchase money, or as much of the purchase money as is sufficient to pay the secured amount and the expenses of the sale, may be paid to the clerk of the court. When the payment is made, the lien on the property ceases. (*Prob.C. 10362(a).*)

The clerk, "without delay" uses the money to pay the expenses of the sale and to satisfy the secured amount. The clerk "at once" returns any surplus to the personal representative unless the court orders otherwise, for good cause and after notice to the personal representative. (*Prob.C. 10362(b).*)

Subject to *Prob.C. 10362*, the property remains subject to the lien until the purchase money has been actually so applied. (*Prob.C. 10361(b).*)

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b. Expenses of Administration.

14 Witkin Sum. Cal. Law Wills § 707

[§ 707] Expenses of Administration.

For purposes of applying the proceeds of the sale of encumbered property, the expenses of administration may be determined as follows:

(1) *Petition*. At any time before payment is made to satisfy all liens on encumbered property that is sold, the personal representative or an interested party may petition for an order determining the amount of expenses of administration "reasonably related to the administration of the encumbered property." (*Prob.C. 10361.5*.)

(2) *Notice*. The following provisions govern notice of the petition:

(a) At least 30 days before the date of the hearing, the petitioner must cause notice of the hearing and a copy of the petition to be served in the manner provided in *C.C.P. 413.10* et seq. on the personal representative (if not the petitioner), the holder of any mortgage or lien secured by the property, and agents or brokers entitled to compensation from the proceeds of the property. (*Prob.C. 10361.6(a)*.)

(b) Except for persons given notice under *Prob.C. 10361.6(a)*, notice of the hearing and a copy of the petition must be given as provided in *Prob.C. 1220* (mailed notice; supra, §391) to those persons listed in *Prob.C. 1220*, each known heir or devisee whose interest in the estate would be affected by the petition, and the Attorney General, if any portion of the estate is to escheat and the state's interest in the estate would be affected by the petition. (*Prob.C. 10361.6(b)*.)

(c) The time for giving notice under *Prob.C. 10361.6* may not be shortened. (*Prob.C. 10361.6(c)*.)

(d) The petition may be heard as part of a petition to confirm the sale of real or personal property or may be heard separately. If heard as part of a confirmation petition, the notice of hearing required for the confirmation hearing must be given in addition to the notice required under *Prob.C. 10361.6*. (*Prob.C. 10361.5*.)

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c. Sale to Lienholder.

14 Witkin Sum. Cal. Law Wills § 708

[§ 708] Sale to Lienholder.

(1) *Right of Lienholder To Purchase Property.* At a sale of real or personal property subject to a lien, the lienholder may purchase the property, even though no claim for the amount secured by the lien has been or could have been filed, allowed, or approved. (*Prob.C. 10363(a).*)

(2) *Payments.* The following provisions apply unless the property is sold subject to the lien:

(a) *Amount secured by lien allowed or approved.* "If the lienholder becomes the purchaser of the property and the amount secured by the lien on the property is a valid claim against the estate and has been allowed or approved, the receipt of the lienholder for the amount due the lienholder from the proceeds of the sale is a payment pro tanto." (*Prob.C. 10363(b)(1).*)

(b) *Amount secured by lien not allowed or approved.* "If the lienholder becomes the purchaser of the property and no claim for the amount secured by the lien on the property has been filed, allowed, or approved, the court may at the hearing on the petition for confirmation of the sale examine into the validity and enforceability of the lien and the amount secured by the lien, and the court may authorize the personal representative to accept the receipt of the lienholder for the amount secured by the lien as payment pro tanto." (*Prob.C. 10363(b)(2).*)

(c) *Expenses of sale.* "If the lienholder becomes the purchaser of the property and the amount for which the property is purchased is insufficient to pay the expenses of the sale and to discharge the lienholder's lien, whether or not a claim has been filed, allowed, or approved, the lienholder shall pay to the clerk of the court an amount sufficient to cover the expenses of the sale." (*Prob.C. 10363(b)(3).*)

(3) *Construction of Statute.* Nothing permitted by *Prob.C. 10363* may be deemed to be an allowance or approval of a claim based on the lien or the amount secured by the lien. (*Prob.C. 10363(c).*)

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6. Liability of Personal Representative.

14 Witkin Sum. Cal. Law Wills § 709

[§ 709] Liability of Personal Representative.

(1) *Liability for Neglect or Misconduct.* "The personal representative is liable to an interested person for damages suffered by the interested person by reason of the neglect or misconduct of the personal representative in the proceedings in relation to a sale." (*Prob.C. 10380.*) (See *Prob.C. 48* ["interested person" defined].) The Law Revision Commission Comment notes that the personal representative's liability may be enforced against his or her bond or by other means for the enforcement of a judgment, and that the surety on the bond is liable only for the damages under *Prob.C. 10380* up to the limits on the bond.

(2) *Liquidated Damages for Fraudulent Sale.* "In addition to any other damages for which the personal representative is liable," if the personal representative fraudulently sells real property of the estate "contrary to or otherwise than under" the provisions of *Prob.C. 10000* et seq., a person with an estate of inheritance in the property may recover liquidated damages from the personal representative equal to double the fair market value of the property on the date of the sale. (*Prob.C. 10381.*) (On measure of liability for breach of fiduciary duty, see *Prob.C. 9601*, supra, §525.)

(3) *Statute of Limitations on Actions.* An action for recovery of property sold by a personal representative on the claim that the sale is void may be brought by an heir or other person claiming under the decedent within (a) 3 years after settlement of the personal representative's final account, or (b) 3 years after any fraud on which the action is based, whichever is later. (*Prob.C. 10382(a).*) This limitation is not tolled for any reason. (*Prob.C. 10382(b).*)

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H. Accounts.

1. Required Accounts.

a. In General.

14 Witkin Sum. Cal. Law Wills § 710

[§ 710] In General.

(1) *Statutory Development.* Under former Prob.C. 921 et seq., the personal representative had to file an account of administration, showing receipts, expenditures, claims, and the condition of the estate (a) when required by the court, on its own motion or the application of an interested person, (b) when the personal representative's authority was revoked or otherwise ceased, or (c) when the estate was in a proper condition to be closed (final account). In its 1987 Recommendation Relating to Accounts (see 19 Cal. Law Rev. Com. Reports, p. 882), the California Law Revision Commission recommended various changes, which were adopted effective July 1, 1989. (See *Prob.C. 10900* et seq.) A comprehensive statute governing all accounts filed under the Probate Code was effective July 1, 1997. (See *Prob.C. 1060* et seq.; *supra*, §381 et seq.) In conjunction with the enactment of the new statute, *Prob.C. 10900* et seq. were revised. (See generally Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:25 et seq.; Rutter Group, 2 Cal. Practice Guide: Probate §16:91 et seq., Form 16:E et seq.; C.E.B., 2 Decedent Estate Practice, §19.1 et seq.)

(2) *Personal Representative's Authority To File Account.* The personal representative may file an account at any time and must do so when required by *Prob.C. 10950* et seq. (On account where personal representative is unavailable, see *infra*, §711.)

(3) *Court-Ordered Account.* On its own motion or on the motion of an interested person, the court may order an account at any time. (*Prob.C. 10950(a)*.) The court must order an account on the petition of an interested person made more than 1 year after the last account was filed or, if no account has been filed, 1 year after issuance of letters. (*Prob.C. 10950(b)*.) The order must specify the time within which the account must be filed. (*Prob.C. 10950(c)*.)

(4) *Final Account.* When the estate is in a position to be closed, the personal representative must file a final account and a petition for an order for final distribution. (*Prob.C. 10951*.)

(5) *Account Where Authority Is Terminated.* A personal representative who resigns or is removed from office, or whose authority is otherwise terminated, must file an account within 60 days after termination, unless the court extends the time. If the personal representative fails to do so, the court may compel the account under *Prob.C. 11050* et seq. (*infra*, §713). (*Prob.C. 10952*.)

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H. Accounts.

1. Required Accounts.
- b. Where Representative Is Unavailable.

14 Witkin Sum. Cal. Law Wills § 711

[§ 711] Where Representative Is Unavailable.

(1) *Law Revision Commission Recommendation.* The Commission explained its proposal concerning interim accounts as follows: "Where there is a turnover or change in administration, either because the personal representative dies or becomes incapacitated, or because the personal representative resigns or absconds or the authority is otherwise terminated, an account should be required automatically without an interested person having to petition for one. ... The automatic account requirement is subject to waiver by the interested parties." (19 Cal. Law Rev. Com. Reports, p. 882.)

(2) *Definitions.* For purposes of *Prob.C. 10953*, "incapacitated" means lack of capacity to serve as a personal representative. (*Prob.C. 10953(a)(1).*) "Legal representative" means the personal representative of a deceased personal representative or the conservator of the estate of an incapacitated personal representative. (*Prob.C. 10953(a)(2).*)

(3) *Account by Legal Representative.* If a personal representative dies or becomes incapacitated and a legal representative is appointed for the deceased or incapacitated personal representative, the legal representative must file an account within 60 days after appointment, unless the court extends the time. (*Prob.C. 10953(b).*)

(4) *Account by Attorney for Personal Representative.* If a personal representative dies or becomes incapacitated and a legal representative is not appointed for the personal representative, or if the personal representative absconds, the court may compel the attorney for the personal representative or the attorney of record in the estate proceeding to file an account. (*Prob.C. 10953(c).*) (On former statute, see *King v. Chase* (1911) 159 C. 420, 423, 115 P. 207; *Estate of Smith* (1954) 123 C.A.2d 844, 847, 268 P.2d 53.)

(5) *Preparation and Settlement.* The legal representative or attorney must exercise *reasonable diligence* in preparing the account; verification may be made on information and belief; and the court must settle the account as in other cases. (*Prob.C. 10953(d).*)

(6) *Compensation.* The court must allow reasonable compensation for preparing the report, and the amount allowed is a charge against the estate being administered by the personal representative. Legal services for which compensation is allowed include services rendered by a paralegal performing services under the direction and supervision of an attorney. The petition or application for compensation must set forth the hours spent and services performed by the

paralegal. (*Prob.C. 10953(d).*)

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1. Required Accounts.

c. When Account Is Not Required.

14 Witkin Sum. Cal. Law Wills § 712

[§ 712] When Account Is Not Required.

(1) *Conditions.* Notwithstanding any other provision of *Prob.C. 10900* et seq., the personal representative is not required to file an account in two circumstances. An account is not required if either of the following conditions is satisfied as to each person entitled to distribution from the estate:

(a) *Waiver or acknowledgement.* The person has executed and filed a written waiver of account or a written acknowledgment that his or her interest has been satisfied. (*Prob.C. 10954(a)(1)*.) (See C.E.B., 3 Will Drafting 3d, §32.29.)

(b) *Interest adequately provided for.* "Adequate provision has been made for satisfaction in full of the person's interest." This exception does not apply to a residuary devisee or a devisee whose interest is subject to abatement, payment of expenses, or accrual of interest or income. (*Prob.C. 10954(a)(2)*.)

(2) *Exception Where Creditor Petitions for Account.* Notwithstanding *Prob.C. 10954(a)*, a creditor whose interest has not been satisfied may petition for an account under *Prob.C. 10950* (supra, §710). (*Prob.C. 10954(c)(2)*.) The California Law Revision Commission (see 19 Cal. Law Rev. Com. Reports, p. 882) points out that this provision remedies a defect in the former law: by executing waivers, estate beneficiaries could effectively hide the details of administration from interested creditors who would otherwise be entitled to an account. (On former statute, see *Middlecoff v. Superior Court* (1906) 149 C. 94, 97, 84 P. 764 [distribution without accounting, on waiver by sole distributee was valid where no creditors' rights were involved]; *Estate of Schneider* (1979) 95 C.A.3d 55, 61, 156 C.R. 838.)

(3) *Execution of Waiver or Acknowledgment.* *Prob.C. 10954(b)* sets forth the following procedure for executing a waiver or acknowledgment:

(a) *Competent adult.* If the person is a competent adult, execution is by that person. (*Prob.C. 10954(b)(1)*.)

(b) *Minor.* If the person is a minor, execution is by a person authorized to receive money or property of the minor. If execution is by the guardian of the estate of the minor, approval of the court in which the guardianship proceeding is

pending is not required. (*Prob.C. 10954(b)(2).*)

(c) *Conservatee*. If the person is a conservatee, execution is by the conservator. The approval of the court in which the conservatorship proceeding is pending is not required. (*Prob.C. 10954(b)(3).*)

(d) *Trust*. If the distribution is to a trust, execution is by the trustee, if the named trustee's written acceptance of the trust is filed with the court. If the trust is subject to continuing jurisdiction under *Prob.C. 17300* et seq. (13 *Summary* (10th), *Trusts*, §237), approval of the court is not required. (*Prob.C. 10954(b)(4).*)

(e) *Estate*. If the distribution is to an estate, execution is by the personal representative of the estate. The approval of the court in which the estate is being administered is not required. (*Prob.C. 10954(b)(5).*)

(f) *Principal under power of attorney*. If the person has designated an attorney in fact with the power to execute the waiver or acknowledgment, execution is by either the attorney in fact or the person (if adult and competent). (*Prob.C. 10954(b)(7).*)

(g) *Others*. If the person is incapacitated, unborn, unascertained, or a person whose identity or address is unknown, or if distribution is to a class of persons who are not ascertained or are not in being, and a guardian ad litem has been appointed, execution is by the guardian ad litem. (*Prob.C. 10954(b)(6).*)

(4) *Final Report of Administration*. The personal representative must file a final report of administration at the time the final account would otherwise have been required. The report must include the amount of compensation paid or payable to the personal representative and the attorney for the personal representative and must set forth the basis for determining the amount. (*Prob.C. 10954(c)(1).*)

If an accounting is waived, the details of receipts and disbursements need not be listed in the report required under *Prob.C. 10954(c)(1)*, but the report required when an account has been waived must list information required by law, including information about creditors' claims; sales, purchases, or exchanges of assets; changes in the form of assets; assets on hand; whether the estate is solvent; detailed schedules of receipts and gains and losses on sales, where an amount other than the amount of the inventory and appraisal is used for calculating fees or commissions; the costs of administration, if reimbursement is requested; fees and commissions paid or to be paid and the calculation of the fees, and specified information about graduated fees. (C.R.C., Rule 7.550.) (On calculation of fees and commissions, see C.R.C., Rule 7.705, *supra*, §529.)

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1. Required Accounts.

d. Compelling Account.

14 Witkin Sum. Cal. Law Wills § 713

[§ 713] Compelling Account.

(1) *Citation for Failure To Account.* A citation must be issued, served, and returned, requiring a personal representative who does not file a required report to appear and show cause why the personal representative should not be punished for contempt. (*Prob.C. 11051(a).*) A personal representative who purposefully evades personal service of the citation must be removed from office. (*Prob.C. 11051(b).*) (On removal from office, see *Prob.C. 8500*, supra, §459.)

(2) *Contempt or Removal From Office.* Subject to *Prob.C. 11050* et seq., if the personal representative does not file a required report, the court must compel the account by punishment for contempt. (*Prob.C. 11050.*) If the personal representative has been duly cited and does not appear and file a required account, the personal representative may be punished by contempt or removal from office, or both, in the court's discretion. (*Prob.C. 11052.*) (On removal from office for contempt, see *Prob.C. 8505*, supra, §456.)

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2. Contents of Account.

14 Witkin Sum. Cal. Law Wills § 714

[§ 714] Contents of Account.

A comprehensive statute governs all accounts filed with the probate court. (See *Prob.C. 1060* et seq.; supra, §381 et seq.)

(1) *Financial Statement*. A financial statement is required by *Prob.C. 10900(a)*, but the content of the statement is specified by *Prob.C. 1060* et seq.

(2) *Report of Administration*. A report of administration is required by *Prob.C. 10900(a)*, but the content of the report generally is specified by *Prob.C. 1060* et seq. However, the statement of liabilities must give the following information:

(a) An indication whether notice to creditors was given under *Prob.C. 9050* (supra, §614). (*Prob.C. 10900(b)(1)*.)

(b) For claims filed, the date of filing, the name of the claimant, the amount of the claim, and the action taken on the claim. (*Prob.C. 10900(b)(2)*.)

(c) For claims not paid, satisfied, or adequately provided for, a statement for each claim indicating whether the claim is due and the date due, the date of any rejection, whether the creditor has brought an action on the claim, and the identity of any property that is security for the claim. (*Prob.C. 10900(b)(3)*.)

The Law Revision Commission Comment states: "Since the purpose of the report of administration ... is to provide a complete summary of the estate's administration, additional statements may be necessary in order to clarify certain events or circumstances and to permit interested persons to understand the report. In certain instances, the report of administration may include such matters as that cash was invested in interest-bearing accounts or other proper investments (Section 9652). In the case of a final account, the report of administration must include the amount of fees and commissions paid or payable to the personal representative and to the attorney and must set forth the basis for determining the amount. See Section 10954(c)."

(3) *Supporting Documentation*. "On court order, or on request by an interested person filed with the clerk and a copy served on the personal representative, the personal representative shall produce for inspection and audit by the court or interested person the documents specified in the order or request that support an account." (*Prob.C. 10901*.)

(4) *Reliance on Account Provided by Conservator or Guardian.* Where a personal representative receives assets from the conservator or guardian of a decedent, the representative may incorporate by reference any accounting provided by the conservator or guardian for the period after the date of death. The personal representative may rely on the accounting and has no duty to independently investigate or verify the transactions reported in it. (*Prob.C. 10902.*)

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3. Settlement of Account.

a. Notice of Hearing.

Witkin Sum. Cal. Law Wills § 715

[§ 715] Notice of Hearing.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *(New) Filing Fees.* *Govt.C. 70657.5* and *70658* impose filing fees for various transactions under the Probate Code, including transactions involving the estates of decedents. (See Supp., supra, §380E.) Under *Govt.C. 70657.5(b)(2)* and *70658(d)*, added in 2007, these fees may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning the settlement of accounts. (*Govt.C. 70658(d)(3).*)



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3. Settlement of Account.

a. Notice of Hearing.

14 Witkin Sum. Cal. Law Wills § 715

[§ 715] Notice of Hearing.

(1) *To Whom Given.* The personal representative must give notice of the hearing to settle the account as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to (a) each person listed in *Prob.C. 1220*, (b) each known heir or devisee whose interest in the estate is affected by the account, (c) the Attorney General (at the Sacramento office), if any portion of the estate is to escheat to the state and the state's interest is affected by the account, and (d) if the estate is insolvent, each creditor who has filed a claim that has been approved or allowed but is unpaid in whole or in part. (*Prob.C. 11000(a).*)

(2) *Required Statements.* If the petition for approval of the account requests all or part of the compensation of the personal representative or the attorney for the personal representative, the notice of hearing must so state. (*Prob.C. 11000(b).*) If the account is a final account and is filed with a petition for an order for final distribution, the notice must so state. (*Prob.C. 11000(c).*)

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3. Settlement of Account.

b. Contest.

14 *Witkin Sum. Cal. Law Wills* § 716

[§ 716] Contest.

(1) *Who May Contest.* Under *Prob.C. 1043* (supra, §378), an interested person may appear and respond or object to an account. (See *Prob.C. 48* ["interested person" defined].) (On interested persons under former, similar statute, see *Estate of Reinicke* (1941) 44 C.A.2d 271, 273, 112 P.2d 311 [unpaid creditor of distributee with execution lien against estate]; *Estate of Brown* (1938) 24 C.A.2d 573, 574, 75 P.2d 658 [holder of future contingent interest]; *Estate of Harrison* (1951) 103 C.A.2d 12, 15, 228 P.2d 881 [residuary legatee where no assets were left for him; possibility of after-discovered property, though remote, was sufficient]; *Estate of Wilson* (1952) 114 C.A.2d 468, 250 P.2d 266 [person claiming interest adverse to estate may not be heard; claimant had instituted actions to quiet title and declare trust in real property of the estate (substantially all of its assets); claims should be litigated in those actions, and fact that claimant sought accounting or damages in the alternative did not give claimant an interest in the account]; *Estate of McMillin* (1956) 46 C.2d 121, 127, 292 P.2d 881 [tax expert entitled to payment from funds of estate was interested]; *Estate of Hart* (1959) 51 C.2d 819, 825, 337 P.2d 73 [stranger who successfully prosecuted civil action to judgment was person interested as judgment creditor]; 87 A.L.R.2d 1231 [tort claimant].)

In *Estate of Auslender* (1960) 53 C.2d 615, 2 C.R. 769, 349 P.2d 537, H and M were coadministrators. On M's objection, the probate court disallowed certain items in their accounts on the ground that they had fraudulently consented to judgments against the estate. H contended that M, a party to the fraud, was thereby taking advantage of his own wrong. The court answered by pointing to his representative character: "He has had a change of conscience. To hold that an administrator cannot disclose his fraud and object to the accounting of his coadministrator who has also acted fraudulently is absurd and would encourage concealment of fraud and discourage the honest administration of estates. Where an administrator has joined in some misconduct with his coadministrator to the detriment of the estate, no obstacles should be placed in the way of full disclosure of the wrongdoing so as to protect the estate and conserve its assets. Moreover, it must be remembered that the administrator or executor represents the estate and the heirs. The action here was properly brought on their behalf by Morris in his representative capacity." (53 C.2d 627.)

(2) *Matters That May Be Contested.* Under *Prob.C. 11001*, all matters relating to an account may be contested on a showing of cause. (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:45 et seq.) The statute provides the following illustrations:

(a) The validity of an allowed or approved claim not reported in a previous account and not established by judgment. (*Prob.C. 11001(a).*)

(b) The value of property for purposes of distribution. (*Prob.C. 11001(b).*) (On contest of appraisal value, see *Prob.C. 8804*, *supra*, §593.)

(c) Actions by the personal representative not previously authorized or approved, subject to *Prob.C. 10590* (Independent Administration of Estates Act; *infra*, §764). (*Prob.C. 11001(c).*)

(3) *Form of Objection.* No particular form for an objection is provided by statute. It has been held that objections or affirmative statements are sufficient. (See *Estate of McMillin* (1956) 46 C.2d 121, 128, 292 P.2d 881 [document entitled "Objections to Final Account and Petition That Allowance Be Made to Objector"]; *Estate of Pardue* (1943) 57 C.A.2d 918, 920, 135 P.2d 394.)

(4) *Duty To Examine Account in Absence of Objection.* Regardless of failure to object, the probate court has an independent duty to examine the account and disallow any item that is found to be improper. (*Estate of Randall* (1922) 188 C. 329, 225, 205 P. 118.)

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c. Hearing and Determination.

14 Witkin Sum. Cal. Law Wills § 717

[§ 717] Hearing and Determination.

(1) *Hearing*. The court may conduct any hearing necessary to settle the account, and may cite the personal representative to appear for examination. (*Prob.C. 11002(a)*.) The court may make any order necessary to effectuate this provision. (*Prob.C. 11002(c)*.) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:57.)

(2) *Referee*. The court may appoint one or more referees to examine the account and make a report, subject to confirmation by the court. The court may allow reasonable compensation to the referee to be paid out of the estate. (*Prob.C. 11002(b)*.) The court may make any order necessary to effectuate this provision. (*Prob.C. 11002(c)*.)

(3) *Litigation Expenses*. *Prob.C. 11003* governs litigation expenses as follows:

(a) *Contest in bad faith*. If the court determines that the contest was "without reasonable cause and in bad faith," it may award against the contestant the compensation and costs of the personal representative and other expenses and costs of litigation incurred to defend the account, including attorneys' fees. "The amount awarded is a charge against any interest of the contestant in the estate and the contestant is personally liable for any amount that remains unsatisfied." (*Prob.C. 11003(a)*.)

(b) *Opposition in bad faith*. If the court determines that the opposition to the contest was "without reasonable cause and in bad faith," it may award the contestant the costs of the contestant and other expenses and costs of litigation incurred to contest the account, including attorney's fees. "The amount awarded is a charge against the compensation or other interest of the personal representative in the estate and the personal representative is liable personally and on the bond, if any, for any amount that remains unsatisfied." (*Prob.C. 11003(b)*.) (See *Estate of Bonaccorsi* (1999) 69 C.A.4th 462, 473, 81 C.R.2d 604 [where administrator's opposition to contest resulted in reversal of substantial portion of surcharge (\$ 50,000 out of \$ 134,000), \$ 50,000 award as attorneys' fees for bad faith opposition was improper].) The California Law Revision Commission (see 19 Cal. Law Rev. Com. Reports, p. 883) notes that under prior law a bad faith contestant could be held liable for the personal representative's expenses in defending the account, and that this provision was added to deal with the situation "where the personal representative acts unreasonably and in bad faith in resisting a contest of an account improperly prepared or presented, causing interested persons unwarranted trouble and expense."

(4) *Claims Not Properly Filed.* If a debt has been paid within the time prescribed in *Prob.C. 9154* (supra, §639) without a claim having been filed and established in the manner prescribed by statute, the court, in settling the account, must allow the amount paid if (a) the debt was justly due and paid in good faith, (b) the amount paid did not exceed the amount reasonably necessary to satisfy the indebtedness, and (c) the estate is solvent. (*Prob.C. 11005.*) (On former statute, see *Estate of Sturm* (1988) 201 C.A.3d 14, 18, 246 C.R. 852 [where debt has been recognized by part payment within 4-month period and balance meets statutory requirements, court may approve payments].)

(5) *Expenses of Administration.* The personal representative must be allowed "all necessary expenses" in the administration of the estate, including expenses in the care, management, preservation, and settlement of the estate. (*Prob.C. 11004*, supra, §527.)

(6) *Tax Certificate for Distribution to Nonresidents.* If assets are to be distributed to nonresident beneficiaries, the final account may not be allowed until the personal representative has filed a certificate from the Franchise Tax Board showing that income taxes on the estate and the decedent have been paid or secured. However, this requirement applies only where the value of the estate and the value of property distributed to nonresidents exceed amounts prescribed by the Franchise Tax Board. (Rev.C. 19513.) Regulations adopted by the Franchise Tax Board impose the requirement where the value of the estate exceed \$ 1 million and the value of assets distributed to nonresidents exceed \$ 250,000. (See 18 Cal. Code Reg. §19513.) The certification request is made on Franchise Tax Board Form 3571. If a final account is waived, the final report may not be approved until the certificate has been filed. (C.R.C., Rule 7.551.)

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H. Accounts.

3. Settlement of Account.

d. Effect of Order Settling Account.

14 Witkin Sum. Cal. Law Wills § 718

[§ 718] Effect of Order Settling Account.

(1) *Former Statute and Case Law.* Under former Prob.C. 931, a final order settling an account, whether current or final, was conclusive as to all matters necessarily involved, against all persons interested in the estate and not under a disability. (See *Security-First Nat. Bank of Los Angeles v. Superior Court* (1934) 1 C.2d 749, 752, 37 P.2d 69 [accounts of testamentary trustee]; *Carr v. Bank of America* (1938) 11 C.2d 366, 371, 79 P.2d 1096 [conclusive as to propriety of agreed plan of distribution, as against subsequent claim of negligence and fraud]; *Perna v. Bank of America* (1938) 28 C.A.2d 372, 376, 82 P.2d 605 [conclusive as against claim of fraud in handling assets]; *Estate of Wear* (1942) 20 C.2d 124, 127, 124 P.2d 12 [conclusive as to respective interests of representative and estate in note and mortgage].) It was held, however, that where minors actually appeared and contested the account, the order of settlement was res judicata, and precluded them from attacking it later on the same grounds, in an action against the executor. (*Giavocchini v. Bank of America* (1940) 39 C.A.2d 444, 445, 103 P.2d 603.) And the decree of distribution terminated any further right to attack the account, even by persons under disability, except for extrinsic fraud. (*Carr v. Bank of America*, *supra* [minor distributee not represented by guardian].) The order was not conclusive as to items not included or matters not actually passed upon. (*Estate of De Laveaga* (1958) 50 C.2d 480, 487, 326 P.2d 129.)

(2) *Current Statute.* When an order concerning the administration of a decedent's estate becomes final, the personal representative and the sureties are released from all claims of any person affected by the order based on any act or omission "directly" authorized, approved, or confirmed in the order. An order settling an account, whether an interim or final account, is an order for purposes of this provision. (Prob.C. 7250(a); *supra*, §469.) (On exception where order is obtained by fraud or misrepresentation, see Prob.C. 7250(c); *supra*, §469.)

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I. Distribution of Estate.

1. Determination of Persons Entitled to Distribution.
 - a. Proceeding To Determine Heirship.

Witkin Sum. Cal. Law Wills § 719

[§ 719] Proceeding To Determine Heirship.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Nature of Proceeding.*

Posthumously conceived child: See 36 McGeorge L. Rev. 926 [inheritance rights of posthumously conceived children].



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I. Distribution of Estate.

1. Determination of Persons Entitled to Distribution.
 - a. Proceeding To Determine Heirship.

14 Witkin Sum. Cal. Law Wills § 719

[§ 719] Proceeding To Determine Heirship.

(1) *Statutory Development.* Former Prob.C. 1080 et seq. created a special advisory proceeding in probate to determine heirship, with the conflicting claimants regarded in much the same light as if engaged in a civil action. (See *O'Day v. Superior Court* (1941) 18 C.2d 540, 543, 116 P.2d 621; *Bales v. Superior Court* (1942) 21 C.2d 17, 22, 129 P.2d 685; *Estate of Wise* (1949) 34 C.2d 376, 383, 210 P.2d 497; *Estate of Marshall* (1953) 120 C.A.2d 747, 751, 262 P.2d 42; *Estate of Neubauer* (1958) 49 C.2d 740, 747, 321 P.2d 741 [in heirship proceeding, court is bound by prior determination of what constitutes will and its validity, but has jurisdiction to interpret that will]; *Estate of Neilson* (1962) 57 C.2d 733, 748, 22 C.R. 1, 371 P.2d 745 [statute authorized recovery of costs but not interest]; *Estate of Stehr* (1986) 181 C.A.3d 1131, 1134, 226 C.R. 806 [statutory time for filing petition (before filing of petition for final distribution) held not jurisdictional].)

In its 1987 Recommendation Relating to Distribution and Discharge (see 19 Cal. Law Rev. Com. Reports, p. 958), the California Law Revision Commission explained why it proposed to eliminate the special proceeding: "The procedure includes a jury trial and special evidentiary rules. There is nothing so unique about the determination made in such a proceeding that requires rules that differ from the general rules of civil practice that govern all other probate procedures, or that precludes the court from making the determination. The proposed law provides for court determination of persons entitled to distribution and eliminates the special evidentiary rules found in existing law."

Former Prob.C. 1080 et seq. were repealed in 1988, and statutes authorizing a similar proceeding to determine those persons entitled to distribution of a probated estate were enacted. (See *Prob.C. 11700* et seq., *infra*, §720.) A separate heirship proceeding was restored in 1992 by the enactment of *Prob.C. 248* et seq.

(2) *Nature of Proceeding.* Where title to property or an interest in property vests (other than by the laws of succession) in the "heirs, heirs of the body, issue, or children" of a person without other description or the means of identifying the persons embraced in the description, any person interested in the property or his or her successor in interest may petition the superior court in the county in which any part of the property is located for a decree establishing the identity of the persons embraced in the description. For this purpose, interested persons include heirs, issue, children, and their personal representatives. (*Prob.C. 248*.) (See 68 Proof of Facts 3d 93 [Determination of Heirship].) (On procedure for distribution of decedent's property to child posthumously conceived using decedent's

genetic material, see *Prob.C. 249.5 et seq.*)

(3) *Form and Content of Petition.* The petition must be verified and must set forth briefly (a) the "derrainment of title of petitioner," (b) a description of the property, (c) the names, ages, and residences of the persons whose identity is sought to be determined, to the extent known, and (d) whether any of the persons is dead. (*Prob.C. 248.*) (See Rutter Group, 1 Cal. Practice Guide: Probate, Form 2:C.1.)

(4) *Notice.* The clerk sets the petition for hearing and gives notice as provided in *Prob.C. 1230* (posting; see *supra*, §394) and the petitioner causes notice to be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). Proof of notice is governed by *Prob.C. 1260* (*supra*, §397). (*Prob.C. 248.5.*)

(5) *Response and Hearing.* Any person interested in the property may answer the petition and deny any matter. The court hears the proofs offered by the petitioner and any contesting person. (*Prob.C. 249.*)

(6) *Decree.* The court enters a decree conformable to the proofs offered at the hearing. The decree is prima facie evidence of the facts determined at the hearing and is conclusive in favor of those "acting thereon in good faith without notice of any conflicting interest." (*Prob.C. 249.*) (On conclusiveness of decree under prior statute, see *Estate of Roberts* (1945) 27 C.2d 70, 74, 162 P.2d 461 [conclusive determination of the right of testator's widow to take both her share of community property and under will]; *Estate of Wise* (1949) 34 C.2d 376, 385, 210 P.2d 497 [settles rights of all persons who could have participated as claimants]; *Estate of Rawnsley* (1951) 106 C.A.2d 500, 503, 235 P.2d 223 [conclusive determination that property was decedent's separate property and petitioner was entitled to one-third as pretermitted heir]; *Woods v. Security-First Nat. Bank of Los Angeles* (1956) 46 C.2d 697, 704, 299 P.2d 657 [determination that surviving husband was entitled to one-half of wife's property]; *Estate of Radovich* (1957) 48 C.2d 116, 120, 308 P.2d 14.)

(7) *Appeal.* The order is appealable. (*Prob.C. 1303(f).*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Nature of Proceeding.*

Posthumously conceived child: See 36 McGeorge L. Rev. 926 [inheritance rights of posthumously conceived children].



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I. Distribution of Estate.

1. Determination of Persons Entitled to Distribution.

b. Proceeding To Determine Distribution.

14 Witkin Sum. Cal. Law Wills § 720

[§ 720] Proceeding To Determine Distribution.

(1) *Petition*. "At any time after letters are first issued to a general personal representative and before an order for final distribution is made, the personal representative, or any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate, may file a petition for a court determination of the persons entitled to distribution of the decedent's estate. The petition shall include a statement of the basis for the petitioner's claim." (*Prob.C. 11700.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §19:41; Rutter Group, Cal. Practice Guide: Probate §15:386 et seq., Forms 15:H, 15:I.)

The Law Revision Commission Comment notes that (a) the time limit for filing the petition is jurisdictional; and (b) a special administrator granted the powers, duties, and obligations of a general personal representative may not file a petition if a will contest is pending.

(2) *Notice of Hearing*. Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; supra, §391) to all of the following persons:

(a) Each person listed in *Prob.C. 1220*. (*Prob.C. 11701(a).*)

(b) Each known heir or devisee whose interest in the estate would be affected by the petition. (*Prob.C. 11701(b)*, (c).)

(c) The Attorney General (at the Sacramento office), if any portion of the estate is to escheat and the state's interest in the estate would be affected by the petition. (*Prob.C. 11701(d).*)

(3) *Responsive Pleadings*. An interested person may appear and, at or before the hearing, file a written statement of interest in the estate. The statement may be in support of, or in opposition to, the petition. No other pleadings are necessary and the written statement of each claimant is deemed denied by each of the other claimants to the extent their written statements conflict. (*Prob.C. 11702(a).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §19:42.)

(4) *Failure To Respond*. Failing to timely file a written statement has the following consequences:

(a) "The case is at issue notwithstanding the failure and the case may proceed on the petition and written statements filed by the time of the hearing, and no further pleadings by others persons are necessary." (*Prob.C. 11702(b)(1).*)

(b) "The person may not participate further in the proceeding for determination of persons entitled to distribution, but the person's interest in the estate is not otherwise affected." (*Prob.C. 11702(b)(2).*)

(c) "The person is bound by the decision in the proceeding." (*Prob.C. 11702(b)(3).*)

(5) *Evidence*. The court must consider as evidence in the proceeding any statement in a timely petition filed under *Prob.C. 11700* and any statement of interest filed under *Prob.C. 11702*. (*Prob.C. 11704(a).*)

(6) *Participation by Representative*. The personal representative may file papers and otherwise participate in the proceeding as a party to assist the court. (*Prob.C. 11704(b).*)

(7) *Attorney General as Party*. For purposes of *Prob.C. 11700* et seq., the Attorney General is deemed a person entitled to distribution if the estate involves or may involve (a) a charitable trust without a designated trustee that may lawfully accept the trust, (b) a devise for a charitable purpose without an identified beneficiary, or (c) an escheat to the State of California. (*Prob.C. 11703.*)

(8) *Order*. The court must make an order that determines the persons entitled to distribution and specifies their shares. (*Prob.C. 11705(a).*) When the order becomes final, it is binding and conclusive as to the rights of all interested persons. (*Prob.C. 11705(b).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §19:43.) (See *Estate of Stoddart* (2004) 115 C.A.4th 1118, 1125, 9 C.R.3d 770 [order is appealable].)

West's Key Number Digest, Executors and Administrators k.314(11)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Distribution of Estate.

2. Order for Distribution.

a. In General.

14 Witkin Sum. Cal. Law Wills § 721

[§ 721] In General.

(1) *Petition for Distribution.* The personal representative or any interested person may petition the court for an order for preliminary or final distribution of the decedent's estate to the persons entitled to distribution. (*Prob.C. 11600.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:13 et seq.; on requirements for description of property in petition, see *infra*, §731.)

(2) *Notice of Hearing.* Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to all of the following persons:

- (a) Each person listed in *Prob.C. 1220*. (*Prob.C. 11601(a).*)
- (b) Each known heir or devisee whose interest in the estate would be affected by the petition. (*Prob.C. 11601(b)*, (c).)
- (c) The Attorney General (at the Sacramento office), if any portion of the estate is to escheat and the state's interest in the estate would be affected by the petition. (*Prob.C. 11601(d).*)
- (d) The controller, if property is to be distributed to the state because there is no known beneficiary or to a beneficiary whose whereabouts is unknown. A copy of the latest account filed with the court must be served on the controller along with the notice. (*Prob.C. 11601(e).*) (On distribution to state, see *infra*, §737.)

(3) *Opposition.* The personal representative or any interested person may oppose the petition. (*Prob.C. 11602.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:23.)

(4) *Order.* If the court determines that the requirements for distribution are satisfied, it orders distribution of all or part of the decedent's estate to those entitled to it. (*Prob.C. 11603(a).*) The order must (a) name the distributees and the share to which each is entitled, and (b) provide that property subject to a limitation or condition (including an option granted under *Prob.C. 9960* et seq., *supra*, §497) is distributed subject to the limitation or condition. (*Prob.C. 11603(b).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:24.)

(5) *Entry*. The order for distribution must be entered at length in the judgment book or other permanent record of the court. (*Prob.C. 1048(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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- b. Where Distributee Cannot Be Located.

14 Witkin Sum. Cal. Law Wills § 722

[§ 722] Where Distributee Cannot Be Located.

Prob.C. 11603(c) provides for alternate distribution where a named distributee cannot be located:

(1) If the whereabouts of a named distributee is unknown, the order for distribution must provide for alternate distributees, indicating the share to which each is entitled.

(2) The alternate distributees are those persons, "to the extent known or reasonably ascertainable," who would be entitled to the distribution if the named distributee had predeceased the decedent. In the case of a devise for a charitable purpose, the alternate distributee is determined under the law of *cy pres*.

(3) If the named distributee does not claim the distribution within 5 years of the date of the order, the named distributee is deemed to have predeceased the decedent and the alternate distributees are entitled to the distribution.

The Law Revision Commission Comment makes the following points:

(a) The personal representative may deposit the property with the county treasurer under *Prob.C. 11851*. A court order is required for the deposit of personal property, but not for the deposit of money. A claim for property or money on deposit is made by a petition under *Prob.C. 11854*. (On deposit and claim, see *infra*, §736.)

(b) "In the case of a devise for a charitable purpose without a designated trustee or identified beneficiary, the Attorney General should ensure that there is an appropriate alternate charitable distribution."

(c) Where a named distributee cannot be located, potential alternate distributees are entitled to notice under *Prob.C. 11601* (*supra*, §721). The personal representative or a person claiming to be an alternate distributee may petition under *Prob.C. 11700 et seq.* (*supra*, §720) for a determination of those entitled to distribution.

SUPPLEMENT: [This section is current through the latest supplement]



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- c. Distribution to Person Other Than Beneficiary.
 1. In General.

Witkin Sum. Cal. Law Wills § 723

[§ 723] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *(New) Restrictions on Agreement With Transferee for Value.* *Prob.C. 11604.5*, added in 2005, imposes further restrictions on distributions to transferees for value, i.e., persons who purchase the interests of beneficiaries for consideration under written agreements and, directly or indirectly, regularly engage in the purchase of beneficial interests in estates for consideration. (*Prob.C. 11604.5(a)*, (b); on excluded persons and transactions, see *Prob.C. 11604.5(c)*; on requirements for effective agreement, see *Prob.C. 11604.5(d)*, (e); on provisions prohibited in agreement, see *Prob.C. 11604.5(f)*; on court review and order, see *Prob.C. 11604.5(g)*, (h).)



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 1. In General.

14 Witkin Sum. Cal. Law Wills § 723

[§ 723] In General.

(1) *Nature of Statute.* A distribution may be made directly to the assignee or transferee of an heir or devisee entitled to a distribution. In this situation, a special statute (former Prob.C. 1020; current *Prob.C. 11604*) authorizes an inquiry into the circumstances of the transaction. The statute was primarily designed to provide for supervision of assignments to heir hunters, but it has been applied to the review of the consideration for any agreement assigning an interest in an estate, and may be used to supervise all types of settlements in estates, including those among rival claimants and heirs. (See *Estate of Freeman* (1965) 238 C.A.2d 486, 489, 48 C.R. 1.) The statute does not, however, validate an heir-hunting contract that violates public policy and is therefore illegal. (See *Estate of Butler* (1947) 29 C.2d 644, 647, 177 P.2d 16, 1 Summary (10th), *Contracts*, §637.)

(2) *Scope.* *Prob.C. 11604* applies where distribution is made to (a) the transferee of a beneficiary, or (b) any person other than a beneficiary under an agreement, request, or instruction of a beneficiary or a beneficiary's attorney in fact. (*Prob.C. 11604(a)*.)

(3) *Inquiry into Transaction.* "The court on its own motion, or on motion of the personal representative or other interested person or of the public administrator, may inquire into the circumstances surrounding the execution of, and the consideration for, the transfer, agreement, request, or instructions, and the amount of any fees, charges, or consideration paid or agreed to be paid by the beneficiary." (*Prob.C. 11604(b)*.) (On inquiry under former statute, see *Estate of Lund* (1944) 65 C.A.2d 151, 155, 150 P.2d 211; *Estate of Cohen* (1944) 66 C.A.2d 450, 456, 152 P.2d 485; *Estate of Cazaurang* (1946) 75 C.A.2d 217, 222, 170 P.2d 694 [leaving undecided question whether assignee might bring independent action against assignor if court refused to recognize assignment]; *Estate of Stanley* (1949) 34 C.2d 311, 318, 209 P.2d 941; *Burchell v. Strube* (1955) 43 C.2d 828, 835, 279 P.2d 1 [reduction of assigned interest from 40% to 10%; order binding on parties in subsequent proceedings]; *Estate of Ramsey* (1951) 107 C.A.2d 372, 375, 237 P.2d 20; cf. *Estate of Kerr* (1966) 63 C.2d 875, 878, 48 C.R. 707, 409 P.2d 931 [no inquiry requested by heir, 50% fee award affirmed]; *Estate of Muhammad* (1971) 16 C.A.3d 726, 733, 94 C.R. 856 [court cannot direct distribution to assignee of beneficiary of testamentary trust]; *Estate of Cook* (1976) 64 C.A.3d 852, 859, 861, 135 C.R. 96 [order appealable]; *Estate of Boyd* (1979) 98 C.A.3d 125, 135, 159 C.R. 298 [court may determine reasonableness as of date assignment was made].)

(4) *Burden of Proof*. In *Estate of Lynch* (1978) 83 C.A.3d 296, 147 C.R. 861, 14 heirs made assignments to an heir hunter, and none challenged the agreements. The Los Angeles Probate Court, pursuant to its Policy Memorandum 13.11, ordered the heirs to file copies of the assignments and affidavits concerning the circumstances of the agreement, which they did. The Public Administrator then moved for an inquiry, but at the hearing he took the position that the burden of producing evidence and the burden of proof were on the assignee, and he offered no evidence on the circumstances of the transactions. He also contended that his function was merely to initiate the inquiry, and that it was the duty of the court to conduct it. The judge stated that he would not assume this role, that the burden was on the party challenging the agreements, and that the burden had not been met. He then issued an order approving the assignments. *Held*, affirmed. The statute gives discretion to the probate judge to inquire into the circumstances; it does not impose a duty to conduct a full hearing on every assignment. "The court may require from the moving party some tangible evidence of irregularity or illegality before the court would be willing to proceed with a full inquiry. Alternately, the court may regard the assignment as questionable to begin with and may therefore place the initial burden of production on the heir hunter." (83 C.A.3d 301.)

(5) *Notice of Hearing*. Notice of the hearing on the motion must be served on the beneficiary and on the transferee or potential distributee at least 15 days before the hearing in the manner provided by C.C.P. 415.10 (personal delivery; see 3 Cal. Proc. (4th), Actions, §924) or C.C.P. 415.30 (service by mail; see 3 Cal. Proc. (4th), Actions, §930), as the court may direct. (Prob.C. 11604(d).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Statute*. See *Estate of Bennett* (2008) 163 C.A.4th 1303, 1311, 78 C.R.3d 435 [probate court's statutory authority is not limited to distribution of estate; court may set aside settlement and assignment of interest in estate]; *Estate of Molino* (2008) 165 C.A.4th 913, 923, 81 C.R.3d 512, citing the text [heir-hunting agreement that authorized heir hunter to hire counsel and control litigation was void as against public policy]. (5) *Notice of Hearing. Personal Delivery*:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §1008.

Service by mail:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §1015 et seq.

(6) *(New) Restrictions on Agreement With Transferee for Value*. Prob.C. 11604.5, added in 2005, imposes further restrictions on distributions to transferees for value, i.e., persons who purchase the interests of beneficiaries for consideration under written agreements and, directly or indirectly, regularly engage in the purchase of beneficial interests in estates for consideration. (Prob.C. 11604.5(a), (b); on excluded persons and transactions, see Prob.C. 11604.5(c); on requirements for effective agreement, see Prob.C. 11604.5(d), (e); on provisions prohibited in agreement, see Prob.C. 11604.5(f); on court review and order, see Prob.C. 11604.5(g), (h).)



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- c. Distribution to Person Other Than Beneficiary.
2. Order.

14 Witkin Sum. Cal. Law Wills § 724

[§ 724] Order.

(1) *Statutory Basis for Order.* The court may refuse to order distribution or may order distribution on any terms it deems "just and equitable" if it finds either (a) the fees, charges, or consideration paid or to be paid by a beneficiary are "grossly unreasonable," or (b) the transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence. (*Prob.C. 11604(c).*) (See *Estate of Wright (2001) 90 C.A.4th 228, 238, 108 C.R.2d 572* [upholding heir's assignment of 35% of inheritance to heir hunter in absence of evidence of fraud, duress, or undue influence].)

(2) *Revision of Agreement.* In *Estate of Freeman (1965) 238 C.A.2d 486, 48 C.R. 1*, decedent left his residuary estate worth \$ 300,000 to M, a friend, and a legacy to T of all "books, curios, tennis prizes and other personal property and effects not otherwise disposed of." M predeceased the testator, and, because he was not kin, the residuary gift lapsed. The probate court properly found that T's legacy only covered tangible effects of slight value, not the intangible securities, hence that F, the sole heir at law, was entitled to the bulk of the residue. However, F had already made a compromise agreement with T to share their interests on the basis of 40% to F and 60% to T. After the order holding F entitled to the entire residue, F filed a motion to set aside the agreement. The probate court found the consideration grossly unreasonable, and authorized "just and equitable distribution": 80% to F and 20% to T. *Held*, on T's appeal, affirmed. F, by the agreement, gave up 60% of a \$ 300,000 estate for a claim that had only nuisance value, and received only a 40% interest in books and curios of negligible value. "We think this peppercorn came at too high a price." (*238 C.A.2d 491.*)

In *Estate of Plum (1967) 255 C.A.2d 357, 63 C.R. 241*, the elderly husband of an intestate decedent was induced by the attorney for decedent's children by a previous marriage to sign a renunciation of his inheritance rights for a consideration of 15% of the total estate. If it was community property, as he contended, he was entitled to all; if it was her separate property, he was entitled to one-third. Hence, the consideration was unrealistic, and the probate judge erred in making no inquiry. (*255 C.A.2d 359, 362.*)

In *Estate of Browne (1969) 2 C.A.3d 406, 413, 82 C.R. 705*, the court refused to order distribution in accordance with the heir's contingent fee agreement with her attorney or to modify the percentage, but instead substituted a flat fee.

(3) *Rescission of Agreement.* In *Estate of Peterson* (1968) 259 C.A.2d 492, 66 C.R. 629, decedent made her will in December, 1963, and died less than 6 months later. She left 90% of a \$ 100,000 estate to Foundation, a charity. Her husband contested the will on the ground of incompetency, but agreed to a settlement of \$ 5,000. Then an heir hunter discovered decedent's forgotten half sister, who successfully opposed distribution on the ground of violation of former Prob.C. 41 (limiting recent gifts to charity). Thereafter, the husband sought to rescind his settlement agreement on the ground of mistake--unawareness of the applicability of the former statute, known to Foundation and its attorneys, and the grossly inadequate consideration. The probate judge held the gift to Foundation void as to all over one-third, and ordered distribution of one-third each to the Foundation, the husband, and the half sister. *Held*, affirmed.

(a) The consideration for the settlement agreement was grossly inadequate, for the husband, at the time it was made (before the half sister was discovered), was entitled to two-thirds of a \$ 100,000 estate. (259 C.A.2d 505.)

(b) The husband was entitled to rescind the agreement and raise the objection on the ground of mistake of law of which the opposing party was aware. (C.C. 1578; see 1 *Summary* (10th), *Contracts*, §272.) The executor's attorney was the agent of Foundation, and Foundation's attorneys were aware of the mistake of the husband's counsel in overlooking the statute. Because they intended to obtain a transfer of his rights, they were under a duty to inform him of his right to challenge. (259 C.A.2d 505.)

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2. Order for Distribution.

c. Distribution to Person Other Than Beneficiary.

3. No Lien on Real Property Before Distribution.

14 Witkin Sum. Cal. Law Wills § 725

[§ 725] No Lien on Real Property Before Distribution.

An agreement to create a lien on after-acquired property attaches at the time the party agreeing to create the lien acquires an interest in the property. (C.C. 2883(a).) For this purpose, an agreement by the beneficiary of an estate subject to probate administration to create a lien on undistributed real property in the estate does not create a lien "unless and until" the property is distributed to that beneficiary. Any expectancy of a lien under the agreement is extinguished when an order confirming the sale of the property under *Prob.C. 10313* (supra, §697) and a duly executed deed are recorded. (C.C. 2883(b).) (See 4 *Summary* (10th), *Security Transactions in Real Property*, §34.)

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2. Order for Distribution.
- d. Conclusiveness of Order.
1. In General.

14 Witkin Sum. Cal. Law Wills § 726

[§ 726] In General.

(1) *Statutory Basis.* Under former Prob.C. 1021, an order or decree of distribution, when it became final, was conclusive "as to the rights of heirs, devisees and legatees." (See *Estate of Scrimger* (1922) 188 C. 158, 164, 206 P. 65; *Federal Farm Mortg. Corp. v. Sandberg* (1950) 35 C.2d 1, 4, 215 P.2d 721.) Under Prob.C. 11605, an order under Prob.C. 11600 et seq., when it becomes final, "binds and is conclusive as to the rights of all interested persons." Thus, decisions under former Prob.C. 1021 remain relevant.

(2) *Issues Determined.* The order is a final determination of the persons who constitute the heirs, devisees, or other beneficiaries (*Whittingham v. California Trust Co.* (1931) 214 C. 128, 134, 4 P.2d 142), and of the property or shares they take (*Lord v. Atchison* (1939) 12 C.2d 681, 685, 87 P.2d 346; *McLellan v. McLellan* (1941) 17 C.2d 552, 554, 110 P.2d 1034). (See *Carr v. Bank of America* (1938) 11 C.2d 366, 374, 79 P.2d 1096 [implied determination of propriety of method of distribution, negating possible charges of fraud or mismanagement]; *Estate of Madsen* (1939) 31 C.A.2d 240, 243, 87 P.2d 903 [determination of ownership of property as between executor and estate]; *Dabney v. Dabney* (1942) 54 C.A.2d 695, 701, 129 P.2d 470 [implied determination that contingent creditor was not entitled to lien on property distributed]; *Estate of Cecala* (1951) 104 C.A.2d 526, 531, 232 P.2d 48 [conclusive on election of widow to waive community property and homestead rights and take under will]; *Bank of America v. Department of Mental Hygiene* (1966) 246 C.A.2d 578, 582, 54 C.R. 899 [validity of state's claim for care of mentally ill person, even though statute on which claim was based was later held unconstitutional].)

(3) *Validity and Effect of Testamentary Trust.* Beneficiaries of a testamentary trust are within the group of persons concluded by the terms of the decree. (*Estate of Buckhantz* (1958) 159 C.A.2d 635, 642, 324 P.2d 317; *Estate of Callnon* (1969) 70 C.2d 150, 156, 74 C.R. 250, 449 P.2d 186.)

In *Estate of Loring* (1946) 29 C.2d 423, 431, 175 P.2d 524, a will left money in trust to pay bequests, within 5 years, to an Iowa town, a charity, and certain heirs. The terms of this testamentary trust were incorporated into the decree of final distribution, but in a few years the value of the assets shrank. The heirs, as beneficiaries of the trust, attacked the right of the town to inherit and challenged the charitable bequests under former Prob.C. 41 (limiting recent gifts to charity). *Held*, the decree of distribution was conclusive as to both matters. (29 C.2d 427.) The beneficiaries are

to be treated as "legatees or devisees" within the meaning of this rule, and not as third parties such as creditors, assignees, or beneficiaries of a constructive trust. "Whatever be the meaning of the word 'heirs, devisees and legatees' in other parts of the code, ... they were intended in section 1021 to cover beneficiaries under a testamentary trust as well as all other persons who may have acquired rights to the property of a decedent under his will or under the rules of intestate succession." (29 C.2d 431.)

In *Wells Fargo Bank v. Superior Court* (1948) 32 C.2d 1, 193 P.2d 721, the testator bequeathed property to the trustee of an existing inter vivos trust. *Held*, the question whether the will augmented the corpus of the existing trust or created a new testamentary trust was concluded by the decree. (32 C.2d 8.)

In *Estate of Bodger* (1955) 130 C.A.2d 416, 279 P.2d 61, a decree carried over a provision from the will specifying the amount of compensation for a testamentary trustee. *Held*, the court had no power to disregard this and award a lesser sum. (130 C.A.2d 419.)

In *Estate of Nash* (1955) 132 C.A.2d 233, 282 P.2d 184, the decree determined that the testator's widow had waived community property rights and elected to take a life interest under a testamentary trust. *Held*, this was conclusive against her heir who, after her death, claimed a share in the former community property. (132 C.A.2d 240.)

(4) *Matters Not Affected by Decree*. The decree is not conclusive as to the following, among other matters:

(a) Rights of third persons whose claims are antagonistic to the decedent and the estate; the Probate Court formerly had no jurisdiction to determine these claims. (*Williams v. Williams* (1915) 170 C. 625, 628, 151 P. 10 [surviving husband's claim to declared homestead vesting in him at death of decedent wife]; *Shaw v. Palmer* (1924) 65 C.A. 441, 446, 224 P. 106 [surviving husband's claim that certain stock distributed as part of deceased wife's estate was his separate property]; *Estate of Cropper* (1947) 83 C.A.2d 105, 108, 187 P.2d 780 [decree of preliminary distribution; claimant under alleged agreement of decedent to make will in her favor]; *Shelton v. Vance* (1951) 106 C.A.2d 194, 197, 234 P.2d 1012; *Estate of Cornitius* (1957) 154 C.A.2d 422, 426, 316 P.2d 438.)

(b) Rights of third persons with claims against individual heirs, devisees, or legatees. (*Rogers v. Schlotterback* (1914) 167 C. 35, 51, 138 P. 728; *Noble v. Beach* (1942) 21 C.2d 91, 130 P.2d 426.)

(c) A determination that there were no heirs at law and that the property should escheat. The statute permits heirs to proceed later to recover the property. (*Estate of Williams* (1940) 37 C.A.2d 181, 187, 99 P.2d 349.)

(d) Rights under another will. The decree is final as to rights under the will probated, but does not bar subsequent probate of a different will. (*Estate of Mitchell* (1931) 115 C.A. 348, 351, 1 P.2d 536; see 25 A.L.R.2d 657 [judgment denying validity of will for undue influence, lack of capacity, etc. as res judicata on validity of another instrument].)

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SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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XI. ESTATE ADMINISTRATION

- I. Distribution of Estate.
 2. Order for Distribution.
 - d. Conclusiveness of Order.
2. Conflict Between Order and Will.

14 Witkin Sum. Cal. Law Wills § 727

[§ 727] Conflict Between Order and Will.

(1) *When Order Supersedes Will.* At the time of distribution, the court must construe the will so as to frame the order in accordance with the intention of the testator. When it has done so, the order supersedes the will, and is a conclusive determination of its effect. Hence, where the court has jurisdiction and there is no extrinsic fraud or mistake, the will cannot be used to impeach the order, no matter how erroneous the interpretation may appear to be. (*Miller v. Pitman* (1919) 180 C. 540, 544, 182 P. 50; *Estate of Easter* (1944) 24 C.2d 191, 194, 148 P.2d 601; *Mitchell v. Bagot* (1941) 48 C.A.2d 281, 285, 119 P.2d 758; *Estate of Gardiner* (1941) 45 C.A.2d 559, 564, 114 P.2d 643; *Society of Calif. Pioneers v. McElroy* (1944) 63 C.A.2d 332, 340, 146 P.2d 962; see 29 Cal. L. Rev. 438; 32 Cal. L. Rev. 320.)

(2) *Exceptions.* Obvious exceptions to the rule prohibiting resort to the will are as follows:

(a) *Provisions of Will Incorporated.* Where the will is incorporated by reference into the order. (*Horton v. Winbigler* (1917) 175 C. 149, 159, 165 P. 423 [incorporation of will and agreement between heirs for method of distribution]; *In re Ewer* (1918) 177 C. 660, 663, 171 P. 683; *Estate of Lockhart* (1937) 21 C.A.2d 574, 578, 69 P.2d 1001; *Clark v. Capital Nat. Bank of Sacramento* (1949) 91 C.A.2d 865, 869, 206 P.2d 16; *Bank of America v. Hennelly* (1951) 102 C.A.2d 750, 753, 228 P.2d 76; *Estate of Cooper* (1969) 274 C.A.2d 70, 77, 78 C.R. 740 [decree ordered distribution to widow "according to the provisions of the last will"; hence, though it appeared to give her fee title, reference to will supported court's interpretation of gift of life estate].) However, even though incorporated, provisions of the will cannot be resorted to for the purpose of creating an ambiguity. (*Estate of Norris* (1947) 78 C.A.2d 152, 160, 177 P.2d 299.)

(b) *Issues Reserved.* Where it affirmatively appears that the court did not attempt to construe the will in the order; i.e., a judgment is not res judicata on an issue expressly reserved. (*Estate of Liddle* (1958) 162 C.A.2d 7, 12, 328 P.2d 35.)

(3) *Resort to Will Where Order Is Uncertain.* Resort may be had to the will where the order itself is uncertain or ambiguous, in which case the will is used not to contradict but to interpret the order. (*Fraser v. Carman-Ryles* (1937) 8 C.2d 143, 146, 64 P.2d 397; *Buttram v. Finley* (1940) 37 C.A.2d 459, 465, 99 P.2d 1093; *Lloyd v. First Nat. Trust &*

Savings Bank of Fullerton (1951) 101 C.A.2d 579, 582, 225 P.2d 962; *Estate of Doyle* (1962) 202 C.A.2d 434, 444, 21 C.R. 123, citing the text; see 29 Cal. L. Rev. 438; 24 So. Cal. L. Rev. 509.) But if the two are irreconcilable, the distributive provisions of the decree must prevail. (*Estate of Norris, supra.*)

Mere incompleteness is not uncertainty. In *Estate of Callnon* (1969) 70 C.2d 150, 74 C.R. 250, 449 P.2d 186, the testator died in 1936, leaving the residue of his estate in a testamentary trust. Anna Elliott, his sister, was named trustee. John, his son, was the life beneficiary of the entire net income and such portions of the principal as the trustee deemed necessary. The last paragraph stated that, at the time of John's death, the trust should terminate, and the entire estate "shall go to and vest in my said Trustee." The decree added language to that provision, so that it read: "shall go to and vest in said Trustee, Anna Elliott if said Anna Elliott survives said John W. Callnon." Anna died first, and then John died. His heirs claimed the estate as intestate property, and Anna's representative claimed it for her estate. *Held*, John's heirs were entitled.

(a) The decree was a judicial construction of the will, and, whether right or wrong, conclusively determined the rights of the parties under it. (70 C.2d 156.)

(b) The decree stated an express condition of survival (see *supra*, §213), and the remainderman (Anna) who predeceased the life tenant took nothing, regardless of whether the remainder was contingent or vested subject to defeasance. (70 C.2d 157; see 12 *Summary* (10th), *Real Property*, §140.)

(c) The ambiguity or uncertainty exception, permitting resort to the will, was inapplicable. The contention was that, because there was no substitutional gift if Anna predeceased John, the decree failed to make a complete disposition of the estate. "In an obvious tactic to resort to the will respondent contends that an incomplete decree is an ambiguous one." (70 C.2d 160.) But the reasoning in cases dealing with the construction of wills (see *supra*, §202) applies equally to an incomplete decree of distribution; i.e., incompleteness is not ambiguity. (70 C.2d 160.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Resort to Will Where Order Is Uncertain.* See *Meyer v. Meyer* (2008) 162 C.A.4th 983, 992, 76 C.R.3d 546 [order for distribution setting forth terms of testamentary trust did not incorporate will's no contest clause by reference to will; order was not ambiguous, did not contain no contest clause, and did not refer to will's no contest clause].



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- I. Distribution of Estate.
2. Order for Distribution.
- e. Correction of Order.

14 Witkin Sum. Cal. Law Wills § 728

[§ 728] Correction of Order.

Within 6 months, the order may be set aside on a motion under *C.C.P.* 473, on the grounds of mistake, inadvertence, surprise, or excusable neglect. (See *Estate of Hunter* (1929) 99 C.A. 191, 195, 278 P. 485 [motion after 6 months is too late]; 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §152 et seq.)

Independently of *C.C.P.* 473, the court has power at any time to correct a clerical error in the decree. (*Estate of Goldberg* (1938) 10 C.2d 709, 717, 76 P.2d 508 [decree inadvertently omitted name of beneficiary; correction by nunc pro tunc order 35 years later]; *Estate of Soboslay* (1935) 4 C.2d 177, 179, 47 P.2d 714 [motion made under *C.C.P.* 473, but order made by court on its own motion]; see 7 Cal. Proc. (4th), *Judgment*, §69 et seq.)

Where the order is the result of extrinsic fraud or mistake, it may be set aside or otherwise attacked in an independent action in equity upon a proper showing at any time. (*Sears v. Rule* (1941) 45 C.A.2d 374, 384, 114 P.2d 57 [failure to disclose persons interested in estate]; cf. *Westphal v. Westphal* (1942) 20 C.2d 393, 399, 126 P.2d 105 [relief denied in absence of sufficient showing of extrinsic fraud]; see 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §214 et seq.)

Where an order of distribution is set aside at the instance of one claimant, the entire proceeding is reopened, and others may come in and set up their claims. In *Edlund v. Superior Court* (1930) 209 C. 690, 289 P. 841, the decree recited the death of the testator's daughter without issue, so that a devise lapsed. An adopted child of the devisee had the decree set aside. *Held*, petitioners, claiming as natural children of the devisee, could also assert heirship; the decree, once set aside, was not binding on any of them.

West's Key Number Digest, Executors and Administrators k.315.3

SUPPLEMENT: [This section is current through the latest supplement]
Mistake, etc.:

Cross-Reference: 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §144 et seq.

Clerical error:

Cross-Reference: 7 Cal. Proc. (5th), Judgment, §67 et seq.



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- I. Distribution of Estate.
- 3. Preliminary Distribution.
 - a. In General.

Witkin Sum. Cal. Law Wills § 729

[§ 729] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition.*

(New) Filing fees: Govt.C. 70657.5 and 70658 impose filing fees for various transactions under the Probate Code, including transactions involving the estates of decedents. (See Supp., supra, §380E.) Under Govt.C. 70657.5(b)(2) and 70658(d), added in 2007, these fees may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning preliminary and final distributions and discharge. (Govt.C. 70658(d)(4).)



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I. Distribution of Estate.

3. Preliminary Distribution.

a. In General.

14 Witkin Sum. Cal. Law Wills § 729

[§ 729] In General.

(1) *Petition.* A petition for an order for preliminary distribution of all or part of the share of the decedent's estate to which a beneficiary is entitled may be made once 2 months have elapsed after letters are first issued to a general personal representative. (*Prob.C. 11620*; on requirements for description of property in petition, see *infra*, §731.) A distribution includes a payment on account of a beneficiary's share of the decedent's estate. (Law Rev. Com. Comment.) (See Rutter Group, 2 Cal. Practice Guide: Probate §16:2 et seq., Form 16:A et seq.; C.E.B., 2 Decedent Estate Practice, §18.1 et seq.)

(2) *Opposition.* Under *Prob.C. 1043*, an interested person may make a written or oral response or objection in hearings under the Probate Code. Decisions under the former distribution statute address those who may oppose a petition for preliminary distribution. Any person interested in the estate or any coexecutor or coadministrator may resist the petition. (See *Estate of Baldwin* (1943) 21 C.2d 586, 590, 134 P.2d 259 [receiver of devisee is "successor in interest" entitled to oppose petition]; *Estate of Dabney* (1951) 37 C.2d 672, 681, 234 P.2d 962 [stranger with adverse claim to property of estate is not entitled]; *Estate of Sandy* (1964) 230 C.A.2d 309, 312, 40 C.R. 837 [collateral heirs of testator's subsequently deceased wife, who had not yet prevailed in contest of her estate, were not entitled]; cf. *Estate of Molera* (1972) 23 C.A.3d 993, 999, 100 C.R. 696 [disinherited heirs had standing to oppose order, but were unable to show pecuniary interest that would be impaired by distribution].)

(3) *Order.* The court must order the distribution if it appears at the hearing "that the distribution may be made without loss to creditors or injury to the estate or any interested person." (*Prob.C. 11621(a)*.) (On former statute, see *Estate of Buchman* (1955) 132 C.A.2d 81, 106, 281 P.2d 608; *Estate of Toler* (1957) 49 C.2d 460, 467, 319 P.2d 337 [stressing policy to encourage distribution at early date; distribution of life interest in legacy]; *Estate of Anderson* (1977) 68 C.A.3d 1010, 1016, 137 C.R. 727 [preliminary distribution as alternative to family allowance].)

(4) *Bond.* If the court orders distribution before 4 months have elapsed after letters are first issued to a general personal representative, the court must require a bond in the amount of the distribution. (*Prob.C. 11622(a)*.) If the court orders distribution after 4 months have elapsed, the court may require a bond in an amount fixed by the court. (*Prob.C. 11622(b)*.) Any required bond must be given by the distributee and filed with the court. It must be conditioned on payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed. (*Prob.C.*

11622(c).) The order must be stayed until any bond required by the court is filed. (*Prob.C. 11621(b)*.)

(5) *Costs*. Costs of a proceeding under *Prob.C. 11620* et seq. are paid by the distributee or the estate "in proportions determined by the court." (*Prob.C. 11624*.) This provision "gives the court discretion whether to impose costs on the beneficiary or to apportion them between the beneficiary and the estate, as may be appropriate to the circumstances," e.g., where the beneficiary is forced to make the petition because of undue delay by the personal representative. (19 Cal. Law Rev. Com. Reports, p. 957.)

(6) *Effect of Order*. Decisions under the former statute deal with the effect of the order. It is only conclusive as to rights in the property distributed; its determination of heirship is not binding in the subsequent proceeding for final distribution. (*Estate of Ampusait* (1933) 131 C.A. 533, 537, 21 P.2d 691.) Nor is it res judicata on matters not actually passed on by the court. (*Estate of Kearns* (1954) 129 C.A.2d 832, 836, 278 P.2d 85; *Estate of Toler* (1957) 49 C.2d 460, 467, 319 P.2d 337; *Estate of Simmons* (1966) 64 C.2d 217, 222, 49 C.R. 369, 411 P.2d 97, citing the text; *Estate of McCallen* (1975) 53 C.A.3d 142, 148, 125 C.R. 645, citing the text [heirship not in issue; order was not conclusive against claim of child adopted after testator's death].)

West's Key Number Digest, Executors and Administrators k.314(13)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Preliminary Distribution.

b. Distribution Under Independent Administration of Estates Act.

14 Witkin Sum. Cal. Law Wills § 730

[§ 730] Distribution Under Independent Administration of Estates Act.

Notwithstanding *Prob.C. 11601* (notice of hearing on petition for distribution; *supra*, §721), the following provisions apply if authority is granted to administer the estate without court supervision under the Independent Administration of Estates Act (*Prob.C. 10400 et seq.*; *infra*, §745 *et seq.*):

(1) *Petition and Notice.* The personal representative may petition for an order for preliminary distribution on notice as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). Notwithstanding *Prob.C. 1220(c)*, the court may not dispense with notice unless the time for filing creditor claims has expired. (*Prob.C. 11623(a)(1).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:22.)

(2) *Maximum Distribution.* The aggregate of all property distributed under *Prob.C. 11623* may not exceed 50% of the net value of the estate. For this purpose, "net value of the estate" means "the excess of value of the property in the estate, as determined by all inventories and appraisals on file with the court, over the total amount of all creditor claims and of all liens and encumbrances recorded or known to the personal representative not included in a creditor claim, excluding any estate tax lien occasioned by the decedent's death." (*Prob.C. 11623(a)(2).*)

(3) *Other Distribution Methods Are Available.* Nothing in *Prob.C. 11623* limits a personal representative's authority to make preliminary distribution under other provisions of *Prob.C. 11600 et seq.* whether or not authority to administer the estate under the Independent Administration of Estates Act has been granted. (*Prob.C. 11623(b).*)

(4) *Report of Actions Taken.* In an accounting, report, petition for preliminary distribution, or petition for final distribution, the petitioner must list and describe all actions taken without court approval under the Independent Administration of Estates Act if notice of the proposed action was required. The description must include the nature of the action, when it was taken, when and to whom notice was given, whether notice was waived and by whom, and whether objections were received. An action properly listed and described in a prior accounting, report, or petition for distribution and approved by the court need not be listed in a subsequent accounting, report, or petition for distribution. (C.R.C., Rule 7.250.)

SUPPLEMENT: [This section is current through the latest supplement]



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I. Distribution of Estate.

4. Final Distribution.

a. In General.

Witkin Sum. Cal. Law Wills § 731

[§ 731] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Time for Petition.*

(New) Filing fees: Govt.C. 70657.5 and 70658 impose filing fees for various transactions under the Probate Code, including transactions involving the estates of decedents. (See Supp., supra, .) Under Govt.C. 70657.5(b)(2) and 70658(d), added in 2007, these fees may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning preliminary and final distributions and discharge. (Govt.C. 70658(d)(4).)



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a. In General.

14 Witkin Sum. Cal. Law Wills § 731

[§ 731] In General.

(1) *Time for Petition.* When all debts have been paid or adequately provided for (or if the estate is insolvent) and the estate is in a condition to be closed, the personal representative must petition for an order for final distribution. (*Prob.C. 11640(a).*)

(2) *Continuance.* If debts remain unpaid or not adequately provided for, or for other reasons the estate is not in a condition to be closed, administration of the estate may be continued for a reasonable time, subject to *Prob.C. 12200* et seq. (time for closing estate; *infra*, §739). (*Prob.C. 11640(c).*) The Law Revision Commission Comment points out that, unless an accounting has been waived, an estate is not in a condition to be closed until final settlement of the accounts of the personal representative. (See *Estate of Fulton* (1922) 188 C. 489, 490, 205 P. 681 [account may be settled and distribution ordered at same time].)

(3) *Contents of Petition.* The petition for final distribution must list and describe all actions taken without court approval under the Independent Administration of Estates Act if notice of the proposed action was required. (See C.R.C., Rule 7.250, *supra*, §730.)

For each creditor's claim, the petition must state the claimant's name; the date, nature, and amount of the claim; the disposition; and, if the claim was rejected, the date of service of the rejection and whether a lawsuit was filed. (C.R.C., Rule 7.403.)

(4) *Description of Property.* The petition or an attachment must list and describe in detail the property to be distributed. If an account is filed with the petition, the description must be included in a schedule in the account. (C.R.C., Rule 7.651(a).) The description must (a) state the amount of cash on hand, (b) indicate whether promissory notes are secured or unsecured and describe security interests in detail, (c) include the complete legal description, street address, and assessor's parcel number of real property, and (d) include the complete description of each individual security held in street name in brokerage accounts. (C.R.C., Rule 7.651(b).)

(5) *Character of Property.* If the character of property to be distributed may affect the distribution, the petition must allege the character of the property (whether separate, community, or quasi-community) and whether community and

quasi-community property being distributed is the decedent's one-half interest only or the entire interest of the decedent and the surviving spouse. " (C.R.C., Rule 7.652(a).) If property is to be distributed outright to the surviving spouse, a written election under *Prob.C. 13502* (infra, §820) must be filed and the petition must show the filing date. (C.R.C., Rule 7.652(b).)

(6) *Time for Order*. When the estate is in a condition to be closed, the court must order final distribution. (*Prob.C. 11640(a)*.)

(7) *Effect of Consent Decree*. The court may distribute the property by a consent decree in accordance with a compromise agreement of the parties in a manner different from that directed by the will or that provided by the law of succession. (See *Bixby v. Security-First Nat. Bank of Los Angeles* (1936) 7 C.2d 424, 427, 60 P.2d 862; *Estate of Dobbins* (1940) 36 C.A.2d 536, 541, 97 P.2d 1051; cf. *Unif.Prob.C. §3-912*.)

(8) *Issues of Ademption and Advancement*. In the order for distribution, the court must resolve all questions arising under *Prob.C. 21135* (ademption by satisfaction; supra, §252) and *Prob.C. 6409* (advancements; supra, §287). (*Prob.C. 11640(b)*.)

(9) *Distribution Establishing Testamentary Trust*. On distribution, the court must determine whether a valid trust is created by the will. If so, the court determines the terms of the trust and distributes the trust property to the trustee. (C.R.C., Rule 7.650(a).) "The order for distribution must incorporate the terms of the trust so as to give effect to the conditions existing at the time distribution is ordered. The pertinent provisions must be stated in the present tense and in the third person instead of quoting the will verbatim." (C.R.C., Rule 7.650(b).)

(10) *Distribution by Personal Representative*. "When an order settling a final account and for final distribution is entered, the personal representative may immediately distribute the property in the estate to the persons entitled to distribution, without further notice or proceedings." (*Prob.C. 11641*.) (On distribution, see infra, §§733, 734.)

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SUPPLEMENT: [This section is current through the latest supplement]



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4. Final Distribution.

b. After-Acquired and After-Discovered Property.

Witkin Sum. Cal. Law Wills § 732

[§ 732] After-Acquired and After-Discovered Property.

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Dehgani-Fard* (2006) 141 C.A.4th 797, 805, 46 C.R.3d 289 [trial court abused discretion in allocating income tax liability attributable to after-acquired assets among four remainder beneficiaries in proportion to their residuary shares where one of them was charitable entity and estate had taken income tax charitable deduction for income attributable to that beneficiary; tax liability should have been allocated only among noncharitable beneficiaries].



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b. After-Acquired and After-Discovered Property.

14 Witkin Sum. Cal. Law Wills § 732

[§ 732] After-Acquired and After-Discovered Property.

Property acquired or discovered after an order for final distribution is distributed as follows:

(1) If the order disposes of the property, distribution is made as provided in the order. In an appropriate case, the court may require a supplemental account and make further instructions relating to the property. (*Prob.C. 11642(a).*)

(2) If the order does not dispose of the property, distribution is made (a) in the manner ordered by the court on a petition for instructions, or (b) if the personal representative has been discharged, as provided by *Prob.C. 12252* (administration after discharge; *infra*, §744). (*Prob.C. 11642(b).*)

It is customary to include in the petition and the order an omnibus clause distributing all the residue of the estate, known or to be discovered, which makes it unnecessary to issue new letters if other property is discovered after the discharge of the representative. (See *Heydenfeldt v. Osmont* (1918) 178 C. 768, 773, 175 P. 1; *Estate of Bouche* (1937) 24 C.A.2d 86, 90, 74 P.2d 563; cf. *Estate of Den* (1935) 3 C.2d 638, 640, 45 P.2d 963 [purported omnibus clause was ineffective for failure to designate persons to take undiscovered property].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Estate of Dehgani-Fard* (2006) 141 C.A.4th 797, 805, 46 C.R.3d 289 [trial court abused discretion in allocating income tax liability attributable to after-acquired assets among four remainder beneficiaries in proportion to their residuary shares where one of them was charitable entity and estate had taken income tax charitable deduction for income attributable to that beneficiary; tax liability should have been allocated only among noncharitable beneficiaries].



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I. Distribution of Estate.

5. Distribution of Property In Estate.

a. In General.

Witkin Sum. Cal. Law Wills § 733

[§ 733] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Discharge*. See Judicial Council Form No. DE-295 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)].



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a. In General.

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[§ 733] In General.

(1) *Distribution by Personal Representative.* The personal representative is responsible for the distribution of property in the estate in compliance with the terms of the order for distribution. (*Prob.C. 11750(a).*) A distribution made in compliance with the terms of the order is valid as to a "person acting in good faith and for a valuable consideration." (*Prob.C. 11750(c).*)

Expenses of administration include the reasonable storage, delivery, and shipping costs for the distribution of tangible personal property to a distributee. (*Prob.C. 11754.*)

(2) *Right of Distributee.* "A distributee may demand, sue for, and recover from the personal representative or any person in possession, property to which the distributee is entitled." (*Prob.C. 11750(b).*) Once the order is made, the statute of limitations begins to run on the distributee's remedy against the personal representative or a surety for failure to deliver the property. (*Rafferty v. Mitchell (1935) 4 C.A.2d 491, 493, 41 P.2d 563; Elkins v. Bryson (1936) 16 C.A.2d 173, 174, 60 P.2d 301.*) The representative may be held personally liable for conversion. (*Aronson v. Bank of America (1941) 42 C.A.2d 710, 718, 109 P.2d 1001.*) (See generally Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:67 et seq.)

(3) *Inventory by Life Tenant.* If personal property in the possession of a distributee is subject to possession by the distributee for life only, the personal representative must demand an inventory of the property from the distributee. On receipt, the personal representative files the inventory with the court and delivers a copy to the distributee of the remainder. (*Prob.C. 11752.*)

(4) *Receipt for Distributed Property.* The personal representative must obtain the receipt of the distributee for distributed property. In the case of real property, the personal representative must record the court order for distribution or the personal representative's deed, or both, in the county in which the real property is located. Recordation of the order or deed is deemed to be the distributee's receipt for the property. (*Prob.C. 11751.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:93.) (On authority to distribute property to county treasurer if distributee refuses to give receipt, see *infra*, §736.)

(5) *Filing Receipts*. The personal representative must file receipts for all the property in the estate. In the case of real property, this means a statement that identifies the appropriate recording information for the distribution order or the personal representative's deed. (*Prob.C. 11753(b)*.) "The court may excuse the filing of a receipt on a showing that the personal representative is unable, after reasonable effort, to obtain a receipt and that the property has been delivered to or is in the possession of the distributee." (*Prob.C. 11753(c)*.)

(6) *Valuation of Property Used To Satisfy Pecuniary Gift*. "If an instrument authorizes a fiduciary to satisfy a pecuniary gift wholly or partly by distribution of property other than money, property selected for that purpose shall be valued at its fair market value on the date of distribution, unless the instrument expressly provides otherwise. If the instrument permits the fiduciary to value the property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose shall fairly reflect net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made." (*Prob.C. 21118(a)*.) This provision incorporates the standard of 26 C.F.R., §26.2642-2(b)(2). (Law Rev. Com. Comment.) For this purpose, a pecuniary gift is a transfer that is (a) expressly stated as a fixed dollar amount or (b) a dollar amount determinable by the provisions of the instrument. (*Prob.C. 21118(b)*.) Unless the context requires otherwise, this provision applies to a will, trust, deed, or "any other instrument." (*Prob.C. 21101*.)

(7) *Discharge*. "Distribution in compliance with the court order entitles the personal representative to a full discharge with respect to property included in the order." (*Prob.C. 11753(a)*.)

West's Key Number Digest, Executors and Administrators k.314(11)

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Discharge*. See Judicial Council Form No. DE-295 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)].



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b. Credit and Offset.

14 Witkin Sum. Cal. Law Wills § 734

[§ 734] Credit and Offset.

(1) *Credit for Advances.* A personal representative who makes an advance to an heir or distributee without court authorization cannot claim a credit or a lien for the advance in his or her accounting. Such payments are not necessary expenditures in the course of administration, and until final distribution, it cannot be determined whether the distributee is in fact entitled to any part of the estate. (*Estate of Willey* (1903) 140 C. 238, 241, 73 P. 998; *Estate of Roberts* (1945) 27 C.2d 70, 79, 162 P.2d 461.) However, the representative is entitled, at the time of distribution, to a credit against the distributive share. (*Estate of Bennett* (1939) 13 C.2d 354, 362, 90 P.2d 84.)

(2) *Offset for Debt Owed to Decedent.* The general rule is that, if the distributee is indebted to the estate, the personal representative may retain the portion necessary to set off the debt against the distributive share. (See 25 Cal. L. Rev. 452.) Despite some uncertainty in the decisions, California appeared to apply the doctrine in the ordinary case of debts owed by a general devisee of money. (*Estate of Gamble* (1913) 166 C. 253, 256, 135 P. 970; *Estate of Pew* (1935) 10 C.A.2d 41, 43, 50 P.2d 1045; cf. *Estate of Chamberlain* (1941) 44 C.A.2d 193, 205, 112 P.2d 934 [leaving question open, but holding that, if power did exist, court could not offset at time of accounting, prior to final distribution].) But at least two important exceptions are recognized:

(a) A debt barred by the statute of limitations cannot be set off. (*Estate of Cates* (1925) 195 C. 319, 323, 232 P.2d 972; *Estate of Schaeffer* (1921) 53 C.A. 493, 495, 200 P. 508; cf. 39 A.L.R.2d 675 [setoff against debtor's share of estate of debt barred by statute of limitations].)

(b) A debt cannot be set off against a devise of land or specific personal property. (*Estate of Polito* (1921) 51 C.A. 752, 754, 197 P. 976.) (See 25 Cal. L. Rev. 452.)

The general rule was restated in *Estate of Berk* (1961) 196 C.A.2d 278, 281, 16 C.R. 492. But in this case of first impression, it was held inapplicable to an heir (son) of a deceased debtor (brother of testator) taking by right of representation. The court followed the weight of authority, but also felt that the result was correct in principle and based on sound policy. The son was not liable for his father's debt, and the succession statute did not call for any change in this rule. "The rules governing the law of succession are technical and more or less arbitrary, and the underlying legislative policy is to a certain extent based on a choice to be made between two or more reasonably possible

approaches." (196 C.A.2d 288.)

Prob.C. 6410, based on *Unif.Prob.C. §2-111*, codifies the case law. A debt owed to the decedent is not charged against the intestate share of any person except the debtor. (*Prob.C. 6410(a)*.) If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the decedent's issue. (*Prob.C. 6410(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Where Distributee Is Deceased.

14 Witkin Sum. Cal. Law Wills § 735

[§ 735] Where Distributee Is Deceased.

(1) *Distribution After Death.* Subject to *Prob.C. 21525* (construction of survivorship requirements involving marital deduction gifts; *supra*, §209), the share in a decedent's estate of a beneficiary who survives the decedent but dies before distribution is distributed "with the same effect as though the distribution were made to the beneficiary while living," unless the decedent's will provides that the beneficiary is entitled to take under the will only if the beneficiary survives to the date of distribution or other stated period and the beneficiary fails to survive. (*Prob.C. 11801.*)

The Law Revision Commission Comment notes that, under existing case law, a provision requiring survival to the date of distribution is satisfied by survival to the date distribution could and should have occurred. (See *Estate of Justesen* (1999) 77 C.A.4th 352, 91 C.R.2d 574, *supra*, §216 [requirement of survival to date of distribution was satisfied by survival to date distribution should have occurred].)

(2) *Manner of Distribution.* If a beneficiary satisfies the requirements of *Prob.C. 11801*, the beneficiary's share in the decedent's estate is distributed as follows:

(a) If the beneficiary was the decedent's issue and died intestate while under the age of majority and not having been emancipated, distribution is made directly to the beneficiary's heirs without administration in the beneficiary's estate. (*Prob.C. 11802(b).*)

(b) If a person entitled to the beneficiary's share applies under *Prob.C. 13000* et seq. (disposition of estate without administration; *infra*, §792 et seq.), distribution is made as provided by *Prob.C. 13000* et seq. (*Prob.C. 11802(c).*)

(c) In all other cases, distribution is made to the personal representative of the beneficiary's estate for administration in the beneficiary's estate. (*Prob.C. 11802(a).*)

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d. Deposit With County Treasurer.

14 Witkin Sum. Cal. Law Wills § 736

[§ 736] Deposit With County Treasurer.

(1) *Authority To Deposit. Prob.C. 11850* authorizes the personal representative to deposit property with the county treasurer in the county in which the proceedings are pending in the name of the distributee in the following circumstances:

(a) The property is unclaimed. (*Prob.C. 11850(a).*)

(b) The whereabouts of the distributee is unknown. (*Prob.C. 11850(a).*)

(c) The distributee refuses to give a receipt. (*Prob.C. 11850(b).*)

(d) The distributee is a minor or incompetent who has no guardian, conservator, or other fiduciary to receive property or person authorized to give a receipt. (*Prob.C. 11850(c).*)

(e) The property cannot be distributed for "any other reason" and the personal representative desires discharge. Distribution cannot be made under this provision except on court order. (*Prob.C. 11850(d).*)

The Law Revision Commission Comment makes two points:

(a) Distribution under *Prob.C. 11850* is permissive. "Therefore, the personal representative may make distribution in any other manner that is appropriate," e.g., distribution to a custodian under the Uniform Transfers to Minors Act (*Prob.C. 3900 et seq.*; see 13 *Summary* (10th), *Personal Property*, §140 et seq.).

(b) If the distributee is a nonresident minor or incompetent who has a guardian, conservator, or other fiduciary of the estate legally appointed, distribution should be made to the fiduciary.

(2) *Deposit of Money.* If property authorized to be deposited consists of money, the personal representative may deposit it. (*Prob.C. 11851(a).*) The Law Revision Commission Comment to *Prob.C. 11850* notes that, under *Govt.C. 53844*, providing for the credit of interest to the county general fund, money deposited with the county treasurer does not bear interest for the benefit of the distributee.

(3) *Deposit or Sale of Personal Property.* If property authorized to be deposited consists of personal property other than money, the personal representative may deposit it only on court order. If the court finds that sale of the property is for the benefit of interested persons, the court orders the property sold. The proceeds, less the expenses of sale allowed by the court, are deposited in the county treasury. If the court finds that sale of the property is not for the benefit of interested persons, the court orders the property deposited with the Controller, to be held subject to *Prob.C. 11900* et seq. (distribution to state; infra, §737). (*Prob.C. 11851(b)*.)

(4) *Receipt of County Treasurer.* The treasurer must give a receipt for the deposit and is liable on his or her official bond for the money deposited. The receipt has the same effect as if executed by the distributee. (*Prob.C. 11852*.)

(5) *Order for Distribution.* If money is deposited or is already on deposit with the county treasurer, the personal representative must deliver to the treasurer a certified copy of the order for distribution. (*Prob.C. 11853*.)

(6) *Claim to Deposited Funds.* A person may claim money on deposit in the county treasury by filing a petition with the court that ordered distribution. The petition must show the person's right or claim and, if not filed by the person named in the decree of distribution, his or her legal representative, or his or her estate, must state the facts required to be stated in a petition for escheated property under *C.C.P. 1355*. The proceedings on the petition are held as provided by *C.C.P. 1355*, except that the hearing is ex parte unless the court orders otherwise. (*Prob.C. 11854(a)*.) If the court so orders, a copy of the petition must be served on the Attorney General. (*Prob.C. 11854(b)*.)

If the court is satisfied of the claimant's right, it makes an order establishing that right. On presentation of a certified copy of the order, the county auditor must draw a warrant on the county treasury for the amount of money covered by the order. (*Prob.C. 11854(c)*.) A claim for money distributed in the estate of a decedent made after the deposit of the property in the State Treasury is governed by *C.C.P. 1335* et seq. (*Prob.C. 11854(d)*.) (See *Parage v. Couedel* (1997) 60 C.A.4th 1037, 1043, 70 C.R.2d 671 [constructive notice by publication of first claim provided to unknown heirs was sufficient to defeat their rival claim]; *Estate of McGuigan* (2000) 83 C.A.4th 639, 649, 99 C.R.2d 887 [deliberate failure to identify known and closer heir in petition for escheated property under *C.C.P. 1355* constituted extrinsic fraud sufficient to vacate judgment distributing property to petitioner; distinguishing *Parage*].)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Distribution to State.

14 Witkin Sum. Cal. Law Wills § 737

[§ 737] Distribution to State.

(1) *Order.* The court must order property not distributed to known beneficiaries to be distributed to the state. (*Prob.C. 11900(a).*) Insofar as practicable, real property and tangible personal property are to be converted to money before distribution. (*Prob.C. 11900(b).*) If the court orders property distributed to the state and the order "includes words that otherwise create a trust in favor of unknown or unidentified persons as a class," the distribution vests both legal and equitable title in the state. (*Prob.C. 11901.*)

(2) *Duties of Personal Representative.* If the court orders distribution to the state, the personal representative promptly delivers money to the State Treasurer and other personal property to the State Controller. For real property, the personal representative must promptly cause a certified copy of the order to be recorded in the office of the county recorder of each county in which the property is located. (*Prob.C. 11902(a).*) At the time of delivery or recordation, the personal representative must deliver to the Controller a certified copy of the order for distribution and a statement of the appropriate recording information. (*Prob.C. 11902(b).*)

(3) *Claims Against Property Distributed.* Property distributed to the state is held by the Treasurer for 5 years from the date of the order for distribution, within which time any person may claim the property in the manner provided by *C.C.P. 1300* et seq. (*Prob.C. 11903(a).*) A person who does not claim the property within that time is forever barred, and the property vests absolutely in the state, subject to *C.C.P. 1300* et seq. (*Prob.C. 11903(b).*)

(4) *No Deposit in County Treasury.* If property in the estate is to be or has been distributed to the state under *Prob.C. 11900* et seq., no other property in the estate may be deposited in the county treasury. Property that would otherwise be deposited in the county treasury must be promptly transmitted to the State Treasurer or State Controller as provided by *Prob.C. 11900* et seq. (*Prob.C. 11904.*) (On deposit with county treasurer, see *supra*, §736.)

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SUPPLEMENT: [This section is current through the latest supplement]



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f. Partition or Allotment of Property.

14 Witkin Sum. Cal. Law Wills § 738

[§ 738] Partition or Allotment of Property.

(1) *Right to Partition.* "If two or more beneficiaries are entitled to the distribution of undivided interests in property and have not agreed among themselves to a partition, allotment, or other division of the property, any of them, or the personal representative at the request of any of them, may petition the court to make a partition, allotment, or other division of the property that will be equitable and will avoid the distribution of undivided interests." (*Prob.C. 11950(a)*.)

(2) *Scope of Proceeding.* A proceeding under *Prob.C. 11950* et seq. "is limited to interests in the property that are subject to administration and does not include other interests except to the extent the owners of other interests in the property consent to be bound by the partition, allotment, or other division." (*Prob.C. 11950(b)*.)

(3) *Petition.* A petition for partition or allotment may be filed with the clerk at any time before an order for final distribution of the affected property becomes final. (*Prob.C. 11951(a)*.) The petition must describe the property, state the names of the persons having or claiming undivided interests, and describe the undivided interests, insofar as known to the petitioner. (*Prob.C. 11951(b)*.)

(4) *Notice.* Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) to the personal representative and to the persons entitled to distribution of the undivided interests. (*Prob.C. 11952(a)*.)

(5) *Response.* At the hearing, the persons entitled to distribution of the undivided interests are considered the parties to the proceeding, whether or not they have appeared or filed a responsive pleading. No one is considered as a plaintiff or as a defendant. (*Prob.C. 11952(b)*.) An objection to the court's jurisdiction must be made and resolved in the manner provided by *Prob.C. 850* et seq. (conveyance or transfer of property claimed to belong to decedent or another person; *supra*, §356). (*Prob.C. 11952(c)*.)

(6) *Division by Court.* "The court shall partition, allot, or otherwise divide the property so that each party receives property with a value proportionate to the value of the party's interest in the whole." (*Prob.C. 11953(a)*.) However, two or more parties may agree to accept undivided interests. (*Prob.C. 11953(c)*.)

When sale would be more equitable than partition and when the property cannot conveniently be allotted to one person, the court may direct the personal representative to sell the property. The sale is conducted in the same manner as other sales during administration. (*Prob.C. 11953(b)*.)

(7) *Appointment of Referee*. If requested to do so by a party, the court may, in its discretion, appoint one or three referees to partition property capable of being partitioned. The number of referees appointed must conform to the request of at least one of the parties. (*Prob.C. 11954(a)*.) The referees have the powers and duties of referees in partition actions under *C.C.P. 872.010* et seq. (see 12 *Summary* (10th), *Real Property*, §65 et seq.), and the court has the same powers with respect to their report as in those actions. (*Prob.C. 11954(b)*.)

(8) *Expenses*. The expenses of partition must be equitably apportioned by the court among the parties, but each party must pay his or her own attorneys' fees. The amount charged to each party is specified in the order, and, to the extent unpaid, constitutes a lien on the property allotted to that party. (*Prob.C. 11955*.)

(9) *Effect of Partition or Allotment*. "The partition, allotment, or other division made by the court shall control in proceedings for distribution, unless modified for good cause on reasonable notice." (*Prob.C. 11956(a)*.) However, "[t]he proceedings leading to the partition, allotment, or other division may be reviewed on appeal from the order for distribution." (*Prob.C. 11956(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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J. Closing Estate Administration.
1. Petition for Distribution or Status Report.

14 Witkin Sum. Cal. Law Wills § 739

[§ 739] Petition for Distribution or Status Report.

(1) *Time for Filing.* The personal representative must either petition for an order for final distribution of the estate or report on the status of administration not later than (a) 1 year after the date of the issuance of letters, in an estate for which a federal estate tax return is not required, or (b) 18 months after the date of the issuance of letters, in an estate for which a federal estate tax return is required. (*Prob.C. 12200.*)

(2) *Status Report.* *Prob.C. 12201* sets forth the following requirements for the status report:

(a) The report must show the condition of the estate, the reasons why the estate cannot be distributed and closed, and an estimate of the time needed to close administration. (*Prob.C. 12201(a).*)

(b) The report is filed with the court. Notice of the hearing on the report must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) to persons then interested in the estate, and must include a statement in boldface type or capital letters in substantially these words: "You have the right to petition for an account under *section 10950 of the California Probate Code.*" (*Prob.C. 12201(b).*)

(c) On the hearing of the report, the court may order that the personal representative petition for final distribution or that administration continue. (*Prob.C. 12201(c).*) (On continuance, see *infra*, §740.) (See generally Rutter Group, 2 Cal. Practice Guide: Probate §16:76 et seq., Form 16:D.)

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2. Continuance of Administration.

14 Witkin Sum. Cal. Law Wills § 740

[§ 740] Continuance of Administration.

(1) *Basis for Continuance.* If the court determines at the hearing of the status report (*supra*, §739) that continuation of administration is in the best interests of the estate or interested persons, the court may order that administration continue for a time "on the terms and conditions that appear reasonable." (*Prob.C. 12201(c).*)

(2) *Continuance To Pay Family Allowance.* For purposes of *Prob.C. 12200* et seq., continuation of administration to pay a family allowance is not in the best interests of the estate or interested persons unless the court determines both of the following:

(a) "The family allowance is needed by the recipient to pay for necessities of life, including education so long as pursued to advantage." (*Prob.C. 12203(a)(1).*)

(b) "The needs of the recipient for continued family allowance outweigh the needs of the decedent's beneficiaries whose interests would be adversely affected by continuing the administration of the estate for this purpose." (*Prob.C. 12203(a)(2).*)

Nothing in *Prob.C. 12203* may be construed to authorize continuation of a family allowance beyond the time prescribed in *Prob.C. 6543* (*infra*, §778). (*Prob.C. 12203(b).*) In addition, nothing limits the power of the court to order preliminary distribution. (*Prob.C. 12203(c).*)

(3) *Time Limit in Will Is Not Controlling.* "A limitation in a will of the time for administration of an estate is directory only and does not limit the power of the personal representative or the court to continue administration of the estate beyond the time limitation in the will if the continuation is necessary." (*Prob.C. 12206.*)

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J. Closing Estate Administration.
3. Sanctions Against Representative.

14 Witkin Sum. Cal. Law Wills § 741

[§ 741] Sanctions Against Representative.

(1) *Failure To File Petition or Status Report.* For "good cause shown on the record," the court may, on petition of an interested party or on its own motion, cite the personal representative to appear and show the condition of the estate and the reasons why the estate cannot be distributed and closed. (*Prob.C. 12202(a)*.) On the hearing of the citation, the court may (a) order the administration of the estate to continue, as provided by *Prob.C. 12201* (*supra*, §740), or (b) order the personal representative to petition for final distribution. (*Prob.C. 12202(b)*.)

(2) *Failure To Comply With Order.* Failure of the personal representative to comply with an order under *Prob.C. 12200* et seq. is grounds for removal from office. (*Prob.C. 12204*.) (On removal from office, see *Prob.C. 8500* et seq., *supra*, §451 et seq.)

(3) *Failure To Timely Close Estate.* The court may reduce the compensation of the personal representative or the attorney for the personal representative by an "appropriate" amount if the time taken for administration exceeds the time required by *Prob.C. 12200* et seq. or prescribed by the court, the time taken was within the control of the person whose compensation is being reduced, and the delay was not in the best interest of the estate or interested persons. (*Prob.C. 12205(a)*.) The order may be made regardless of whether the compensation allowable under *Prob.C. 10800* et seq. (*supra*, §529 et seq.) would be reasonable compensation for the services rendered. (*Prob.C. 12205(b)*.) In making the determination, the court must take into account any action under *Prob.C. 12202* as a result of a previous delay. (*Prob.C. 12205(d)*.) The order may be made at the hearing for final distribution or at the hearing on compensation. (*Prob.C. 12205(c)*.) (See *Estate of Heller* (1992) 7 C.A.4th 862, 867, 9 C.R.2d 274, citing the text [denial of executor's commission for excessive delay in closing estate administration was within court's discretion under *Prob.C. 12205*].)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Discharge of Representative.
a. Petition and Order.

Witkin Sum. Cal. Law Wills § 742

[§ 742] Petition and Order.

SUPPLEMENT: [This section is current through the latest supplement]

See Judicial Council Form No. DE-295 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)].

(New) Filing fees: Govt.C. 70657.5 and 70658 impose filing fees for various transactions under the Probate Code, including transactions involving the estates of decedents. (See Supp., supra, §380E.) Under Govt.C. 70657.5(b)(2) and 70658(d), added in 2007, these fees may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning preliminary and final distributions and discharge. (Govt.C. 70658(d)(4).)



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J. Closing Estate Administration.

4. Discharge of Representative.

a. Petition and Order.

14 Witkin Sum. Cal. Law Wills § 742

[§ 742] Petition and Order.

When the personal representative has complied with the terms of the order for final distribution and has filed the appropriate receipts (or filing has been excused), the court, ex parte, makes an order discharging the personal representative "from all liability incurred thereafter." (*Prob.C. 12250(a)*.) Nothing in this provision precludes discharge of the personal representative for distribution made without prior court order, if the terms of the order for final distribution are satisfied. (*Prob.C. 12250(b)*.) (See *Goldberg v. Frye* (1990) 217 C.A.3d 1258, 1265, 266 C.R. 483 [discharge protected administrator from personal liability for alleged extrinsic fraud on devisees where devisees had full knowledge of administrator's actions and decisions at time of final account]; Cal. Civil Practice, 3 Probate and Trust Proceedings, §21:81 et seq.)

The Law Revision Commission Comment notes: "The estate is fully administered for purposes of this section when all sums of money due from the personal representative have been paid, all property of the estate has been discharged to the persons entitled under court order, and all the acts lawfully required of the personal representative have been performed."

West's Key Number Digest, Executors and Administrators k.33

SUPPLEMENT: [This section is current through the latest supplement]

See Judicial Council Form No. DE-295 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)].



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b. Discharge Without Administration.

14 Witkin Sum. Cal. Law Wills § 743

[§ 743] Discharge Without Administration.

(1) *Petition.* At any time after the appointment of a personal representative and whether or not letters have been issued, "if it appears there is no property of any kind belonging to the estate and subject to administration," the personal representative may petition for termination of further proceedings and for discharge. The petition must state the facts required by this provision. (*Prob.C. 12251(a)*.) Proceedings may be taken under *Prob.C. 12251* without the return of an inventory. (Law Rev. Com. Comment.)

(2) *Notice.* Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) to all interested persons. (*Prob.C. 12251(b)*.)

(3) *Order.* "If it appears to the satisfaction of the court on the hearing that the facts stated in the petition are true, the court shall make an order terminating the proceeding and discharging the personal representative." (*Prob.C. 12251(c)*.)

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SUPPLEMENT: [This section is current through the latest supplement]



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c. Administration After Discharge.

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[§ 744] Administration After Discharge.

SUPPLEMENT: [This section is current through the latest supplement]

(New) Privileged communications: Prob.C. 12252 was amended in 2007 to also authorize the appointment of a personal representative to hold a decedent's lawyer-client privilege where a communication deemed privileged is sought to be disclosed and the privilege has not been waived.



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[§ 744] Administration After Discharge.

If subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered or because it is necessary and proper to do so for any cause, the court appoints a personal representative, giving priority to the person serving as the personal representative at the time of discharge. (*Prob.C. 12252(a)*.) (On after-acquired and after-discovered property, see *Prob.C. 11642*, *supra*, §732.) (See *Estate of Heigho (1960) 186 C.A.2d 360, 367, 9 C.R. 196* [petition by creditors to reopen administration was properly denied for dilatoriness in prosecution].)

Notice of the hearing on the appointment must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to (1) the person serving as the personal representative at the time of the order of discharge, (2) other interested persons, and (3) if property has been distributed to the State of California, to the State Controller. (*Prob.C. 12252(b)*.)

To avoid the need for the issuance of new letters, an order for distribution generally contains an omnibus clause disposing of all future property. (See *supra*, §732.)

West's Key Number Digest, Executors and Administrators k.33

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Privileged communications*: *Prob.C. 12252* was amended in 2007 to also authorize the appointment of a personal representative to hold a decedent's lawyer-client privilege where a communication deemed privileged is sought to be disclosed and the privilege has not been waived.



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A. In General.
1. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 745

[§ 745] Statutory Development.

(1) *Original Enactment.* The Independent Administration of Estates Act (former Prob.C. 591 et seq.) was first enacted in 1974. The Act was drafted by a State Bar Committee after a study and rejection of the proposed Uniform Probate Code. It provided an optional procedure to simplify administration by eliminating the normal court supervision required for many aspects of administration. (See 6 *Pacific L. J.* 151; 50 *So. Cal. L. Rev.* 155.) It applied to the estate of any person dying on or after July 1, 1975.

(2) *Law Revision Commission Report.* The California Law Revision Commission, in its 1986 Recommendation Relating to Independent Administration of Estates Act (19 Cal. Law Rev. Com. Reports, p. 211), proposed various technical and substantive revisions to reorganize the statute, fill in gaps in coverage, and make clear whether notice was required before a particular action could be taken.

(3) *Current Statute.* The revised statute (*Prob.C. 10400 et seq.*) was enacted in 1987. Its title, the *Independent Administration of Estates Act (Prob.C. 10400)*, is frequently abbreviated IAEA. (See generally Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:1 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §9:1 et seq.; C.E.B., 1 Decedent Estate Practice, §9.1 et seq.; C.E.B., 2 Probate Workflow Manual, §9.1 et seq.; C.E.B., 3 Will Drafting 3d, §33.10 et seq.) The Act has the following chapters and articles:

Chapter 1. General Provisions. (Prob.C. 10400 et seq.)

Chapter 2. Granting or Revoking Independent Administration Authority. (Prob.C. 10450 et seq.)

Chapter 3. Administration Under Independent Administration Authority. (Prob.C. 10500 et seq.)

Article 1. General Provisions. (*Prob.C. 10500 et seq.*)

Article 2. Powers Exercisable Only After Giving Notice of Proposed Action. (*Prob.C. 10510 et seq.*)

Article 3. Powers the Exercise of Which Require Giving of Notice of Proposed Action Under Some Circumstances. (*Prob.C. 10530 et seq.*)

Article 4. Powers Exercisable Without Giving Notice of Proposed Action. (*Prob.C. 10550 et seq.*)

Chapter 4. Notice of Proposed Action Procedure. (Prob.C. 10580 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Definitions.

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[§ 746] Definitions.

(1) *Court Supervision*. The term "court supervision" means "the judicial order, authorization, approval, confirmation, or instructions that would be required if authority to administer the estate" under the IAEA had not been granted. (*Prob.C. 10401.*)

(2) *Full Authority*. The term "full authority" means authority to administer the estate under the IAEA that includes all the powers granted under the IAEA. (*Prob.C. 10402.*)

(3) *Limited Authority*. The term "limited authority" means authority to administer the estate under the IAEA that includes all the powers granted under the IAEA except the power to do the following: (a) Sell real property, (b) exchange real property, (c) grant an option to purchase real property, and (d) borrow money with the loan secured by an encumbrance on real property. (*Prob.C. 10403.*)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Preliminary Provisions.

14 Witkin Sum. Cal. Law Wills § 747

[§ 747] Preliminary Provisions.

(1) *Effect of Contrary Provision in Will.* A personal representative may not be granted authority to administer an estate under the IAEA if independent administration is prohibited in the decedent's will. (*Prob.C. 10404.*) In addition, the decedent's will may restrict the powers exercisable under the IAEA. (*Prob.C. 10502(b)*; see C.E.B., 3 Will Drafting 3d, §33.12.)

(2) *Special Administrator.* A special administrator may be granted independent administration authority if the special administrator is appointed with, or has been granted, the powers of a general personal representative. (*Prob.C. 10405.*) The Law Revision Commission Comment notes that this authority "will be useful, for example, in an estate with a lengthy will contest where virtually all of the administration is handled by the special administrator, and the only act which occurs after the final resolution of the will contest is the distribution of the estate assets. In such a case, the special administrator may obtain independent administration authority unless good cause is shown why the authority should not be granted."

(3) *IAEA Authority Is Not Restricted by Estate Administration Statutes.* Nothing in the estate administration statutes (*Prob.C. 9600 et seq.*) limits or restricts the authority of a personal representative authorized to administer an estate under the IAEA. (*Prob.C. 9640.*)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Granting or Revoking Authority.
1. Petition and Notice.

Witkin Sum. Cal. Law Wills § 748

[§ 748] Petition and Notice.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Notice of Hearing*. Judicial Council Form No. DE-120 has been renamed: Notice of Hearing--Decedent's Estate or Trust (Probate--Decedents' Estates).



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14 Witkin Sum. Cal. Law Wills § 748

[§ 748] Petition and Notice.

(1) *Petition for Authority.* To obtain authority to administer an estate under the IAEA, a personal representative must petition the court for that authority either (a) in the petition for appointment of the personal representative or (b) in a separate petition filed in the estate proceedings. (*Prob.C. 10450(a).*) The petition may request either full or limited authority to administer the estate under the IAEA. (*Prob.C. 10450(b).*) (See *Prob.C. 10402* ["full authority" defined]; *Prob.C. 10403* ["limited authority" defined]; *supra*, §746; for forms, see C.E.B., 1 Decedent Estate Practice, §9.4; C.E.B., 2 Probate Workflow Manual, §9.6; Rutter Group, 1 Cal. Practice Guide: Probate, Form 9:A; Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:22.)

(2) *Notice of Hearing.* *Prob.C. 10451* provides the following rules for the notice of the hearing on the petition:

(a) If authority to administer the estate under the IAEA is requested in the petition for appointment of the personal representative, notice of the hearing on the petition must be given for the period and in the manner applicable to the petition for appointment. (*Prob.C. 10451(a).*)

(b) Where proceedings for the administration of the estate are pending at the time the petition is filed, notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to each person listed in *Prob.C. 1220*, to each known heir or devisee whose interest in the estate would be affected by the petition, and to each person named as executor in the decedent's will. (*Prob.C. 10451(b).*)

(c) The notice of hearing on the petition, whether included in the petition for appointment or in a separate petition, must include the substance of the following statement: "The petition requests authority to administer the estate under the Independent Administration of Estates Act. This will avoid the need to obtain court approval for many actions taken in connection with the estate. However, before taking certain actions, the personal representative will be required to give notice to interested persons unless they have waived notice or have consented to the proposed action. The petition will be granted unless good cause is shown why it should not be." (*Prob.C. 10451(c).*) (For forms of notice, see Judicial Council Form No. DE-120 [Notice of Hearing (Probate)], Judicial Council Form No. DE-121 [Notice of Petition to Administer Estate].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Notice of Hearing*. Judicial Council Form No. DE-120 has been renamed: Notice of Hearing--Decedent's Estate or Trust (Probate--Decedents' Estates).



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14 Witkin Sum. Cal. Law Wills § 749

[§ 749] Order, Letters, and Bond.

(1) *Order*. The court must grant authority to administer an estate under the IAEA unless an interested person objects as provided in *Prob.C. 1043* (supra, §378) and the court determines that the objecting party has shown good cause why independent authority should not be granted. However, if the objecting party shows good cause why only limited authority should be granted, the court may grant only limited authority. (*Prob.C. 10452*.) (See *Prob.C. 10402* ["full authority" defined]; *Prob.C. 10403* ["limited authority" defined]; supra, §746; Judicial Council Form No. DE-140 [Order for Probate]; C.E.B., 1 Decedent Estate Practice, §9.7; C.E.B., 2 Probate Workflow Manual, §9.9; Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:24 [order granting], §11:25 [order denying].)

(2) *Letters*. When the court grants IAEA authority, the representative's letters must indicate (a) that the personal representative is authorized to act under the IAEA, and (b) whether the independent administration authority includes or excludes the sale or exchange of real property, granting an option to purchase real property, and borrowing money with the loan secured by an encumbrance on real property. (*Prob.C. 8405(c)*, supra, §446.)

(3) *Bond*. *Prob.C. 10453* sets forth the following rules governing bond:

(a) *Full authority granted*. "If the personal representative is otherwise required to file a bond and has full authority, the court, in its discretion, shall fix the amount of the bond at not more than the estimated value of the personal property, the estimated value of the decedent's interest in the real property authorized to be sold under this part, and the probable annual gross income of the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount." (*Prob.C. 10453(a)*.)

(b) *Limited authority granted*. "If the personal representative is otherwise required to file a bond and has limited authority, the court, in its discretion, shall fix the amount of the bond at not more than the estimated value of the personal property and the probable annual gross income of the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount." (*Prob.C. 10453(b)*.)

The Law Revision Commission Comment to *Prob.C. 10453* points out that where limited authority is granted, the amount of the bond does not include the estimated net proceeds of real property. The Comment to *Prob.C. 10450* explains the personal representative's options: "[I]n some cases, a significant saving in the bond premium can be

realized by seeking only limited authority. Because of this consideration, limited authority ordinarily is sought only where a bond is required and the personal representative seeks to avoid the increased bond premium that is required when full authority is granted. Accordingly, a personal representative who is not required to provide a bond almost always will request full authority; and a personal representative who is required to provide a bond for an estate that includes real property ordinarily will request limited authority unless the personal representative wishes to use independent administration authority for a sale of some or all of the real property or to borrow money secured by the real property."

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 750

[§ 750] Petition To Revoke or Limit Authority.

(1) *Petition.* An interested person may petition the court for either (a) an order revoking the authority of a personal representative to continue administration of an estate under the IAEA or (b) an order revoking the full authority of a personal representative to administer an estate under the IAEA and granting the personal representative limited authority to administer the estate under the IAEA. (*Prob.C. 10454(a).*) The petition must set forth the basis for the requested order. (*Prob.C. 10454(b).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:30.)

(2) *Notice.* Notice of the hearing on the petition must be given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). In addition, a copy of the petition and notice of the time and place of the hearing must be served on the personal representative at least 15 days before the hearing. Service on the personal representative is made in the manner provided in *C.C.P. 415.10* (personal delivery; see 3 *Cal. Proc.* (4th), *Actions*, §924) or *C.C.P. 415.30* (service by mail; see 3 *Cal. Proc.* (4th), *Actions*, §930), or as authorized by the court. (*Prob.C. 10454(c).*)

(3) *Order Revoking Authority.* On a showing of good cause, the court must revoke the authority of the personal representative to continue administration of the estate under the IAEA. New letters must then be issued without the notation described in *Prob.C. 8405(c)* (*supra*, §749). (*Prob.C. 10454(d).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:31.)

(4) *Order Limiting Authority.* On a showing of good cause, the court must revoke the full authority of the personal representative to continue administration of the estate under the IAEA and grant limited authority. New letters must then be issued with the notation described in *Prob.C. 8405(c)* (*supra*, §749) that is required where limited authority is granted. (*Prob.C. 10454(e).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:31.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Notice.*

Personal Delivery:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1008.

Service by mail:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1015 et seq.



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C. Administration Under IAEA Authority.
1. Court Supervision of Transactions.
a. In General.

Witkin Sum. Cal. Law Wills § 751

[§ 751] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Election To Obtain Court Supervision.* The filing fee for a petition, application, or opposition to an order authorizing, instructing, or directing a fiduciary or approving or confirming the acts of a fiduciary is \$ 180. (*Govt.C. 70658(a)(3)*, added in 2007.) The filing fee for a petition, application, or opposition to an order directing, authorizing, approving, or confirming sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property is \$ 180. (*Govt.C. 70658(a)(1)*, added in 2007.) (See *Govt.C. 70658(d)*, Supp., supra, §380B [listing circumstances in which fee does not apply to personal representative of decedent's estate].)



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C. Administration Under IAEA Authority.

1. Court Supervision of Transactions.

a. In General.

14 Witkin Sum. Cal. Law Wills § 751

[§ 751] In General.

(1) *Scope of IAEA Authority.* Subject to the limitations and conditions of the IAEA, a personal representative who has been granted authority to administer the estate under the IAEA may administer the estate as provided in the IAEA without court supervision. However, "in all other respects the personal representative shall administer the estate in the same manner as a personal representative who has not been granted authority to administer the estate" under the IAEA. (*Prob.C. 10500(a)*.) (See *Prob.C. 10401*, *supra*, §746 ["court supervision" defined].)

The Law Revision Commission Comment makes the following observations:

(a) A personal representative who has been granted only limited authority may not exercise independent administration authority with respect to matters not included within the scope of the limited authority.

(b) Even if full authority has been granted, some actions may be taken only under court supervision. (See *Prob.C. 10501*, *infra*, §§752, 753.)

(c) In some cases, powers may be exercised only if notice of a proposed action is given or the person entitled to notice of the proposed action has waived the notice or has consented to the proposed action. If a person entitled to notice of the proposed action makes a timely objection to the proposed action, the action may be taken only under court supervision. (See *infra*, §761.)

(2) *Election To Obtain Court Supervision.* Notwithstanding *Prob.C. 10500(a)*, a personal representative may obtain court supervision of any action to be taken during administration of the estate. (*Prob.C. 10500(b)*.)

The Law Revision Commission Comment makes the following points:

(a) Even though the personal representative has been granted full authority (which includes the power to sell real property), the personal representative may nevertheless determine to sell real property using the court-supervised procedure for a real property sale.

(b) "If the personal representative determines to use the court supervised procedure, all the requirements of the

court supervised procedure apply to the same extent that they would apply if the personal representative had not been granted independent administration authority."

(c) Where court supervision of an action is sought, and no other procedure is provided by statute for court supervision of the particular proposed action, the personal representative may petition for instructions under *Prob.C. 9611* (supra, §469). For example, if there is no specific procedure for obtaining authority under supervised administration for incorporation of the decedent's unincorporated business (see *Prob.C. 10512*, infra, §754), the personal representative may elect to petition for instructions rather than use the notice of proposed action procedure under *Prob.C. 10580* et seq. (infra, §757 et seq.).

(3) *Testamentary Restriction of Powers*. The decedent's will may restrict the powers that the personal representative may exercise under the IAEA. (*Prob.C. 10502(b)*; see *Prob.C. 10404*, supra, §747 [IAEA is not applicable if decedent's will so provides].)

(4) *Powers Exercisable*. Subject to the conditions and limitations of the IAEA and to *Prob.C. 9600* (duty to manage estate using ordinary care and diligence; supra, §465), a personal representative who has been granted independent administration authority has the powers described in *Prob.C. 10510* et seq. (infra, §754), *Prob.C. 10530* et seq. (infra, §755), and *Prob.C. 10550* et seq. (infra, §756). (*Prob.C. 10502(a)*.)

(5) *Accounts and Distributions*. Notwithstanding any other provision of the IAEA, whether granted full authority or limited authority, the personal representative is required to obtain court supervision for (a) the settlement of accounts (*Prob.C. 10501(a)(3)*) and (b) subject to *Prob.C. 10520* (preliminary distribution on notice; infra, §754), preliminary and final distributions and discharge (*Prob.C. 10501(a)(4)*).

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Election To Obtain Court Supervision*. The fee for filing a petition, application, or opposition concerning an order authorizing, instructing, or directing a fiduciary or approving or confirming the acts of a fiduciary is \$ 350. (*Govt.C. 70658(a)(3)*, added in 2007 and amended in 2008.) The fee for filing a petition, application, or opposition concerning an order directing, authorizing, approving, or confirming a sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property is \$ 350. (*Govt.C. 70658(a)(1)*, added in 2007 and amended in 2008.)



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C. Administration Under IAEA Authority.

1. Court Supervision of Transactions.

b. Property Transactions.

14 Witkin Sum. Cal. Law Wills § 752

[§ 752] Property Transactions.

(1) *Where Full Authority Is Granted.* Generally, a personal representative who has been granted full authority to administer an estate under the IAEA may engage in property transactions without court supervision. (See *Prob.C. 10500(a)*, supra, §751.) The Law Revision Commission Comment notes the following limitations:

(a) The decedent's will may restrict the exercise of the power to sell property. (See *Prob.C. 10502*, supra, §751.)

(b) Except in certain narrowly limited circumstances, independent administration authority may not be used to sell estate property to the personal representative or the personal representative's attorney. (See *Prob.C. 10501*, infra, §753.)

(c) Unless notice has been waived or consent to the proposed action has been obtained, notice of a proposed action is required to sell or exchange real property and certain kinds of personal property, to sell the decedent's unincorporated business, grant an option to purchase real property, transfer property to a person given an option to purchase in the decedent's will, complete a contract by the decedent to convey property, or grant an extension of an exclusive right to sell property that will cause the entire period covered by the right to exceed 270 days. (See infra, §754.)

(2) *Where Limited Authority Is Granted.* Notwithstanding any other provision of the IAEA, a personal representative who has obtained only limited authority to administer the estate under the IAEA is required to obtain court supervision to do the following:

(a) Sell real property. (*Prob.C. 10501(b)(1)*.)

(b) Exchange real property. (*Prob.C. 10501(b)(2)*.)

(c) Grant an option to purchase real property. (*Prob.C. 10501(b)(3)*.)

(d) Borrow money with the loan secured by an encumbrance on real property. (*Prob.C. 10501(b)(4)*.)

(3) *Manner of Sale of Property Under IAEA.* Subject to the limitations and requirements of the IAEA, a personal representative who exercises the authority to sell estate property under the IAEA, "may sell the property either at public

auction or private sale, and with or without notice, for such price, for cash or on credit, and upon such terms and conditions" as the personal representative determines. The requirements otherwise applicable to court confirmation of sales of real property do not apply, including, but not limited to, publication of notice of the sale, court approval of agents' and brokers' commissions, sale at not less than 90% of the appraised value, and court examination into the necessity for the sale, the advantage to the estate and benefit to interested persons, and efforts of the personal representative to obtain the highest and best price for the property reasonably attainable. (*Prob.C. 10503.*) The personal representative also has the power to execute any conveyance needed to effectuate a sale. (See *Prob.C. 10555*, *infra*, §756.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Transactions Involving Personal Representative or Attorney.

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[§ 753] Transactions Involving Personal Representative or Attorney.

SUPPLEMENT: [This section is current through the latest supplement]

(4) (*New*) *Filing Fees*. *Govt.C. 70657.5* and *70658* impose filing fees for various transactions under the Probate Code, including transactions involving the estates of decedents. (See Supp., supra, §380E.) Under *Govt.C. 70657.5(b)(2)* and *70658(d)*, added in 2007, these fees may not be charged to a personal representative in a decedent's estate proceeding for a petition or application concerning the following actions:

(a) The sale of property of the estate to the personal representative or to the attorney for the personal representative. (*Govt.C. 70658(d)(5).*)

(b) The exchange of property of the estate for property of the personal representative or property of the attorney for the personal representative. (*Govt.C. 70658(d)(6).*)

(c) The grant of an option to purchase property of the estate to the personal representative or to the attorney for the personal representative. (*Govt.C. 70658(d)(7).*)

(d) The allowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate. (*Govt.C. 70658(d)(8).*)

(e) The compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or the attorney for the personal representative. (*Govt.C. 70658(d)(9).*)

(f) The 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. (*Govt.C. 70658(d)(10).*)



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[§ 753] Transactions Involving Personal Representative or Attorney.

(1) *Supervision Is Generally Required.* Notwithstanding any other provision of the IAEA, the personal representative, whether granted full authority or limited authority, is required to obtain court supervision for the following actions:

(a) Allowance of the compensation of the personal representative or the attorney for the personal representative. (*Prob.C. 10501(a)(1), (a)(2).*)

(b) Sale of estate property to the personal representative or to the attorney for the personal representative. (*Prob.C. 10501(a)(5).*)

(c) Exchange of estate property for property of the personal representative or the attorney for the personal representative. (*Prob.C. 10501(a)(6).*)

(d) Grant of an option to purchase estate property to the personal representative or the attorney for the personal representative. (*Prob.C. 10501(a)(7).*)

(e) Allowance, payment, or compromise of a claim against the estate made by the personal representative or the attorney for the personal representative. (*Prob.C. 10501(a)(8).*)

(f) Compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or the attorney for the personal representative. (*Prob.C. 10501(a)(9).*)

(g) Extension, renewal, or modification of the terms of a debt or other obligation of the personal representative or the attorney for the personal representative, owed to or in favor of the decedent or the estate. (*Prob.C. 10501(a)(10).*)

(2) *Exceptions for Transactions Involving Personal Representative.* *Prob.C. 10501(a)(5) through Prob.C. 10501(a)(10)* 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:

(a) Either the personal representative is the sole beneficiary of the estate or all known heirs or devisees have

consented to the transaction. (*Prob.C. 10501(c)(1).*)

(b) The period for filing creditor's claims has expired. (*Prob.C. 10501(c)(2).*)

(c) No request for special notice is on file or all persons who filed requests for special notice have consented to the transaction. (*Prob.C. 10501(c)(3).*)

(d) The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction. (*Prob.C. 10501(c)(4).*)

(3) *No Exceptions for Transactions Involving Attorney.* The IAEA does not permit independent administration for transactions involving the attorney for the personal representative; these transactions are subject to applicable provisions governing court supervision. For this purpose, "attorney for the personal representative" is broadly used and includes "the associates, partners, and attorneys of counsel with the law firm of the attorney selected by the personal representative and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney selected by the personal representative." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Administration Under IAEA Authority.

2. Requirement of Notice.

a. Powers Exercisable Only After Notice.

14 Witkin Sum. Cal. Law Wills § 754

[§ 754] Powers Exercisable Only After Notice.

A personal representative with authority to act under the IAEA may exercise certain powers only after giving notice of the proposed action as required by *Prob.C. 10580* et seq. (infra, §757 et seq.). (*Prob.C. 10510*.) (See *Prob.C. 10501*, supra, §753 [court supervision required for most transactions involving personal representative in personal capacity or personal representative's attorney].) Notice of the proposed action is required to exercise the following powers:

(1) *Sell or exchange real property.* The power to sell or exchange real property of the estate, where the personal representative has full authority. (*Prob.C. 10511*; on manner of sale of property, see *Prob.C. 10503*, supra, §752.) The Law Revision Commission Comment points out that a personal representative who has only limited authority may not sell or exchange real property using the independent administration procedure.

(2) *Sell or incorporate business.* The power to sell or incorporate an unincorporated business or venture in which the decedent was engaged at the time of death or that was wholly or partly owned by the decedent at the time of death. (*Prob.C. 10512*.) The Law Revision Commission Comment notes that real or personal property may be sold in connection with the sale of the decedent's business. However, if the business includes the ownership of real property, a personal representative who has only limited authority may not sell or exchange the real property using the independent administration procedure.

(3) *Abandon tangible personal property.* The power to abandon tangible personal property where the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value. (*Prob.C. 10513*.)

(4) *Borrow money or encumber estate property.* The power to borrow money and the power to encumber property of the estate. However, only a personal representative with full authority has the power to borrow money with the loan secured by an encumbrance on real property. (*Prob.C. 10514*.)

(5) *Grant option to purchase real property.* The power to grant an option to purchase real property of the estate for a period within or beyond the period of administration, where the personal representative has full authority. (*Prob.C. 10515*.) The Law Revision Commission Comment notes that a personal representative who has been granted only limited authority may not grant an option to purchase real property of the estate using the independent administration

procedure.

(6) *Convey or transfer property to person given option to purchase.* The power to convey or transfer property to a person if the will gives that person an option to purchase the property and the person has complied with the terms and conditions stated in the will. (*Prob.C. 10516.*) The Law Revision Commission Comment notes that even a personal representative with limited authority has the power.

(7) *Complete decedent's contract to convey or transfer property.* The power to convey or transfer real or personal property to complete a contract entered into by the decedent. (*Prob.C. 10517.*) The Law Revision Commission Comment notes that even a personal representative with limited authority has the power.

(8) *Determine claims to property.* The power to allow, compromise, or settle (a) a third-party claim to real or personal property, if the decedent died with possession or title to the property, and (b) the decedent's claim to real or personal property, if title or possession is held by another. (*Prob.C. 10518.*)

(9) *Make a disclaimer.* The power to make a disclaimer. (*Prob.C. 10519.*)

(10) *Make preliminary distribution.* The personal representative may make the following preliminary distributions 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 interested persons:

(a) Income received during administration may be distributed to those entitled to it under *Prob.C. 12000* et seq. (*supra*, §246). (*Prob.C. 10520(a).*)

(b) Household furnishings, motor vehicles, clothing, jewelry, and other "tangible articles of a personal nature" may be distributed to those entitled to the property under the decedent's will, not to exceed an aggregate fair market value to all distributees of \$ 50,000, determined on the basis of the inventory and appraisal. (*Prob.C. 10520(b).*)

(c) Cash may be distributed to general pecuniary devisees under the decedent's will, not to exceed \$ 10,000 to any one person. (*Prob.C. 10520(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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[§ 755] Powers Requiring Notice in Some Circumstances.

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 846, line 20, "(Corp.C. 16001 et seq.)" should be "(Corp.C. 16100 et seq.)".



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b. Powers Requiring Notice in Some Circumstances.

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[§ 755] Powers Requiring Notice in Some Circumstances.

(1) *Powers Exercisable Without Notice Except as Otherwise Provided.* A personal representative with authority to act under the IAEA may exercise the powers described in *Prob.C. 10530* et seq. without giving notice of a proposed action under *Prob.C. 10580* et seq. (infra, §757 et seq.), except to the extent otherwise provided by *Prob.C. 10530* et seq. (*Prob.C. 10530.*) (See *Prob.C. 10501*, supra, §753 [court supervision is required for most transactions involving personal representative in personal capacity or attorney for personal representative].)

(2) *Manage and Control Estate Property.* The personal representative has the power to "manage and control" estate property, including the power to make allocations and determinations under the Uniform Principal and Income Act (*Prob.C. 16320* et seq.; see 13 *Summary* (10th), *Trusts*, §167 et seq.) and may exercise this power without giving notice of a proposed action except where a provision of *Prob.C. 10500* et seq. governing the exercise of a specific power requires notice. (*Prob.C. 10531.*)

(3) *Enter Contracts To Carry Out Specific Powers.* *Prob.C. 10532* provides as follows:

(a) Notice of a proposed action is required when a contract is made to carry out the exercise of a specific power granted by the IAEA, and the IAEA provision that grants the power requires notice. (*Prob.C. 10532(c).*)

(b) Notice of a proposed action must be given "where the contract is one that by its provisions is not to be fully performed within two years," unless the personal representative "has the unrestricted right under the contract to terminate the contract within two years." (*Prob.C. 10532(b).*) "A contract that can be terminated within two years should be treated the same as a contract that is to be fully performed within two years." (Law Rev. Com. Comment.)

(c) Except as provided by *Prob.C. 10532(b)*, the personal representative may enter into a contract to carry out the exercise of a specific power granted by the IAEA without giving notice of a proposed action. (*Prob.C. 10532(a).*)

(4) *Deposit and Invest Estate Property.* The personal representative has the power to make the following deposits and investments:

(a) Deposit money of the estate in an insured account in a financial institution in California. (*Prob.C. 10533(a)(1).*)

(b) Invest money of the estate in (1) direct obligations of the United States or California maturing within 1 year from the date of the investment, (2) authorized money market mutual funds and investment vehicles with portfolios limited to United States government obligations maturing within 5 years from the date of investment and to repurchase agreements fully collateralized by United States government obligations, (3) units of a common trust fund under *Fin.C. 1564* invested primarily in short-term fixed income obligations and valued at cost, and (4) securities eligible for the investment of surplus state funds under *Govt.C. 16430*. (*Prob.C. 10533(a)(2)*.)

(c) Invest money of the estate in any manner provided by the will. (*Prob.C. 10533(a)(3)*.)

Generally, notice of a proposed deposit or investment is not required unless the investment is in securities eligible for the investment of surplus state funds under *Govt.C. 16430* or as provided in the will and the investment is not in direct obligations of the United States or California maturing within 1 year. (*Prob.C. 10533(b), 10533(c)*.)

(5) *Continue Operation of Decedent's Partnership or Business.* *Prob.C. 10534* provides as follows:

(a) The personal representative has the power to continue as a general partner in any partnership in which the decedent was a general partner at the time of death, subject to the partnership agreement and the provisions of the Uniform Partnership Act (*Corp.C. 16001 et seq.*). (*Prob.C. 10534(a)*.)

(b) The personal representative has the power to continue the operation of an unincorporated business or venture wholly or partly owned by the decedent at the time of death or in which the decedent was engaged at the time of death. (*Prob.C. 10534(b)*.)

(c) Generally, the personal representative may exercise these powers without giving notice of a proposed action. (*Prob.C. 10534(c)*.) However, notice of a proposed action is required if the personal representative continues as a general partner or continues the operation of an unincorporated business or venture for more than 6 months from the date letters are first issued. (*Prob.C. 10534(d)*.)

The Law Revision Commission Comment notes: (1) The 6-month period commences to run from the time letters are issued to the first special or general personal representative. (2) Although notice of a proposed action is not required in order to continue the operation of the decedent's business for the first 6 months, the personal representative has the option of giving notice if the personal representative plans to continue the business beyond 6 months. (See *Prob.C. 10580(b)*, *infra*, §758.)

(6) *Pay Family Allowance.* The personal representative has the power to pay a reasonable family allowance. Under *Prob.C. 10535(b)*, the personal representative must give notice of the proposed action when (a) making the first payment of a family allowance, (b) making the first payment of a family allowance for a period commencing more than 12 months after the death of the decedent, or (c) making an increase in the amount of a family allowance. Except as provided in *Prob.C. 10535(b)*, the personal representative may exercise this power without giving notice of the proposed action. (*Prob.C. 10535(a)*.) Notice of the proposed action must also be given if a family allowance is proposed to be paid to a person who has not been receiving a family allowance, even where notice of the proposed action was given with reference to the payment of a family allowance to another person. (Law Rev. Com. Comment.)

(7) *Lease Real and Personal Property.* *Prob.C. 10536* provides as follows:

(a) The personal representative has the power to enter as lessor into a lease of property of the estate for any purpose (including oil, gas, mineral, and geothermal leases) for a period within or beyond the period of administration, for a rental or royalty amount, and on other terms and conditions "as the personal representative may determine." Generally, notice of the proposed action is not required. (*Prob.C. 10536(a)*.)

(b) The personal representative must give notice of the proposed action before entering into a lease of real property for a term in excess of 1 year. "If the lease gives the lessee the right to extend the term of the lease, the lease shall be

considered as if the right to extend has been exercised." (*Prob.C. 10536(b).*)

(c) The personal representative must give notice of the proposed action before entering into a lease of personal property if the lease is one not to be fully performed within 2 years, unless the personal representative has the unrestricted right to terminate within 2 years. (*Prob.C. 10536(c).*)

(8) *Sell or Exchange Personal Property.* The personal representative has the power to sell or exchange personal property of the estate on such terms and conditions as the personal representative determines. (*Prob.C. 10537(a).*) Notice of a proposed action is not required for the sale or exchange of the following:

(a) A security sold on an established stock or bond exchange. (*Prob.C. 10537(b)(1).*)

(b) A security designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, sold through a registered broker-dealer during the regular course of business. (*Prob.C. 10537(b)(2).*)

(c) Personal property referred to in *Prob.C. 10202* (security subscription or conversion right; *supra*, §700) or *Prob.C. 10259* (perishable and depreciating property, sale to provide family allowance, and property sold at public auction; *supra*, §688) when sold for cash. (*Prob.C. 10537(b)(3).*)

(d) A security described in *Prob.C. 10200* (surrendered for redemption or conversion; *supra*, §700). (*Prob.C. 10537(b)(4).*)

(9) *Grant or Extend Exclusive Right To Sell Property.* The personal representative has the power to grant "an exclusive right to sell property for a period not to exceed 90 days." (*Prob.C. 10538(a)(1).*) The personal representative also has the power to grant to the same broker "one or more extensions of an exclusive right to sell property, each extension being for a period not to exceed 90 days." (*Prob.C. 10538(a)(2).*) The Law Revision Commission Comment points out that the personal representative may grant an exclusive right to sell to one broker, and, when that exclusive right expires, grant another broker the exclusive right to sell the same property. The grant of the exclusive right to sell to the new broker is not an extension of the original exclusive right to sell.

The personal representative must give notice of a proposed action "where the personal representative grants to the same broker an extension of an exclusive right to sell property and the period of the extension, together with the periods of the original exclusive right to sell the property and any previous extensions of that right, is more than 270 days." (*Prob.C. 10538(c).*) Except as provided in *Prob.C. 10538(c)*, notice of a proposed action is not required. (*Prob.C. 10538(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 846, line 20, "(Corp.C. 16001 et seq.)" should be "(Corp.C. 16100 et seq.)".



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2. Requirement of Notice.

c. Powers Exercisable Without Notice.

14 Witkin Sum. Cal. Law Wills § 756

[§ 756] Powers Exercisable Without Notice.

A personal representative with authority to act under the IAEA may exercise the powers described in *Prob.C. 10550* et seq. without notice of a proposed action under *Prob.C. 10580* et seq. (infra, §757 et seq.). (*Prob.C. 10550.*) (See *Prob.C. 10501*, supra, §753 [court supervision is required for most transactions involving personal representative in personal capacity or the attorney for the personal representative].) Notice of proposed action is not required to exercise the following powers:

(1) *Powers exercisable without court supervision.* In addition to the powers granted to the personal representative by *Prob.C. 10500* et seq., the personal representative has "all the powers that the personal representative could exercise without court supervision" under the Probate Code if the personal representative had not been granted authority to administer the estate under the IAEA. (*Prob.C. 10551.*)

The Law Revision Commission Comment points out that the inclusion of *Prob.C. 10551* makes it unnecessary to list in *Prob.C. 10550* et seq. "those powers that a personal representative not having independent administration authority can exercise without court supervision."

(2) *Act on claims by or against estate.* The personal representative has the power to (a) allow, pay, reject, and contest claims by or against the estate, (b) compromise or settle claims, actions, or proceedings for or against the decedent, the personal representative, or the estate, (c) release, in whole or in part, a claim of the estate to the extent the claim is uncollectible, and (d) allow claims to be filed after the expiration of the time for filing claims. (*Prob.C. 10552.*)

The Law Revision Commission Comment notes that notice of a proposed action is required for determining third-party claims to real or personal property if the decedent died in possession of, or holding title to, the property, and for determining decedent's claim to real or personal property title to or possession of which is held by another. (See *Prob.C. 10518*, supra, §754.)

(3) *Commence or defend actions and proceedings.* The personal representative has the power to (a) commence and maintain actions and proceedings for the benefit of the estate and (b) defend actions and proceedings against the decedent, the personal representative, or the estate. (*Prob.C. 10553.*) This includes partition actions. (Law. Rev. Com.

Comment.)

The Law Revision Commission Comment notes that notice of a proposed action is required for determining third-party claims to real or personal property if the decedent died in possession of, or holding title to, the property and for determining decedent's claim to real or personal property title to or possession of which is held by another. (See *Prob.C. 10518*, *supra*, §754.)

(4) *Modify terms of obligation.* The personal representative has the power to extend, renew, or modify the terms of an obligation owing to or in favor of the decedent or the estate. (*Prob.C. 10554.*)

The Law Revision Commission Comment notes that the power granted by the statute is not limited to modifying the terms of an indebtedness owed to the decedent or the estate. "It extends to the modification of the terms of an obligation as well. For example, if the lessee has an obligation (not involving the payment of money) to the estate under the terms of a lease (such as a requirement as to the hours of business of the lessee), Section 10554 authorizes the personal representative to modify that term of the lease, it being one of the terms of the obligation in favor of the estate."

(5) *Convey property to carry out specific power.* The personal representative has the power to "convey or transfer property in order to carry out the exercise of a specific power" granted by the IAEA. (*Prob.C. 10555.*)

The Law Revision Commission Comment notes that, under the IAEA, "there must be a specific power to act in the specific circumstances (such as the power to make a sale or exchange) in order to authorize the personal representative to execute a conveyance." "Where the personal representative acts under one of these specific powers (and complies with the notice of proposed action procedure if notice of proposed action is required), Section 10555 gives the personal representative power to execute any conveyance that is necessary to effectuate the exercise of the specific power without giving notice of proposed action with respect to the execution of the conveyance." However, although notice of a proposed action is not required to exercise the power granted by *Prob.C. 10555*, the personal representative may choose to use the notice of proposed action procedure. (See *Prob.C. 10580(b)*, *infra*, §757.)

(6) *Pay taxes, assessments, or expenses.* The personal representative has the power to pay taxes and assessments and expenses incurred in the collection, care, and administration of the estate. (*Prob.C. 10556.*)

(7) *Purchase annuity granted in will.* The personal representative has the power to "purchase an annuity from an insurer admitted to do business in this state to satisfy a devise of an annuity or other direction in the will for periodic payments to a devisee." (*Prob.C. 10557.*)

(8) *Exercise option.* The personal representative has the power to exercise an option right that is an asset of the estate. (*Prob.C. 10558.*)

(9) *Purchase undelivered securities or commodities.* The personal representative has the power to "purchase securities or commodities required to perform an incomplete contract of sale where the decedent died having sold but not delivered securities or commodities not owned by the decedent." (*Prob.C. 10559.*)

(10) *Hold security in name of nominee or in other form.* The personal representative has the power to "hold a security in the name of a nominee or in any other form without disclosure of the estate, so that title to the security may pass by delivery." (*Prob.C. 10560.*)

(11) *Exercise security subscription or conversion rights.* The personal representative has the power to exercise security subscription or conversion rights. (*Prob.C. 10561.*)

(12) *Make repairs and improvements.* The personal representative has the power to make repairs and improvements to real and personal property of the estate. (*Prob.C. 10562.*)

(13) *Accept deed in lieu of foreclosure or trustee's sale.* The personal representative has the power to "accept a deed to property which is subject to a mortgage or deed of trust in lieu of foreclosure of the mortgage or sale under the deed of trust." (*Prob.C. 10563.*)

(14) *Give partial satisfaction of mortgage or partial reconveyance under trust deed.* The personal representative has the power to "give a partial satisfaction of a mortgage or to cause a partial reconveyance to be executed by a trustee under a deed of trust held by the estate." (*Prob.C. 10564.*)

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14 Witkin Sum. Cal. Law Wills § 757

[§ 757] Where Notice Is Required.

(1) *Statutory Requirement.* A personal representative who has been granted authority to administer the estate under the IAEA must give notice of a proposed action, as provided in *Prob.C. 10580 et seq.*, before taking the proposed action without court supervision if the provision of *Prob.C. 10500 et seq.* (supra, §751 et seq.) that gives the power to take the action requires notice. However, nothing in this provision authorizes a personal representative to take an action under the IAEA if the personal representative does not have IAEA authority to take the action. (*Prob.C. 10580(a).*) (See Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:8 et seq.)

(2) *Representative's Election To Use Procedure.* A personal representative who has been granted authority to administer the estate under the IAEA may give notice of a proposed action even if *Prob.C. 10500 et seq.* permit the personal representative to take the action without giving notice. However, nothing in this provision requires the personal representative to give notice of a proposed action where not required to do so under *Prob.C. 10580(a)* or authorizes a personal representative to take any action that the personal representative is not otherwise authorized to take. (*Prob.C. 10580(b).*)

(3) *Persons to Whom Notice Must Be Given.* In the absence of consent under *Prob.C. 10582* (infra, §758) or waiver of notice under *Prob.C. 10583* (infra, §759), notice of a proposed action must be given to (a) each known heir or devisee whose interest in the estate would be affected by the proposed action, (b) each person who has filed a request for special notice, and (c) the Attorney General (at the Sacramento office) if any portion of the estate is to escheat and the state's interest in the estate would be affected by the proposed action. (*Prob.C. 10581.*) (On giving notice to known heirs and devisees, see *Prob.C. 1206*, supra, §388; on request for special notice under *Prob.C. 1250*, see supra, §395.)

(4) *Mailing or Delivery of Notice.* The notice of a proposed action must be mailed or personally delivered to each person required to be given notice not less than 15 days before the date specified in the notice as the date on or after which the proposed action is to be taken. If mailed, the notice must be addressed to the person at the person's last known address. *Prob.C. 1215* (mailing; supra, §392) and *Prob.C. 1216* (personal delivery; supra, §393) apply. (*Prob.C. 10586.*) The time of the notice is not extended if the notice is given by mail; mailing is complete when the notice is deposited in the mail. (Law Rev. Com. Comment.)

(5) *Removal for Failure To Give Notice.* Where notice of a proposed action is required, the court in its discretion

may remove the personal representative from office unless the personal representative does one of the following: (a) gives notice of the proposed action; (b) obtains a waiver of notice of the proposed action; or (c) obtains consent to the proposed action. (*Prob.C. 10592(a)*.) The court in its discretion may also remove the personal representative from office if the personal representative takes a proposed action without court supervision in violation of *Prob.C. 10589* (see *infra*, §763). (*Prob.C. 10592(b)*.) "Among the significant considerations are whether the personal representative violated the statute with the intent to deprive the person entitled to notice of his or her rights or whether the failure was inadvertent or merely negligent." (Law Rev. Com. Comment.)

(6) *Protection of Bona Fide Purchasers*. The failure of the personal representative to comply with *Prob.C. 10580(a)*, *10581*, *10585*, *10586*, and *10589*, and taking action without compliance, "does not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers or the rights of third persons who, dealing in good faith with the personal representative, changed their position in reliance upon the action, conveyance, or transfer without actual notice of the failure of the personal representative to comply with those provisions." (*Prob.C. 10591(a)*.) Moreover, no person dealing with the personal representative "has any duty to inquire or investigate whether or not the personal representative has complied with the provisions listed" in *Prob.C. 10591(a)*. (*Prob.C. 10591(b)*.)

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14 Witkin Sum. Cal. Law Wills § 758

[§ 758] Consent Without Notice.

(1) *Consent to Action.* Notice of a proposed action need not be given to a person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken. (*Prob.C. 10582.*) (On effect of consent, see *Prob.C. 10590*, infra, §764; for consent form, see Judicial Council Form No. DE-165 [Notice of Proposed Action (Objection--Consent)]; C.E.B., 1 Probate Workflow Manual, §9.18.) The Law Revision Commission Comment points out that *Prob.C. 10582* provides a method that can be used to avoid the delay that otherwise would result from the requirement that a person given notice of a proposed action be allowed at least 15 days within which to object to the proposed action (see *supra*, §757).

(2) *Revocation of Consent.* Consent may be revoked only in writing, and the revocation is effective only when the writing is received by the personal representative. (*Prob.C. 10584(a).*) A copy of the revocation may be filed with the court, but its effectiveness is not dependent on being filed. (*Prob.C. 10584(b).*) Filing the revocation with the court may be of some value in proving that the consent was revoked. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 759

[§ 759] Waiver of Notice.

(1) *Waiver for Specific Proposed Action.* Notice of a proposed action need not be given to a person who waives the right to notice with respect to the proposed action in writing. The waiver may be executed at any time before or after the proposed action is taken. The waiver must describe the particular proposed action and may waive the entire notice or particular aspects of the notice, such as the delivery, mailing, or time requirements of *Prob.C. 10586* (supra, §757). (*Prob.C. 10583(a)*.) (For form of waiver see Rutter Group, 1 Cal. Practice Guide: Probate, Form 9:D.)

The Law Revision Commission Comment points out that *Prob.C. 10583(a)* permits waiver of notice of a proposed action only with respect to a particular proposed action. "A person entitled to notice of proposed action may execute a written waiver under subdivision (a) that would, for example, permit notice of a particular proposed real property transaction to be given to the person by telephone so that the proposed action can be expeditiously completed if the person does not object. In such a case, if the person is agreeable to the sale of the real property, the waiver could be drafted in terms that would permit the personal representative to call the person on the telephone to notify the person of an offer to buy the property and to permit the sale of the property at the price and on the terms offered if the person called is agreeable or at a price and on the terms of a counter-offer that is agreeable to the person called."

(2) *General Waiver or Waiver of Specified Types of Transactions.* Notice of a proposed action need not be given to a person who has executed a general waiver of the right to notice of proposed actions or a waiver of the right to notice of all transactions of a type that includes the particular proposed action, using the Statutory Waiver of Notice of Proposed Action Form prescribed by the Judicial Council. (*Prob.C. 10583(b)*.) The Law Revision Commission Comment points out that under *Prob.C. 10583(b)*, a person could, e.g., (a) "waive the right of notice of proposed action with respect to investing funds of the estate and borrowing money without waiving the right to notice of proposed action with respect to sales of real property," or (b) "waive the right to receive notice of proposed action with respect to any and all actions the personal representative might decide to take." (On effect of waiver, see *Prob.C. 10590*, infra, §764.) (See Judicial Council Form No. DE-166 [Waiver of Notice of Proposed Action].)

(3) *Revocation of Waiver.* A waiver may be revoked only in writing, and the revocation is effective only when the writing is received by the personal representative. (*Prob.C. 10584(a)*; for form of revocation, see Judicial Council Form No. DE-166 [Waiver of Notice of Proposed Action].) A revocation of waiver is effective only with respect to proposed actions that have not been taken at the time the revocation is actually received by the personal representative. (Law Rev.

Com. Comment.)

A copy of the revocation may be filed with the court, but its effectiveness is not dependent on being filed. (*Prob.C. 10584(b).*) However, filing with the court may be of some value in proving that the waiver was revoked. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Content and Form of Notice.

14 Witkin Sum. Cal. Law Wills § 760

[§ 760] Content and Form of Notice.

The notice of a proposed action must state all of the following:

- (1) The name and mailing address of the personal representative. (*Prob.C. 10585(a)(1).*)
- (2) The person and telephone number to call to get additional information. (*Prob.C. 10585(a)(2).*)
- (3) The action proposed to be taken, with a reasonably specific description of the action. Where the proposed action involves the sale or exchange of real property, or granting an option to purchase real property, the notice must state the material terms of the transaction, including, if applicable, the sale price and the amount and method of calculating the compensation of an agent or broker. (*Prob.C. 10585(a)(3).*)
- (4) The date on or after which the proposed action is to be taken. (*Prob.C. 10585(a)(4).*)

The notice of a proposed action may be given using the most current Notice of Proposed Action form prescribed by the Judicial Council. (*Prob.C. 10585(b).*) (See Judicial Council Form No. DE-165 [Notice of Proposed Action (Objection--Consent)].) If the most current Judicial Council form is not used, the notice must be in substantially the same form, must contain the statements described in *Prob.C. 10585(a)*, and must contain a form for objecting to the proposed action in substantially the form set out in the Judicial Council form. (*Prob.C. 10585(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 761

[§ 761] Objection to Proposed Action.

(1) *Statutory Authority.* *Prob.C. 10587* provides an objection procedure to prevent the personal representative from taking a proposed action without court supervision. (On effect of failure to object, see *Prob.C. 10590*, *infra*, §764.)

(2) *Persons Entitled To Object.* A person entitled to notice of a proposed action under *Prob.C. 10581* (*supra*, §757) may object to the proposed action under *Prob.C. 10587*. (*Prob.C. 10587(a).*)

The Law Revision Commission Comment notes: (a) The statutory procedure applies whether the notice of the proposed action is mandatory or permissive. (b) An objection may be made by a person entitled to notice, even if the person has not actually received the notice. If the person entitled to the notice objects to the proposed action, the action can be taken only under court supervision. (See *Prob.C. 10589*, *infra*, §763.) "However, the person is not required to object to the proposed action in order to protect the right to have the court later review the action. Since the person was not given notice of proposed action, the person's right to have the court later review the proposed action is not affected." (See *Prob.C. 10590*, *infra*, §764.)

(3) *Manner of Objection.* An objection to a proposed action is made by delivering or mailing a written objection to the personal representative at the address stated in the notice of the proposed action. The person objecting may use the Judicial Council form or may make the objection in any other writing that identifies the proposed action with *reasonable certainty* and indicates that the person objects to the action. (*Prob.C. 10587(b).*) (See Judicial Council Form No. DE-165 [Notice of Proposed Action (Objection--Consent)].)

(4) *Effective Date of Objection.* The personal representative is deemed to have notice of an objection to a proposed action if the objection is delivered or received at the address stated in the notice of the proposed action before (a) the date specified in the notice as the date on or after which the action is to be taken or (b) the date the proposed action is actually taken, whichever is later. (*Prob.C. 10587(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Restraining Order To Prevent Proposed Action.

14 Witkin Sum. Cal. Law Wills § 762

[§ 762] Restraining Order To Prevent Proposed Action.

(1) *Statutory Authority.* A restraining order to prevent a proposed action from being taken without court supervision may be available under *Prob.C. 10588(a)*. This remedy is either an alternative to or in addition to the objection procedure under *Prob.C. 10587* (*supra*, §761).

(2) *Persons Entitled To Apply.* A person who is entitled to notice of a proposed action under *Prob.C. 10580(a)* (*supra*, §757), or who is given notice of a proposed action under *Prob.C. 10580(b)* (*supra*, §758), may apply to the court with jurisdiction over the proceeding for an order restraining the personal representative from taking the proposed action without court supervision. (*Prob.C. 10588(a)*.) (On application for order, see C.E.B., 1 Decedent Estate Practice, §9.18; C.E.B., 1 Probate Workflow Manual, §9.24; 1 Rutter Group, Cal. Practice Guide: Probate, Form 9:C; Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:28.)

The Law Revision Commission Comment makes the following observations:

(a) Where notice of the proposed action is mandatory under *Prob.C. 10580(a)*, a person who is entitled to notice of the proposed action, but has not been given notice of proposed action, may nevertheless obtain a restraining order under *Prob.C. 10588*.

(b) Where notice of the proposed action is permissive under *Prob.C. 10580(b)*, a person may obtain a restraining order under *Prob.C. 10588* only if the person has been given notice of the proposed action.

(c) If other persons have been given notice of the proposed action under *Prob.C. 10580(b)*, but the person who objects has not been given notice, a person entitled to notice under *Prob.C. 10581* may object to the proposed action as provided in *Prob.C. 10587*, but may not obtain a restraining order under *Prob.C. 10588*.

(3) *Issuance of Order.* "The court shall grant the requested order without requiring notice to the personal representative and without cause being shown for the order." (*Prob.C. 10588(a)*.) (For restraining order, see C.E.B., 1 Decedent Estate Practice, §9.19; C.E.B., 1 Probate Workflow Manual, §9.25; Rutter Group, 1 Cal. Practice Guide: Probate, Form 9:C; Cal. Civil Practice, 2 Probate and Trust Proceedings, §11:29.)

(4) *Effective Date of Order.* The personal representative is deemed to have notice of the restraining order if the

order is served under *C.C.P. 415.10* (personal delivery; see 3 *Cal. Proc. (4th), Actions*, §924) or *C.C.P. 415.30* (service by mail; see 3 *Cal. Proc. (4th), Actions*, §930), or in the manner authorized by the court, before (a) the date specified in the notice as the date on or after which the action is to be taken or (b) the date the proposed action is actually taken, whichever is later. (*Prob.C. 10588(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]
(4) *Effective Date of Order*.

Personal Delivery:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §1008.

Service by mail:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §1015 et seq.



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7. Hearing After Objection or Restraining Order.

14 Witkin Sum. Cal. Law Wills § 763

[§ 763] Hearing After Objection or Restraining Order.

(1) *In General.* Where the objecting party delivers a written objection to a proposed action under *Prob.C. 10587* (supra, §761) or obtains a restraining order under *Prob.C. 10588* (supra, §762), the personal representative with notice of the objection or restraining order may not take the proposed action without court supervision. (*Prob.C. 10589.*)

(2) *Procedure Where Court Supervision Is Otherwise Required.* If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under the IAEA, and the personal representative has notice of a written objection under *Prob.C. 10587* or a restraining order under *Prob.C. 10588*, "the personal representative shall, if the personal representative desires to take the proposed action, take the proposed action under the provisions of this code dealing with court supervision of that kind of action." (*Prob.C. 10589(a).*)

The Law Revision Commission Comment notes:

(a) Where notice of a proposed action is required, *Prob.C. 10589(a)* requires that the proposed action be taken only under court supervision if the personal representative has notice of a written objection or of a restraining order. When the proposed action is taken under court supervision, the requirements of the court supervised procedure apply as if the personal representative had not been granted independent administration authority.

(b) *Prob.C. 10589(a)* applies not only where notice of a proposed action is required but also where notice of a proposed action is not required for a proposed action that would require court supervision if independent administration authority had not been granted. (See *Prob.C. 10580(b)*, supra, §757.) If the personal representative elects to give notice of the proposed action in that case, even though not required, and the personal representative has notice of a written objection or a restraining order, the statute permits the personal representative to take the proposed action only under court supervision.

(3) *Procedure Where Court Supervision Is Not Otherwise Required.* If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under the IAEA, but the personal representative has given notice of the proposed action and has notice of a written objection under *Prob.C. 10587* or a restraining order under *Prob.C. 10588*, "the personal representative shall, if he or

she desires to take the proposed action, request instructions from the court concerning the proposed action. The personal representative may take the proposed action only under such order as may be entered by the court." (*Prob.C. 10589(b)*.)

The Law Revision Commission Comment points out that *Prob.C. 10589(b)* applies where the personal representative determines to give notice of proposed action where the personal representative would be authorized to take the proposed action without court supervision even if the personal representative had not been granted independent administration authority. In that case, the proposed action must be taken only after court authorization on a petition for instructions if the personal representative has notice of a written objection or of a restraining order.

(4) *Notice of Hearing.* A person who objects to a proposed action under *Prob.C. 10587*, or serves a restraining order issued under *Prob.C. 10588*, must be given notice of any hearing on a petition for court authorization or confirmation of the proposed action. (*Prob.C. 10589(c)*.) The Law Revision Commission Comment points out that notice of the hearing must be given for a hearing on a petition for instructions authorizing a proposed action described in *Prob.C. 10589(b)*, as well as for a hearing on a petition for court authorization or confirmation of a proposed action described in *Prob.C. 10589(a)*.

(5) *Effect of Failure To Obtain Court Supervision.* The Law Revision Commission Comment to *Prob.C. 10589* points out that, if the personal representative has notice of an objection, the statutory procedure permits court review of the proposed action before it is taken, rather than having the objection first made after the action has been taken. The Comment discusses the consequences if the personal representative goes ahead with the proposed transaction without court supervision:

(a) "As far as the third party to the transaction is concerned, the third party is protected if the third party is a bona fide purchaser or a third person dealing in good faith with the personal representative who changes his or her position in reliance upon the action, conveyance, or transfer, without actual notice of the failure of the personal representative to comply with the court supervision requirements." (See *Prob.C. 10591*, *supra*, §757.)

(b) "As far as the personal representative is concerned, there are two sanctions that would apply where the personal representative goes ahead with a transaction knowing that there is a written objection to the transaction. First, the personal representative can be surcharged if the personal representative violates the standard of ordinary care and diligence established by Section 9600. In view of the objection, the burden is on the personal representative to establish that the action taken satisfied the requirements of Section 9600. Second, taking an action without obtaining court supervision where there has been an objection to the proposed action is grounds for removal of the personal representative. See Section 10592 and the Comment to that section. If the objection was made by serving a restraining order with respect to the proposed action, the personal representative also would be subject to sanctions for violation of the court order."

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 764

[§ 764] Effect of Failure To Object.

(1) *Waiver of Court Review.* Except as provided in *Prob.C. 10590(c)*, only a person entitled to notice under *Prob.C. 10581* (*supra*, §757) has the right to have the court review a proposed action after it has been taken or otherwise to object to a proposed action after it has been taken. Except as provided in *Prob.C. 10590(b)* and (c), a person entitled to notice under *Prob.C. 10581* waives the right to have the court review a proposed action after it has been taken, or otherwise to object to a proposed action after it has been taken, if either (a) the person has been given notice of a proposed action and fails to object, or (b) the person has waived notice or consented to the proposed action. (*Prob.C. 10590(a).*)

(2) *Exception: No Timely Notice.* Unless the person has waived notice or consented to the proposed action, the court may review the action taken on motion of a person entitled to notice under *Prob.C. 10581* who establishes that he or she did not actually receive the notice of the proposed action before expiration of the time to object. (*Prob.C. 10590(b).*)

(3) *Exception: Protection of Interests of Minors or Incompetents.* The court may review the action of the personal representative on motion of an heir or devisee who establishes all of the following: (a) At the time the notice was given, the heir or devisee lacked capacity to object to the proposed action or was a minor. (b) No notice of proposed action was actually received by the guardian, conservator, or other legal representative of the heir or devisee. (c) The guardian, conservator, or other legal representative did not waive notice of the proposed action or consent to the proposed action. (*Prob.C. 10590(c).*)

(4) *"Objection to Proposed Action" Defined.* For purposes of *Prob.C. 10590*, an objection to a proposed action is made only by one or both of the following methods: (a) Delivering or mailing a written objection as provided in *Prob.C. 10587* within the time specified in *Prob.C. 10587(c)*. (b) Serving a restraining order obtained under *Prob.C. 10588* in the manner prescribed and within the time specified in *Prob.C. 10588(b)*. (*Prob.C. 10590(d).*)

(5) *Law Revision Commission Comment.* The Comment to *Prob.C. 10590* makes the following observations:

(a) To satisfy the requirements of *Prob.C. 10590*, "the notice must include a description of the proposed action in reasonably specific terms, with additional information if the proposed action involves a sale or exchange of real

property or an option to purchase real property."

(b) "A guardian ad litem can be appointed to object, waive, or consent to proposed actions under the Independent Administration of Estates Act where the person entitled to notice of proposed action lacks the capacity to act with respect to the proposed action."

SUPPLEMENT: [This section is current through the latest supplement]



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XIII. FAMILY PROTECTION

A. Temporary Possession of Dwelling and Exempt Property.

14 Witkin Sum. Cal. Law Wills § 765

[§ 765] Temporary Possession of Dwelling and Exempt Property.

(1) *Right of Surviving Spouse and Minor Children.* A decedent's surviving spouse and minor children may "remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment" until 60 days after the inventory is filed "or for such other period as may be ordered by the court." (*Prob.C. 6500.*) (On property exempt from enforcement of money judgment, see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §159 et seq.) Because the statutory purpose is to furnish support for the family, those in possession are not liable to the estate for rent of the dwelling during the period of temporary possession. (*Robson v. Meder* (1944) 66 *C.A.2d* 47, 49, 151 *P.2d* 662 [construing former law].)

(2) *Petition and Notice of Hearing.* A petition for an order of possession may be filed by any interested person. Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 6501.*) (See *Prob.C. 48*, *supra*, §49 ["interested person" defined]; C.E.B., 2 Probate Workflow Manual, §§15.13, 15.14; C.E.B., 2 Decedent Estate Practice, §16.32 et seq.; Cal. Civil Practice, 3 Probate and Trust Proceedings, §§18:5 et seq., 18:12 et seq.)

West's Key Number Digest, Executors and Administrators k.175

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Right of Surviving Spouse and Minor Children.*

Property exempt from enforcement of money judgment:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §168 et seq.



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B. Setting Aside Exempt Property.

14 Witkin Sum. Cal. Law Wills § 766

[§ 766] Setting Aside Exempt Property.

(1) *Exempt Property Other Than Family Dwelling.* When the inventory is filed, or at any subsequent time during administration, the court may, on petition, set apart to a decedent's surviving spouse or minor children all or part of the property exempt from enforcement of a money judgment, except the family dwelling. (*Prob.C. 6510.*) (On property exempt from enforcement of money judgment, see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §159 et seq.) (For cases construing former law, see *Estate of Kachigian* (1942) 20 *C.2d* 787, 792, 128 *P.2d* 865 [undivided interest in property that decedent held as tenant in common could be set aside]; *Estate of Starr* (1920) 183 *C.* 121, 123, 190 *P.* 625 [former statute was inapplicable where there was no surviving spouse, and children were over age 21]; *Estate of Schwall* (1932) 123 *C.A.* 106, 111, 10 *P.2d* 1013 [accrued installments unpaid under disability provisions of war risk insurance policy were part of insured's estate, properly set aside for widow]; *Estate of Crosby* (1935) 2 *C.2d* 470, 471, 477, 41 *P.2d* 928 [insurance policy on life of first husband, in favor of decedent wife; second husband was not entitled to proceeds]; and see also 24 *Cal. L. Rev.* 227; 9 *So. Cal. L. Rev.* 66.)

The discretionary nature of this power was emphasized in *Estate of Jones* (1947) 78 *C.A.2d* 265, 177 *P.2d* 372, construing the former statute. Decedent's widow was the beneficiary of insurance policies and the surviving coowner of war bonds. She demanded the setting aside of exempt personal property. The court's denial of her petition was upheld on the ground that the assets were few, and expenses of the funeral, last illness, and administration would probably be unpaid if the assignment to her were made. (78 *C.A.2d* 267.)

(2) *Procedure.* A set aside petition may be filed by any interested person. Notice of the hearing on the petition must be given as provided by *Prob.C. 1220* (mailed notice; supra, §391). (*Prob.C. 6511.*) (See *Prob.C. 48*, supra, §49 ["interested person" defined]; *C.E.B.*, 2 Probate Workflow Manual, §§15.15, 15.16; *C.E.B.*, 2 Decedent Estate Practice, §16.35 et seq.; Rutter Group, 1 *Cal. Practice Guide: Probate* §7:1 et seq., Forms 7:A, 7:B; *Cal. Civil Practice*, 3 Probate and Trust Proceedings, §18:16 [petition], §18:17 [order].)

West's Key Number Digest, Executors and Administrators k.181

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Exempt Property Other Than Family Dwelling.* Property exempt from enforcement of money judgment:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §168 et seq.



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XIII. FAMILY PROTECTION

C. Setting Aside Probate Homestead.

1. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 767

[§ 767] Statutory Development.

(1) *Original Statutes.* Former Prob.C. 660 et seq. provided a procedure (after a noticed hearing) for setting apart a "homestead" or dwelling house for the decedent's surviving spouse and children, free from claims of creditors, and superior to the rights of heirs and devisees. (See *Estate of Levy* (1904) 141 C. 646, 649, 75 P. 301; *Estate of Kachigian* (1942) 20 C.2d 787, 791, 128 P.2d 865; *Estate of Brooks* (1946) 28 C.2d 748, 750, 171 P.2d 724 [identity of legislative purpose in creating rights to probate homestead and family allowance]; *Estate of Alba* (1965) 238 C.A.2d 618, 621, 48 C.R. 100, *infra*, §790; 53 Cal. L. Rev. 655.)

(2) *Revision in 1980.* In a study of probate homesteads (see 15 Cal. Law Rev. Com. Reports, p. 401 et seq.) the California Law Revision Commission addressed differences between the survivorship right in a declared homestead and a probate homestead, criticized existing law, and recommended the following changes:

(a) *Elimination of survivorship right in declared homestead.* The probate homestead generally gives greater protection to the survivors, and the survivorship function of the declared homestead is merely incidental to its fundamental purpose of providing an exemption for the family home from claims of creditors. "The surviving family of any decedent should be eligible for a probate homestead regardless of the existence of a declared homestead."

(b) *Reform of law governing probate homestead.* Vesting of title in the surviving spouse and minor children can frustrate the estate plan of the decedent, has economic disadvantages (e.g., property might have to pass through probate twice) and adverse tax consequences, and treats adult children inequitably. These problems can be avoided by giving the court discretion to set apart a homestead in cases of need, for a limited term, with retained jurisdiction to modify the terms and conditions until the entry of the final decree of distribution; ultimately title should vest under the rules of testate and intestate succession. In addition, the existing statutory law is unclear on the rights of creditors, and the rules as to liability for claims against the decedent should be codified.

The recommended changes were made by the 1980 Legislature (Stats. 1980, Chap. 119). (See 12 *Pacific L. J.* 533.)

(3) *Revision in 1983.* The 1983 Legislature repealed former Prob.C. 660 et seq. and enacted Prob.C. 6520 et seq., operative January 1, 1985, as part of its comprehensive revision of the Probate Code (see *supra*, §24). Prob.C. 6520 et seq. continue and expand the former provisions. (See *infra*, §769 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Setting Aside Probate Homestead.

2. Relationship Between Probate Homestead and Declared Homestead.

14 Witkin Sum. Cal. Law Wills § 768

[§ 768] Relationship Between Probate Homestead and Declared Homestead.

Prob.C. 6528 makes clear the relationship between the probate homestead law and the declared homestead law (*C.C.P. 704.910* et seq.; see 8 *Cal. Proc. (4th), Enforcement of Judgment*, §224 et seq.): "Nothing in this chapter terminates or otherwise affects a declaration of homestead by, or for the benefit of, a surviving spouse or minor child of the decedent with respect to the community, quasi-community, or common interest of the surviving spouse or minor child in property in the decedent's estate. This section is declaratory of, and does not constitute a change in, existing law."

The Legislative Committee Comment to *Prob.C. 6528* points out that, although there is no longer a right of survivorship created by a declaration of homestead "in the sense that the survivor no longer takes the decedent's interest in the property over a contrary testamentary disposition, a homestead declaration made by or for the benefit of a survivor nonetheless remains effective as to the survivor's interest in the property," notwithstanding dictum to the contrary in *Estate of Grigsby (1982) 134 C.A.3d 611, 184 C.R. 886*.

West's Key Number Digest, Executors and Administrators k.173, 174

SUPPLEMENT: [This section is current through the latest supplement]

Declared homestead:

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment*, §229 et seq.



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C. Setting Aside Probate Homestead.

3. Petition.

14 Witkin Sum. Cal. Law Wills § 769

[§ 769] Petition.

(1) *Court's Discretion.* On a petition filed with the inventory or at any subsequent time during administration, the court may, in its discretion, set apart a probate homestead as provided by *Prob.C. 6520 et seq. (Prob.C. 6520.)* (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §18:19 et seq.)

(2) *Persons for Whom Homestead May Be Set Apart.* The homestead may be set apart for the use of one or more of the surviving spouse and the decedent's minor children. (*Prob.C. 6521.*) The homestead may be set aside for minor children even if there is a surviving spouse: e.g., where the children live apart from the surviving spouse or are not children of the surviving spouse. (Law Rev. Com. Comment.) (See *Estate of Dean (1980) 109 C.A.3d 156, 158, 167 C.R. 138* [right was lost where surviving spouse remarried before seeking homestead].)

(3) *Petition and Notice of Hearing.* A petition to set aside a probate homestead may be filed by any interested person. Notice of the hearing on the petition is given as provided in *Prob.C. 1220* (mailed notice; *supra*, §391) to each person listed in *Prob.C. 1220* and to each known heir or devisee whose interest in the estate would be affected by the petition. (*Prob.C. 6525.*) (See *Prob.C. 48*, *supra*, §49 ["interested person" defined]; C.E.B., 2 Probate Workflow Manual, §§15.18, 15.19; C.E.B., 2 Decedent Estate Practice, §16.38 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §7:1 et seq., Forms 7:C, 7:D; Cal. Civil Practice, 3 Probate and Trust Proceedings, §18:32 [petition], §18:33 [order].)

(4) *Duration.* The probate homestead is set aside for the period designated in the order, but not beyond the lifetime of the surviving spouse or the minority of a child. (*Prob.C. 6524.*)

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4. Available Property.

14 Witkin Sum. Cal. Law Wills § 770

[§ 770] Available Property.

(1) *Property That May Be Selected.* The probate homestead must be selected from the following property:

(a) If the probate homestead is set apart for the use of the surviving spouse or the use of the surviving spouse and minor children, out of community or quasi-community property. (*Prob.C. 6522(a)(1).*)

(b) If the probate homestead is set apart for the use of the surviving spouse or the use of minor children or the use of the surviving spouse and the minor children, out of (1) property owned in common by the decedent and the persons entitled to have the probate homestead set aside, or (2) the separate property of the decedent, or (3) property owned by the decedent (if the decedent was not married at the time of death). (*Prob.C. 6522(a)(2).*)

The probate homestead may be selected from real or personal property, e.g., a mobilehome. (Law Rev. Com. Comment.)

In selecting the property, preference must be given to the community, quasi-community, and commonly owned property of the decedent and the person entitled to have the probate homestead set aside. (*Prob.C. 6522(a).*)

(2) *Property That May Not Be Selected.* The probate homestead may not be selected from property for which a right of possession is vested in a third person, unless the third person consents. A third person is one whose right of possession (a) existed or came into existence at the decedent's death, and (b) was not created by testate or intestate succession from the decedent. (*Prob.C. 6522(b).*) The right of possession may be by partial ownership, lease, or otherwise. (Law Rev. Com. Comment.)

Only property in the probate estate may be selected. Community property set aside to the surviving spouse without administration under *Prob.C. 13500* et seq. (infra, §818 et seq.) is beyond the jurisdiction of the court and may not be selected. (*Estate of Liccardo (1991) 232 C.A.3d 962, 965, 283 C.R. 839.*)

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5. Factors To Be Considered.

14 Witkin Sum. Cal. Law Wills § 771

[§ 771] Factors To Be Considered.

In selecting and setting apart the probate homestead, the court must consider "the needs of the surviving spouse and minor children, the liens and encumbrances on the property, the claims of creditors, the needs of the heirs or devisees of the decedent, and the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means." (*Prob.C. 6523(a)*.)

In light of these factors and other "relevant considerations" within its discretion, the court selects "the most appropriate property available," including the dwelling and adjoining property. The court imposes a term and conditions "as appear proper," which may include assignment by the probate homestead recipient of other property to the heirs or devisees of the homestead property. (*Prob.C. 6523(b)*.)

Decisions under the former statute are illustrative. (See *Estate of Tittel* (1903) 139 C. 149, 150, 72 P. 909 [remainder interest of decedent's heirs was liable for his debts, including widow's claim for family allowance]; *Estate of Levy* (1904) 141 C. 646, 651, 75 P. 301 [property need not have been previous residence and may be used for other purposes as well as living quarters; three-flat building, family previously occupied only top flat]; *Estate of Barkley* (1928) 91 C.A. 388, 393, 267 P. 148 [in determining length of period, court could consider financial condition of estate and claims of creditors]; *Estate of Mattingly* (1937) 19 C.A.2d 550, 552, 65 P.2d 1338 [court need not designate property selected by petitioner]; *Estate of Claussenius* (1950) 96 C.A.2d 600, 611, 216 P.2d 485 [surviving husband of advanced years who gave decedent wife all his property, awarded for lifetime]; *Estate of Nelson* (1964) 224 C.A.2d 138, 145, 36 C.R. 352 [setting aside single structure with multiple apartments is permissible]; *Estate of Schmelz* (1968) 259 C.A.2d 440, 446, 66 C.R. 480 [no authority to set aside two structures, each of which was proper residence].)

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6. Liability of Property.

14 Witkin Sum. Cal. Law Wills § 772

[§ 772] Liability of Property.

(1) *In General.* Subject to the probate homestead right, the probate homestead property remains subject to administration. For the duration of the probate homestead, the rights of the parties are governed, to the extent applicable, by the Legal Estates Principal and Income Law (C.C. 731 et seq.; see 12 *Summary* (10th), *Real Property*, §170). (*Prob.C.* 6524.)

(2) *Debts of Decedent.* Probate homestead property is liable for claims against the estate, subject to the probate homestead right. The probate homestead right in property of the decedent is liable for claims secured by liens or encumbrances on the property at the date of the decedent's death, but is exempt to the extent of the homestead exemption (see C.C.P. 704.710 et seq., 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §208 et seq.) with respect to a claim that would have been subject to the homestead exemption at the date of the decedent's death. (*Prob.C.* 6526(a).)

(3) *Debts of Person for Whom Homestead Is Set Apart.* The probate homestead right is not liable for claims against the person for whose use the probate homestead is set aside. (*Prob.C.* 6526(b).) This provision creates an absolute exemption both as to prior and subsequently incurred debts and regardless of liens created on the homestead right, but it does not preclude a creditor from reaching an interest in the property the debtor may have apart from the homestead right (e.g., where the property was community or held in common with the decedent). (Law Rev. Com. Comment.)

(4) *Debts of Heirs and Devisees.* The probate homestead property is liable for claims against the heirs and devisees of the decedent or other successors to the property after administration, subject to the probate homestead right. (*Prob.C.* 6526(c).) This means that the homestead property goes through administration and devolves as any other property, subject to the right of use by the person for whom the property is set apart. (Law Rev. Com. Comment.)

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(2) *Debts of Decedent.* Homestead exemption:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §215 et seq.



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7. Modification or Termination.

14 Witkin Sum. Cal. Law Wills § 773

[§ 773] Modification or Termination.

(1) *Discretion of Court.* The court may, in its discretion, order termination of a probate homestead right or modification of the term or conditions of the right at any time prior to entry of an order for final distribution of the estate where "to do so appears appropriate under the circumstances." (*Prob.C. 6527(a).*)

(2) *Petition.* A petition for modification or termination may be filed by (a) the person for whom the property is set aside, (b) the successors to the decedent or other successors to the property, or (c) creditors with claims secured by liens or encumbrances on the property. (*Prob.C. 6527(b).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §18:34 [petition], §18:35 [order].)

(3) *Notice.* Notice of the hearing on the petition must be given to the persons listed in *Prob.C. 6527(b)* as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 6527(c).*)

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1. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 774

[§ 774] Statutory Development.

Former Prob.C. 680 provided that the surviving spouse, minor children, and adult children who were physically or mentally incapacitated from earning a living and were actually dependent in whole or in part on the decedent for support were "entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate." (See *Estate of Loundagin* (1962) 199 C.A.2d 555, 558, 19 C.R. 19, *infra*, §777, citing the text; *Estate of Wiedemann* (1964) 228 C.A.2d 362, 367, 39 C.R. 496; *Estate of Fawcett* (1965) 232 C.A.2d 770, 777, 43 C.R. 160; *Estate of Wallace* (1977) 74 C.A.3d 196, 202, 141 C.R. 426, *infra*, §777.) Both legitimated and illegitimate children were entitled to the allowance. (See *Estate of Filtzer* (1949) 33 C.2d 776, 781, 783, 205 P.2d 377 [void marriage; children legitimated]; *Estate of Woodward* (1964) 230 C.A.2d 113, 40 C.R. 781 [illegitimate child with right to support was entitled to family allowance]; 12 A.L.R.3d 1140 [eligibility of illegitimate child to receive family allowance].)

Former Prob.C. 680 et seq. were repealed, effective January 1, 1985, and replaced by revised provisions (*Prob.C. 6540 et seq.*). Because the current statutes are substantially similar to the former statutes, decisions under the former statutes remain relevant.

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14 Witkin Sum. Cal. Law Wills § 775

[§ 775] Mandatory Allowance.

(1) *In General.* A decedent's surviving spouse, minor children, and adult children "who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part upon the decedent for support" are entitled to "such reasonable family allowance out of the estate as is necessary for their maintenance according to their circumstances during administration of the estate." (*Prob.C. 6540(a)*); on discretionary allowance, see *Prob.C. 6540(b)*, *infra*, §776.) (See *Estate of McSwain* (1917) 176 C. 280, 284, 168 P. 117 [where allowance was given to widow for herself and child, and home was suitable, further allowance for child to live with aunt was improper]; 31 *Am.Jur.2d* (2002 ed.), *Executors and Administrators* §677 et seq.; 77 *Harv. L. Rev.* 533 [widow's allowance and marital deduction]; 6 *A.L.R.3d* 1387 [effect of previous agreement or judgment for support on right of minor children to family allowance].)

In *Estate of Secord* (1948) 84 C.A.2d 783, 192 P.2d 81, the estate was valued at \$ 4,370. The widow had an income from property previously held in joint tenancy by the spouses, and made no demand for a family allowance until after a former wife of the decedent filed a claim for \$ 9,000 arrearages under an order to support his daughter. Then the widow petitioned for an allowance of \$ 500 per month, which was denied. *Held*, order reversed. The facts of her other source of income, the delay, and the excessive demand (which would have consumed the assets in 9 months) might justify the inference that her principal motive was to prevent satisfaction of the creditor's claim. Nevertheless she had a statutory right, and the lower court was therefore directed to grant her an allowance "in such amount and for such period as in its discretion it shall determine to be reasonable and necessary." (84 C.A.2d 787.)

(2) *Source of Funds.* The statute provides for a family allowance "out of the estate." It does not authorize an allowance from the decedent's revocable trust, even though there is no probate estate and no administration. (*Parson v. Parson* (1996) 49 C.A.4th 537, 541, 56 C.R.2d 686.)

(3) *Preferred Claim.* A family allowance is a preferred claim, with priority over all other charges except debts owed to the United States and to California that have preference, expenses of administration, funeral expenses, and expenses of last illness. (See *Prob.C. 11420*, *supra*, §649; *Estate of Brooks* (1946) 28 C.2d 748, 750, 171 P.2d 724, *infra*, §787; *Estate of Dow* (1957) 48 C.2d 649, 652, 312 P.2d 1.) However, the allowance is not exempt from liability for debts. (See *Estate of Silverman* (1967) 249 C.A.2d 180, 184, 57 C.R. 379; 27 *A.L.R.3d* 863 [family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure].)

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3. Discretionary Allowance.

14 Witkin Sum. Cal. Law Wills § 776

[§ 776] Discretionary Allowance.

A decedent's parents and adult children, other than incapacitated adult children under *Prob.C. 6540(a)* (*supra*, §775), may be given a family allowance, in the court's discretion, if they were "actually dependent in whole or in part upon the decedent for support." (*Prob.C. 6540(b)*.)

Estate of Herrera (1992) 10 C.A.4th 630, 12 C.R.2d 751, considered the extent of the court's discretion under *Prob.C. 6540(b)*. M, the administrator of her son's estate, was removed for failing to submit an accounting as ordered, and F, a judgment creditor of the estate, moved to have her surcharged for the amount of its claim (\$ 10,000 plus interest). M then petitioned for a family allowance of \$ 1,000 per month and sought approval of an accounting showing that, during her time as administrator, she had used \$ 20,000 of estate funds for her personal use. F objected to the family allowance on the ground of insufficiency of estate assets. The trial judge, after being informed that the value of the estate was only \$ 2,000, approved the accounting, but surcharged M for the \$ 20,000 withdrawn for living expenses, and denied the petition for a family allowance. M appealed from the denial of the petition. *Held*, affirmed; under *Prob.C. 6540(b)* the trial judge has discretion to deny an application for a family allowance solely to allow a judgment creditor of the estate to be paid.

(a) *Nature and scope of discretion.* M's contention that the trial judge erred in denying her petition was based on the arguments that (1) a trial judge has no discretion to deny a request for a family allowance presented by a qualified application, and (2) by statute, family allowances have priority over creditors' claims, even when reduced to judgment. This position, based on the premise that a parent has a "right" to a family allowance, is unsound. The plain language of *Prob.C. 6540(b)* establishes that a parent has merely a right to apply for an allowance. Hence, until she is actually granted an allowance, M does not stand on an equal footing with F, and cannot complain that her claim should have been given priority. (10 C.A.4th 636.)

(b) *Interests of creditors.* M further argued that the trial judge's discretion under *Prob.C. 6540(b)* applies only to determining eligibility and amount, and does not allow the judge to place the interests of creditors over the interests of dependent parents. However, this position, which would in effect require parents to be found dependent as a matter of law, would make it virtually obligatory that they be awarded an allowance. This in turn would create a new form of mandatory allowance that would obliterate the distinction between the groups of applicants so carefully delineated in *Prob.C. 6540(a)* and (b). (10 C.A.4th 637.)

(c) *Equitable considerations.* In determining a petition for a family allowance, it is appropriate for the trial judge to base the decision on equitable considerations, such as the relative merits of the parties. (10 C.A.4th 638.) Here, M was removed as administrator after 3 years for failing to perform her responsibilities. During that period and while F's undisputed claim was unpaid, M withdrew estate funds for her private use. The withdrawal was not discovered until she filed an accounting 10 months after the deadline set by the court. F, on the other hand, had a valid claim perfected in a timely and proper fashion. Under these circumstances the trial judge did not err in concluding that it would be inequitable for M to become the indirect beneficiary of her prior misconduct at the expense of an innocent party. (10 C.A.4th 639.)

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14 Witkin Sum. Cal. Law Wills § 777

[§ 777] Limitations.

(1) *Other Sources of Support.* If a person entitled to a family allowance has "reasonable maintenance from other sources" and there are others entitled to an allowance, the allowance may be granted only to those who do not have "reasonable maintenance from other sources." (*Prob.C. 6540(c)*.) Decisions under the former statute are illustrative. (See *Estate of Silver* (1949) 92 C.A.2d 173, 175, 206 P.2d 895 [surviving spouse with large independent income was denied family allowance on ground that it was not "necessary" for maintenance]; *Estate of Jameson* (1964) 224 C.A.2d 517, 520, 36 C.R. 802 [right to allowance was not affected by fact that child was also receiving Social Security payments].) (On loss or waiver of right to support, see *infra*, §787.)

In *Estate of Loundagin* (1962) 199 C.A.2d 555, 19 C.R. 19, the parties had received an interlocutory decree of divorce, with a provision for \$ 1 per month support for the wife from the ailing husband. He died shortly afterwards, leaving an estate of \$ 3,850 to his mother, who paid over \$ 1,200 on part of the creditors' claims. The widow owned over \$ 33,000 in separate property (life insurance money collected and proceeds of sale of home) and a home valued at \$ 25,000; she earned \$ 500 a month and had living expenses of \$ 350 per month. The probate judge gave her an allowance of \$ 75 per month until further order of the court. She appealed on the ground of inadequacy, contending that her right to support should be determined by her living expenses, regardless of her means and the value of the estate. *Held*, the modest award was a proper exercise of discretion, and even this, if allowed for any extended time, would operate unreasonably to consume the assets and might defeat the claims of both the sole devisee and creditors. (199 C.A.2d 559.)

(2) *Duration of Marriage Is Irrelevant.* In *Estate of Wallace* (1977) 74 C.A.3d 196, 141 C.R. 426, the executor offered evidence to show that the marriage was of short duration (just over 1 year), and argued that, because a family allowance was an extension of the decedent's obligation of spousal support, the duration of the marriage should be considered as it is in a marital dissolution. *Held*, the evidence was properly excluded. (a) The court in a marital dissolution seeks to split one primary income so that it will support two households; and generally the standard of living of each will be diminished. Hence, the dissolution statutes allow consideration of the duration of the marriage as one factor in determining support. (b) The purpose of the family allowance to a spouse is to continue, during settlement of the estate, the support which he or she was receiving or entitled to receive during the decedent's life; and the allowance is deemed necessary despite the possibility of invading capital to meet the need. (74 C.A.3d 202.)

(3) *Effect of Dissolution.* A final decree of dissolution of marriage, entered nunc pro tunc so as to precede the testator's death, defeats the surviving spouse's right to a family allowance. (*Estate of Casimir* (1971) 19 C.A.3d 773, 781, 97 C.R. 623.)

(4) *Effect of Remarriage.* Remarriage terminates a surviving spouse's right to a family allowance, but, if there are minor children, the court may continue the allowance for their benefit. (*Estate of Houston* (1928) 205 C. 276, 283, 270 P. 939.) (See *Estate of Murphy* (1964) 225 C.A.2d 224, 233, 37 C.R. 205 [despite failure to disclose her remarriage (intrinsic fraud only) widow was entitled to original installments until modification order].)

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5. Commencement and Termination.

14 Witkin Sum. Cal. Law Wills § 778

[§ 778] Commencement and Termination.

(1) *Commencement of Allowance.* The court has discretion to order commencement of the allowance at any time before or after the date of the order, but not earlier than the date of the decedent's death. (*Prob.C. 6542.*)

(2) *Termination of Allowance.* The allowance continues until modified or terminated by the court, or until the time specified in the order, but must terminate no later than the entry of the order for final distribution of the estate or, if the estate is insolvent, no later than 1 year after the granting of letters. (*Prob.C. 6543.*) (See *Estate of Dow (1957) 48 C.2d 649, 651, 312 P.2d 1* [neither termination of prior allowance nor entry of decree of distribution precluded further award pending final distribution].)

Decisions under the former statute are illustrative. (See *Estate of Taylor (1936) 12 C.A.2d 374, 375, 55 P.2d 537* [allowance terminated after about 1 year, when probate homestead was granted]; *Estate of Dougherty (1951) 102 C.A.2d 785, 788, 228 P.2d 857* [reversing order refusing to terminate where settlement was delayed by spouse for purposes of continuing allowance]; *Estate of Guidotti (1957) 155 C.A.2d 814, 815, 318 P.2d 737* [reduction from \$ 450 per month to \$ 150 per month where preliminary distribution to spouse had depleted estate]; *Estate of Schumacher (1971) 18 C.A.3d 146, 153, 95 C.R. 572* [allowance for children was terminated where decedent made ample provision for support by life insurance policies].)

(3) *Estate Insolvent.* In determining whether the estate is insolvent, the court has discretion to consider the probable effect of litigation. Thus, in *Estate of Murphy (1964) 225 C.A.2d 224, 37 C.R. 205*, the adverse party was not an ordinary creditor with a claim; his suit asserted that the property was his, and he had obtained a preliminary injunction against the transfer of assets by the administrator. *Held*, termination of the allowance was a proper exercise of discretion. (*225 C.A.2d 238.*) (See *Estate of Cates (1971) 16 C.A.3d 1, 24, 93 C.R. 696* [additional family allowance was abuse of discretion].)

Insolvency as a reason for termination of the allowance, and the alternative of preliminary distribution, were explored in *Estate of Anderson (1977) 68 C.A.3d 1010, 137 C.R. 727*. The estate was inventoried at over \$ 1 million, with an annual income of about \$ 75,000. The widow, with monthly living expenses of \$ 6,567, had monthly income of \$ 363. Nevertheless, at the end of 1 year, the probate court terminated her family allowance on a finding of insolvency. The finding was based on the existence of civil actions filed by respondents, nieces and nephews of the decedent,

against the estate for damages, including compound interest and treble damages, of more than twice the value of the estate. The actions were based on alleged breach of fiduciary duty by the decedent as cotrustee of a trust, occurring over 40 years before the suit; the likelihood of overcoming the bar of limitations and of proving the allegations of the complaints was not great. The probate judge, however, took the position that because the actions had survived law and motion procedures and were at issue, there was a reasonable probability that the lawsuit would render the estate insolvent. *Held*, order terminating allowance affirmed.

(a) *Estate of Murphy* and *Estate of Cates*, *supra*, are distinguishable in that the litigation by the adverse claimants there was almost certain to be concluded in their favor, while here it was extremely doubtful whether the actions would be successful. (68 C.A.3d 1013, 1014.) But *Murphy* and *Cates* used the definition of insolvency in the Uniform Fraudulent Conveyance Act, under which "mere pendency of claims against the transferor, however far-fetched, constitutes sufficient evidence to support a finding of probable insolvency." (68 C.A.3d 1015.) This was a sound approach. The probate court should not pre-try contested civil actions in the summary proceeding for family allowance, which gives the court no ready means to adjust the rights of the parties. Hence, the probate court's order was within its discretion. (68 C.A.3d 1015.)

(b) The widow's interests can be more appropriately protected by preliminary distribution, which can be had despite the pendency of litigation against the estate (see *supra*, §729). "Preliminary distribution to the widow would appear proper, in that public policy favors speedy distribution of probate estates, especially where the widow has little outside resources. The court may authorize preliminary distribution despite pending claims, leaving respondents to their remedies on the civil side of the court. If the law and motion department is sufficiently convinced of the merits of respondents' cause and its likelihood of success, it can issue an injunction to prevent preliminary distribution, as happened in *Murphy*. Moreover, nothing would prevent the probate court conditioning partial distribution on posting of bond or subjecting the estate's real property to a lien for such sums, if any, as respondents might ultimately recover." (68 C.A.3d 1016.)

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14 Witkin Sum. Cal. Law Wills § 779

[§ 779] Procedure.

(1) *Petition*. The court may grant or modify a family allowance on petition of any interested person. (*Prob.C. 6541(a)*.) (See *Prob.C. 48*, supra, §49 ["interested person" defined]; *Estate of Broad (1933) 134 C.A. 196, 197, 25 P.2d 31* [court may make more than one order; not limited to modification of first order]; C.E.B., 2 Probate Workflow Manual, §15.2 et seq.; C.E.B., Decedent Estate Practice, §16.2 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §7:69 et seq., Forms 7:E, 7:F; Cal. Civil Practice, 3 Probate and Trust Proceedings, §18:52 [petition for family allowance], §18:53 [order awarding], §18:54 [petition to modify or terminate], §18:55 [order modifying or terminating].)

(2) *Mandatory Allowance*. A mandatory allowance under *Prob.C. 6540(a)* (supra, §775) may be made or modified (a) before the inventory is filed, either ex parte or after notice of the hearing on the petition under *Prob.C. 1220* (mailed notice; supra, §391); and (b) after the inventory is filed, only after notice. (*Prob.C. 6541(b)*.)

(3) *Discretionary Allowance*. A discretionary allowance under *Prob.C. 6540(b)* (supra, §776) may be made only after notice under *Prob.C. 1220* (mailed notice; supra, §391), has been given to (a) each person listed in *Prob.C. 1220*, and (b) each known heir and devisee whose interest in the estate would be affected by the petition. (*Prob.C. 6541(c)*.)

(4) *Costs*. The cost of proceedings under *Prob.C. 6540* et seq. are paid by the estate as expenses of administration. (*Prob.C. 6544*.)

(5) *Right To Appeal*. A grant or refusal to grant an order granting, modifying, or terminating a family allowance is appealable. (*Prob.C. 1303(e)*, supra, §411.)

(6) *Effect of Appeal*. Appeal of an order for a family allowance does not stay further proceedings or enforcement of the order if an undertaking for double the amount of the allowance is given. (*Prob.C. 6545*.)

(7) *Appellate Review*. An unusual contrast in appellate review was offered by two cases involving the same estate. In *Estate of Dow (1949) 91 C.A.2d 420, 205 P.2d 698*, probate proceedings were begun in 1931. The widow was given a 12 months' allowance in 1931, a 6 months' allowance in 1947, and a new allowance "until further order of this Court" in 1949. The widow's showing, held sufficient on appeal, was that the estate was continuously involved in litigation, and

was not in a condition for distribution despite the lapse of 20 years. The court saw no sufficient evidence of an intention by the widow to delay settlement of the estate. (91 C.A.2d 429.)

However, in *Estate of Dow* (1953) 120 C.A.2d 296, 260 P.2d 970, the showing was that decedent left his estate in equal parts to the widow (administrator) and his daughter. In addition to the substantial family allowance received since 1931, the widow was drawing 7% interest on a \$ 12,000 claim against the estate, but refused to wind up administration. The daughter had received nothing for 22 years. *Held*, the daughter's motion for orders terminating the family allowance, an accounting, and closing administration, were wrongly denied. Accordingly, the lower court was directed to enter those orders and to further order that, if the administrator did not sell the assets and pay all claims and costs of administration within 6 months, she be removed and another appointed to close the estate. (120 C.A.2d 298.)

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SUPPLEMENT: [This section is current through the latest supplement]



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E. Small Estate Set-Aside.
1. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 780

[§ 780] Statutory Development.

(1) *Original Statute.* Under former Prob.C. 640 et seq., an estate with a net value not exceeding \$ 2,500 could, under certain conditions, be set aside to a surviving spouse or minor children free from claims of general creditors, irrespective of contrary dispositions in the will. Subsequent amendments raised the amount to \$ 3,500, \$ 5,000, \$ 10,000, and \$ 20,000. (See *Estate of Atwood* (1900) 127 C. 427, 429, 59 P. 770; *Estate of Miller* (1910) 158 C. 420, 421, 111 P. 255 [showing that widow abandoned decedent husband would defeat her right]; *Estate of Abila* (1948) 32 C.2d 559, 560, 197 P.2d 10 [widow was not entitled to have estate set aside to her where interlocutory decree of divorce had been rendered without provision for support].)

(2) *Law Revision Commission Recommendation.* The California Law Revision Commission, in its 1986 Recommendation Relating to Small Estate Set-Aside (18 Cal. Law Rev. Com. Reports, p. 1101), proposed a number of substantial changes in the existing law, generally giving the court discretion to order or deny a set aside, clarifying the property included in the estate, and expanding the persons to whom the estate could be set aside.

(3) *Current Statute.* Revised set aside statutes (*Prob.C. 6600 et seq.*) were enacted in 1986, effective July 1, 1987. (See *infra*, §781 et seq.)

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2. Nature of Right.

14 Witkin Sum. Cal. Law Wills § 781

[§ 781] Nature of Right.

(1) *Estate Not Exceeding \$ 20,000.* A petition may be filed under *Prob.C. 6600* et seq. for an order setting aside the decedent's estate if the net value of the estate, over and above liens and encumbrances at the date of death and over and above the value of any probate homestead interest set apart out of the decedent's estate under *Prob.C. 6520* (supra, §769), does not exceed \$ 20,000. (*Prob.C. 6602.*) (See C.E.B., 1 Decedent Estate Practice, §5.24 et seq.; C.E.B., 1 Probate Workflow Manual, §6.12 et seq.; Cal. Civil Practice, 1 Probate and Trust Proceedings, §6:33 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §2:30 et seq. and Form 2:B.)

(2) *Persons Entitled to Set-Aside.* The procedure is available to the decedent's "surviving spouse and minor children, or one or more of them." (*Prob.C. 6602.*) For this purpose, "minor child" means "a child of the decedent who was under the age of 18 at the time of the decedent's death and who survived the decedent." (*Prob.C. 6601.*)

(3) *"Decedent's Estate" Defined.* For purposes of *Prob.C. 6600* et seq., "decedent's estate" means "all the decedent's personal property, wherever located, and all the decedent's real property located in this state." (*Prob.C. 6600(a).*) The definition is subject to the following limitations:

(a) Property held by the decedent at the time of death as a joint tenant, or in which the decedent had a life or other interest terminable on the decedent's death, is excluded in determining the estate or its value. (*Prob.C. 6600(b)(1).*)

(b) A multiple-party account to which the decedent was a party at the time of death is excluded in determining the estate or its value, whether or not all or part of the sums on deposit are community property, to the extent that the sums on deposit belong after the decedent's death to a surviving party, a P.O.D. payee, or a beneficiary. For this purpose, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" are defined in *Prob.C. 5120* et seq. (see 4 Summary (10th), *Negotiable Instruments*, §78). (*Prob.C. 6600(b)(2).*)

The Law Revision Commission Comment to *Prob.C. 6600* makes the following observations:

(a) The definition of "decedent's estate" is not limited to probate assets; it includes all of the decedent's personal property, wherever located, and all California real property, except property excluded by *Prob.C. 6600(b).*

(b) *Prob.C. 6600(a)* requires, for example, that the decedent's one-half share of the community and

quasi-community property be included in determining the decedent's estate or its value, whether or not the decedent's interest is set apart to the surviving spouse under *Prob.C. 13650* et seq. (infra, §829), unless the interest is excluded in determining the decedent's estate under *Prob.C. 6600(b)* as would be the case, for example, if the property is held in joint tenancy. (See *Estate of Pezzola (1980) 112 C.A.3d 752, 757, 169 C.R. 464* [decedent's one-half interest in community property was neither terminated nor extinguished on his death; hence, its value was included].)

(c) *Prob.C. 6600(b)* excludes an interest that terminates at death in determining the decedent's estate or its value. If the interest is one that passes to another on the decedent's death by virtue of a joint tenancy, a pay-on-death provision, or a contractual provision that provides for the interest to be transferred or paid to another on the decedent's death, *Prob.C. 6600(b)(1)* requires that the value of the interest be excluded in determining the decedent's estate or its value. For example, if there is a policy of insurance on the decedent's life and the proceeds are payable to a named beneficiary (not to the decedent's estate), the insurance proceeds are excluded in determining the decedent's estate or its value. Similarly, if the decedent has a retirement plan that provides benefits to a surviving spouse, those benefits are excluded in determining the decedent's estate or its value. *Prob.C. 6600(b)* also excludes life interests in trusts and life estates.

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[§ 782] Petition To Set Aside.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) Filing Fee.* If no estate proceeding is pending, the fee for filing a set-aside petition or a paper in opposition to the petition is \$ 180. If a paper in opposition is filed with a petition for the appointment of a personal representative, only the fee for the petition for appointment is charged. (See *Govt.C. 70656*, Supp., supra, §380B.)



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[§ 782] Petition To Set Aside.

(1) *Venue.* A set aside petition is filed in the superior court of a county in which the decedent's estate may be administered. (*Prob.C. 6603.*)

(2) *Persons Authorized To File.* A petition may be filed by any of the following: (a) the executor named in the decedent's will; (b) the decedent's surviving spouse; (c) the guardian of a minor child of the decedent; (d) a child of the decedent who was a minor at the time of the decedent's death; or (e) the decedent's personal representative if one has been appointed. (*Prob.C. 6606(a).*) The guardian of a minor child of the decedent may file the petition without authorization or approval of the court in which the guardianship proceeding is pending. (*Prob.C. 6606(b).*)

(3) *Allegations.* The petition must allege that *Prob.C. 6600* et seq. apply and request that an order be made setting aside the decedent's estate as provided in *Prob.C. 6600* et seq. (*Prob.C. 6604(a)*; see Cal. Civil Practice, 1 Probate and Trust Proceedings, §6:39.) The petition must include the following allegations:

(a) If proceedings for administration of the estate are not pending, the "facts necessary" to determine the county in which the decedent's estate may be administered. (*Prob.C. 6604(b)(1).*)

(b) The name, age, address, and relation to the decedent of each known heir and devisee. (*Prob.C. 6604(b)(2).*)

(c) "A specific description and estimate of the value of the decedent's estate and a list of all liens and encumbrances at the date of death." (*Prob.C. 6604(b)(3).*)

(d) "A specific description and estimate of the value of the decedent's real property" located outside California that passed to the decedent's surviving spouse and minor children, or any one or more of them, under the decedent's will or by intestate succession. (*Prob.C. 6604(b)(4).*)

(e) "A specific description and estimate of the value of any of the decedent's property" described in *Prob.C. 6600(b)* (*supra*, §781) that passed to the decedent's surviving spouse and minor children, or any one or more of them, on the decedent's death. (*Prob.C. 6604(b)(5).*)

(f) "A designation of any property" set apart as a probate homestead, pursuant to *Prob.C. 6520* (*supra*, §769). (

Prob.C. 6604(b)(6).)

(g) "A statement of any unpaid liabilities for expenses of the last illness, funeral charges, and expenses of administration." (*Prob.C. 6604(b)(7).*)

(h) "The requested disposition" of the decedent's estate under *Prob.C. 6600* et seq. and "the considerations that justify the requested disposition." (*Prob.C. 6604(b)(8).*)

(4) *Joinder With Petition for Probate or Administration.* If proceedings for the administration of the decedent's estate are pending, a petition under *Prob.C. 6600* et seq. must be filed in those proceedings without the payment of an additional fee. (*Prob.C. 6605(a).*) If proceedings for the administration of the decedent's estate have not yet been commenced, a petition under *Prob.C. 6600* et seq. may be filed concurrently with a petition for the probate of the decedent's will or for administration of the decedent's estate. (*Prob.C. 6605(b).*) If no petition for probate or for administration is being filed, a petition under *Prob.C. 6600* et seq. may be filed independently. (*Prob.C. 6605(b).*) A petition may be filed under *Prob.C. 6600* et seq. at any time prior to the entry of the order of final distribution of the estate. (*Prob.C. 6605(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) Filing Fee.* If no estate proceeding is pending, the fee for filing a set-aside petition or a paper in opposition to the petition is \$ 200. If a paper in opposition is filed with a petition for the appointment of a personal representative, only the fee for the petition for appointment is charged. (See *Govt.C. 70656*, as amended in 2008; Supp., supra, §380B.)



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4. Notice and Hearing.

14 Witkin Sum. Cal. Law Wills § 783

[§ 783] Notice and Hearing.

(1) *Notice of Hearing.* If proceedings for the administration of the decedent's estate are not pending when the set aside petition is filed under *Prob.C. 6600 et seq.* and the set aside petition is not joined with a petition for the probate of the decedent's will or for administration of the decedent's estate, the petitioner must give notice of the hearing as provided by *Prob.C. 1220* (mailed notice; *supra*, §391) to each known heir and devisee of the decedent, and to each person named as executor in the decedent's will. A copy of the petition must be sent with the notice of hearing to the surviving spouse, each child, and each devisee who is not petitioning. (*Prob.C. 6607(a).*)

If the set aside petition is filed with a petition for the probate of the decedent's will or with a petition for administration of the decedent's estate, notice of the hearing on the set aside petition must be given to the persons and in the manner prescribed by *Prob.C. 8003* (*supra*, §587) and must be included in the notice required by that statute. (*Prob.C. 6607(b).*)

If proceedings for probate of the will or administration of the estate are pending when the set aside petition is filed under *Prob.C. 6600 et seq.* and the hearing of the petition for probate of the will or administration of the decedent's estate is set for a day more than 15 days after the filing of the set aside petition, the set aside petition must be set for hearing at the same time as the petition for probate of the will or for administration of the estate, and notice of hearing on the set aside petition must be given by the petitioner as provided in *Prob.C. 1220* (mailed notice; *supra*, §391). (*Prob.C. 6607(c).*)

If the hearing of the petition for probate of the will or for administration of the estate is not set for hearing for a day more than 15 days after the filing of the set aside petition, (1) the set aside petition must be set for hearing at least 15 days after the date on which it is filed, (2) notice of the hearing on the set aside petition must be given by the petitioner as provided in *Prob.C. 1220* (mailed notice; *supra*, §391), and (3) if the petition for probate of the will or for administration of the estate has not already been heard, the probate petition must be continued until the scheduled date for the set-aside petition and heard at the same time unless the court otherwise orders. (*Prob.C. 6607(c).*)

(2) *Inventory and Appraisal.* If a set aside petition is filed, the personal representative, or the petitioner if no personal representative has been appointed, must file with the clerk of the court, before the hearing of the petition, an inventory and appraisal made as set forth in *Prob.C. 8000 et seq.* (*supra*, §583 et seq.). The personal representative or

the petitioner, as the case may be, may appraise the assets that a personal representative could appraise under *Prob.C. 8901* (supra, §602). (*Prob.C. 6608.*)

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5. Order.

14 Witkin Sum. Cal. Law Wills § 784

[§ 784] Order.

(1) *Court's Determination That Conditions Exist.* The court must grant the set aside petition if it finds that the net value of the decedent's estate, over and above liens and encumbrances at the date of the decedent's death and over and above the value of any probate homestead interest set apart out of the decedent's estate under *Prob.C. 6520* (supra, §769), does not exceed \$ 20,000 as of the date of the decedent's death, unless the court determines that granting the petition "would be inequitable under the circumstances of the particular case." (*Prob.C. 6609(a)*.) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §6:40.)

(2) *Factors Considered.* In determining whether to grant the set aside petition, the court must consider the following: (a) the needs of the surviving spouse and minor children, (b) the liens and encumbrances on the property of the decedent's estate, (c) the claims of creditors, (d) the needs of the decedent's heirs or devisees, (e) the decedent's intent with respect to the property in the estate and the decedent's estate plan as expressed in inter vivos and testamentary transfers or by other means, and (f) "any other relevant considerations." (*Prob.C. 6609(b)*.)

(3) *Effect of Remarriage.* If the surviving spouse has remarried at the time the petition is heard, it is presumed that the needs of the surviving spouse do not justify setting aside any portion of the estate to the surviving spouse. The presumption is a presumption affecting the burden of proof. (*Prob.C. 6609(b)*.) This provision places on the remarried surviving spouse the burden of proof to establish the need for the small estate set aside. (Law Rev. Com. Comment.)

(4) *Liabilities.* If any liabilities for the expenses of the last illness, funeral charges, and expenses of administration are unpaid at the time the court makes a set aside order, the court must "make such orders as are necessary so that those unpaid liabilities are paid." (*Prob.C. 6609(d)*.) The Law Revision Commission Comment points out that although the court may set aside a small estate whether or not these expenses have been paid, it must make an appropriate order to ensure that they will be paid.

(5) *Assignment of Estate.* Subject to *Prob.C. 6609(d)*, if the court makes a set aside order, it must "assign the whole of the decedent's estate, subject to all liens and encumbrances on property in the estate at the date of the decedent's death, to the surviving spouse and the minor children of the decedent, or any one or more of them." (*Prob.C. 6609(c)*.) The Law Revision Commission Comment makes the following observations:

(a) The court may assign the estate to the minor child or minor children of the decedent even if there is a surviving spouse. "This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse."

(b) The court may assign the estate to a surviving spouse even if the surviving spouse has remarried.

(c) "Under some circumstances, the court may order that the small estate be set aside to one of the minor children and that the other minor children and the spouse be excluded, or that the small estate be set aside in unequal shares to the minor children, or that the small estate be set aside to the surviving spouse and that the minor children be excluded. In determining the assignment to make, the court must take into account the various considerations listed in" *Prob.C. 6609(b)*.

(6) *Title*. "Title to property in the decedent's estate vests absolutely in the surviving spouse, minor children, or any or all of them, as provided in the order, subject to all liens and encumbrances on property in the estate at the date of the decedent's death." No further proceedings in the administration of the decedent's estate are authorized unless additional property in the decedent's estate is discovered. (*Prob.C. 6609(e)*.)

(7) *Conclusive Effect of Order*. A final set-aside order is "conclusive on all persons, whether or not they are then in being." (*Prob.C. 6610*.) However, the order is subject to collateral attack if "fraudulently procured" or if based on an "erroneous assumption of death." (See Law Rev. Com. Comment to *Prob.C. 6610*, pointing out that this language appeared in the former statute, but that its omission from *Prob.C. 6610* makes "no substantive change in the effect of the section.")

(8) *Administration Where Estate Is Not Set-Aside*. If a set aside petition is filed with a petition for the probate of the decedent's will or for administration of the decedent's estate, and the court determines not to make a set aside order, the court must act on the petition for probate of the decedent's will or for administration of the decedent's estate in the same manner as if no set-aside petition had been filed, and the estate must then be administered in the same manner as if no set aside petition had been filed. (*Prob.C. 6612*.)

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6. Personal Liability for Unsecured Debts.

14 Witkin Sum. Cal. Law Wills § 785

[§ 785] Personal Liability for Unsecured Debts.

(1) *General Rule.* Subject to specified limitations and conditions, the person or persons in whom title vested pursuant to *Prob.C. 6609* (supra, §784) are personally liable for the decedent's unsecured debts. (*Prob.C. 6611(a).*)

(2) *Ceiling on Personal Liability.* The personal liability of a person who takes only a share or portion of the decedent's estate is limited to the net value of the share or portion (fair market value as of date of decedent's death, less liens and encumbrances, probate homestead, and exempt property set apart out of that share), rather than the net value of the entire estate. (*Prob.C. 6611(b).*)

(3) *One-Year Limitations Period.* *C.C.P. 366.2* (statute of limitations on action against decedent; see supra, §517) applies in an action under *Prob.C. 6611*. (*Prob.C. 6611(e).*)

(4) *Decedent's Defenses.* "In any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse of the decedent, the child or children of the decedent, or the guardian of the minor child or children of the decedent, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died." (*Prob.C. 6611(c).*)

(5) *Creditors' Claims.* If proceedings are commenced in California for the administration of the decedent's estate and the time for filing claims has commenced, any action on the personal liability of a person under *Prob.C. 6611* is barred to the same extent as provided for claims under *Prob.C. 9000* et seq. (supra, §612 et seq.), except as to: (a) creditors who commence judicial proceedings to enforce the debt and serve the person liable under *Prob.C. 6611* with the complaint before the expiration of the time for filing claims; (b) creditors who have or who secure a written acknowledgment of liability from the person liable under *Prob.C. 6611*; and (c) creditors who file a timely claim in the proceedings for the administration of the decedent's estate. (*Prob.C. 6611(d).*)

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7. Attorneys' Fees.

14 Witkin Sum. Cal. Law Wills § 786

[§ 786] Attorneys' Fees.

Prob.C. 6613 provides as follows:

(1) Attorneys' fees for services performed in connection with filing a set aside petition and obtaining a set aside order are determined by private agreement between the attorney and the client and are not subject to court approval.

(2) If there is no agreement between the attorney and the client concerning attorneys' fees for these services, and there is a dispute concerning the reasonableness of the fees, a petition may be filed with the court in the same proceeding requesting that the court determine the reasonableness of the fees.

(3) If there is an agreement between the attorney and the client concerning attorneys' fees for these services and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court in the same proceeding requesting that the court determine the dispute.

The Law Revision Commission Comment notes that *Prob.C. 6613* is the same as *Prob.C. 13660* (infra, §833) and continues former law and practice. However, the court lacks jurisdiction to determine disputes concerning attorneys' fees for other services, "such as termination of joint tenancies, collection of insurance, and the like."

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F. Loss and Waiver of Rights.
1. Loss of Right to Support.

14 Witkin Sum. Cal. Law Wills § 787

[§ 787] Loss of Right to Support.

The original family allowance statute referred to decedent's "widow" and many of the early family protection decisions involving support were concerned with a surviving wife and a decedent husband.

Several early cases established the rule that the benefits of the family protection statutes could be lost where a wife voluntarily abandoned her husband without justification, so that he was no longer liable for her support. (*Estate of Fulton* (1936) 15 C.A.2d 202, 204, 59 P.2d 508 [probate homestead]; *Estate of Miller* (1910) 158 C. 420, 422, 111 P. 255 [small estate].) Other cases held that neither separation, nor pendency of a divorce action, nor the entry of an interlocutory decree was necessarily a bar. (*Estate of Ehler* (1931) 115 C.A. 403, 405, 1 P.2d 546 [divorce action by wife pending]; *Estate of Gould* (1919) 181 C. 11, 13, 183 P. 146 [interlocutory decree]; *Estate of Henningsen* (1926) 199 C. 103, 109, 247 P. 1082 [separation]; *Estate of Coons* (1951) 107 C.A.2d 531, 536, 237 P.2d 291 [separation].) (See 31 Am.Jur.2d (2002 ed.), *Executors and Administrators* §695 et seq.; 13 A.L.R.3d 446 [loss of rights by abandonment, desertion, or refusal to support]; 13 A.L.R.3d 486 [loss of right by adultery].)

Later the principle underlying the abandonment rule was applied to divorce cases. In *Estate of Ruiz* (1942) 53 C.A.2d 363, 127 P.2d 945, the husband was granted an interlocutory decree but died before the end of the year. The widow had no income or property. *Held*, the intent of the statute is to protect a wife entitled to demand support, and where the divorce is granted for fault of the wife without alimony, she is no more entitled to these special rights than when she voluntarily abandons her husband without cause. (53 C.A.2d 365.) (See 16 So. Cal. L. Rev. 353.)

In *Estate of Brooks* (1946) 28 C.2d 748, 171 P.2d 724, the Supreme Court departed from the view of *Estate of Gould* and followed *Estate of Ruiz*, laying down the test of right to support from the decedent prior to death. The wife received an interlocutory decree of divorce with no provision for support. Later the husband died and the wife applied for both the homestead and the family allowance. *Held*, she was not entitled to either. (a) The homestead and family allowance statutes carry out the same statutory policy, and the test of the rights of a surviving wife is the same under both sections. (b) Although the family allowance statutes made no express condition other than that the applicant be the decedent's widow, a widow could lose her rights by waiver or by misconduct that deprived her of her right to support. "The cases that do not insist upon the condition that the wife be entitled to support seem to lose sight of the purposes for which an allowance is granted. They give her an allowance intended to continue a support that she neither received previously nor was entitled to receive. No doubt the Legislature intended also to protect the family by restricting the

decendent's absolute testamentary freedom and by continuing to the family as against creditors the exemptions to which the decedent was entitled during his life. ... That protection is accorded them, however, only as a part of the broader protection that is derived from the decedent's duty to support them." (28 C.2d 755.)

The result of the *Brooks* case was criticized on the ground that sometimes, for jurisdictional reasons, the wife cannot obtain support in a divorce action, and that therefore the new test, based simply on whether provision for support was made in the interlocutory decree, was unfair. A more reasonable test, it was said, would bar her only where she lost the right to support by waiver, misconduct, or by failure to establish the right, after an opportunity to do so. (See 35 Cal. L. Rev. 303; cf. 20 So. Cal. L. Rev. 233.)

The *Brooks* theory was applied and perhaps extended in *Estate of Fallon* (1957) 49 C.2d 402, 317 P.2d 963. In 1945, the parties both sought divorces, which were denied, but the court awarded the wife \$ 250 per month support for 1 year. At the end of the year the husband stopped payments, and the wife lived apart without support for about 7 years until the husband's death. *Held*, although the right to a family allowance is not lost merely by reason of separation and the wife's self-support, the expiration of the award for support had the effect of a determination that she was not entitled to support at the time of her husband's death. She might have sought modification of that decree by showing changed circumstances occurring before his death, and could still do so; but, in the absence of a showing, the probate court could not grant the allowance. (49 C.2d 404.)

The *Brooks* and *Fallon* cases held that when a divorce decree was rendered on the merits without provision for support (or further support), the widow was not entitled to the allowance. In *Estate of Fawcett* (1965) 232 C.A.2d 770, 43 C.R. 160, the court declared that these cases had no application to a preliminary ruling not embodied in a divorce decree. In *Fawcett*, after a marriage of nearly 30 years, and with all children over 21, the wife sued for divorce. On an order to show cause, the judge, taking note of her employment at an adequate salary, made an order pendente lite that she vacate the family home, and that the husband as an "equalizer" pay her \$ 100 per month for 3 months to take care of her rent, "and we will see how this works out." A few months later, after expiration of the payment period, the husband died testate, leaving an estate valued at \$ 42,000. The wife sought a family allowance of \$ 200 a month, but was denied an allowance on the ground that she was not legally entitled to his support at the time of his death. *Held*, reversed. The purpose of the order was solely to preserve the property intact until determination on the merits; it was not an adjudication that the wife had no right of support at the time of her husband's death. (232 C.A.2d 783, 787.) Accordingly, the court was directed on retrial to receive evidence on her needs, and on whether there was an unjustifiable abandonment or a separation without her fault. (232 C.A.2d 788.)

In *Estate of Kalal* (1981) 121 C.A.3d 841, 175 C.R. 582, the wife and husband, in a dissolution proceeding commenced by the wife, signed a stipulation in which the husband agreed to vacate the family residence; the box on the form referring to spousal support was left blank. On the wife's death, the probate judge denied a family allowance without a statement of reasons. The administrator contended that the order could be upheld on either of two grounds: (1) The husband was not entitled to support because the parties were living separate by an agreement that did not provide for support; (2) the husband waived his right to support by his subsequent conduct. *Held*, order reversed. (a) Pendency of the dissolution action did not of itself establish separation by mutual consent. (121 C.A.3d 848.) (b) The stipulation, if considered a waiver of support, covered only temporary support and extended only until the time of trial; it was not a waiver of permanent support. (121 C.A.3d 850.) (c) Although the spouses were living separate at the time of the wife's death, and the husband had been supporting himself, these facts did not establish a waiver of the right to support. (121 C.A.3d 850.) (See *Estate of Blair* (1954) 42 C.2d 728, 733, 269 P.2d 612 [surviving spouse with sufficient estate waived allowance by failure to apply; her administrator was not entitled to retroactive allowance].)

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2. Express Release or Waiver.

14 Witkin Sum. Cal. Law Wills § 788

[§ 788] Express Release or Waiver.

(1) *Nature and Effect.* One spouse by contract with the other may release or waive the right to receive exempt property, a family allowance, or a probate homestead. The two common methods are writings attached to the will itself and property settlement agreements made at the time of separation or divorce. These agreements, if supported by consideration, and fair in other respects, will be given effect. (*Estate of Wyss* (1931) 112 C.A. 487, 494, 297 P. 100 [writing attached to will]; *Estate of Yoell* (1913) 164 C. 540, 548, 129 P. 999 [property settlement agreement]; *Estate of McCoy* (1942) 51 C.A.2d 483, 485, 125 P.2d 71 [same]; *Estate of Boeson* (1927) 201 C. 36, 41, 255 P. 800 [property settlement agreement was waiver of right to small estate]; *Estate of Sloan* (1918) 179 C. 393, 396, 177 P. 150 [property settlement agreement was waiver of right to exempt property]; see 20 Cal. L. Rev. 217; 34 A.L.R.2d 1020 [separation agreement as barring surviving spouse's right in decedent spouse's estate]; 65 A.L.R.2d 727 [waiver of homestead exemption by antenuptial agreement]; 9 A.L.R.3d 955 [waiver of family allowance by postnuptial agreement]; 30 A.L.R.3d 858 [waiver of family allowance by antenuptial agreement]; 31 Am.Jur.2d (2002 ed.), *Executors and Administrators* §702 et seq.; on similar waiver of community property rights, see *supra*, §321 et seq.)

This rule was limited, however, in *Estate of Branam* (1944) 66 C.A.2d 309, 152 P.2d 354. The surviving wife expressly waived an allowance and a probate homestead, and the court, pursuant to the waiver, set the homestead aside solely for the two minor children. *Held*, this was improper. The statutory protection is for the family as a unit, and does not contemplate its separation by creation of a home from which the children could exclude the parent or vice versa. Because the attempted waiver by the widow alone could not be given effect without defeating the paramount purpose of the law, it was declared ineffectual. (66 C.A.2d 316.)

In *Estate of Brisacher* (1959) 172 C.A.2d 392, 342 P.2d 384, decedent husband and petitioner wife made an antenuptial agreement that either of them could dispose of separate property and that "the survivor of us shall not have a claim against the estate of the other" except where a devise or bequest was made. *Held*, this was a waiver of the right to a family allowance out of the decedent husband's separate property; i.e., "claim" covered family allowance, and "survivor" covered the widow's rights. (172 C.A.2d 400.)

(2) *Strict Construction.* Early release agreements were subjected to an abnormally strict construction in order to preserve the valuable statutory rights of the wife. In particular, it appeared that where the language referred merely to her rights as a wife, and failed to make express reference to her rights as a widow or surviving spouse, no waiver of her

special rights as such surviving spouse would result. (See *Estate of Bidigare* (1932) 215 C. 28, 30, 8 P.2d 122 [family allowance; property settlement agreement, releasing "all claims ... for support and maintenance as wife or husband, or otherwise," was not waiver of claim as surviving widow]; *Estate of Myers* (1931) 115 C.A. 443, 446, 1 P.2d 1013; *Estate of Whitney* (1916) 171 C. 750, 760, 154 P. 855 [election to accept provisions of will and waiver of share in community property and "all other claims ... upon any of the estate disposed of by said will"; intention was to permit free disposal of community property, and it was not a waiver of right to family allowance]; *Estate of Dow* (1949) 91 C.A.2d 420, 426, 205 P.2d 698 [contract under which wife "agrees that she has no community interest" in husband's property does not amount to waiver of her right, as widow, to family allowance]; *Estate of Shapero* (1940) 39 C.A.2d 144, 148, 102 P.2d 569 [antenuptial contract waiving rights arising out of domestic relations "including also all rights of inheriting, administration, homestead or otherwise, whatever," was no bar to family allowance]; 34 A.L.R.2d 1020 [separation agreement as barring surviving spouse's right in deceased spouse's estate].)

However, in *Estate of Howe* (1947) 81 C.A.2d 95, 183 P.2d 329, the parties made an agreement before marriage, reciting that the prospective husband had extensive property holdings and the prospective wife did not, and providing that "neither party shall at any time claim any interest in the separate property of the other" except as to any provision made by will. The probate judge granted a probate homestead to the widow. *Held*, the order was improper, for the language of the agreement was clearly a waiver of the right; "any time includes all time and any interest includes every interest." (81 C.A.2d 99.) The court also declared that no precise language was necessary for a waiver, and that by the nature of the premarital agreement the parties must have had in mind the future rights of the wife as surviving widow. While the interpretation given by the court cannot easily be challenged, the decision seems clearly contrary to the cases cited above, in which the courts sought to avoid the effect of waiver wherever it was possible to do so, and gave effect to it only where it was impossible to give any contrary construction to the language.

(3) *Statutory Recognition of Written Waiver*. Under *Prob.C. 140* et seq. (supra, §322 et seq.), a surviving spouse's rights may be waived by a signed writing, including (a) the right to a probate homestead, (b) the right to have exempt property set aside, (c) the right to a family allowance, and (d) the right of a small estate set aside. Insofar as they relate to family protection rights, these waiver provisions are consistent with prior California case law. (Law Rev. Com. Comment to *Prob.C. 141*.)

(4) *Invalid Waivers*. A waiver is not enforceable if either (a) the surviving spouse was not represented by independent counsel, or (b) the surviving spouse was not provided with a fair and reasonable disclosure of the property and financial obligations of the decedent, unless disclosure was waived after advice by independent counsel. (*Prob.C. 143*, supra, §324.)

(5) *Unconscionable Provisions*. The court may refuse to enforce unconscionable provisions in a waiver or limit the application of unconscionable provisions to avoid an unconscionable result. (*Prob.C. 144*, supra, §323.) (On the doctrine of unconscionability, see 1 *Summary* (10th), *Contracts*, §322 et seq.)

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14 Witkin Sum. Cal. Law Wills § 789

[§ 789] Election or Waiver.

Even though a surviving spouse does not enter into an agreement of release or waiver (see *supra*, §788), the will may declare that the provision made for the surviving spouse in the will is in lieu of rights in community property (*supra*, §321 et seq.) or to a probate homestead or family allowance. The surviving spouse is then forced to elect to take under the will alone, or under the statute. (*Estate of Bump* (1907) 152 C. 274, 278, 92 P. 643 [election to take under statute]; see 97 A.L.R.2d 1319 [election].)

In *Estate of Cecala* (1951) 104 C.A.2d 526, 232 P.2d 48, decedent left property to his wife for life, with remainder to their children. The wife, in her petition for distribution, expressly waived community property rights and a statutory homestead, electing to take under the will, and a decree was rendered accordingly. Subsequently, a later will was found and admitted to probate, whereupon the administrator of the wife (since deceased) claimed the homestead for her estate. *Held*, relief denied; the wife could not accept benefits under the will and also assert rights against the testator's disposition. Although most of the cases deal with waiver of community property rights, "[t]he principle applies to any other kind of property right which one must relinquish if he desires to take under such a will." (104 C.A.2d 530.)

A waiver may result from a failure of the surviving spouse to seek a family allowance, probate homestead, or small estate during life; i.e., the right does not survive. (*Estate of Blair* (1954) 42 C.2d 728, 731, 269 P.2d 612; see 43 Cal. L. Rev. 335.)

In *Estate of Wiedemann* (1964) 228 C.A.2d 362, 39 C.R. 496, the wife and husband, both previously married and having separate property, made a postnuptial agreement 6 years after marriage, in which the husband set up a trust for the wife, and each waived any right to inherit from the other. On his death, she sought a family allowance. *Held*, the agreement did not constitute a waiver of her right, either by express language or necessary implication. (228 C.A.2d 368.) Nor was it material that she had waived her right to share in his estate. The purpose of the allowance is not merely to give interim support until distribution to those entitled to share in the estate, but rather to maintain the family during the period following death, irrespective of whether they share. (228 C.A.2d 373.)

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4. Estoppel.

14 Witkin Sum. Cal. Law Wills § 790

[§ 790] Estoppel.

An estoppel may result from the surviving spouse's own acts, after the decedent's death, inconsistent with a claim of family protection rights. In *Soares v. Steidtmann* (1955) 130 C.A.2d 401, 278 P.2d 953, a widow inherited land, and the right accrued to have it assigned to her as a small estate. Instead she conveyed by quitclaim deed to defendant's predecessor. Six years later, she sought to convey the property to plaintiff; and, to make this grant deed effective and defeat the earlier quitclaim deed, she applied to have the estate set aside to her. *Held*, reversing the probate court's order, the right was lost. "Whether it be held that the widow is estopped, has waived her rights, or had already conveyed away this right to the holder of the quitclaim deed is immaterial. In any event she cannot, nor can the respondent as the subsequent grantee with knowledge, assert any rights in the property" under the set aside statutes. (130 C.A.2d 406.)

No estoppel results, however, from an attempt to establish a trust in property on the theory that it belongs to the surviving spouse. After a determination by the court that the property was the decedent's, a probate homestead may be claimed. (*Estate of Claussenius* (1950) 96 C.A.2d 600, 612, 216 P.2d 485 [claim by surviving husband].) And, in view of the strict construction against written agreements purporting to waive the rights (supra, §788), no waiver will be found in general conversations between the spouses. (*Estate of Claussenius*, supra, 96 C.A.2d 613.)

In *Estate of Alba* (1965) 238 C.A.2d 618, 48 C.R. 100, decedent wife and petitioner husband had a residence in joint tenancy. They changed it to a tenancy in common, in order to create an estate on which their wills could act. Decedent then made a will giving \$ 10,000 to the children of her son by a former marriage and \$ 10,000 to her sister. But at her death the only asset was the undivided half-interest in this tenancy in common property, valued at \$ 28,000 (half-interest, \$ 14,000), and petitioner claimed it as a probate homestead. *Held*, his claim was good. The probate judge thought that his conduct in joining with the wife in the change to tenancy in common, thus providing an estate for the wife to devise, amounted to a waiver or estoppel. But the cases applying these doctrines involve either some misconduct or a clear intent to relinquish the right. Here, no such intent appeared, and there was neither misconduct nor any act inducing reliance by the wife; the frustration of the wife's will occurred simply by reason of the valid claim of a statutory right. (238 C.A.2d 625.)

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5. Murder of Decedent.

14 Witkin Sum. Cal. Law Wills § 791

[§ 791] Murder of Decedent.

In *Estate of Helwinkel* (1962) 199 C.A.2d 283, 18 C.R. 473, appellant widow, executor of her husband's estate, obtained an order for family allowance, and some installments accrued. Then she was convicted of his murder. Under former Prob.C. 258 (now Prob.C. 250), she could not succeed to the estate, but she claimed the right to a family allowance on the ground that this was not expressly excluded by the statute. *Held*, order vacating allowance affirmed. A court that has authority to deny it because of failure to maintain a home for the decedent certainly has authority to deny it to the decedent's murderess; and the principle of C.C. 3517 (no one can take advantage of his own wrong) precludes any claim by her. (199 C.A.2d 287.) The court also rejected the contention that, as to accrued installments prior to termination, denial would constitute a forfeiture for crime in violation of former P.C. 2604. A forfeiture involves the deprivation of a right to which a person was entitled at the time of commission of the crime; here, appellant's crime gave rise to her claim, and without it she had none. (199 C.A.2d 288.)

One who intentionally and feloniously kills a decedent may not take any property, interest, or benefit by reason of the death of the victim. (Prob.C. 250, supra, §293 et seq.) The disqualification expressly applies to any property of the decedent under the family protection provisions of Prob.C. 6500 et seq. (Prob.C. 250(a)(5).)

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A. Statutory Framework.

14 Witkin Sum. Cal. Law Wills § 792

[§ 792] Statutory Framework.

(1) *Recommendation and Revision.* It is sometimes convenient and appropriate to dispose of an estate without formal estate administration, e.g., where the decedent's property is of relatively low value or the decedent's successor is the surviving spouse. In response to the California Law Revision Commission's 1986 Recommendation relating to Disposition of Estate Without Administration (see 18 Cal. Law Rev. Com. Reports, p. 1505), the Legislature replaced the original summary administration statutes with a new division of the Probate Code (*Prob.C. 13000 et seq.*), effective July 1, 1987.

(2) *Structure of Division 8.* Division 8 of the Probate Code, entitled *Disposition of Estate Without Administration*, consists of two parts:

Part 1. *Collection or Transfer of Small Estate Without Administration* has the following chapters:

Chapter 1. Definitions. (*Prob.C. 13000 et seq.*) (See *infra*, §793.)

Chapter 2. General Provisions. (*Prob.C. 13050 et seq.*) (See *infra*, §§794, 795.)

Chapter 3. Affidavit Procedure for Collection or Transfer of Personal Property. (*Prob.C. 13100 et seq.*) (See *infra*, §796 et seq.)

Chapter 4. Court Order Determining Succession to Property. (*Prob.C. 13150 et seq.*) (See *infra*, §813 et seq.)

Chapter 5. Affidavit Procedure for Real Property of Small Value. (*Prob.C. 13200 et seq.*) (See *infra*, §807 et seq.)

Part 2. *Passage of Property to Surviving Spouse Without Administration* has the following chapters:

Chapter 1. General Provisions. (*Prob.C. 13500 et seq.*) (See *infra*, §818 et seq.)

Chapter 2. Right of Surviving Spouse to Dispose of Property. (*Prob.C. 13540 et seq.*) (See *infra*, §§821, 822.)

Chapter 3. Liability for Debts of Deceased Spouse. (*Prob.C. 13550 et seq.*) (See *infra*, §823.)

Chapter 3.5. Liability for Decedent's Property. (*Prob.C. 13560 et seq.*) (See *infra*, §824.)

Chapter 4. Collection by Affidavit of Compensation Owed to Deceased Spouse. (*Prob.C. 13600* et seq.) (See *infra*, §825 et seq.)

Chapter 5. Determination or Confirmation of Property Passing or Belonging to Surviving Spouse. (*Prob.C. 13650* et seq.) (See *infra*, §829 et seq.)

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1. In General. a. Definitions.

14 Witkin Sum. Cal. Law Wills § 793

[§ 793] Definitions.

Unless the provision or context otherwise requires, the definitions in *Prob.C. 13002* et seq. govern the construction of *Prob.C. 13000* et seq. (*Prob.C. 13000*.) The following terms are defined:

(1) *Holder of the Decedent's Property*. The term "holder of the decedent's property" or "holder" means, with respect to a particular item of property of the decedent, "the person owing money to the decedent, having custody of tangible personal property of the decedent, or acting as registrar or transfer agent of the evidences of a debt, obligation, interest, right, security, or chose in action belonging to the decedent." (*Prob.C. 13002*.)

(2) *Particular Item of Property*. The term "particular item of property" includes the following:

(a) Particular personal property of the decedent sought to be collected, received, or transferred by the decedent's successor under *Prob.C. 13100* et seq. (infra, §797 et seq.). (*Prob.C. 13004(a)(1)*.)

(b) Particular real property of the decedent, or particular real and personal property of the decedent, for which the decedent's successor seeks a court order determining succession under *Prob.C. 13150* et seq. (infra, §813 et seq.). (*Prob.C. 13004(a)(2)*.)

(c) Particular real property of the decedent with respect to which the decedent's successor files an affidavit of succession under *Prob.C. 13200* et seq. (infra, §807 et seq.). (*Prob.C. 13004(a)(3)*.)

(d) All interests specified in *Prob.C. 62* ("property" defined; supra, §50), subject to *Prob.C. 13004(a)*. (*Prob.C. 13004(b)*.)

(3) *Property of the Decedent*. The terms "property of the decedent," "decedent's property," and "money due the decedent," and similar phrases include property that becomes part of the decedent's estate on the decedent's death, whether by designation of the estate as a beneficiary under a life insurance policy or retirement plan, or otherwise. (*Prob.C. 13005*.)

(4) *Proceeding*. For purposes of *Prob.C. 13000* et seq., the term "proceeding" means that (a) a petition for

administration under *Prob.C. 7000* et seq. is pending, (b) a special administrator is serving, or (c) a personal representative with general powers has been appointed. The term does not include (a) a petition for administration that has been dismissed without appointment of a personal representative, (b) a proceeding under *Prob.C. 13000* et seq., or (c) a proceeding in another state. (*Prob.C. 13007*.)

(5) *Successor of the Decedent*. The term "successor of the decedent" has the following meanings:

(a) *If the decedent died leaving a will*, the beneficiary or beneficiaries who succeed to a particular item of property of the decedent under the decedent's will. A trust is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will. (*Prob.C. 13006(a)*.)

(b) *If the decedent died without a will*, the person or persons who succeed to the particular item of property of the decedent under *Prob.C. 6401* and *6402* (intestacy statutes; supra, §74 et seq.) or, if the law of a sister state or foreign nation governs succession to the particular item of property, under that law. (*Prob.C. 13006(b)*.)

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1. In General.

b. Property Excluded From Estate.

14 Witkin Sum. Cal. Law Wills § 794

[§ 794] Property Excluded From Estate.

Prob.C. 13050 specifies the following exclusions in determining the property or estate of the decedent or its value for purposes of *Prob.C. 13000* et seq.:

(1) *Interests Terminable at Death.* Any property, interest, or lien held by the decedent as a joint tenant at the time of death, or in which the decedent had a life or other interest terminable on the decedent's death, or which was held by the decedent and passed to the decedent's surviving spouse pursuant to *Prob.C. 13500* (infra, §818). Excluded property includes property in a trust revocable by the decedent during his or her lifetime. (*Prob.C. 13050(a)(1)*.) "The exclusion for an interest that terminates at death embraces life interests in trusts and contractual rights (such as insurance and employee retirement or death benefits) that terminate at death, as well as life interests in other property." (Law Rev. Com. Comment.)

(2) *Multiple-Party Accounts.* A multiple-party account to which the decedent was a party at the time of death whether or not all or part of the sums on deposit are community property, to the extent that the sums on deposit belong after the decedent's death to a surviving party, a P.O.D. payee, or a beneficiary. For this purpose, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" are defined in *Prob.C. 5120* et seq. (see 4 *Summary* (10th), *Negotiable Instruments*, §78). (*Prob.C. 13050(a)(2)*.)

(3) *Registered and Titled Vehicles and Vessels.* (a) Vehicles registered under *Veh.C. 4000* et seq. or titled under *Veh.C. 38000* et seq. (*Prob.C. 13050(b)(1)*.) (b) Vessels numbered under *Veh.C. 9840* et seq. (*Prob.C. 13050(b)(2)*.) (c) Manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes registered under *Health & Saf.C. 18000* et seq. (*Prob.C. 13050(b)(3)*.)

(4) *Compensation.* (a) Amounts due the decedent for services in the armed forces of the United States. (*Prob.C. 13050(c)(1)*.) (b) Up to \$ 5,000 of salary or other compensation, including compensation for unused vacation, due to the decedent for personal services from any employment. (*Prob.C. 13050(c)(2)*.)

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1. In General.
c. Authority of Fiduciaries.

14 Witkin Sum. Cal. Law Wills § 795

[§ 795] Authority of Fiduciaries.

(1) *Guardian or Conservator of Estate.* For purposes of *Prob.C. 13000* et seq., a guardian or conservator of the estate of a person entitled to any of the decedent's property may act on behalf of the person without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending. (*Prob.C. 13051(a).*)

(2) *Trustee.* For purposes of *Prob.C. 13000* et seq., the trustee of a trust may act on behalf of the trust. Where the trust is subject to continuing court jurisdiction under *Prob.C. 17300* et seq. (see 13 *Summary* (10th), *Trusts*, §237), the trustee may act on behalf of the trust without court approval. (*Prob.C. 13051(b).*)

(3) *Custodian.* For purposes of *Prob.C. 13000* et seq., if the decedent's will authorizes a custodian to receive a devise to a beneficiary under the Uniform Transfers to Minors Act of any state, the custodian may act on behalf of the beneficiary until the custodianship terminates. (*Prob.C. 13051(c).*) (On Uniform Act, *Prob.C. 3900* et seq., see 13 *Summary* (10th), *Personal Property*, §140 et seq.)

(4) *Sister State Personal Representative.* For purposes of *Prob.C. 13000* et seq., a sister state personal representative may act on behalf of the beneficiaries as provided in *Prob.C. 12570* et seq. (*supra*, §69). (*Prob.C. 13051(d).*)

(5) *Attorney-in-Fact.* For purposes of *Prob.C. 13000* et seq., an attorney-in-fact under a durable power of attorney (see 3 *Summary* (10th), *Agency and Employment*, §207) may act on behalf of the beneficiary giving the power. (*Prob.C. 13051(e).*)

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2. Affidavit Procedure for Personal Property.
a. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 796

[§ 796] Statutory Development.

(1) *Original Statute.* Former Prob.C. 630 et seq. provided a summary means for collecting money or personal property where the decedent did not leave real property (or an interest in or lien on real property) in California, and the total value of property in California, subject to a variety of exclusions, did not exceed a specified amount (originally \$ 3,000, and subsequently increased).

(2) *Law Revision Commission Recommendation.* The California Law Revision Commission recommended various changes in the summary procedure, raising the maximum amount, adding a waiting period, and providing for evidence of the decedent's ownership, proof of the claimant's identity, and enforcement of the duty to transfer the property. (See Affidavit Procedure for Collection or Transfer of Personal Property, 18 Cal. Law Rev. Com. Reports, p. 1508.)

(3) *Current Statute.* Former Prob.C. 630 et seq. were repealed in 1986, effective July 1, 1987, and replaced with provisions carrying out the Commission's recommendations. (See *Prob.C. 13100* et seq., *infra*, §797 et seq.)

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14 Witkin Sum. Cal. Law Wills § 797

[§ 797] Nature of Proceeding.

(1) *In General.* *Prob.C. 13100* et seq. authorize the collection or transfer of a decedent's personal property by affidavit in specified circumstances. (See C.E.B., 1 Decedent Estate Practice, §5.6 et seq.; C.E.B., 1 Probate Workflow Manual, §6.3 et seq.; Cal. Civil Practice, 1 Probate and Trust Proceedings, §6:3 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §2:6 et seq.; *infra*, §798 et seq.)

(2) *Property Covered.* Decedent's successors in interest may, without procuring letters of administration or awaiting probate of the will (a) collect money due the decedent; (b) receive the decedent's tangible personal property; and (c) have transferred any "evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent," whether or not secured by a lien on real property. (*Prob.C. 13100.*) However, the affidavit procedure may not be used to obtain possession or transfer of real property. (*Prob.C. 13115.*)

(3) *Maximum Value.* The affidavit procedure may be used only if the gross value of the decedent's real and personal property in California (excluding the property described in *Prob.C. 13050*, *supra*, §794) does not exceed \$ 100,000. (*Prob.C. 13100.*)

(4) *Earliest Time for Procedure.* The affidavit procedure may be used only after 40 days have elapsed since the decedent's death. (*Prob.C. 13100.*)

(5) *Effect of Estate Administration.* The affidavit procedure may be used only if (a) no proceeding for administration is pending or has been conducted, or (b) the decedent's personal representative consents in writing to the payment, transfer, or delivery of the property. (*Prob.C. 13108(a).*) However, payment, delivery, or transfer of property by this procedure does not preclude later proceedings for administration of the decedent's estate. (*Prob.C. 13108(b).*)

(6) *Other Procedures.* The affidavit procedure is in addition to and supplemental to any other procedure for collecting money due to a decedent, receiving tangible personal property of a decedent, or having evidence of ownership of property of a decedent transferred. Nothing in *Prob.C. 13100* et seq. "restricts or limits the release of tangible personal property of a decedent pursuant to any other provision of law." (*Prob.C. 13116.*)

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14 Witkin Sum. Cal. Law Wills § 798

[§ 798] Affidavit and Attachments.

(1) *In General.* The holder of a decedent's property must be furnished with an affidavit or declaration under penalty of perjury for the collection of money or tangible personal property, or the transfer of evidence of a debt, obligation, interest, right, security, or chose in action. (*Prob.C. 13101(a).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §6:13; C.E.B., 1 Decedent Estate Practice, §5.16; C.E.B., 1 Probate Workflow Manual, §6.6; Rutter Group, 1 Cal. Practice Guide: Probate, Form 2:A.)

(2) *Contents of Affidavit.* The affidavit must include the following:

(a) The name of the decedent. (*Prob.C. 13101(a)(1).*)

(b) The date and place of the decedent's death. (*Prob.C. 13101(a)(2).*)

(c) A statement that at least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to the affidavit. (*Prob.C. 13101(a)(3).*)

(d) Either of the following, as appropriate:

(1) "No proceeding is now being or has been conducted in California for administration of the decedent's estate." (*Prob.C. 13101(a)(4)(A).*)

(2) "The decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration." (*Prob.C. 13101(a)(4)(B).*)

(e) A statement that the current gross fair market value of the decedent's real and personal property in California, excluding property described in *Prob.C. 13050* (*supra*, §794), does not exceed \$ 100,000. (*Prob.C. 13101(a)(5).*)

(f) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant. (*Prob.C. 13101(a)(6).*)

(g) The name of the successor of the decedent to the described property. (*Prob.C. 13101(a)(7).*)

(h) Either of the following, as appropriate:

(1) "The affiant or declarant is the successor of the decedent (as defined in *Section 13006 of the California Probate Code*) to the decedent's interest in the described property." (*Prob.C. 13101(a)(8)(A).*)

(2) "The affiant or declarant is authorized under *Section 13051 of the California Probate Code* to act on behalf of the successor of the decedent (as defined in *Section 13006 of the California Probate Code*) with respect to the decedent's interest in the described property." (*Prob.C. 13101(a)(8)(B).*)

(i) A statement that no other person has a superior right to the interest of the decedent in the described property. (*Prob.C. 13101(a)(9).*)

(j) A request that the described property be paid, delivered, or transferred to the affiant. (*Prob.C. 13101(a)(10).*)

(k) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct." (*Prob.C. 13101(a)(11).*)

(3) *Multiple Affiants or Declarants.* Where more than one person executes the affidavit, the statements required by *Prob.C. 13101(a)* must be modified as appropriate to reflect that fact. (*Prob.C. 13101(b).*)

(4) *Debt or Interest Secured by Real Property.* If the particular item of property to be transferred is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder where the real property is located, the affidavit must satisfy the requirements of both *Prob.C. 13101* and *Prob.C. 13106.5* (see *infra*, §803). (*Prob.C. 13101(c).*)

(5) *Death Certificate.* A certified copy of the decedent's death certificate must be attached to the affidavit. (*Prob.C. 13101(d).*) (On procedure for acquiring certified copy of death certificate, see *Health & Saf.C. 103526.*)

(6) *Consent by Personal Representative.* If the personal representative has consented to the payment, transfer, or delivery of the described property to the affiant, a copy of the consent and of the personal representative's letters must be attached. (*Prob.C. 13101(e).*)

(7) *Inventory and Appraisal.* If the decedent's estate includes real property in California, the affidavit must be accompanied by an inventory and appraisal of the real property. The inventory and appraisal must be made as provided in *Prob.C. 8800 et seq.* (*supra*, §592 *et seq.*). The appraisal must be made by a probate referee selected by the affiant from among those probate referees appointed to appraise property in the county where the real property is located. (*Prob.C. 13103.*) In making the appraisal, the probate referee uses the date of the decedent's death as the date of valuation of the property. (*Prob.C. 13052.*)

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14 Witkin Sum. Cal. Law Wills § 799

[§ 799] Additional Evidence of Ownership.

(1) *Evidence Available.* If the decedent had evidence of ownership of the property and the holder of the property would have had the right to require presentation of that evidence before the duty of the holder to pay, deliver, or transfer the property to the decedent would have arisen, the evidence of ownership, if available, must be presented to the holder with the affidavit. (*Prob.C. 13102(a).*)

(2) *Evidence Unavailable.* If the evidence of ownership is not presented to the holder, the holder may require, as a condition for the payment, delivery, or transfer of the property, that the affiant provide the holder with a bond or undertaking "in a reasonable amount determined by the holder to be sufficient to indemnify the holder against all liability, claims, demands, loss, damages, costs, and expenses that the holder may incur or suffer by reason of the payment, delivery, or transfer of the property." However, the holder and the affiant may dispense with the requirement of a bond or undertaking and enter into an agreement concerning the duty of the affiant to indemnify the holder. (*Prob.C. 13102(b).*)

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14 Witkin Sum. Cal. Law Wills § 800

[§ 800] Proof of Affiant's Identity.

(1) *Requirement.* Each person executing the affidavit must provide "reasonable proof of identity" to the holder of the property. (*Prob.C. 13104(a).*)

(2) *Identification by Execution in Holder's Presence.* "Reasonable proof of identity" is provided if the affiant executes the affidavit in the presence of the holder and either the affiant is personally known to the holder, or a person personally known to the holder executes a written statement under penalty of perjury affirming the affiant's identity. (*Prob.C. 13104(b), (c).*)

(3) *Identification by Affiant's Identity Documents.* If the affidavit is executed in the holder's presence, the holder may reasonably rely on any of the following as "reasonable proof of identity":

(a) An identification card or driver's license issued by the California Department of Motor Vehicles that is current or was issued during the preceding 5 years. (*Prob.C. 13104(d)(1).*)

(b) A United States passport that is current or was issued during the preceding 5 years. (*Prob.C. 13104(d)(2).*)

(c) Any of the following documents if the document is current or was issued during the preceding 5 years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number: (1) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service. (2) A driver's license or identification card issued by another state. (3) An identification card issued by a branch of the armed forces of the United States. (*Prob.C. 13104(d)(3).*) The Law Revision Commission Comment notes that *Prob.C. 13104* does not permit a Canadian or Mexican driver's license to be used as proof of identity.

(4) *Identification by Notary's Certificate.* A notary public's certificate of acknowledgment identifying the affiant is reasonable proof of identity. (*Prob.C. 13104(e).*)

(5) *Notation on Affidavit.* Unless the affidavit contains a notary public's certificate of acknowledgment of the identity of the affiant, the holder must note on the affidavit either (a) that the affiant is personally known, or (b) a

description of the identification provided by the affiant. (*Prob.C. 13104(f).*)

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f. Collection of Property.

1. Successor's Entitlement to Property.

14 Witkin Sum. Cal. Law Wills § 801

[§ 801] Successor's Entitlement to Property.

(1) *Transfer of Property to Successor.* If the requirements of *Prob.C. 13100 to 13104* (supra, §787 et seq.) are met:

(a) The affiant as "successor of the decedent" is entitled to have the property described in the affidavit paid, delivered, or transferred. (*Prob.C. 13105(a)(1).*)

(b) A transfer agent of a security described in the affidavit must change the registered ownership on the books of the corporation from the decedent to the affiant as "successor of the decedent." (*Prob.C. 13105(a)(2).*)

(2) *Action To Compel Transfer.* If the holder of the property refuses to pay, deliver, or transfer personal property or evidence of it to the successor of the decedent within a reasonable time, "the successor may recover the property or compel its payment, delivery, or transfer in an action brought for that purpose against the holder of the property." If the court finds that the holder acted "unreasonably" in refusing to pay, deliver, or transfer the property, the court must award attorneys' fees to the person bringing the action. (*Prob.C. 13105(b).*)

The Law Revision Commission Comment notes: (a) This remedy is in addition to remedies against the holder if the decedent's estate is probated. (b) "The holder does not act unreasonably in refusing to pay, deliver, or transfer the property if the refusal is based on the holder's good faith belief that there may be estate taxes payable."

(3) *Protection of Holder From Liability.* If the requirements of *Prob.C. 13100 to 13104* are satisfied, the transferor is protected as follows:

(a) Receipt of the affidavit by the holder "constitutes sufficient acquittance for the payment of money, delivery of property, or changing registered ownership of property" and "discharges the holder from any further liability with respect to the money or property." The holder may rely in good faith on the statements in the affidavit and has no duty to inquire into the truth of any statement. (*Prob.C. 13106(a).*)

(b) The holder is not liable for taxes due to the State of California by reason of paying money, delivering property, or changing registered ownership of the property. (*Prob.C. 13106(b).*)

(4) *Claim Against Estate in Probate.* Where the money or property claimed in an affidavit belongs to a deceased heir or devisee of a decedent whose estate is being administered in California, the personal representative of the decedent must present the affidavit to the court in which the estate is being administered. The court must direct the personal representative to pay the money or deliver the property to the person identified by the affidavit as the successor of the decedent "to the extent that the order for distribution determines that the deceased heir or devisee was entitled to the money or property under the will or the laws of succession." (*Prob.C. 13107.*)

(5) *Property Subject to Pending Action.* Where money or property claimed in an affidavit is subject to a pending action in which the decedent was a party, the successor of the decedent is substituted as a party by a motion under *C.C.P. 377.30* et seq. (*supra*, §519), without procuring letters of administration or awaiting probate. The successor must file the affidavit or declaration when the motion is made. For purposes of *C.C.P. 377.30* et seq., a successor of the decedent who complies with *Prob.C. 13100* et seq. is considered the decedent's successor in interest. (*Prob.C. 13107.5.*)

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2. Property in Possession of Public Administrator or Coroner.

14 Witkin Sum. Cal. Law Wills § 802

[§ 802] Property in Possession of Public Administrator or Coroner.

(1) *Public Administrator.* A public administrator who has taken possession or control of a decedent's property under *Prob.C. 7600* et seq. (supra, §417) may refuse to pay money or deliver property pursuant to *Prob.C. 13100* et seq. if payment of the costs and fees described in *Prob.C. 7604* has not "first been made or adequately assured to the satisfaction of the public administrator." (*Prob.C. 13114(a)*.)

(2) *Coroner.* A coroner who has property found on the body of a decedent, or who has taken charge of property of a decedent pursuant to *Govt.C. 27491.3*, may refuse to pay or deliver the property pursuant to *Prob.C. 13100* et seq. "if payment of the reasonable costs of holding or safeguarding the property has not first been made or adequately assured to the satisfaction of the coroner." (*Prob.C. 13114(b)*.)

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3. Obligation Secured by Lien on Real Property.

14 Witkin Sum. Cal. Law Wills § 803

[§ 803] Obligation Secured by Lien on Real Property.

Prob.C. 13106.5 provides special rules for the transfer by affidavit of a debt or other obligation, including a promissory note, secured by a recorded lien on real property. The statute "covers not only the right to payment of a debt secured by a lien on real property, but also the right to enforce an obligation the performance of which is secured by a lien on real property." (Law Rev. Com. Comment.)

(1) *Requirements.* The affidavit must (a) be recorded in the office of the county recorder of the county where the real property is located; (b) include the recording reference of the instrument creating the lien; and (c) include a notary public's certificate of acknowledgment identifying each person executing the affidavit. (*Prob.C. 13106.5(a)*.)

(2) *Effect of Transfer.* The transfer of the debt or obligation secured by a lien on real property has the same effect as an assignment of the right to collect the debt or enforce the obligation. (*Prob.C. 13106.5(b)*.) The Law Revision Commission Comment explains:

(a) Under C.C. 2936, the assignment of a debt secured by a mortgage carries the mortgage with it; under C.C. 2932.5, when a power to sell is given to a mortgagee or other encumbrancer in an instrument intended to secure the payment of money, the power is part of the security and vests in the person who by assignment becomes entitled to the money, and may be executed by that person if the assignment is acknowledged and recorded.

(b) Under C.C. 2941, the persons executing the affidavit or declaration as successor of the decedent have the same rights and duties they would have if they were an assignee of the mortgage or an assignee of the beneficial interest under the deed of trust. "Giving these persons these rights would, for example, permit a title insurer to rely upon the affidavit or declaration in case of the recording of a notice of default in a non-judicial foreclosure of the deed of trust or the mortgage (with a power of sale). The duties include, for example, the duty to execute a certificate of discharge of the mortgage if the lien is secured by a mortgage."

(3) *Effect of Recordation.* The recording of the affidavit under *Prob.C. 13106.5(a)* has the same effect as recording an assignment of a mortgage or an assignment of the beneficial interest under a deed of trust have under C.C. 2934 and

2935. (*Prob.C. 13106.5(b)*.) The Law Revision Commission Comment points out:

(a) The recording of the affidavit or declaration operates as constructive notice of its contents to all persons.

(b) Any duty of the obligor under *Prob.C. 13105* to pay the successor of the decedent or otherwise to satisfy the obligation does not arise until the obligor has been furnished with satisfactory evidence that the affidavit has been recorded and satisfies the requirements of *Prob.C. 13106.5(a)*. "Such evidence might be, for example, a certified copy of the recorded affidavit or declaration, but any other satisfactory evidence of the recorded affidavit or declaration would be sufficient."

(c) The reference to C.C. 2935 in *Prob.C. 13106.5(b)* "makes clear that the recording of the affidavit or declaration is not itself notice to the obligor so as to invalidate a payment made to the holder of the note secured by the lien on the real property."

(4) *Protection of Third Parties Acting in Good Faith*. If the requirements of *Prob.C. 13106.5(a)* and of *Prob.C. 13100* to *13103* are satisfied, third parties acting in good faith are protected as follows:

(a) If a *deed of trust* on the real property was given to secure the debt, (1) the trustee under the deed of trust may rely in good faith on the statements made in the affidavit and has no duty to inquire into the truth of any statement, and (2) a person acting in good faith and for a valuable consideration may rely on a recorded reconveyance of the trustee under the deed of trust. (*Prob.C. 13106.5(c)*.)

(b) If a *mortgage* on the real property was given to secure the debt, a person acting in good faith and for a valuable consideration may rely on a recorded discharge of the mortgage executed by the person or persons executing the affidavit as successor of the decedent or by their successors in interest. (*Prob.C. 13106.5(d)*.)

"These protections are consistent with the protection given the holder of the decedent's property under Section 13106. They are necessary to protect the obligor on the debt who has paid the debt to the person or persons executing the affidavit or declaration and needs to have the property title records reflect the fact that the debt has been paid and the security released." (Law Rev. Com. Comment.)

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1. Liability for Decedent's Debts.

14 Witkin Sum. Cal. Law Wills § 804

[§ 804] Liability for Decedent's Debts.

(1) *General Rule.* A person who takes the decedent's personal property by affidavit is personally liable for the decedent's unsecured debts. (*Prob.C. 13109.*)

(2) *Limitations on Liability.* A person who takes the decedent's personal property by affidavit is not liable under *Prob.C. 13109* if proceedings for the administration of the decedent's estate are commenced in California, and the transferee satisfies the requirements of *Prob.C. 13111* (liability to estate; *infra*, §806). (*Prob.C. 13112(a).*)

Except as provided in *Prob.C. 13110(b)* (liability for fraudulent transfer; *infra*, §805), a person's total personal liability cannot exceed the sum of the following: (a) the fair market value, at the time the affidavit is presented, of the property received, less the amount of liens and encumbrances on the property at that time; (b) the net income the person received from the property; and (c) if the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For this purpose, "fair market value of the property" has the meaning provided in *Prob.C. 13111(a)(2)* (*infra*, §806). (*Prob.C. 13112(b).*)

(3) *Enforcement.* An unsecured debt may be enforced against the person "in the same manner as it could have been enforced against the decedent if the decedent had not died." In an action on the debt, the person may assert defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died. (*Prob.C. 13109.*)

(4) *Limitation of Action.* Nothing in *Prob.C. 13109* permits enforcement of a claim that is barred under *Prob.C. 9000* et seq. (*supra*, §612 et seq.). *C.C.P. 366.2* (*supra*, §517), the statute of limitations on an action against a decedent, applies in an action under *Prob.C. 13109*. (*Prob.C. 13109.*)

(5) *Remedies Are Not Exclusive.* The remedies available under *Prob.C. 13109* to *13112* are in addition to other remedies available "by reason of fraud or intentional wrongdoing." (*Prob.C. 13113.*)

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2. Liability to Holder of Superior Right.

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[§ 805] Liability to Holder of Superior Right.

(1) *General Rule.* A person who takes the decedent's personal property by affidavit is personally liable to any person "having a superior right by testate or intestate succession from the decedent." (*Prob.C. 13110(a).*)

(2) *Limitations on Liability.* A person who takes the decedent's personal property by affidavit is not liable under *Prob.C. 13110* if proceedings for the administration of the decedent's estate are commenced in California, and the transferee satisfies the requirements of *Prob.C. 13111* (liability to estate; *infra*, §806). (*Prob.C. 13112(a).*)

Except as provided in *Prob.C. 13110(b)* (*infra*, this section), the person's total personal liability cannot exceed the sum of the following: (a) the fair market value, at the time the affidavit is presented, of the property received, less the amount of liens and encumbrances on that property at that time; (b) the net income the person received from the property; and (c) if the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For this purpose, "fair market value of the property" has the same meaning as defined in *Prob.C. 13111(a)(2)* (*infra*, §806). (*Prob.C. 13112(b).*)

(3) *Liability for Fraudulent Transfer.* In addition to any other liability the person has under *Prob.C. 13109* to *13112*, a person who "fraudulently secures the payment, delivery, or transfer of the decedent's property" under *Prob.C. 13100* et seq. is liable to superior claimants for three times the fair market value of the property. For this purpose, the "fair market value of the property" is the fair market value of the property paid, delivered, or transferred, valued as of the time the affidavit is presented to the holder of the decedent's property, excluding liens and encumbrances on that property at that time. (*Prob.C. 13110(b).*)

(4) *Limitation of Action.* An action to impose liability under *Prob.C. 13110* is "forever barred" 3 years after the affidavit is presented to the holder, or 3 years after the discovery of the fraud, whichever is later. This 3-year period is not tolled for any reason. (*Prob.C. 13110(c).*)

(5) *Remedies Are Not Exclusive.* The remedies available under *Prob.C. 13110* and *13112* do not limit any other remedies that are available "by reason of fraud or intentional wrongdoing." (*Prob.C. 13113.*)

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3. Liability to Estate.

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[§ 806] Liability to Estate.

(1) *In General.* If proceedings for the administration of the decedent's estate are commenced in California, or if the personal representative has consented to the payment, transfer, or delivery of the decedent's property and later requests that the property be restored to the estate, each person who takes the decedent's personal property by affidavit is liable for the following:

(a) *Restoration.* If the person still has the property, restoration of the property to the estate together with the net income the person received from the property, and, if the person encumbered the property, the amount necessary to satisfy the balance of the encumbrance on the date the property is restored. (*Prob.C. 13111(a)(1).*)

(b) *Restitution.* If the person no longer has the property, restitution to the estate of the fair market value of the property together with (1) the net income the person received from property, and (2) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For this purpose, the "fair market value of the property" is the fair market value of the property, determined as of the time of the disposition of the property, less liens and encumbrances on the property at that time. (*Prob.C. 13111(a)(2).*)

(2) *Reduction of Liability.* The property and amount required to be restored to the estate under *Prob.C. 13111* must be reduced by any property or amount paid to satisfy a liability under *Prob.C. 13109* (liability for unsecured debts; *supra*, §804) or *Prob.C. 13110* (liability to holder of superior right; *supra*, §805). (*Prob.C. 13111(c).*)

(3) *Liability for Fraudulent Transfer.* Subject to *Prob.C. 13111(c)* and in addition to any liability the person has under *Prob.C. 13109* to *13112*, a person who "fraudulently secured the payment, delivery, or transfer" of the decedent's property is liable for restitution to the decedent's estate of three times the fair market value of the property. For this purpose, the "fair market value of the property" is the fair market value of the property received, determined as of the time the person presents the affidavit, less liens and encumbrances on the property at that time. (*Prob.C. 13111(b).*)

(4) *Enforcement.* An action to enforce liability under *Prob.C. 13111* may be brought only by the personal representative of the decedent's estate. The court's judgment may enforce the liability "only to the extent necessary to

protect the interests" of the decedent's heirs, devisees, and creditors. (*Prob.C. 13111(d).*)

(5) *Limitation of Action.* An action to enforce liability under *Prob.C. 13111* is "forever barred" 3 years after presentation of the affidavit to the holder, or 3 years after the discovery of the fraud, whichever is later. This 3-year period is not tolled for any reason. (*Prob.C. 13111(e).*)

(6) *Nondomiciliary Decedent.* In the case of a nondomiciliary decedent, restitution under *Prob.C. 13111* is made to the estate in an ancillary administration proceeding (see *supra*, §66). (*Prob.C. 13111(f).*)

(7) *Remedies Are Not Exclusive.* The remedies available under *Prob.C. 13111* are in addition to other remedies available "by reason of any fraud or intentional wrongdoing." (*Prob.C. 13113.*)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Nature of Proceeding.

Witkin Sum. Cal. Law Wills § 807

[§ 807] Nature of Proceeding.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Filing Fee*. The total fee for filing an affidavit under *Prob.C. 13200* and issuance of a certified copy of the affidavit is the amount provided in *Govt.C. 70626(b)* (\$ 20). (*Prob.C. 13201*, as amended in 2005.)



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14 Witkin Sum. Cal. Law Wills § 807

[§ 807] Nature of Proceeding.

Prob.C. 13200 et seq. authorize an affidavit procedure for obtaining a marketable title to real property in which the value of the decedent's interest is low. (See C.E.B., 1 Decedent Estate Practice, §5.23A et seq.; Cal. Civil Practice, 1 Probate and Trust Proceedings, §6:22 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §2:28 et seq.)

(1) *Law Revision Commission Report*. The California Law Revision Commission Report (18 Cal. Law Rev. Com. Reports, p. 1515) explains the purpose of the procedure:

"Unless the successor is the surviving spouse, there is no summary procedure under existing California law to obtain a marketable title to a real property interest of small value. Therefore, in order to obtain marketable title to real property, whether the estate be large or small, there must be proceedings for the probate of the decedent's will or for administration of the decedent's estate."

"If a decedent dies owning real property of minimal value (such as a desert lot or speculative undeveloped mineral rights), the property is sometimes abandoned by the decedent's heirs or devisees because the cost of administration may exceed the value of the property."

(2) *Maximum Value*. The affidavit procedure may be used only if the gross value of the decedent's real property in California does not exceed \$ 20,000, excluding property described in *Prob.C. 13050* (supra, §794). (*Prob.C. 13200(a)(5)*.)

(3) *Effect of Estate Administration*. The affidavit procedure may be used only if no proceeding for the administration of the decedent's estate is pending or has been conducted in California or the decedent's personal representative has consented in writing to the use of the procedure. (*Prob.C. 13210*.)

(4) *Earliest Time for Procedure*. The affidavit procedure may be used once 6 months have elapsed since the decedent's death. (*Prob.C. 13200(a)(6)*.)

(5) *Expenses Paid*. The affidavit procedure may be used only if the funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid. (*Prob.C. 13200(a)(8)*.)

(6) *Filing Fee*. The total fee for filing an affidavit under *Prob.C. 13200* and issuance of a certified copy of the affidavit is \$ 35. (*Prob.C. 13201*.) No additions may be made "for such fees as a law library fee, judges' retirement fee, or the like." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Filing Fee*. The total fee for filing an affidavit under *Prob.C. 13200* and issuance of a certified copy of the affidavit is the amount provided in *Govt.C. 70626(b)* (\$ 20). (*Prob.C. 13201*, as amended in 2005.)



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b. Affidavit and Attachments.

14 Witkin Sum. Cal. Law Wills § 808

[§ 808] Affidavit and Attachments.

(1) *Filing Affidavit.* Once 6 months have elapsed after the death of a decedent, a person claiming a particular item of real property as the decedent's successor may file an affidavit under *Prob.C. 13200* et seq. The affidavit is filed in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death, in any county in which real property of the decedent is located. (*Prob.C. 13200(a).*)

(2) *Contents of Affidavit.* The affidavit must include the following:

(a) The name of the decedent. (*Prob.C. 13200(a)(1).*)

(b) The date and place of the decedent's death. (*Prob.C. 13200(a)(2).*)

(c) A legal description of the real property and the interest of the decedent in the property. (*Prob.C. 13200(a)(3).*)

(d) The name and address of each known person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death. (*Prob.C. 13200(a)(4).*)

(e) A statement that the gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to the affidavit, excluding real property described in *Prob.C. 13050* (supra, §794), does not exceed \$ 20,000. (*Prob.C. 13200(a)(5).*)

(f) A statement that at least 6 months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to the affidavit. (*Prob.C. 13200(a)(6).*)

(g) Either of the following, as appropriate: (1) "No proceeding is now being or has been conducted in California for administration of the decedent's estate." (*Prob.C. 13200(a)(7)(A).*) (2) "The decedent's personal representative has consented in writing to use of the procedure provided by this chapter." (*Prob.C. 13200(a)(7)(B).*)

(h) A statement that funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been

paid. (*Prob.C. 13200(a)(8).*)

(i) A statement that the affiant is the successor of the decedent and to the decedent's interest in the described property, and that no other person has a superior right to the interest of the decedent in the described property. (*Prob.C. 13200(a)(9).*)

(j) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct." (*Prob.C. 13200(a)(10).*)

(3) *Judicial Council Form.* The Judicial Council has prescribed a form for the affidavit. (See Judicial Council Form No. DE-305 [Affidavit re Property of Small Value].)

(4) *Certificate of Acknowledgment.* The affidavit must contain a notary public's certificate of acknowledgment identifying each person executing the affidavit. (*Prob.C. 13200(b).*)

(5) *Inventory and Appraisal.* An inventory and appraisal of the decedent's real property in California, excluding real property described in *Prob.C. 13050* (supra, §794), must be attached to the affidavit. The inventory and appraisal must be made as provided in *Prob.C. 8800* et seq. (supra, §592 et seq.). The appraisal is made by a probate referee selected by the affiant from among those probate referees appointed to appraise property in the county where the real property is located. (*Prob.C. 13200(c).*) In making the appraisal, the probate referee uses the date of the decedent's death as the date of valuation of the property. (*Prob.C. 13052.*)

(6) *Other Attachments.* If the affiant claims under the decedent's will and no estate proceeding is or has been conducted, a copy of the will must be attached to the affidavit. (*Prob.C. 13200(d).*) A certified copy of the decedent's death certificate must also be attached to the affidavit. (*Prob.C. 13200(e).*) If the personal representative has consented to the use of the procedure, a copy of the consent and a copy of the personal representative's letters must be attached. (*Prob.C. 13200(e).*)

(7) *Service.* The affiant must mail a copy of the affidavit and attachments to any person identified in *Prob.C. 13200(a)(4)* (guardian or conservator of estate of decedent). (*Prob.C. 13200(f).*)

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c. Recordation of Affidavit.

14 Witkin Sum. Cal. Law Wills § 809

[§ 809] Recordation of Affidavit.

(1) *Procedure.* On receipt of the affidavit and the required fee, the court clerk, if the affidavit is complete and has the required attachments, files the affidavit and attachments and issues a certified copy of the affidavit without the attachments. The certified copy is then recorded in the office of the county recorder of the county where the real property is located. The county recorder indexes the certified copy in the index of grantors and grantees. The decedent is indexed as the grantor and each person designated as a successor to the property is indexed as a grantee. (*Prob.C. 13202.*)

(2) *Effect of Recordation.* "A person acting in good faith and for a valuable consideration" with the decedent's successor designated in a certified copy of an affidavit recorded in the county in which the real property is located "has the same rights and protections as the person would have if each person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in an order for distribution that had become final." (*Prob.C. 13203(a).*)

The Law Revision Commission Comment points out that *Prob.C. 13203* "is designed to give the successors designated in the certified copy of the affidavit a marketable title to the real property." However, the issuance and recording of a certified copy of the affidavit does not preclude later proceedings for administration of the decedent's estate. (*Prob.C. 13203(b).*) (On liability of transferees, see *infra*, §810 et seq.)

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d. Liability of Transferee.

1. Liability for Decedent's Debts.

14 Witkin Sum. Cal. Law Wills § 810

[§ 810] Liability for Decedent's Debts.

(1) *General Rule.* Each person designated as a successor of the decedent in a certified copy of an affidavit issued under *Prob.C. 13202* (supra, §809) is personally liable for the decedent's unsecured debts. (*Prob.C. 13204.*)

(2) *Limitations on Liability.* A person is not liable under *Prob.C. 13204* if proceedings for the administration of the decedent's estate are commenced or the personal representative has consented to use of the affidavit procedure and later requests that the property be restored to the estate and the person satisfies the requirements of *Prob.C. 13206* (liability to estate; infra, §812). (*Prob.C. 13207(a).*)

Except as provided in *Prob.C. 13205(b)* (damages for fraud; infra, §811), the total personal liability of a person under *Prob.C. 13204* and *Prob.C. 13205* (liability to holder of superior right; infra, §811) cannot exceed the sum of the following: (a) the fair market value of the property received at the time the certified copy of the affidavit is issued, less the amount of liens and encumbrances on the property at that time; (b) the net income the person received from the property; and (c) if the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For this purpose, "fair market value of the property" has the same meaning provided in *Prob.C. 13206(a)(2)* (infra, §812). (*Prob.C. 13207(b).*)

(3) *Enforcement.* A debt may be enforced against the person "in the same manner as it could have been enforced against the decedent if the decedent had not died." However, in an action based on the debt, the person may assert any "defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died." (*Prob.C. 13204.*)

(4) *Limitation of Action.* Nothing in *Prob.C. 13204* permits enforcement of a claim that is barred under *Prob.C. 9000* et seq. (supra, §612 et seq.). *C.C.P. 366.2* (supra, §517), the statute of limitations in an action against a decedent, applies in an action under *Prob.C. 13204.* (*Prob.C. 13204.*)

(5) *Remedies Are Not Exclusive.* The remedies available under *Prob.C. 13204* to *13207* do not limit any other remedies that are available "by reason of any fraud or intentional wrongdoing." (*Prob.C. 13208.*)

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2. Liability to Holder of Superior Right.

14 Witkin Sum. Cal. Law Wills § 811

[§ 811] Liability to Holder of Superior Right.

(1) *General Rule.* Each person designated as a successor of the decedent in a certified copy of an affidavit issued under *Prob.C. 13202* is personally liable to any person "having a superior right by testate or intestate succession from the decedent." (*Prob.C. 13205(a)*.) However, one who fraudulently executes or files an affidavit is liable to a superior claimant for three times the fair market value of the property. For this purpose, the "fair market value of the property" is the fair market value, determined as of the time the certified copy of the affidavit was issued, of the property the person liable took under the affidavit to which the other person has a superior right, less liens and encumbrances on the property at that time. (*Prob.C. 13205(b)*.)

(2) *Limitations on Liability.* A person designated as a successor of the decedent in a certified copy of an affidavit is not liable under *Prob.C. 13205* if proceedings for the administration of the decedent's estate are commenced or the personal representative has consented to use of the affidavit procedure and later requests that the property be restored to the estate and the person satisfies the requirements of *Prob.C. 13206* (liability to estate; *infra*, §812). (*Prob.C. 13207(a)*.)

Except as provided in *Prob.C. 13205(b)*, the total personal liability of a person under *Prob.C. 13204* (liability for debts of decedent; *supra*, §810) and *Prob.C. 13205* cannot exceed the sum of the following: (a) the fair market value of the property received at the time the certified copy of the affidavit is issued, less the amount of liens and encumbrances on the property at that time; (b) the net income the person received from the property; and (c) if the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For this purpose, "fair market value of the property" has the same meaning provided in *Prob.C. 13206(a)(2)* (*infra*, §812). (*Prob.C. 13207(b)*.)

(3) *Limitation of Action.* An action to impose liability under *Prob.C. 13205* is "forever barred" 3 years after the certified copy of the affidavit is issued or fraud is discovered, whichever is later. The 3-year period is not tolled for any reason. (*Prob.C. 13205(c)*.)

(4) *Remedies Are Not Exclusive.* The remedies available under *Prob.C. 13204* to *13207* do not limit any other

remedies that are available "by reason of any fraud or intentional wrongdoing." (*Prob.C. 13208.*)

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3. Liability to Estate.

14 Witkin Sum. Cal. Law Wills § 812

[§ 812] Liability to Estate.

(1) *In General.* If proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative consented to use of the procedure and later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit is liable for the following:

(a) *Restoration.* If the person still has the property, restoration to the decedent's estate of the property, together with the net income the person received from the property, and, if the person encumbered the property, the amount necessary to satisfy the balance of the encumbrance on the date the property is restored. (*Prob.C. 13206(a)(1).*)

(b) *Restitution.* If the person no longer has the property, restitution to the decedent's estate of the fair market value of the property, together with (a) the net income the person received from the property and (b) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For this purpose, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, less the amount of liens and encumbrances on the property at the time the certified copy of the affidavit was issued. (*Prob.C. 13206(a)(2).*)

(2) *Reduction of Liability.* The property and amount required to be restored to the estate under *Prob.C. 13206* must be reduced by any property or amount paid by the person to satisfy a liability under *Prob.C. 13204* (liability for decedent's debts; *supra*, §810) or *Prob.C. 13205* (liability to holder of superior right; *supra*, §811). (*Prob.C. 13206(d).*)

(3) *Enforcement.* An action to enforce liability under *Prob.C. 13206* may be brought only by the personal representative of the decedent's estate. The court's judgment may enforce the liability "only to the extent necessary to protect the interests" of the decedent's heirs, devisees, and creditors. (*Prob.C. 13206(e).*)

(4) *Damages for Fraud.* Subject to *Prob.C. 13206(d)*, a person who fraudulently executes or files an affidavit is liable for restitution to the decedent's estate of three times the fair market value of the property. For this purpose, the "fair market value of the property" is the fair market value, determined as of the time the certified copy of the affidavit

was issued, less the amount of liens and encumbrances on the property at that time. (*Prob.C. 13206(b).*)

(5) *Reimbursement for Good Faith Improvement.* Subject to *Prob.C. 13206(d)*, if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit made a *significant improvement* to the property taken under the affidavit in the good faith belief that he or she was the decedent's successor to that property, the person is liable for whichever of the following the decedent's estate elects:

(a) The *restoration* of the improved property to the decedent's estate, on the condition that the estate reimburse the person for (1) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (2) the amount paid by the person for principal and interest on liens or encumbrances on the property at the time the certified copy of the affidavit was issued. (*Prob.C. 13206(c)(1).*)

(b) The *restitution* to the decedent's estate of the fair market value of the property, determined as of the time of the issuance of the certified copy of the affidavit, less the amount of liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit. (*Prob.C. 13206(c)(2).*)

(6) *Limitation of Action.* An action to enforce liability under *Prob.C. 13206* is "forever barred" 3 years after the certified copy of the affidavit is issued, or 3 years after the discovery of the fraud, whichever is later. This 3-year period is not tolled for any reason. (*Prob.C. 13206(f).*)

(7) *Remedies Are Not Exclusive.* The remedies available under *Prob.C. 13204* to *13207* do not limit any other remedies that are available "by reason of any fraud or intentional wrongdoing." (*Prob.C. 13208.*)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 813

[§ 813] Nature of Proceeding.

Prob.C. 13150 et seq. authorize a court-ordered transfer of a decedent's real property interests in specified circumstances. (See C.E.B., 1 Decedent Estate Practice, §5.23A et seq.; C.E.B., 1 Probate Workflow Manual, §6.20 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §2:28.40 et seq.) The procedure is an alternative to formal probate.

(1) *Property Covered*. The transfer procedure may only be used if the decedent died leaving real property in California. (*Prob.C. 13151*.)

(2) *Maximum Value*. The transfer procedure may only be used if the gross value of the decedent's real and personal property in California does not exceed \$ 100,000, excluding property described in *Prob.C. 13050* (supra, §794). (*Prob.C. 13151, 13152*.)

(3) *Earliest Time for Procedure*. The transfer procedure may only be used if 40 days have elapsed since the decedent's death. (*Prob.C. 13151*.)

(4) *Effect of Estate Administration*. The transfer procedure may only be used if no proceeding is pending or has been conducted in California for administration of the decedent's estate, or the decedent's personal representative consents in writing to use of the procedure. (*Prob.C. 13150*.)

(5) *Other Procedures*. Nothing in *Prob.C. 13150* et seq. excuses compliance with *Prob.C. 13100* et seq. (collection of property by affidavit; supra, §797 et seq.) by the holder of the decedent's personal property if an affidavit is furnished under those provisions. (*Prob.C. 13158*.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Petition.

Witkin Sum. Cal. Law Wills § 814

[§ 814] Petition.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Filing. Govt.C. 26827* was amended and renumbered in 2005. The fee for filing a petition to determine succession to real property under *Prob.C. 13151* or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(2)*, added in 2005.)



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b. Petition.

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[§ 814] Petition.

(1) *Filing.* The decedent's successor to a particular item of real property, "without procuring letters of administration or awaiting the probate of the will, may file a petition in the superior court of the county in which the estate of the decedent may be administered requesting a court order determining that the petitioner has succeeded to that real property." The petition may also request an order determining that the petitioner has succeeded to personal property described in the petition. (*Prob.C. 13151.*) (On filing fee, see *Govt.C. 26827*, *supra*, §585.)

(2) *Contents of Petition.* The petition must state the following:

(a) Facts necessary to determine that the petition is filed in the proper county. (*Prob.C. 13152(a)(1).*)

(b) The gross value of the decedent's real and personal property in California, excluding property described in *Prob.C. 13050*, as shown by the inventory and appraisal attached to the petition, does not exceed \$ 100,000. (*Prob.C. 13152(a)(2).*)

(c) A description of the particular items of real property in California and personal property that the petitioner alleges is property of the decedent passing to the petitioner. (*Prob.C. 13152(a)(3).*)

(d) The facts upon which the petitioner bases the allegation that the described property is property passing to the petitioner. (*Prob.C. 13152(a)(4).*)

(e) A statement that no proceeding is being or has been conducted in California for administration of the decedent's estate or that the decedent's personal representative has consented in writing to use of the procedure authorized by *Prob.C. 13150 et seq.* (*Prob.C. 13152(a)(5).*)

(f) Whether estate proceedings have been commenced in any other jurisdiction and, if so, where those proceedings are pending or were conducted. (*Prob.C. 13152(a)(6).*)

(g) The name, address, relationship, and age of each known heir and devisee of the decedent, the names and addresses of all persons named as executors of the will of the decedent, and, if the petitioner is the trustee of a trust that

is a devisee under the will of the decedent, the names and addresses of all persons interested in the trust, as determined in cases of future interests pursuant to *Prob.C. 15804(a)*. (*Prob.C. 13152(a)(7)*.)

(h) The names and addresses of each known person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death. (*Prob.C. 13152(a)(8)*.)

(3) *Form*. The petition must be verified by each petitioner, and must request that the court make an order determining that the property described in the petition is property passing to the petitioner. (*Prob.C. 13152(a)*.) The Judicial Council has approved a form for the petition. (See Judicial Council Form No. DE-310 [Petition to Determine Succession to Real Property (Estates \$ 100,000 or Less)].)

(4) *Attachments*. The petition must be accompanied by an inventory and appraisal of the decedent's real and personal property in California, excluding the property described in *Prob.C. 13050* (supra, §794). The appraisal must be made as set forth in *Prob.C. 8800* et seq. (supra, §592 et seq.). The petitioner may appraise assets that a personal representative could appraise under *Prob.C. 8901*. The remaining assets are appraised by a probate referee selected by the petitioner from among those probate referees appointed to appraise property in the county where the real property is located. (*Prob.C. 13152(b)*.) In making the appraisal, the probate referee uses the date of the decedent's death as the date of valuation of the property. (*Prob.C. 13052*.)

If the petitioner bases his or her claim to the described particular item of property on the decedent's will, a copy of the will must be attached to the petition. (*Prob.C. 13152(c)*.)

If the decedent's personal representative has consented to use of the procedure authorized by *Prob.C. 13150* et seq., a copy of the consent must be attached. (*Prob.C. 13152(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Filing*. *Govt.C. 26827* was amended and renumbered in 2005. The fee for filing a petition to determine succession to real property under *Prob.C. 13151* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(2)*, added in 2005 and amended in 2008.)



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CHAPTER XXI - Wills and Probate

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XIV. DISPOSITION OF ESTATE WITHOUT ADMINISTRATION
B. Collection or Transfer of Small Estate.
4. Determining Succession to Real Property.
c. Hearing and Order.

14 Witkin Sum. Cal. Law Wills § 815

[§ 815] Hearing and Order.

(1) *Notice of Hearing.* Notice of the hearing must be given, as provided in *Prob.C. 1220* (mailed notice; *supra*, §391), to all persons named in the petition. (*Prob.C. 13153.*)

(2) *Required Determinations.* The court may make the order only if it makes all of the following determinations:

(a) The gross value of the decedent's real and personal property in California, excluding property described in *Prob.C. 13050* (*supra*, §794), does not exceed \$ 100,000. (*Prob.C. 13154(b)(1).*) If an inventory and appraisal that satisfy the requirements of *Prob.C. 13152(b)* (*supra*, §814) are attached to the petition, this determination is made on the basis of the verified petition and the attached inventory and appraisal, unless evidence is offered by a person opposing the petition that the gross value exceeds \$ 100,000. (*Prob.C. 13154(c).*) The Law Revision Commission Comment points out that the court's finding is only as to the gross value of the decedent's California real and personal property; the court does not make a determination as to the value of specific items or parcels of property.

(b) At least 40 days have elapsed since the decedent's death. (*Prob.C. 13154(b)(2).*)

(c) No proceeding is being or has been conducted in California for administration of the decedent's estate or the decedent's personal representative has consented in writing to use of the procedure authorized by *Prob.C. 13150* et seq. (*Prob.C. 13154(b)(3).*)

(d) The property described in the order is property of the decedent passing to the petitioner. (*Prob.C. 13154(b)(4).*)

(3) *Order.* If the court makes the required determinations, it must issue an order determining (a) that real property of the decedent described in the order is property passing to the petitioners and the specific property interest of each petitioner in the described property, and (b) if the petition requests, that personal property of the decedent described in the order is property passing to the petitioners and the specific property interest of each petitioner in the described property. (*Prob.C. 13154(a).*)

(4) *Judicial Council Form.* The Judicial Council has approved a form for the order. (See Judicial Council Form No. DE-315 [Order Determining Succession to Real Property (Estates \$ 100,000 or Less)].)

(5) *Effect of Order*. When final, the order "is conclusive on all persons, whether or not they are in being." (*Prob.C.* 13155.)

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14 Witkin Sum. Cal. Law Wills § 816

[§ 816] Liability of Transferee.

(1) *General Rule.* A petitioner who receives a decedent's property under *Prob.C. 13154* (supra, §815) is personally liable for the decedent's unsecured debts, subject to the limitations of *Prob.C. 13156*. (*Prob.C. 13156(a).*)

(2) *Limitation on Liability.* The petitioner's personal liability may not exceed the fair market value of the property received determined as of the date of the decedent's death, less the amount of liens and encumbrances on that property. (*Prob.C. 13156(b).*)

(3) *Decedent's Defenses.* "In any action or proceeding based upon an unsecured debt of the decedent, the petitioner may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died." (*Prob.C. 13156(c).*)

(4) *Limitation of Action.* Nothing in *Prob.C. 13156* permits enforcement of a claim that is barred under *Prob.C. 9000* et seq. (supra, §612 et seq.). (*Prob.C. 13156(d).*) The provision makes it clear that a petitioner who receives the decedent's real property by court order is not liable to a creditor whose claim is barred. (Law Rev. Com. Comment.) *C.C.P. 366.2* (supra, §517), the statute of limitations on an action against a decedent, applies in an action under *Prob.C. 13156*. (*Prob.C. 13156(e).*)

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14 Witkin Sum. Cal. Law Wills § 817

[§ 817] Attorneys' Fees.

Prob.C. 13157 provides as follows:

(1) The attorneys' fees for services performed in connection with a proceeding under *Prob.C. 13150* et seq. are determined by private agreement between the attorney and the client and are not subject to court approval.

(2) If there is no agreement and there is a dispute concerning the reasonableness of the fees, a petition may be filed with the court in the same proceeding requesting that the court determine the reasonableness of the fees.

(3) If there is an agreement and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court in the same proceeding requesting that the court determine the dispute.

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- C. Passage of Property to Surviving Spouse.
 - 1. Passage of Property.
 - a. Property Passing Without Administration.

14 Witkin Sum. Cal. Law Wills § 818

[§ 818] Property Passing Without Administration.

(1) *In General.* Except as provided by *Prob.C. 13500* et seq., when a husband or wife dies intestate leaving property that passes to the surviving spouse under *Prob.C. 6401* (supra, §78), or dies testate and devises all or a part of his or her property to the surviving spouse, the property passes to the survivor subject to the provisions of *Prob.C. 13540* et seq. (infra, §821) and *Prob.C. 13550* et seq. (infra, §823), and no administration is necessary. (*Prob.C. 13500.*) (See C.E.B., 1 Decedent Estate Practice, §5.31 et seq.; C.E.B., 1 Probate Workflow Manual, §6.16 et seq.; Cal. Civil Practice, 1 Probate and Trust Proceedings, §7:1 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §4:53 et seq.; Recommendation on Passage of Property to Surviving Spouse Without Administration, 18 Cal. Law Rev. Com. Reports, p. 1517.)

(2) *Property Held in Revocable Trust.* Notwithstanding the provisions of *Prob.C. 13500* et seq., community property held in a revocable trust described in *Family C. 761* (see 13 *Summary* (10th), *Trusts*, §198) is governed by any provisions in the trust for disposition in the event of death. (*Prob.C. 13504.*)

West's Key Number Digest, Executors and Administrators k.3(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Estate of Bonanno* (2008) 165 C.A.4th 7, 23, 80 C.R.3d 560, citing the text [decedent's surviving spouse was estopped to take her share of estate assets without probate administration, where she had agreed to permit probate court to distribute estate property under settlement agreement, and where bypassing administration of those assets would substantially reduce compensation of administrator and attorney who had acted for estate for years].



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C. Passage of Property to Surviving Spouse.

1. Passage of Property.

b. Property Subject to Administration.

14 Witkin Sum. Cal. Law Wills § 819

[§ 819] Property Subject to Administration.

(1) *In General.* Except as provided in *Prob.C. 6600* et seq. (small estate set-aside; supra, §781 et seq.) and *Prob.C. 13000* et seq. (collection or transfer of small estate without administration; supra, §793 et seq.), the following property of the decedent is subject to administration under *Prob.C. 7000* et seq. (supra, §404 et seq.):

(a) "Property passing to someone other than the surviving spouse under the decedent's will or by intestate succession." (*Prob.C. 13501(a).*)

(b) "Property disposed of in trust under the decedent's will." (*Prob.C. 13501(b).*)

(c) "Property in which the decedent's will limits the surviving spouse to a qualified ownership." For this purpose, a devise to the surviving spouse conditioned on the spouse surviving the decedent for a specified period of time is not a "qualified ownership" interest if the specified period of time has expired. (*Prob.C. 13501(c).*)

(2) *Petition To Administer Property Passing to Surviving Spouse.* On a showing of good cause, a decedent's personal representative may petition for administration of (a) a pecuniary devise to the decedent's surviving spouse, or (b) a fractional interest passing to the spouse of property in which the remaining fraction is subject to administration, except to the extent the devise or interest has passed by inheritance as determined by an order under *Prob.C. 13650* et seq. (confirmation of community property; infra, §829 et seq.). (*Prob.C. 13502.5(a).*) Notice of the petition must be given as provided in *Prob.C. 1220* (mailed notice; supra, §391) to the person designated in *Prob.C. 1220* and to the surviving spouse. (*Prob.C. 13502.5(b).*)

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14 Witkin Sum. Cal. Law Wills § 820

[§ 820] Survivor's Election.

(1) *Scope of Election To Administer Property.* On the election of the surviving spouse (or the spouse's personal representative or guardian or conservator of the estate), all or a portion of the following property may be administered:

(a) The one-half of the community property that belongs to the decedent under *Prob.C. 100* (supra, §265), the one-half of the quasi-community property that belongs to the decedent under *Prob.C. 101* (supra, §265), and the separate property of the decedent. (*Prob.C. 13502(a)(1).*)

(b) The one-half of the community property that belongs to the surviving spouse under *Prob.C. 100* and the one-half of the quasi-community property that belongs to the surviving spouse under *Prob.C. 101*. (*Prob.C. 13502(a)(2).*)

The Law Revision Commission Comment states: "This language makes clear that the surviving spouse may elect to probate only a portion of the surviving spouse's one-half of the community or quasi-community property. This is consistent with the practice under prior law and permits, for example, probate of all of a block of stock that is community property without the need to probate the surviving spouse's one-half share of the other community property. The language also recognizes the practice in some cases under former law of probating less than all of the property of the deceased spouse in the estate of the deceased spouse."

(2) *Manner of Making Election To Administer.* The election is made by a writing "specifically evidencing the election" filed in the proceeding for the administration of the estate of the deceased spouse, within 4 months after the issuance of letters (or within any further time that the court may allow on a showing of good cause) and prior to the entry of an order under *Prob.C. 13656* (infra, §832). (*Prob.C. 13502(b).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §7:4; Rutter Group, 1 Cal. Practice Guide: Probate, Forms 4:B, 4:C.)

(3) *Election To Transfer to Trustee.* The surviving spouse (or the spouse's personal representative or guardian or conservator of the estate) may file an election and agreement to have all or part of the community property that belongs to the surviving spouse under *Prob.C. 100* and the quasi-community property that belongs to the surviving spouse under *Prob.C. 101* transferred to the trustee under the will of the deceased spouse or the trustee of an existing trust identified

by the will of the deceased spouse, to be administered and distributed by the trustee. (*Prob.C. 13503(a).*)

(4) *Manner of Making Election To Transfer.* The election is made by filing an election and agreement in the proceeding for the administration of the estate of the deceased spouse before the entry of the order for final distribution. (*Prob.C. 13503(b).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §7:5; Rutter Group, 1 Cal. Practice Guide: Probate, Form 4:D.)

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14 Witkin Sum. Cal. Law Wills § 821

[§ 821] Real Property.

(1) *Disposition After 40 Days.* Except as provided in *Prob.C. 13541* (infra, this section), 40 days after the death of a spouse, the surviving spouse (or the spouse's personal representative or guardian or conservator of the estate) "has full power to sell, convey, lease, mortgage, or otherwise deal with and dispose of" community or quasi-community real property. The right, title, and interest of any grantee, purchaser, encumbrancer, or lessee are free of rights of the decedent's estate, devisees, or creditors "to the same extent as if the property had been owned as the separate property of the surviving spouse." (*Prob.C. 13540(a)*.) However, nothing in this statute affects or limits the liability of the surviving spouse under *Prob.C. 13550* et seq. (debts of deceased spouse; infra, §823) or *Prob.C. 13560* et seq. (property of deceased spouse; infra, §824). (*Prob.C. 13540(c)*.) Thus, if the surviving spouse is liable under *Prob.C. 13550* et seq., and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in *Prob.C. 13540*) that is subject to the enforcement of a judgment. (Law Rev. Com. Comment.)

Before or with the instrument that makes the disposition of the property, the surviving spouse (or the spouse's personal representative or guardian or conservator of the estate) may record an affidavit "of the facts that establish the right of the surviving spouse to make the disposition." (*Prob.C. 13540(b)*.)

(2) *Exception Where Notice Is Recorded.* *Prob.C. 13540* does not apply to a disposition that occurs after a notice is recorded in the office of the county recorder of the county in which the property is situated. (*Prob.C. 13541(a)*.) The notice must contain (a) a description of the property in which an interest is claimed; (b) a statement that an interest in the property is claimed by a named person under the will of the deceased spouse; and (c) the name or names of the owner or owners of the record title to the property. (*Prob.C. 13541(b)*.) There must be endorsed on the notice "instructions that it shall be indexed by the recorder in the name or names of the owner or owners of record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee." (*Prob.C. 13541(c)*.) (See Rutter Group, 1 Cal. Practice Guide: Probate, Form 4:A.)

(3) *Slander of Title.* A person may not record the notice for the purpose of slandering title to the property. If the court determines that a person recorded the notice for that purpose, it must award against that person the cost of the action, including a reasonable attorneys' fee, and the damages caused by the recording. (*Prob.C. 13541(d)*.)

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- C. Passage of Property to Surviving Spouse.
- 2. Right To Dispose of Community Property.
 - b. Securities.

14 Witkin Sum. Cal. Law Wills § 822

[§ 822] Securities.

After the death of a spouse, the surviving spouse (or the surviving spouse's personal representative or guardian or conservator of the estate) has "full power" to sell, assign, pledge, or otherwise deal with or dispose of community or quasi-community property securities registered in the name of the surviving spouse alone. The right, title, and interest of any purchaser, assignee, encumbrancer, or transferee are free of the rights of the decedent's estate, devisees, or creditors "to the same extent as if the deceased spouse had not died." (*Prob.C. 13545(a)*.) Nothing in this provision affects or limits the liability of a surviving spouse under *Prob.C. 13550* et seq. (debts of deceased spouse; *infra*, §823) or *Prob.C. 13560* et seq. (property of deceased spouse; *infra*, §824). (*Prob.C. 13545(b)*.)

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C. Passage of Property to Surviving Spouse.

3. Liability of Surviving Spouse.

a. Debts of Deceased Spouse.

14 Witkin Sum. Cal. Law Wills § 823

[§ 823] Debts of Deceased Spouse.

(1) *Surviving Spouse's Liability.* Except as provided in *Prob.C. 11446* (funeral and last illness expenses are not chargeable to surviving spouse; *supra*, §657), and *Prob.C. 13552 et seq.* (*infra*, this section), on the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in *Prob.C. 13551* to the extent provided in *Prob.C. 13551. (Prob.C. 13550.)* (See *In re Marriage of D'Antoni (1981) 125 C.A.3d 747, 750, 178 C.R. 285* [former statute stated rule long established by judicial decisions and included debts for spousal or child support].) However, the surviving spouse is not liable under *Prob.C. 13550 et seq.* if all the property described in *Prob.C. 13502(a)* (election to administer spouse's community and quasi-community property; *supra*, §820) is administered. (*Prob.C. 13553.*)

(2) *Limits of Liability.* The liability imposed by *Prob.C. 13550* "shall not exceed the fair market value at the date of the decedent's death, less the amount of any liens and encumbrances, of the total of the following":

(a) The portion of the one-half of the community and quasi-community property belonging to the surviving spouse that is not exempt from enforcement of a money judgment and is not administered in the estate of the deceased spouse. (*Prob.C. 13551(a).*)

(b) The portion of the one-half of the community and quasi-community property belonging to the decedent that passes to the surviving spouse without administration. (*Prob.C. 13551(b).*)

(c) The separate property of the decedent that passes to the surviving spouse without administration. (*Prob.C. 13551(c).*)

(3) *Actions To Enforce Liability.* Except as otherwise provided in *Prob.C. 13550 et seq.*, any debt described in *Prob.C. 13550* "may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died." (*Prob.C. 13554(a).*) (See *Spurr v. Spurr (1979) 88 C.A.3d 614, 619, 151 C.R. 813* [divorce decree required decedent father to maintain life insurance policy in favor of plaintiff daughter; action against second wife alleging that she became beneficiary and seeking recovery of proceeds from her].)

In an action based on the debt, the surviving spouse may assert any defense, cross-complaint, or setoff that would have been available to the deceased spouse if the deceased spouse had not died. (*Prob.C. 13554(b).*)

(4) *Limitation of Action.* C.C.P. 366.2 (*supra*, §517), the statute of limitations on an action against a decedent, applies to the action. (*Prob.C. 13554(c).*) (See *Collection Bureau of San Jose v. Rumsey* (2000) 24 C.4th 301, 99 C.R.2d 792, 6 P.3d 713, 3 Cal. Proc. (4th), Actions, Supp., §653 [under *Prob.C. 13554(c)*, 1-year period of C.C.P. 366.2 applies to action against surviving spouse to recover expenses of decedent's last illness, not 4-year period of *Family C. 914*, governing one spouse's liability for the other's debts for necessities of life].) (On 2001 amendment to *Family C. 914*, specifying applicable statute of limitations when creditor does not receive notice of probate administration, see *supra*, §517.)

(5) *Creditor Claims.* If proceedings are commenced in California for the administration of the estate of the deceased spouse and the time for filing claims has commenced, an action on the liability of the surviving spouse pursuant to *Prob.C. 13550* is ordinarily barred to the same extent as any other claim against the estate is barred under *Prob.C. 9000* et seq. (*supra*, §612 et seq.). (*Prob.C. 13552.*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §7:27 et seq.) However, the following creditors will not be barred:

(a) Those who have commenced actions for the enforcement of the debts and serve the surviving spouse prior to the expiration of the time for filing claims. (*Prob.C. 13552(a).*)

(b) Those who secure the acknowledgment in writing of the surviving spouse's liability. (*Prob.C. 13552(b).*)

(c) Those who file a timely claim in the administration proceedings. (*Prob.C. 13552(c).*)

West's Key Number Digest, Executors and Administrators k.3(3)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Limitation of Action.*

Collection Bureau case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §719.



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3. Liability of Surviving Spouse.

b. Property of Deceased Spouse.

14 Witkin Sum. Cal. Law Wills § 824

[§ 824] Property of Deceased Spouse.

Prob.C. 13560 et seq. govern the liability of a decedent's surviving spouse for property of the decedent.

(1) *Definition.* For purposes of *Prob.C. 13560* et seq., "decedent's property" means the half of the community and quasi-community property that belongs to the decedent under *Prob.C. 100* and *101* (supra, §265). (*Prob.C. 13560.*)

(2) *Scope of Surviving Spouse's Liability.* If the decedent's property is in the possession or control of the surviving spouse at the time of death, the surviving spouse is personally liable to the extent provided by *Prob.C. 13563* (infra, this section) "to any person having a superior right by testate succession from the decedent." (*Prob.C. 13561(a).*) However, the surviving spouse is not liable under *Prob.C. 13561* if proceedings for administration of the decedent's estate are commenced and the surviving spouse satisfies the requirements of *Prob.C. 13562* (infra, this section). (*Prob.C. 13563(a).*)

(3) *Restitution to Estate.* If proceedings for the administration of the decedent's estate are commenced, the surviving spouse is liable for the following:

(a) *Restoration* to the estate of property the spouse still has, net income received from that property, and an amount sufficient to satisfy any encumbrances on that property incurred by the spouse after the date of death. (*Prob.C. 13562(a)(1).*)

(b) *Restitution* to the estate of the fair market value of property the spouse no longer has, net income received from that property before the date of disposition, and interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For this purpose, fair market value is the value determined at the time of disposition, less liens and encumbrances at the time of death. (*Prob.C. 13562(a)(2).*)

(4) *Effect of Spouse's Improvements.* If proceedings for administration of the decedent's estate are commenced and the spouse made a significant improvement to the property in a good faith belief that the spouse was the successor to the property, the spouse's liability is subject to an election by the estate of one of the following:

(a) *Restoration* of the improved property on condition that the estate reimburse the spouse for (1) the amount by

which the improvement increases the fair market value of the property, valued at the time of restoration, and (2) the amount paid for principal and interest on any liens or encumbrances on the property at the time of death. (*Prob.C. 13562(b)(1).*)

(b) *Restitution* of the fair market value of the property, valued at the time of death, less liens and encumbrances at that time, with interest on the net amount from the date of death at the rate payable on a money judgment. (*Prob.C. 13562(b)(2).*)

(5) *Reduction of Liability.* The property and amount restored under *Prob.C. 13562* must be reduced by any property and amount paid by the surviving spouse to satisfy a liability under *Prob.C. 13550* et seq. (debts of deceased spouse; supra, §823). (*Prob.C. 13562(c).*)

(6) *Limits of Liability.* The aggregate liability of the surviving spouse under *Prob.C. 13561* may not exceed the sum of the following:

(a) The fair market value at the time of the decedent's death, less liens and encumbrances at that time, of property that passes to a person with a superior right. (*Prob.C. 13563(b)(1).*)

(b) The net income received by the surviving spouse from that property. (*Prob.C. 13563(b)(2).*)

(c) Interest on the fair market value of any part of that property disposed of from the date of disposition at the rate payable on a money judgment. For this purpose, fair market value is the value determined at the date of disposition, less any liens or encumbrances at the time of the decedent's death. (*Prob.C. 13563(b)(3).*)

(7) *Enforcement.* An action to enforce liability under *Prob.C. 13562* may be brought only by the personal representative of the decedent, and liability may be enforced "only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent." (*Prob.C. 13562(d).*)

(8) *Limitation of Action.* An action to impose liability under *Prob.C. 13561* is "forever barred" 3 years after the decedent's death, and this period is not tolled for any reason. (*Prob.C. 13562(e).*)

(9) *Other Remedies Are Available.* The remedies available under *Prob.C. 13560* et seq. are in addition to any remedies available by reason of fraud or intentional wrongdoing. (*Prob.C. 13564.*)

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C. Passage of Property to Surviving Spouse.

4. Collection of Compensation Owed to Deceased Spouse.

a. Authority To Collect.

14 Witkin Sum. Cal. Law Wills § 825

[§ 825] Authority To Collect.

(1) *In General.* *Prob.C. 13600* et seq. provide a simple affidavit procedure that permits a surviving spouse to collect earnings owed by an employer to the deceased spouse. (See C.E.B., 1 Decedent Estate Practice, §5.33B; C.E.B., 1 Probate Workflow Manual, §6.10; Cal. Civil Practice, 1 Probate and Trust Proceedings, §7:15 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §4:52 et seq.)

At any time after one spouse dies, the surviving spouse (or the guardian or conservator of the estate of the surviving spouse) may, without procuring letters of administration or awaiting probate of the will, collect salary or other compensation owed by an employer for personal services of the deceased spouse, including compensation for unused vacation. (*Prob.C. 13600(a)*.) For purposes of *Prob.C. 13600* et seq., a guardian or conservator of the estate of the surviving spouse may act on behalf of the surviving spouse without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending. (*Prob.C. 13600(c)*.)

The Law Revision Commission Comment makes the following observations:

(a) The procedure may be used without regard to the amount of the decedent's estate; its use is not limited to cases where the estate is a small estate.

(b) Use of the procedure is permitted without any delay after the decedent's death; its use is not limited to cases where the decedent died not less than 40 days before the affidavit or declaration is presented to the employer.

(c) Use of this procedure provides funds for the surviving spouse until the probate proceeding is commenced and a family allowance may be obtained.

(2) *Maximum Amount.* The maximum amount specified in the statute is \$ 5,000 net. (*Prob.C. 13600(a)*.) In addition, no more than \$ 5,000 net in the aggregate may be collected from all employers of the decedent. (*Prob.C. 13600(b)*.) However, the \$ 5,000 limit is annually adjusted (beginning January 1, 2003) to reflect cost-of-living increases. (*Prob.C. 13600(e)*.) The limit does not apply to the compensation of specified police officers and firefighters. (*Prob.C. 13600(d)*.)

(3) *Payment by Employer.* If the requirements of *Prob.C. 13600* are satisfied, the employer to whom an affidavit under *Prob.C. 13601* (infra, §826) is presented must promptly pay the earnings of the decedent, including compensation for unused vacation, to the person presenting the affidavit. (*Prob.C. 13602.*) If the requirements of *Prob.C. 13601* are satisfied, receipt by the employer of the affidavit "constitutes sufficient acquittance for the compensation paid" and discharges the employer from any further liability with respect to the compensation. The employer may rely in good faith on the statements in the affidavit and has no duty to inquire into the truth of any statement. (*Prob.C. 13603.*)

(4) *Procedure Is Not Exclusive.* The procedure "is in addition to, and not in lieu of, any other method of collecting compensation owed to a decedent." (*Prob.C. 13606.*)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Collection of Compensation Owed to Deceased Spouse.

b. Affidavit and Additional Proof.

14 Witkin Sum. Cal. Law Wills § 826

[§ 826] Affidavit and Additional Proof.

(1) *Affidavit.* An affidavit or declaration under penalty of perjury is furnished to the employer to collect compensation. (*Prob.C. 13601(a).*) (See Cal. Civil Practice, 1 Probate and Trust Proceedings, §7:21; C.E.B., 1 Probate Workflow Manual, §6.11; Rutter Group, 1 Cal. Practice Guide: Probate, Form 4:A.2.) The affidavit must state all of the following:

(a) The name of the decedent. (*Prob.C. 13601(a)(1).*)

(b) The date and place of the decedent's death. (*Prob.C. 13601(a)(2).*)

(c) Either of the following, as appropriate: (1) "The affiant or declarant is the surviving spouse of the decedent" or (2) "The affiant or declarant is the guardian or conservator of the estate of the surviving spouse of the decedent." (*Prob.C. 13601(a)(3).*)

(d) "The surviving spouse of the decedent is entitled to the earnings of the decedent under the decedent's will or by intestate succession and no one else has a superior right to the earnings." (*Prob.C. 13601(a)(4).*)

(e) "No proceeding is now being or has been conducted in California for administration of the decedent's estate." (*Prob.C. 13601(a)(5).*)

(f) "Sections 13600 to 13605, inclusive, of the California Probate Code require that the earnings of the decedent, including compensation for unused vacation, not in excess of five thousand dollars (\$ 5,000) net, be paid promptly to the affiant or declarant." (*Prob.C. 13601(a)(6).*)

(g) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has a pending request to collect compensation owed by another employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code." (*Prob.C. 13601(a)(7).*)

(h) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has collected any compensation owed by an employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code except the sum of ____ dollars (\$ ____) which was collected from ____." (*Prob.C.*

13601(a)(8).)

(i) "The affiant or declarant requests that he or she be paid the salary or other compensation owed by you for personal services of the decedent, including compensation for unused vacation, not to exceed five thousand dollars (\$ 5,000) net, less the amount of ____ dollars (\$ ____) which was previously collected." (*Prob.C. 13601(a)(9).*)

(j) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct." (*Prob.C. 13601(a)(10).*)

(2) *Additional Proof.* The employer must be provided with reasonable proof of the identity of the surviving spouse. If a guardian or conservator is acting for the surviving spouse, the employer must also be provided with reasonable proof of the identity of the guardian or conservator. Proof of identity that is sufficient under *Prob.C. 13104* (supra, §800) is sufficient proof of identity for the purposes of this subdivision. (*Prob.C. 13601(b).*) If the affiant is the guardian or conservator of the estate of the surviving spouse, the employer must be provided with reasonable proof, satisfactory to the employer, of the appointment of the person to act as guardian or conservator of the estate of the surviving spouse. (*Prob.C. 13601(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Collection of Compensation Owed to Deceased Spouse.

c. Action To Compel Payment.

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[§ 827] Action To Compel Payment.

(1) *In General.* If the employer refuses to pay as required by *Prob.C. 13600* et seq., the surviving spouse may recover the amount the surviving spouse is entitled to receive in an action brought for that purpose against the employer. (*Prob.C. 13604(a)*.) The Law Revision Commission Comment points out that this remedy is in addition to the remedies against the employer if the estate of the deceased spouse is probated. (See *Prob.C. 13606*, supra, §825 [other methods of collecting compensation are not affected].)

(2) *Attorneys' Fees.* In an action against the employer under *Prob.C. 13604*, the court must award reasonable attorneys' fees to the surviving spouse if the court finds that the employer "acted unreasonably in refusing to pay" as required by *Prob.C. 13600* et seq. (*Prob.C. 13604(b)*.)

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d. Liability to Holder of Superior Right.

14 Witkin Sum. Cal. Law Wills § 828

[§ 828] Liability to Holder of Superior Right.

(1) *Subsequent Probate Is Not Precluded.* Nothing in *Prob.C. 13600* et seq. limits the rights of the heirs or devisees of the deceased spouse; payment of a decedent's compensation does not preclude later proceedings for administration of the decedent's estate. (*Prob.C. 13605.*)

(2) *Rights of Superior Claimants.* Any person to whom payment is made under *Prob.C. 13600* et seq. "is answerable and accountable therefor to the personal representative of the decedent's estate and is liable for the amount of the payment to any other person having a superior right to the payment received." (*Prob.C. 13605.*)

(3) *Treble Liability.* In addition to any other liability the transferee has under *Prob.C. 13605*, a person who fraudulently secures a payment under *Prob.C. 13600* et seq. is liable to a person having a superior right to the payment for three times the amount of the payment. (*Prob.C. 13605.*)

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5. Determination or Confirmation of Community Property.

a. Nature of Proceeding.

14 Witkin Sum. Cal. Law Wills § 829

[§ 829] Nature of Proceeding.

Prob.C. 13650 et seq. provide for court determination or confirmation of community property. (See C.E.B., 1 Decedent Estate Practice, §5.31 et seq.; C.E.B., 1 Probate Workflow Manual, §6.16 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §4:99 et seq.)

(1) *Petition for Order*. A surviving spouse (or the personal representative or guardian or conservator of the estate of the surviving spouse) may file a petition in the superior court of the county in which the estate of the deceased spouse may be administered, "requesting an order that administration of all or part of the estate is not necessary for the reason that all or part of the estate is property passing to the surviving spouse." The petition may also request an order confirming the ownership of the surviving spouse of property belonging to the surviving spouse under *Prob.C. 100* or *101*. (*Prob.C. 13650(a)*.) A guardian or conservator may file the petition under *Prob.C. 13650* without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending. (*Prob.C. 13650(c)*.)

Prob.C. 13650 does not apply to property that the petitioner has elected, pursuant to *Prob.C. 13502* (supra, §820), to have administered under *Prob.C. 7000* et seq. (supra, §404 et seq.). (*Prob.C. 13650(b)*.)

(2) *Effect of Proceeding for Probate or Administration*. Filing the petition does not preclude the court from admitting the will of the deceased spouse to probate or appointing a personal representative of the estate of the deceased spouse on the petition of any person legally entitled, including a petition for probate of the will or for administration of the estate filed with the petition for determination or confirmation. (*Prob.C. 13654*.)

If proceedings for the administration of the estate of the deceased spouse are not pending, the petition "may, but need not, be filed with a petition for probate of the will of the deceased spouse or for administration of the estate of the deceased spouse." (*Prob.C. 13653*.)

If proceedings for the administration of the estate of the deceased spouse are pending, the petition may be filed in those proceedings without the payment of an additional fee. (*Prob.C. 13652*.)

A petition for determination or confirmation must be filed separately from a petition for probate of a will or letters

of administration, even if both petitions are filed at the same time. The two petitions must be filed under the same case number. (C.R.C., Rule 7.301.)

(3) *Inventory and Appraisal.* No inventory and appraisal of the estate of the deceased spouse is required in a proceeding under *Prob.C. 13650* et seq., except as provided in *Prob.C. 13658* (protection of creditors of decedent's unincorporated business; *infra*, §832). (*Prob.C. 13659.*) However, within 3 months after filing the petition, "or within such further time as the court or judge for reasonable cause may allow," the petitioner may file an inventory and appraisal as provided in *Prob.C. 8800* et seq., and the petitioner may appraise the assets that a personal representative could appraise under *Prob.C. 8901*. (On inventory and appraisal, see *supra*, §591 et seq.)

West's Key Number Digest, Executors and Administrators k.3(2)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Petition.

Witkin Sum. Cal. Law Wills § 830

[§ 830] Petition.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Govt.C. 26827* was amended and renumbered in 2005. The fee for filing a spousal or domestic partner property petition under *Prob.C. 13650* where estate administration proceedings are not pending or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(3)*, added in 2005.)



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b. Petition.

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[§ 830] Petition.

(1) *In General.* A petition under *Prob.C. 13650* et seq. must "allege that administration of all or a part of the estate of the deceased spouse is not necessary for the reason that all or a part of the estate is property passing to the surviving spouse." (*Prob.C. 13651(a)*.) (On filing fee where estate administration proceeding is not pending, see *Govt.C. 26827*, supra, §585.)

(2) *Judicial Council Form.* The Judicial Council has approved a form for the petition. (See Judicial Council Form No. DE-221 [Spousal or Domestic Partner Property Petition (Probate--Decedents Estates)].)

(3) *Contents of Petition.* The petition must set forth all of the following information:

(a) If proceedings for the administration of the estate are not pending, the facts necessary to determine the county in which the estate of the deceased spouse may be administered. (*Prob.C. 13651(a)(1)*.)

(b) A description of the property of the deceased spouse that the petitioner alleges is property passing to the surviving spouse, including the trade or business name of property that consists of an unincorporated business or an interest in an unincorporated business the deceased spouse was operating or managing at the time of death. (*Prob.C. 13651(a)(2)*.)

(c) The facts upon which the petitioner bases the allegation that all or a part of the estate of the deceased spouse is property passing to the surviving spouse. (*Prob.C. 13651(a)(3)*.)

(d) A description of any interest in the community property or quasi-community property, or both, that the petitioner requests the court to confirm to the surviving spouse as belonging to the surviving spouse pursuant to *Prob.C. 100* or *101*. (*Prob.C. 13651(a)(4)*.)

(e) The name, age, and address of each known heir and devisee of the deceased spouse, and the names and addresses of all known persons named as executors of the will of the deceased spouse or appointed as personal representatives of the deceased spouse. (*Prob.C. 13651(a)(5)*.)

If the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse under the will of the deceased spouse, a copy of the will must be attached to the petition. (*Prob.C. 13651(b).*)

(4) *Agreement for Non Pro Rata Division of Property.* Under *Prob.C. 100(b)* and *101(b)*, spouses may agree in writing to divide community and quasi-community property "on the basis of a non pro rata division of the aggregate value" or "on the basis of a division of each individual item or asset" or partly on each basis. However, these provisions do not require a written agreement in order to permit or recognize a non pro rata division. *Prob.C. 13651* recognizes the possibility of an agreement. The description of property in the petition is subject to any agreement between the spouses for a non pro rata division of community or quasi-community property. (*Prob.C. 13651(a).*) If the description of the property is based on an agreement for a non pro rata division, a copy of the agreement must be attached to the petition. (*Prob.C. 13651(c).*) The petition must disclose any agreement for a non pro rata division or state affirmatively that an agreement does not exist. If a dispute arises over the division of community or quasi-community property pursuant to an agreement, "the court shall determine the division 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." (*Prob.C. 13651(a).*)

West's Key Number Digest, Executors and Administrators k.3(5)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Govt.C. 26827* was amended and renumbered in 2005. The fee for filing a spousal or domestic partner property petition under *Prob.C. 13650* where estate administration proceedings are not pending or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(3)*, added in 2005 and amended in 2008.)



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c. Notice of Hearing.

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[§ 831] Notice of Hearing.

If proceedings for the administration of the estate of the deceased spouse are pending at the time the petition under *Prob.C. 13650* et seq. is filed, or if the proceedings are not pending and the petition under *Prob.C. 13650* et seq. is not filed with a petition for probate of the deceased spouse's will or the administration of the deceased spouse's estate, notice must be given as provided by *Prob.C. 1220* (mailed notice; supra, §391) to all the following:

(1) Each person listed in *Prob.C. 1220*. (*Prob.C. 13655(a)(1)*.)

(2) Each person named as executor in any will of the deceased spouse. (*Prob.C. 13655(a)(1)*.)

(3) All devisees and known heirs of the deceased spouse. (*Prob.C. 13655(a)(2)*.)

(4) If the petitioner is the trustee of a trust that is a devisee under the decedent's will, all persons interested in the trust, as determined under *Prob.C. 15804(a)*. (*Prob.C. 13655(a)(2)*.)

The notice must also be mailed to the Attorney General (at the Sacramento office), "if the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will of the deceased spouse and the will involves or may involve either" (a) a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state, or (b) a devise for a charitable purpose without an identified devisee or beneficiary. (*Prob.C. 13655(b)*.)

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d. Orders.

14 Witkin Sum. Cal. Law Wills § 832

[§ 832] Orders.

(1) *Order Determining Passage of Property.* *Prob.C. 13656* provides as follows:

(a) *All property passes to surviving spouse.* If the court finds that all of the estate of the deceased spouse is property passing to the surviving spouse, the court must issue an order describing the property, determining that the property is property passing to the surviving spouse, and determining that no administration is necessary. The court may issue any further orders necessary to cause delivery of the property or its proceeds to the surviving spouse. (*Prob.C. 13656(a).*)

(b) *All or part of property does not pass to surviving spouse.* If the court finds that all or part of the estate of the deceased spouse is not property passing to the surviving spouse, the court must issue an order (1) describing any property that is not property passing to the surviving spouse, determining that that property does not pass to the surviving spouse, and determining that that property is subject to administration under the Probate Code, and (2) describing the property, if any, that is property passing to the surviving spouse, determining that that property passes to the surviving spouse, and determining that no administration of that property is necessary. If the court determines that property passes to the surviving spouse, the court may issue any further orders necessary to cause delivery of that property or its proceeds to the surviving spouse. (*Prob.C. 13656(b).*)

(c) *Community property determination.* If the petition includes a description of the interest of the surviving spouse in community or quasi-community property that belongs to the surviving spouse under *Prob.C. 100* or *101*, and the court finds that the interest belongs to the surviving spouse, the court must issue an order describing the property and confirming the ownership of the surviving spouse and may issue any further orders necessary to cause ownership of the property to be confirmed in the surviving spouse. (*Prob.C. 13656(c).*)

(2) *Judicial Council Form.* The Judicial Council has approved a form for the order. (See Judicial Council Form No. DE-226 [Spousal or Domestic Partner Property Order (Probate--Decedents Estates)].)

(3) *Order Protecting Business Creditors.* If the court determines that all or a part of the property passing to the surviving spouse consists of an unincorporated business or an interest in an unincorporated business that the deceased spouse was operating or managing at the time of death, the court must require the surviving spouse to file a list of all of

the known creditors of the business and the amounts owing to each of them. The court may issue any order necessary to protect the interests of the creditors of the business, including, but not limited to, the filing of an undertaking and an inventory and appraisal. (*Prob.C. 13658.*)

(4) *Effect of Order.* When final, an order under *Prob.C. 13656* determining that property is property passing to the surviving spouse or confirming the ownership of the surviving spouse of property belonging to the surviving spouse under *Prob.C. 100* or *101* is "conclusive on all persons whether or not they are in being." (*Prob.C. 13657.*)

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e. Attorneys' Fees.

14 Witkin Sum. Cal. Law Wills § 833

[§ 833] Attorneys' Fees.

Prob.C. 13660 provides as follows:

(1) The attorneys' fees for services performed in connection with filing a petition and obtaining a court order under *Prob.C. 13650* et seq. are determined by private agreement between the attorney and the client and are not subject to court approval.

(2) If there is no agreement between the attorney and the client, and there is a dispute concerning the reasonableness of the fees, a petition may be filed with the court in the same proceeding requesting that the court determine the reasonableness of the attorneys' fees.

(3) If there is an agreement between the attorney and the client and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court in the same proceeding requesting that the court determine the dispute.

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[§ 834] Special Property Interests and Benefits.

A number of other statutes provide some form of summary administration in particular circumstances:

(1) *Motor Vehicles, Undocumented Vessels, Manufactured Mobilehomes, etc.* *Veh.C. 5910* permits eligible testate and intestate beneficiaries to secure, by a declaration procedure, an immediate transfer of registration of the decedent's title or interest in a registered vehicle, without the need to probate the decedent's estate, where the decedent leaves no other property necessitating probate. *Veh.C. 9916* authorizes a similar procedure for an undocumented vessel, and *Health & Saf.C. 18102* authorizes a similar procedure for a registered manufactured home, mobilehome, commercial coach, truck camper, or floating home; but these latter statutes provide for a 40-day delay after the owner's death. (See C.E.B., 1 Decedent Estate Practice, §§5.19, 5.20; C.E.B., 1 Probate Workflow Manual, §6.7 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §2:29 et seq. and Form 2:F.) (On registration of vehicles, vessels, and mobilehomes in beneficiary form, and transfer without administration, see *supra*, §312.)

(2) *Money and Personal Property of Deceased Veteran.* Where a veteran is a member of a veterans' home, money and other personal property of the veteran held by the home, or by its authority, or left by the veteran on the premises of the home, must, on the veteran's death, be paid or delivered, directly and without probate, to the veteran's heirs, subject to payment of funeral expenses and obligations owed to the home. (*Mil. & Vet.C. 1035.*) (See C.E.B., 1 Decedent Estate Practice, §5.22.)

(3) *Unemployment and Disability Benefits.* Benefits due the decedent may be paid, upon affidavit, to a person legally entitled to the benefits. (*Unemp.Ins.C. 1341, 2705.*) (See C.E.B., 1 Decedent Estate Practice, §5.21.)

(4) *Workers' Compensation Benefits.* Where the cause of death was employment-related, specified benefits may be paid to dependents or other eligible recipients without administration. (*Lab.C. 4700 et seq.*) (See C.E.B., 1 Decedent Estate Practice, §5.23; C.E.B., 1 Work. Comp. 4th, §7.1 et seq.; 2 *Summary* (10th), *Workers' Compensation*, §275 et seq.)

(5) *Share of Unmarried Minor Issue.* If a minor beneficiary who is the issue of the decedent dies intestate during administration, the beneficiary's share of the decedent's estate may be distributed directly to the beneficiary's heirs without administration in the estate of the beneficiary. (*Prob.C. 11801, 11802, supra*, §735.)

(6) *Administration of Small Estate by Public Administrator.* In specified circumstances, the public administrator may summarily dispose of an estate. (See *Prob.C.* 7660 et seq., supra, §§423, 424.)

(7) *Small Estate of Military Absentee.* In specified circumstances the estate of a military absentee may be disposed of without administration. (See *Prob.C.* 3710 et seq., infra, §1075.)

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A. In General.

1. Nature and Scope of Instrument.

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[§ 835] Nature and Scope of Instrument.

(1) *In General.* A power of attorney is a written instrument giving authority to an agent. The agent acting under this grant of authority is sometimes called an "attorney-in-fact." (See *Frink v. Roe* (1886) 70 C. 296, 306, 11 P. 820.) The power may be special: to do certain acts; or general: to transact all business for the principal. (See generally 3 *Am.Jur.2d* (2002 ed.), *Agency* §21 et seq.)

(2) *Agent Is Not Attorney.* An attorney-in-fact cannot, as such, act as an attorney in litigation involving the principal, even though the attorney-in-fact and the principal are codefendants with similar interests. (*People v. Malone* (1965) 232 C.A.2d 531, 537, 42 C.R. 888, 1 Cal. Proc. (4th), *Attorneys*, §413.)

(3) *Power To Deal With Real Property.* "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." (C.C. 1095; see *Hodge v. Hodge* (1967) 257 C.A.2d 31, 33, 64 C.R. 587 [wife with husband's general power of attorney signed deed of his property in his name only; although typewritten statement contained both names, instrument was void].) Merely signing "A, attorney in fact for P" is ineffective to pass title or interest; P's name must be separately subscribed. (*Mitchell v. Benjamin Franklin Bond & Indem. Corp.* (1936) 13 C.A.2d 447, 448, 57 P.2d 185.) Where the power has been recorded, it cannot be revoked unless the revoking instrument is also recorded. (C.C. 1216.)

(4) *Power To Deal With Estate.* Powers of attorney to obtain distribution of an estate are, on motion of an interested party or on the court's own motion, subject to inquiry by and approval of the probate court before making a distribution pursuant to a power. (*Prob.C. 11604*, *supra*, §723.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Agent Is Not Attorney.*

Malone case:

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §401.



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2. Construction.

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[§ 836] Construction.

Powers of attorney are strictly construed. Ordinarily, therefore, where the language gives specific authority to do particular things, followed by words of general power, the general words are limited to the particular acts. (C.C. 2321; see *Quay v. Presidio & Ferries R. Co.* (1889) 82 C. 1, 4, 22 P. 925; *Byer v. Canadian Bank of Commerce* (1937) 8 C.2d 297, 302, 65 P.2d 67; *Rosenberg v. C.W. Clarke Co.* (1962) 200 C.A.2d 178, 186, 19 C.R. 191; *Jay v. Dollarhide* (1970) 3 C.A.3d 1001, 1020, 84 C.R. 538; *White v. Moriarty* (1993) 15 C.A.4th 1290, 1295, 1296, 19 C.R.2d 200 [by executing power of attorney authorizing attorney-in-fact to ratify his or her own acts, principal expressly adopted prior acts by attorney-in-fact within scope of power].)

But where the power is clearly general, and the enumeration of many particular authorized acts gives no indication of an intention to limit the general power, no limitation will be enforced. (*Kiekhoefer v. United States Nat. Bank of Los Angeles* (1934) 2 C.2d 98, 103, 39 P.2d 807; *Moore v. Gould* (1907) 151 C. 723, 728, 91 P. 616; *Roth v. Schaaf* (1957) 148 C.A.2d 662, 666, 307 P.2d 421.) Thus, in *Seymour v. Oelrichs* (1912) 162 C. 318, 122 P. 847, the instrument gave the agent special authority to settle an estate, this language being followed by words of general authority of the broadest kind. *Held*, the agent had authority to hire plaintiff to manage the property of the principal. (162 C. 323.) (See Rest.2d, Agency §37; 3 Cal. L. Rev. 45; 24 So. Cal. L. Rev. 124 [general power does not authorize agent to make gift].)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Statutory Development.
1. Original Statutes.

14 Witkin Sum. Cal. Law Wills § 837

[§ 837] Original Statutes.

(1) *Enactment.* On a recommendation of the California Law Revision Commission, the 1981 Legislature adopted the Uniform Durable Power of Attorney Act (former C.C. 2400 et seq.). (See 15 Cal. Law Rev. Com. Reports, p. 351; 8A U.L.A. (Master Ed.), p. 275; 13 *Pacific L. J.* 561; 17 *U.S.F. L. Rev.* 611.)

(2) *Commission Recommendation.* The Law Revision Commission Report made the following observations:

(a) *Nature and purpose.* The durable power of attorney, recognized by legislation in more than half the states, provides a simple alternative to the more complicated devices of trust and conservatorship where the principal is incapacitated, by keeping the power effective despite such subsequent incapacity. "[T]he durable power is a form of senility insurance--comparable to that available to relatively wealthy persons who use funded, revocable trusts--for a person who is unwilling or unable to transfer assets as required to establish a trust." (15 Cal. Law Rev. Com. Reports, p. 357.)

(b) *When the power is an appropriate device.* This depends on the nature of the property, whether there is someone who can be trusted, and whether court supervision is or is not desired. "The person may decide to use a durable power where the power can be given to someone in whom the principal has complete confidence--both as to trustworthiness and property managing ability. In this type of case, the person may decide that the lack of court supervision is offset by the savings and informality of the durable power device." (15 Cal. Law Rev. Com. Reports, p. 358.)

(c) *Safeguards against abuse by attorney-in-fact.* The principal can revoke the power; or the principal or a relative, friend, or interested person can petition for a conservatorship and the conservator may revoke or amend it. "Thus, although there is no continuing court supervision over the durable power of attorney, the principal or any interested person can secure court protection and supervision whenever necessary." (15 Cal. Law Rev. Com. Reports, p. 358.)

(3) *Repeal of C.C. 2307.1.* Former C.C. 2307.1 had been enacted in 1979 to give limited recognition to the concept of a durable power, but it had several serious defects: (a) The power could be exercised only until 1 year after disability or incapacity of the principal or a lesser period specified by the principal; this made it virtually useless as an inexpensive alternative to a court-supervised conservatorship (period too short, precise moment of incapacity impossible to determine). (b) The authority over real property was limited to that comprising the principal's residence;

hence, the power could not be used as a property management device for real property generally. (c) Even though the principal lacked capacity to contract when he purported to create the power, a bona fide purchaser or encumbrancer for value could conclusively rely on the principal's capacity. For these reasons the Commission recommended repeal of the section and adoption of the Uniform Act. (See 15 Cal. Law Rev. Com. Reports, pp. 359, 360.)

(4) *Changes in Uniform Act.* (a) The Uniform Act provision authorizing a court-appointed guardian, conservator, or other fiduciary to revoke or amend a durable power (Act, §3(a)) was qualified by requiring that a California conservator obtain prior authorization from the court. (b) The Uniform Act provision permitting a person to use a durable power to nominate a guardian or conservator (Act, §3(b)) was revised to conform to the nomination provision of the Guardianship-Conservatorship Law, permitting nomination in any signed writing. (c) The Uniform Act's references to "disability" of the principal (Act, §§1, 2, 4, 5) were omitted and the concept of the principal's *incapacity* to contract was used instead. (15 Cal. Law Rev. Com. Reports, pp. 361, 362.)

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2. Law Revision Commission Report.

14 Witkin Sum. Cal. Law Wills § 838

[§ 838] Law Revision Commission Report.

(1) *In General.* Pursuant to a legislative directive, the California Law Revision Commission reviewed the power of attorney statutes formerly located with the other agency rules in the Civil Code and recommended their repeal and replacement by a new comprehensive Power of Attorney Law contained in the Probate Code. (See 24 Cal. Law Rev. Com. Reports, pp. 111 et seq., 323 et seq.) In preparing the recommendation, the Commission considered new comprehensive power of attorney statutes in other states. "Of particular interest are the new statutes in Illinois (1987), Indiana (1991), Minnesota (1984), Missouri (1989), and Nebraska (1988)." (24 Cal. Law Rev. Com. Reports, p. 332.)

(2) *Purpose of Project.* "The statutes governing powers of attorney needed reorganization and revision. Since 1979, several bills have been enacted recognizing general durable powers of attorney and durable powers of attorney for health care, providing statutory forms, specifying a procedure for enforcement of the duties of attorneys-in-fact, and making a number of other changes in the law. From the beginning of these reforms, the power of attorney statutes have been added to the part of the Civil Code relating to agency. A shortage of available section numbers in this part of the Civil Code, together with the piecemeal nature of the revisions over the past 12 years, resulted in a disorganized set of statutes. In some cases it became difficult to determine whether a particular provision applied to all powers of attorney, to durable powers generally, or only to health care powers. The degree to which the different varieties of powers of attorney were subject to the general agency rules was unclear. In addition, the general agency statutes are obscure and incomplete. They provide little practical guidance to individuals attempting to resolve issues that may arise in connection with powers of attorney relating to their private affairs." (24 Cal. Law Rev. Com. Reports, pp. 329, 330, 331.)

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3. Enactment of Revised Law.

14 Witkin Sum. Cal. Law Wills § 839

[§ 839] Enactment of Revised Law.

(1) *In General.* Acting on the recommendation of the California Law Revision Commission (see *supra*, §838), the 1994 Legislature repealed the former power of attorney statutes (former C.C. 2400 et seq.) and replaced them with *Prob.C. 4000* et seq., effective January 1, 1995. The statutes are designated the Power of Attorney Law. (*Prob.C. 4000*; see 26 *Pacific L. J.* 265; C.E.B., *Durable Powers of Attorney*, §1.1 et seq.)

(2) *Organization of Power of Attorney Law.* The Power of Attorney Law is divided into four (originally five) parts:

Part 1. Definitions and General Provisions. (*Prob.C. 4000* et seq.) This part contains shorthand citations for various parts of the law (*Prob.C. 4000, 4001*), definitions (*Prob.C. 4010* et seq.; *infra*, §842), provisions governing application of the law (*Prob.C. 4050, 4051, 4054*; *infra*, §841 et seq.), and conflict of law rules (*Prob.C. 4052, 4053*; *infra*, §844).

Part 2. Powers of Attorney Generally. (*Prob.C. 4100* et seq.; *infra*, §845 et seq.)

Part 3. Uniform Statutory Form Power of Attorney. (*Prob.C. 4400* et seq.; *infra*, §866 et seq.)

Part 4. Judicial Proceedings Concerning Powers of Attorney. (*Prob.C. 4500* et seq.; *infra*, §873 et seq.)

Former *Prob.C. 4600* et seq., originally Part 4, concerned durable powers of attorney for health care. These provisions were repealed in 1999, effective July 1, 2000, when the Health Care Decisions Law (*Prob.C. 4600* et seq.) was enacted. (See *infra*, §878.) Former *Prob.C. 4900* et seq., originally Part 5, concerned judicial proceedings. These provisions were moved to *Prob.C. 4500* et seq. in 1999, effective July 1, 2000.

(3) *Uniform Durable Power of Attorney Act.* The Uniform Durable Power of Attorney Act, within the Power of Attorney Law, is not contained in consecutive sections. Instead, it is composed of the following sections (see *Prob.C. 4001*):

(a) *Prob.C. 4124* (requirements for durable power; see *infra*, §849).

(b) *Prob.C. 4125* (effect of acts under durable power during principal's incapacity; *infra*, §849).

(c) *Prob.C. 4126* (nomination of conservator in durable power; *infra*, §849).

(d) *Prob.C. 4127* (effect of lapse of time on authority of attorney-in-fact; *infra*, §849).

(e) *Prob.C. 4206* (relation of attorney-in-fact to court appointed fiduciary; *infra*, §860).

(f) *Prob.C. 4304* (effect of death or incapacity of principal; *infra*, §865).

(g) *Prob.C. 4305* (affidavit of lack of knowledge of termination of power; *infra*, §865).

(4) *Conforming Changes*. The 1994 Legislature added C.C. 2400 (*infra*, §841) to provide that powers of attorney are now governed by *Prob.C. 4000* et seq., and made conforming changes to various provisions in other codes. The general agency statutes regulating the termination of powers of attorney (C.C. 2355, 2356, 2357; see 3 *Summary* (10th), *Agency and Employment*, §§205, 215) were revised and *Prob.C. 3721* and *3722* (effect of termination of power of attorney on federal absentee; *infra*, §§852, 865) were added to reflect the transfer of that regulation to the Probate Code.

(5) *Technical Amendments*. On the recommendation of the California Law Revision Commission, the 1995 Legislature added a number of nonsubstantive technical and clarifying amendments to the 1994 legislation. (See Stats. 1995, Chaps. 91, 300, 417.) The Commission prepared comments to the more important amendments, but did not comment on corrections of purely technical errors. (See 25 Cal. Law Rev. Com. Reports, p. 709.)

West's Key Number Digest, Powers k.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See C.E.B., Powers of Attorney and Health Care Directives, §1.1 et seq.



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4. Scope of Revision.

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[§ 840] Scope of Revision.

(1) *Relocation of Power of Attorney Statutes to Probate Code.* "Relocating the power of attorney statutes in the Probate Code reinforces the estate planning nature of the durable power of attorney, and assists in distinguishing powers of attorney executed for personal reasons from powers of attorney used in business transactions. A durable power of attorney may serve as an alternative to a conservatorship--hence it is appropriate to place the new statutes following the guardianship-conservatorship law in the Probate Code. Moreover, under prior law, the power of attorney statutes were linked to probate law through the incorporation of Probate Code procedures in the provisions governing judicial review." (24 Cal. Law Rev. Com. Reports, p. 333.)

(2) *Relation to General Agency Law.* "Useful rules from the general agency provisions have been worked into the fabric of the new law, in the interest of providing a relatively complete statute. However, powers of attorney are a type of agency and remain subject to the general law of agency, except to the extent that the Power of Attorney Law provides its own rules. The general rules concerning agency in the Civil Code remain largely untouched, with only a few conforming revisions required to remove material related exclusively to powers of attorney." (24 Cal. Law Rev. Com. Reports, pp. 333, 334.)

(3) *Emphasis on Powers of Attorney Related to Property.* "The great majority of changes made by the new Power of Attorney Law concern the law relating to powers of attorney for property--i.e., powers other than durable powers of attorney for health care--because these statutes were incomplete and disorganized. Much of the new law is directed toward supplying more detailed rules and filling gaps in existing coverage, rather than making any major substantive revisions." (24 Cal. Law Rev. Com. Reports, p. 334.)

(4) *Law Is Not Applicable to Powers of Attorney Used in Business.* "The scope of the new law is broad, but not unlimited. It applies to durable powers of attorney (including durable powers of attorney for health care), statutory form powers of attorney, and any other power of attorney that incorporates or refers to the Power of Attorney Law. A power of attorney is defined as a written agency agreement executed by a natural person that grants powers to an attorney-in-fact, and a *durable* power is one that survives the incapacity of the principal. The effect of these provisions is to avoid unintentional application of the Power of Attorney Law to powers of attorney commonly used in business." (24 Cal. Law Rev. Com. Reports, pp. 334, 335.)

(5) *Generalization of Rules.* "The new law generalizes certain rules to apply to all powers of attorney covered by the statute, whether for property matters, personal care, or health care. General rules concerning execution, termination, revocation of authority, and the like apply to all powers covered by the statute, thereby achieving a greater consistency in the law. The statutes relating to durable powers of attorney for health care and powers under the Uniform Statutory Form Power of Attorney Act remain largely self-contained, with only minor technical changes to conform to the restructured statute." (24 Cal. Law Rev. Com. Reports, p. 335.)

(6) *Default Rules May Be Limited by Instrument.* "The new Power of Attorney Law makes clear that many statutory rules are default rules subject to limitations in the power of attorney." (24 Cal. Law Rev. Com. Reports, p. 336.)

(7) *Creation of Power of Attorney.* "The new law provides general rules governing creation of a power of attorney. As under prior law, a power of attorney must be in writing and signed by the principal or at the principal's direction. There is no requirement that the attorney-in-fact sign the instrument. The new law generalizes the requirement that a power of attorney be dated, which under prior law applied only to the durable power of attorney for health care and the statutory form power of attorney. ... In addition, the new law requires as a general rule that powers of attorney be either acknowledged before a notary public or signed by two witnesses." (24 Cal. Law Rev. Com. Reports, pp. 336, 337.)

(8) *Qualifications of Attorney-in-Fact.* "Prior law imposed no particular qualifications on who could be an attorney-in-fact under a power of attorney for property, although special restrictions applied in the case of a durable power of attorney for health care. ... The new law provides that any person (including both natural persons and artificial entities) having the capacity to make a contract may be an attorney-in-fact." (24 Cal. Law Rev. Com. Reports, p. 338.)

(9) *Duty To Act.* "The prior statutes were silent as to what obligation, if any, a person designated as an attorney-in-fact had to accept the position or what obligation there was to continue acting as attorney-in-fact. In the absence of an agreement, it appears under general agency principles that an attorney-in-fact is generally free to act or not to act, may refuse to act in future transactions after having acted in some matters, and can resign at will. ... The new law adopts this approach." (24 Cal. Law Rev. Com. Reports, pp. 339, 340.)

(10) *Authority of Attorneys-in-Fact.* "[I]f an individual sets out to draft his or her own power of attorney, the statute provides little guidance on the extent of the attorney-in-fact's authority. ... The new law does not attempt to provide yet another statutory list of available powers. Instead, it fleshes out the meaning of a grant of general authority or limited authority to an attorney-in-fact." (24 Cal. Law Rev. Com. Reports, pp. 342, 343.) "Former law was unclear on the extent to which an attorney-in-fact could delegate authority under a power of attorney for property. ... As the default rule, the new law permits delegation of mechanical acts. However, unlike the general agency rule, the original attorney-in-fact remains responsible to the principal for the exercise of the authority delegated." (24 Cal. Law Rev. Com. Reports, pp. 343, 344.)

(11) *Duties of Attorneys-in-Fact.* "The former power of attorney statutes did not provide a set of duties applicable to attorneys-in-fact. ... Nor do general agency statutes provide sufficient guidance. ... The duties in the new law are drawn from existing agency law, from the Trust Law, and from relevant statutes in other states. The new law provides a number of explicit duties." (24 Cal. Law Rev. Com. Reports, pp. 344, 345.)

(12) *Termination of Power of Attorney and Authority of Agent.* "The general agency statute lists several events that act to terminate an agency. ... The repealed power of attorney statute focuses on what does not terminate a ... power, providing that the death of the principal does not terminate the agency as to anyone acting in good faith without actual knowledge of the principal's death. ... The new law reorganizes and combines these rules, but preserves most of their substance." (24 Cal. Law Rev. Com. Reports, pp. 349, 350.)

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C. Definitions and Preliminary Provisions.
1. In General.

14 Witkin Sum. Cal. Law Wills § 841

[§ 841] In General.

(1) *Powers of Attorney Governed by Power of Attorney Law.* Powers of attorney are governed by the Power of Attorney Law (*Prob.C. 4000* et seq.) "to the extent provided in that law." (C.C. 2400.) Except where another statute provides otherwise, the Power of Attorney Law applies to all powers of attorney regardless of when created and to all proceedings concerning powers of attorney (see *infra*, §873 et seq.), regardless of when commenced. (*Prob.C. 4054.*)

(2) *Powers of Attorney for Health Care Governed by Health Care Decisions Law.* Powers of attorney for health care are governed by the Health Care Decisions Law (*Prob.C. 4600* et seq.), rather than by the Power of Attorney Law. (*Prob.C. 4050*; on Health Care Decisions Law, see *infra*, §876 et seq.)

(3) *Relationship to General Agency Law.* Except where the Power of Attorney Law provides a specific rule, the general law of agency, including C.C. 2295 et seq. (3 *Summary* (10th), *Agency and Employment*, §§2, 89 et seq.), applies to powers of attorney. (*Prob.C. 4051.*) (On other devices for handling incapacity, see C.E.B., *Durable Powers of Attorney*, §2.1 et seq.)

(4) *Powers Valid Under Prior Law.* Nothing in the Power of Attorney Law affects the validity of a power executed before January 1, 1995, that was valid under prior law. (*Prob.C. 4054(d).*) The Law Revision Commission Comment notes, for example, that a durable power of attorney for property matters executed before January 1, 1995, though neither notarized nor witnessed, is not made invalid by the execution formalities provided by *Prob.C. 4121* (*infra*, §846). *Prob.C. 4054(d)* "is declaratory of, and not a change in, the law."

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Relationship to General Agency Law.* See C.E.B., *Powers of Attorney and Health Care Directives*, §2.1 et seq.



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2. Definitions.

14 Witkin Sum. Cal. Law Wills § 842

[§ 842] Definitions.

Prob.C. 4010 provides that unless the provision or context requires otherwise, the following definitions govern the construction of the Power of Attorney Law:

(1) *Attorney-in-fact* means a person granted authority to act for the principal in a power of attorney, regardless of whether the person is known as an attorney-in-fact or agent, or by some other term. (*Prob.C. 4014(a)*.) The term includes an attorney-in-fact's successor, alternate, or delegate. (*Prob.C. 4014(b)*.)

(2) *Durable power of attorney* means a power of attorney that satisfies the requirements for durability set forth in *Prob.C. 4124* (*infra*, §849). (*Prob.C. 4018*.)

(3) *Power of attorney* means a written instrument, however denominated, that (a) is executed by a natural person having the capacity to contract, and (b) grants authority to an attorney-in-fact. A power of attorney may be durable or nondurable. (*Prob.C. 4022*.)

(4) *Principal* means a natural person who executes a power of attorney. (*Prob.C. 4026*.)

(5) *Springing power of attorney* means a power of attorney that by its terms becomes effective at a specified future time or on the occurrence of a specified future event or contingency, including, but not limited to, the subsequent incapacity of the principal. A springing power of attorney may be durable or nondurable. (*Prob.C. 4030*.)

(6) *Third person* means any person other than the principal or attorney-in-fact. (*Prob.C. 4034*.) "For the purposes of this statute, a third person is a person who acts on a request from, contracts with, relies on, or otherwise deals with the attorney-in-fact." (Law Rev. Com. Comment.)

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3. Covered and Excluded Instruments.

14 Witkin Sum. Cal. Law Wills § 843

[§ 843] Covered and Excluded Instruments.

(1) *Covered Instruments.* The Power of Attorney Law applies to the following instruments:

- (a) Durable powers of attorney, other than powers of attorney for health care. (*Prob.C. 4050(a)(1).*)
- (b) Statutory form powers of attorney under *Prob.C. 4400* et seq. (see *infra*, §866 et seq.). (*Prob.C. 4050(a)(2).*)
- (c) Any other power of attorney that incorporates or refers to the Power of Attorney Law or its provisions. (*Prob.C. 4050(a)(3).*)

"If a section in this division refers to a 'power of attorney,' it generally refers to a durable power of attorney, but may, under certain circumstances, also apply to a nondurable power of attorney. For example, a statutory form power of attorney may be durable or nondurable. See Sections 4401, 4404. A nondurable power may incorporate provisions of this division, thereby becoming subject to its provisions." (Law Rev. Com. Comment.)

(2) *Excluded Instruments.* The Power of Attorney Law does not apply to the following instruments:

- (a) A power of attorney coupled with an interest (see 3 *Summary* (10th), *Agency and Employment*, §217 et seq.). (*Prob.C. 4050(b)(1).*)
- (b) Reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys-in-fact, agents, and representatives. (*Prob.C. 4050(b)(2).*)
- (c) A proxy given by an attorney-in-fact to another person to exercise voting rights. (*Prob.C. 4050(b)(3).*)

The Power of Attorney Law is not intended to affect the validity of any instrument or arrangement that is not described in *Prob.C. 4050(a)*. (*Prob.C. 4050(c).*) The Power of Attorney Law thus does not apply to other specialized agencies, such as real estate agents, who are subject to a different statutory scheme. (See 3 *Summary* (10th), *Agency and Employment*, §53.) As a corollary, an instrument denominated a power of attorney that does not satisfy the execution requirements for a power of attorney under the Power of Attorney Law may be valid under general agency law or other principles. (Law Rev. Com. Comment.)

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4. Conflict of Law Rules.

14 Witkin Sum. Cal. Law Wills § 844

[§ 844] Conflict of Law Rules.

(1) *Where Power of Attorney Specifies That California Law Applies.* If a power of attorney provides or otherwise indicates the principal's intention that California law apply, the Power of Attorney Law governs the power and applies to acts and transactions of the attorney-in-fact *within or outside* California where any of the following conditions is satisfied:

(a) The principal or attorney-in-fact was domiciled in California when the principal executed the power. (*Prob.C. 4052(a)(1).*)

(b) The authority conferred on the attorney-in-fact relates to property, acts, or transactions in California. (*Prob.C. 4052(a)(2).*)

(c) The acts or transactions of the attorney-in-fact occurred or were intended to occur in California. (*Prob.C. 4052(a)(3).*)

(d) The principal executed the power in California. (*Prob.C. 4052(a)(4).*)

(e) There is otherwise a reasonable relationship between California and the subject matter of the power. (*Prob.C. 4052(a)(5).*)

(2) *Where Power of Attorney Does Not Specify That California Law Applies.* If *Prob.C. 4052(a)* does not apply to a power of attorney, the Power of Attorney Law governs the power and applies to the acts and transactions of the attorney-in-fact *within* California where either of the following conditions is satisfied:

(a) The principal was domiciled in California when the power was executed. (*Prob.C. 4052(b)(1).*)

(b) The principal executed the power in California. (*Prob.C. 4052(b)(2).*)

A power of attorney may also specify choice of law rules. (Law Rev. Com. Comment.)

(3) *Effect of Relocation of Attorney-in-Fact, Principal, or Property.* A power of attorney described in *Prob.C. 4052*

remains subject to the Power of Attorney Law despite a change in domicile of the principal or the attorney-in-fact, or the removal from California of property that is the subject of the power. (*Prob.C. 4052(c)*.)

(4) *Effect on Jurisdiction.* *Prob.C. 4052* does not limit the jurisdiction exercisable under *C.C.P. 410.10* (see 2 *Cal. Proc.* (4th), *Jurisdiction*, §7 et seq.). (Law Rev. Com. Comment.)

(5) *Power Executed Elsewhere.* A durable power of attorney executed in a forum outside of California in compliance with that forum's law is valid and enforceable in California to the same extent as a durable power of attorney executed in California, regardless of whether the principal is domiciled in California. (*Prob.C. 4053*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Effect on Jurisdiction.*

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §9.



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D. General Provisions Governing Powers of Attorney.
1. Governing Rules and Limitations.

14 Witkin Sum. Cal. Law Wills § 845

[§ 845] Governing Rules and Limitations.

(1) *Application.* *Prob.C. 4100* et seq. establish general rules that apply to all powers of attorney covered by the Power of Attorney Law, subject to any special rules applicable to statutory form powers of attorney (*infra*, §866 et seq.). (*Prob.C. 4100.*) (See generally C.E.B., Durable Powers of Attorney, §1.5 et seq.)

(2) *Limitations.* Generally, a principal may limit the application of any provision of the Power of Attorney Law by including an express statement or inconsistent rule in the power of attorney. (*Prob.C. 4101(a).*) "[M]any of the statutory rules provided in the Law are subject to express or implicit limitations in the power of attorney. If a statutory rule is not subject to control by the power of attorney, this is stated explicitly, either in a particular section or as to a group of sections." (Law Rev. Com. Comment to *Prob.C. 4101.*) *Prob.C. 4101(b)* states two exceptions to this general rule:

(a) A power of attorney may not limit the application of a statute concerning warnings or notices required to be included in a power of attorney, operative dates of statutory enactments or amendments, execution formalities, qualifications of witnesses or attorneys-in-fact, or immunities of third persons from liability.

(b) A power of attorney may not limit the application of a statute specifically providing that the statute is not subject to limitation in the power. (See, e.g., *Prob.C. 4130* [priority in event of inconsistent grants of authority]; *Prob.C. 4155* [effect of incapacity under nondurable power]; *Prob.C. 4206* [relation of attorney-in-fact to court appointed fiduciary]; *Prob.C. 4207* [resignation of attorney-in-fact]; *Prob.C. 4236* [duty of attorney-in-fact concerning recordkeeping and accounting].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Application.* See C.E.B., Powers of Attorney and Health Care Directives, §1.4 et seq.



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Witkin Summary of California Law
XV. POWER OF ATTORNEY LAW
D. General Provisions Governing Powers of Attorney.
2. Creation and Effect of Power.
a. Formalities of Execution.

14 Witkin Sum. Cal. Law Wills § 846

[§ 846] Formalities of Execution.

(1) *Who May Execute.* A natural person having the capacity to contract may execute a power of attorney. (*Prob.C. 4120.*)

(2) *Requirements for Legal Sufficiency.* A power of attorney is legally sufficient if it satisfies all of the following requirements:

(a) It contains the date of execution. (*Prob.C. 4121(a).*)

(b) It is signed either (1) by the principal, or (2) by some other adult in the principal's name, in the principal's presence, and at the principal's direction. (*Prob.C. 4121(b).*)

(c) It is either (1) acknowledged before a notary public, or (2) signed by at least two witnesses. (*Prob.C. 4121(c).*)

The Law Revision Commission Comment notes, however, that a power legally sufficient under *Prob.C. 4121* still must satisfy the general rules concerning recordation of real property interests (C.C. 1169 et seq.; see 12 *Summary* (10th), *Real Property*, §316 et seq.). To facilitate recordation of a power granting authority concerning real property, the power should be acknowledged before a notary, whether or not it is witnessed. (On execution generally, see C.E.B., *Durable Powers of Attorney*, §3.52 et seq.)

Additional qualifications apply to durable powers of attorney (see *infra*, §849), statutory form powers of attorney (see *infra*, §866 et seq.) and powers of attorney for health care (see *infra*, §§885, 886).

(3) *Witnessing.* If a power of attorney is witnessed, the witnesses must be adults and the attorney-in-fact may not be a witness. Each witness must witness either (a) the principal's signing of the power, or (b) the principal's acknowledgment of that signature. (*Prob.C. 4122.*) (See *Estate of Rabinowitz* (2003) 114 C.A.4th 635, 640, 7 C.R.3d 722 [power of attorney orally acknowledged by principal but not signed by witnesses until after his death was valid; following *Estate of Eugene* (2002) 104 C.A.4th 907, 128 C.R.2d 622, *supra*, §145, by analogy and distinguishing *Crook v. Contreras* (2002) 95 C.A.4th 1194, 116 C.R.2d 319, *supra*, §145, in "the absence of any hint of fraud"].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Requirements for Legal Sufficiency*. See C.E.B., Powers of Attorney and Health Care Directives, §4.23 et seq.



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b. Grants of Authority.

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[§ 847] Grants of Authority.

(1) *In General.* In a power of attorney under *Prob.C. 4000* et seq., a principal may grant authority to an attorney-in-fact to act on the principal's behalf either as to all lawful subjects and purposes or as to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, health care, or any other matter. (*Prob.C. 4123(a)*.) Durable powers of attorney for financial management and for health care are common components of estate plans. (On power for financial management, see Cal. Transactions Forms, 2 Estate Planning §8:9 et seq.; C.E.B., Durable Powers of Attorney, §§3.1 et seq., 4.1 et seq.; C.E.B., 1 Will Drafting 3d, §3.15 et seq.; C.E.B., 2 Estate Planning, §28.1 et seq.)

(2) *Property Matters.* A power of attorney may grant authority to make decisions concerning all or part of the principal's real and personal property wherever situated, and whether owned by the principal at the time of the power's execution or acquired thereafter. The power need not describe each item or parcel of property. (*Prob.C. 4123(b)*.)

(3) *Personal Care.* A power of attorney may grant authority to make decisions relating to the personal care of the principal, including determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment. (*Prob.C. 4123(c)*.)

(4) *Inconsistent Grants of Authority in Multiple Powers of Attorney.* If a principal grants inconsistent authority to one or more attorneys-in-fact in two or more powers of attorney, the authority granted last controls to the extent of the inconsistency. (*Prob.C. 4130(a)*.) This rule is not subject to limitation in a power of attorney. (*Prob.C. 4130(b)*); on limitations in powers of attorney generally, see *supra*, §845.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See C.E.B., Powers of Attorney and Health Care Directives, §§4.1 et seq., 5.1 et seq.



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c. Springing Powers.

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[§ 848] Springing Powers.

(1) *Statutory Development.* The California Law Revision Commission concluded in a 1990 report that there was a need for a specific provision (a) to recognize a "springing power of attorney" for principals unwilling to grant an immediately effective power, and (b) to protect third persons relying on these instruments. (20 Cal. Law Rev. Com. Reports, pp. 409, 410.) The 1990 Legislature accordingly enacted former C.C. 2514, based on a similar New York statute. (See 22 *Pacific L. J.* 680.) The 1994 Legislature repealed the statute and replaced it, without substantive change, with provisions of the Power of Attorney Law. (See generally C.E.B., *Durable Powers of Attorney*, §3.10 et seq.)

(2) *Definition.* A *springing power of attorney* is a power of attorney that by its terms becomes effective at a specified future time or on the occurrence of a specified future event or contingency, including, but not limited to, the subsequent incapacity of the principal. A springing power of attorney may be durable or nondurable. (*Prob.C. 4030.*)

(3) *When Springing Event Occurs.* The principal may give the attorney-in-fact (or one or more other persons) the power to determine *conclusively* by declaration whether the event or contingency specified in the springing power of attorney has occurred so that the power of attorney is effective. The principal may specify that the designee perform this function either alone or jointly. The declaration must be in writing under penalty of perjury. (*Prob.C. 4129(a).*)

(4) *When Power Becomes Effective.* When the designee executes the written declaration under *Prob.C. 4129(a)*, the springing power becomes effective. (*Prob.C. 4129(b).*)

(5) *Protection of Third Person.* The execution of the declaration grants immunity from liability to persons acting in reliance on the power of attorney, even if the event or contingency specified in the declaration does not occur. (*Prob.C. 4129(b).*)

(6) *Applicability.* *Prob.C. 4129* applies to powers of attorney whenever executed if they contain the designation described by *Prob.C. 4129(a)*. (*Prob.C. 4129(c).*) *Prob.C. 4129* does not provide the exclusive method by which a springing power of attorney may be created. (*Prob.C. 4129(d).*)

(7) *When Springing Power Is Also Durable.* The Law Revision Commission Comment clarifies when a springing

power is also a durable power: "A springing power that takes effect on the occurrence of a contingency other than the incapacity of the principal (such as, for example, the principal's failure to return from a vacation or business trip by a certain date) need not be a durable power of attorney. However, a springing power of attorney that takes effect upon the incapacity of the principal is necessarily a durable power of attorney, and the other rules concerning durable powers of attorney are applicable." (On durable power, see *infra*, §849.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Development.* See C.E.B., Powers of Attorney and Health Care Directives, §4.8 et seq.



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[§ 849] Special Requirements for Durable Powers.

(1) *In General.* A durable power of attorney is a power of attorney by which a principal designates another person as attorney-in-fact in a writing that contains any of the following statements:

(a) "This power of attorney shall not be affected by subsequent incapacity of the principal." (*Prob.C. 4124(a).*)

(b) "This power of attorney shall become effective upon the incapacity of the principal." (*Prob.C. 4124(b).*)

(c) Similar words showing the intent of the principal that the authority conferred is to be exercisable notwithstanding the principal's subsequent incapacity. (*Prob.C. 4124(c).*) (See *Prob.C. 4018*, supra, §842 ["durable power of attorney" is power that satisfies durability requirements of *Prob.C. 4124*].)

(2) *Not Affected by Lapse of Time.* Unless a power of attorney states a time of termination, the authority of the attorney-in-fact is exercisable notwithstanding any lapse of time since execution of the power. (*Prob.C. 4127.*) Although this statute is part of the Uniform Durable Power of Attorney Act (see *Prob.C. 4001*, supra, §839), it is not, by its terms, restricted to durable powers.

(3) *Not Affected by Principal's Incapacity.* "All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had capacity." (*Prob.C. 4125.*)

(4) *Nomination of Conservator or Guardian.* "A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced." (*Prob.C. 4126(a).*)

If the protective proceedings are conservatorship proceedings commenced in California, the nomination has the effect provided in *Prob.C. 1810* (infra, §934), and the court must give effect to the most recent writing executed in accordance with that statute, regardless of whether the writing is a durable power of attorney. (*Prob.C. 4126(a).*) (On relation of attorney-in-fact under durable power of attorney to court-appointed fiduciary, see infra, §860.)

(5) *Warnings on Purchased Form.* A printed form of a durable power of attorney that is sold or otherwise distributed in California for use by a person who does not have the advice of legal counsel must contain, in not less than 10-point boldface type (or a reasonable equivalent), two prescribed warning notices set forth in *Prob.C. 4128*, one to the person who executes a durable power of attorney, and another to the person who accepts an appointment as attorney-in-fact. (*Prob.C. 4128(a)*.) (On use of printed forms valid under former law, see *Prob.C. 4102(a)*.)

(6) *When Statutory Warning Is Not Required.* The warning notice is inapplicable to a statutory form power of attorney. (*Prob.C. 4128(c)*.) (For warning notice required for statutory form power of attorney, see *infra*, §869.)

(7) *Protection of Third Persons.* Nothing in the notice prescribed by *Prob.C. 4128(a)* invalidates any transaction in which a third person relied in good faith upon the authority created by the durable power of attorney. (*Prob.C. 4128(b)*.) (On protections afforded by powers of attorney to third persons generally, see *infra*, §862 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Power of Attorney.

14 Witkin Sum. Cal. Law Wills § 850

[§ 850] Power of Attorney.

(1) *Modification.* A principal may modify a power of attorney (a) in accordance with the terms of the power (*Prob.C. 4150(a)(1)*), or (b) by an instrument executed in the same manner as a power may be executed (*Prob.C. 4150(a)(2)*). (On execution requirements for powers of attorney, see *supra*, §846.)

An attorney-in-fact or third person who does not have notice of the modification is protected from liability as provided in *Prob.C. 4300 et seq.* (*infra*, §862 *et seq.*). (*Prob.C. 4150(b)*.)

The manner of modifying a power of attorney under *Prob.C. 4150(a)(2)* is more formal than the manner of revoking the attorney-in-fact's authority under *Prob.C. 4153(a)* (*infra*, §852). (Law Rev. Com. Comment.)

(2) *Revocation.* A principal may revoke a power of attorney (a) in accordance with the terms of the power (*Prob.C. 4151(a)(1)*), or (b) by a writing (*Prob.C. 4151(a)(2)*). The authority to revoke by a writing may not be limited in the power of attorney. (*Prob.C. 4151(a)(2)*; on limitations in powers of attorney, see *supra*, §845.)

An attorney-in-fact or third person who does not have notice of the revocation is protected from liability as provided in *Prob.C. 4300 et seq.* (*infra*, §862 *et seq.*). (*Prob.C. 4151(b)*.)

"This section recognizes that a power of attorney may, for example, contain expressions of wishes, may nominate a conservator, or name a successor attorney-in-fact. These provisions may exist independent from the provisions granting authority to the attorney-in-fact. Revocation under this section revokes all provisions stated in the instrument, rather than modifying or terminating the authority of the attorney-in-fact." (Law Rev. Com. Comment.)

Court proceedings to determine whether a power of attorney has terminated are authorized. (See *infra*, §874.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 851

[§ 851] Termination of Authority of Attorney-in-Fact.

(1) *In General. Prob.C. 4152*, based on general agency rules provided in C.C. 2355 and 2356 (3 *Summary* (10th), *Agency and Employment*, §§204, 205), provides that the authority of an attorney-in-fact under a power of attorney is terminated by any of the following events:

- (a) In accordance with the terms of the power. (*Prob.C. 4152(a)(1).*)
- (b) Extinction of the subject, or fulfillment of the purpose, of the power. (*Prob.C. 4152(a)(2).*)
- (c) Revocation of the attorney-in-fact's authority under *Prob.C. 4153* (infra, §852). (*Prob.C. 4152(a)(3).*)
- (d) Death of the principal, except as to specific statutory authority. (*Prob.C. 4152(a)(4).*)
- (e) Removal of the attorney-in-fact. (*Prob.C. 4152(a)(5).*)
- (f) Resignation of the attorney-in-fact. (*Prob.C. 4152(a)(6)*; see infra, §861.)
- (g) Incapacity of the attorney-in-fact, except that a temporary incapacity suspends the attorney-in-fact's authority only during the period of the incapacity. (*Prob.C. 4152(a)(7).*)
- (h) Revocation by dissolution or annulment of the marriage of the attorney-in-fact and principal under *Prob.C. 4154* (infra, §852). (*Prob.C. 4152(a)(8).*)
- (i) Death of the attorney-in-fact. (*Prob.C. 4152(a)(9).*)

An attorney-in-fact or third person who does not have notice of a terminating event is protected from liability as provided in *Prob.C. 4300* et seq. (infra, §862 et seq.). (*Prob.C. 4152(b).*) (On termination generally, see C.E.B., *Durable Powers of Attorney*, §3.60 et seq.)

Court proceedings to determine whether the authority of an attorney-in-fact has terminated are authorized. (See

infra, §874.)

(2) *Nondurable Power*. The authority of an attorney-in-fact under a nondurable power of attorney is terminated by the incapacity of the principal to contract. (*Prob.C. 4155(a)*.) An attorney-in-fact or third person who does not have notice of the incapacity of the principal is protected from liability as provided in *Prob.C. 4300* et seq. (infra, §862 et seq.). (*Prob.C. 4155(b)*.) *Prob.C. 4155* is not subject to limitation by the power of attorney. (*Prob.C. 4155(c)*.) (On limitations in powers of attorney, see supra, §845.)

(3) *Duty To Render Accounts*. Termination of the attorney-in-fact's authority does not relieve any duty to render accounts. (*Prob.C. 4238(c)*.) (On duty to account, see *Prob.C. 4236*, infra, §856.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See C.E.B., Powers of Attorney and Health Care Directives, §4.86 et seq.



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14 Witkin Sum. Cal. Law Wills § 852

[§ 852] Revocation of Authority of Attorney-in-Fact.

(1) *In General.* The authority of an attorney-in-fact under a power of attorney may be revoked as follows:

(a) In accordance with the terms of the power. (*Prob.C. 4153(a)(1).*)

(b) Where the principal informs the attorney-in-fact orally or in writing that his or her authority is revoked, or when and under what circumstances it is revoked. (*Prob.C. 4153(a)(2).*)

(c) Where the principal's legal representative, with approval of the court as provided in *Prob.C. 4206* (infra, §860), informs the attorney-in-fact in writing that his or her authority is revoked, or when and under what circumstances it is revoked. (*Prob.C. 4153(a)(3).*)

Prob.C. 4153(a)(2) and *4153(a)(3)* are not subject to limitation in the power of attorney. (On limitations in powers of attorney, see supra, §845.)

An attorney-in-fact or third person who does not have notice of the revocation is protected from liability as provided in *Prob.C. 4300* et seq. (infra, §862 et seq.). (*Prob.C. 4153(b).*)

The Law Revision Commission Comment observes that the rules concerning revocation of the attorney-in-fact's authority under *Prob.C. 4153(a)(2)* are not as strict as the rules on modification of the power of attorney under *Prob.C. 4150(a)(2)* (supra, §850): "No writing is required to revoke the attorney-in-fact's authority, and if a writing is used, it need not be witnessed or notarized to be effective between the principal and attorney-in-fact."

(2) *Revocation by Dissolution or Annulment of Marriage.* *Prob.C. 3722* and *4154* provide these special rules:

(a) Dissolution or annulment of the principal's marriage revokes any designation of a former spouse as attorney-in-fact. (*Prob.C. 4154(a).*) However, a designation revoked solely by dissolution or annulment is revived by the principal's remarriage to the former spouse. (*Prob.C. 4154(b).*) (For similar provision governing powers of attorney for health care, see *Prob.C. 4697*, infra, §887.)

(b) In addition to *Prob.C. 4154*, *Prob.C. 3722* applies where a power of attorney is executed by a principal who designates his or her spouse as attorney-in-fact and the principal subsequently becomes a federal "absentee" (see *Prob.C. 1403*). If the spouse commences a proceeding for dissolution, annulment, or legal separation, or if legal separation is ordered, the spouse's authority under the power is revoked. (On setting aside personal property of federal absentee generally, see *infra*, §1073 et seq.; on special rules protecting third persons acting without knowledge of termination of power of attorney executed by federal absentee, see *infra*, §865.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. In General.

14 Witkin Sum. Cal. Law Wills § 853

[§ 853] In General.

(1) *Qualifications.* A person must have the capacity to contract to be qualified to act as an attorney-in-fact. (*Prob.C. 4200*, based on general requirement for agent stated in C.C. 2296, 3 *Summary* (10th), *Agency and Employment*, §89.) However, designation of an unqualified person as an attorney-in-fact neither affects the immunities of third persons (see *infra*, §§864, 865), nor relieves the unqualified person of any applicable duties to the principal or the principal's successors (see *infra*, §§855, 856). (*Prob.C. 4201.*) (On agent generally, see C.E.B., *Durable Powers of Attorney*, §3.20 et seq.)

(2) *Multiple Attorneys-in-Fact.* A principal may designate more than one attorney-in-fact in one or more powers of attorney. (*Prob.C. 4202(a).*) However, authority granted to two or more attorneys-in-fact is exercisable only by their unanimous action. (*Prob.C. 4202(b).*)

If a vacancy occurs, the remaining attorneys-in-fact may exercise the authority conferred as if they are the only attorneys-in-fact. (*Prob.C. 4202(c).*) The same rule applies if an attorney-in-fact is unavailable because of absence, illness, or other temporary incapacity, but only where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal's interests. (*Prob.C. 4202(d).*)

An attorney-in-fact is not liable for the actions of other attorneys-in-fact, unless he or she actually "participates in, knowingly acquiesces in, or conceals" a breach of fiduciary duty committed by another attorney-in-fact. (*Prob.C. 4202(e).*)

(3) *Successor Attorneys-in-Fact.* A principal may designate one or more successor attorneys-in-fact to act if the authority of a predecessor terminates. (*Prob.C. 4203(a).*)

The principal may grant authority to another person to designate (at any time) one or more successor attorneys-in-fact. The designator may be the initial or a successor attorney-in-fact, and may be described by either name, office, or function. (*Prob.C. 4203(b).*)

A successor attorney-in-fact is not liable for the actions of a predecessor. (*Prob.C. 4203(c).*)

(4) *Revocable Delegation of Authority by Attorney-in-Fact.* An attorney-in-fact may revocably delegate authority to perform mechanical acts to one or more persons qualified to exercise the delegated authority. (*Prob.C. 4205(a).*) However, the attorney-in-fact remains responsible to the principal for the exercise or nonexercise of the delegated authority. (*Prob.C. 4205(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Qualifications.* See C.E.B., Powers of Attorney and Health Care Directives, §4.37 et seq.



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[§ 854] Compensation and Expenses.

An attorney-in-fact is entitled to reasonable compensation and to reimbursement for reasonable expenses incurred as a result of acting as attorney-in-fact. (*Prob.C. 4204.*) (See C.E.B., *Durable Powers of Attorney*, §3.48 et seq.) The Law Revision Commission Comment makes the following additional observations:

(1) "In many situations, a relative acting as an attorney-in-fact under a durable power of attorney expects to act for the principal as an accommodation. Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort, and expense may be required of the attorney-in-fact and any successor attorneys-in-fact extending over a long period of time, compensation may be important."

(2) "A definite understanding regarding compensation may be included in the power of attorney or in a separate agreement."

(3) "Reimbursement of expenses would be expected to include the cost of bookkeeping, tax, and legal services incurred by the attorney-in-fact in performing duties on the principal's behalf. It would also include the cost of preparing an accounting and any travel or personal expense incurred by the attorney-in-fact."

(4) "This section is subject to limitation by the power of attorney." (On limitations in powers of attorney, see *supra*, §845.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., *Powers of Attorney and Health Care Directives*, §4.81 et seq.



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c. No General Duty To Act.

14 Witkin Sum. Cal. Law Wills § 855

[§ 855] No General Duty To Act.

An attorney-in-fact has no duty to exercise the authority granted in the power of attorney and is not subject to the other duties of an attorney-in-fact (see *infra*, §856), regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act. (*Prob.C. 4230(a)*.) This general rule is subject to two qualifications:

(1) Although acting for the principal in one or more transactions does not obligate an attorney-in-fact to act for the principal in a subsequent transaction, the attorney-in-fact has a duty to complete any transaction that he or she has already commenced. (*Prob.C. 4230(b)*.)

(2) If the attorney-in-fact has expressly agreed in writing to act for the principal, the attorney-in-fact has a duty to act pursuant to the terms of the agreement. Moreover, the agreement is enforceable against the attorney-in-fact as a fiduciary, regardless of whether there is consideration to support a contractual obligation. (*Prob.C. 4230(b)*.)

The Law Revision Commission Comment further explains: "This section recognizes that many powers of attorney are given and accepted as a gratuitous accommodation by the attorney-in-fact. The principal wants someone to have the ability to act if something needs to be done, but rarely would the principal expect to impose a duty to act on a friend or family member if the attorney-in-fact chooses not to do so. Consequently, unless the attorney-in-fact has agreed to act, accepting a power of attorney designation imposes no duty to act and the named person may even renounce the designation. The person named as attorney-in-fact may also merely wait until the situation arises and then determine whether to act. The person may refuse to act because of personal inconvenience at the time of becoming involved, or for any other reason, and is not required to justify a decision not to act. The person named as attorney-in-fact may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court-supervised guardian or conservator. However, once the attorney-in-fact agrees in writing to act under the power of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary."

SUPPLEMENT: [This section is current through the latest supplement]



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d. Special Duties.

14 Witkin Sum. Cal. Law Wills § 856

[§ 856] Special Duties.

For an attorney-in-fact under a duty to act (see *supra*, §855), the Power of Attorney Law imposes special duties with respect to the following matters:

(1) *Conflicts of Interest*. An attorney-in-fact has a duty to act "solely in the interest of the principal and to avoid conflicts of interest." (*Prob.C. 4232(a)*.) However, the attorney-in-fact does not violate this duty solely because the attorney-in-fact also benefits, "has conflicting interests in relation to the property, care, or affairs of the principal, or acts in an inconsistent manner regarding the respective interests of the attorney-in-fact and the principal." (*Prob.C. 4232(b)*.)

(2) *Commingling of Property*. An attorney-in-fact must keep the principal's property separate and distinct. (*Prob.C. 4233(a)*.) The attorney-in-fact complies with this duty if the property is held in the name of the principal or in the name of the attorney-in-fact as attorney-in-fact for the principal. (*Prob.C. 4233(b)*.)

(3) *Communication With Principal*. An attorney-in-fact must keep in regular contact with, communicate with, and follow the instructions of the principal to the extent "reasonably practicable under the circumstances." (*Prob.C. 4234(a)*.) The attorney-in-fact may disobey instructions with court approval. (*Prob.C. 4234(b)*.)

(4) *Incapacity of Principal*. If the principal becomes incapacitated or the capacity of the principal to give instructions and supervise the attorney-in-fact is in question, the attorney-in-fact must consult a person previously designated for this purpose and may consult others (e.g., spouse, physician, attorney) to gather information needed to carry out the attorney-in-fact's duties. Those persons must disclose relevant information, but disclosure is not a waiver of any privilege. (*Prob.C. 4235*.)

(5) *Recordkeeping*. An attorney-in-fact must keep records of transactions entered into on behalf of the principal. (*Prob.C. 4236(a)*.) Records may be examined by the principal, the conservator of the principal's estate, a personal representative or successor in interest after the principal's death, or pursuant to a court order. (*Prob.C. 4236(c)*.) The attorney-in-fact is under no general duty to make an account of transactions, but must do so in specified circumstances. (See *Prob.C. 4236(b)*.) These provisions are not subject to limitation in the power of attorney. (*Prob.C. 4236(d)*.)

(6) *Attorney-in-Fact With Special Skills*. "An attorney-in-fact with special skills has a duty to apply the full extent of those skills." (*Prob.C. 4237.*)

(7) *Termination of Authority*. When an attorney-in-fact's authority terminates, the attorney-in-fact must deliver possession or control of the principal's property and copies of any relevant records to the appropriate person. (*Prob.C. 4238.*)

SUPPLEMENT: [This section is current through the latest supplement]



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 e. Standard of Care.

14 Witkin Sum. Cal. Law Wills § 857

[§ 857] Standard of Care.

In dealing with property of the principal, an attorney-in-fact under a duty to act (see *supra*, §855) is required to observe "the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries." (*Prob.C. 4231(a)*.) However, a higher standard is imposed on an attorney-in-fact who has (or has represented that he or she has) special skills or expertise. (*Prob.C. 4231(c)*.) An attorney-in-fact who is not compensated is not liable for a loss to the principal's property, unless the loss results from bad faith, intentional wrongdoing, or gross negligence. (*Prob.C. 4231(b)*.) (See generally C.E.B., Durable Powers of Attorney, §3.37 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Powers of Attorney and Health Care Directives, §4.62 et seq.



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f. Nature and Scope of Authority.

14 Witkin Sum. Cal. Law Wills § 858

[§ 858] Nature and Scope of Authority.

(1) *Application of Provisions.* Except as to statutory form powers of attorney (see *infra*, §866 et seq.), the authority of an attorney-in-fact to act under a power of attorney is governed by *Prob.C. 4260 et seq. (Prob.C. 4260.)*

(2) *Authority Is Subject to Attorney-in-Fact's Fiduciary Duties.* The grant of authority to an attorney-in-fact, whether by the power of attorney, by statute, or by a court, does not in itself require or permit the exercise of the power; instead, the exercise of that authority is subject to the attorney-in-fact's fiduciary duties. (*Prob.C. 4266.*)

(3) *Incorporation of Authority by Reference to Statute.* A power of attorney may grant authority to the attorney-in-fact by incorporating a statute by reference, including, but not limited to, the following:

(a) Powers of attorneys-in-fact provided by the Uniform Statutory Form Power of Attorney Act (*infra*, §866 et seq.). (*Prob.C. 4263(a)(1).*)

(b) Powers of guardians and conservators provided by *Prob.C. 2350 et seq. (infra*, §989 et seq.) and *Prob.C. 2400 et seq. (infra*, §997 et seq.). (*Prob.C. 4263(a)(2).*)

(c) Powers of trustees provided by *Prob.C. 16200 et seq. (13 Summary (10th), Trusts*, §91 et seq.). (*Prob.C. 4263(a)(3).*)

Incorporation by reference to a statute includes amendments made to the incorporated provisions after the date of execution of the power of attorney. (*Prob.C. 4263(b).*)

(4) *Transactions Concerning Will Are Not Authorized.* A power of attorney may not authorize an attorney-in-fact to "make, publish, declare, amend, or revoke" the principal's will. (*Prob.C. 4265.*)

SUPPLEMENT: [This section is current through the latest supplement]



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g. General, Limited, and Express Authority.

14 Witkin Sum. Cal. Law Wills § 859

[§ 859] General, Limited, and Express Authority.

(1) *General Authority*. "If a power of attorney grants general authority to an attorney-in-fact and is not limited to one or more express actions, subjects, or purposes for which general authority is conferred, the attorney-in-fact has all the authority to act that a person having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action." (*Prob.C. 4261.*)

(2) *Limited Authority*. Subject to *Prob.C. 4260* et seq., if a power of attorney grants limited authority to an attorney-in-fact, the attorney-in-fact has the following authority:

(a) The authority granted in the power, as limited with respect to permissible actions, subjects, or purposes. (*Prob.C. 4262(a).*)

(b) The authority incidental, necessary, or proper to carry out the granted authority. (*Prob.C. 4262(b).*)

(3) *Express Authority*. A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts, unless expressly authorized in the power:

(a) Create, modify, or revoke a trust. (*Prob.C. 4264(a).*)

(b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on the principal's behalf. (*Prob.C. 4264(b).*)

(c) Make or revoke a gift of the principal's property in trust or otherwise. (*Prob.C. 4264(c).*) (See *Estate of Huston* (1997) 51 C.A.4th 1721, 1726, 60 C.R.2d 217 [attorney-in-fact's purchase of annuity as gift for himself was void, even though principal orally assented to transaction, where power expressly prohibited attorney from making gifts to himself].)

(d) Exercise the right to make a disclaimer on behalf of the principal, except that the attorney-in-fact is authorized to disclaim a detrimental transfer to the principal with the approval of a court. (*Prob.C. 4264(d)*; see Law Rev. Com. Comment ["Subdivision (d) is intended to permit the attorney-in-fact to make a disclaimer of a donative transfer of

property where, for example, acceptance of the property would make the principal liable for the cleanup of hazardous or toxic materials"].)

(e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest. (*Prob.C. 4264(e)*.)

(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death. (*Prob.C. 4264(f)*.)

(g) Make a loan to the attorney-in-fact. (*Prob.C. 4264(g)*.)

In *Schubert v. Reynolds* (2002) 95 C.A.4th 100, 115 C.R.2d 285, three of decedent's children brought a declaratory relief action against their sister, seeking to void a trust she had created the day before the decedent's death as his attorney-in-fact. Two months earlier, the decedent had executed a power of attorney that expressly authorized the attorney-in-fact to create a trust under *Prob.C. 4264(a)*. The trust created by defendant provided that she would hold the decedent's residence in trust during her life, with the remainder going to the decedent's grandchildren. The decedent had earlier prepared a will, which provided for the equal division of his property among his four children. The trial judge entered judgment voiding the trust. *Held*, affirmed. Defendant's act in changing the designation of beneficiaries, as established under either the earlier will or the laws of intestate succession, contravened *Prob.C. 4264(f)*. (95 C.A.4th 104.) Any conflict between *Prob.C. 4264(a)* and *Prob.C. 4264(f)* may be harmonized by interpreting *Prob.C. 4264(f)* to limit the designation of beneficiaries by an attorney-in-fact to those designated by the principal in his or her estate plan or by the laws of intestate succession, unless the power of attorney expressly authorizes the attorney-in-fact to exceed those limits. (95 C.A.4th 105.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Express Authority.* See C.E.B., Powers of Attorney and Health Care Directives, §6.18 et seq.



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14 Witkin Sum. Cal. Law Wills § 860

[§ 860] Relation to Court-Appointed Fiduciary.

Prob.C. 4206 clarifies the powers and duties of an attorney-in-fact where a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of the principal's property (except for specified exclusions) is appointed by a court of the principal's domicile following execution of a durable power of attorney:

(1) The attorney-in-fact is accountable to the fiduciary as well as to the principal. (*Prob.C. 4206(a).*)

(2) The fiduciary has the same power to revoke or amend the durable power that the principal would have had if the principal were not incapacitated, subject to any required court approval. However, if a conservator of the estate is appointed by a California court, the conservator may revoke or amend the durable power only if (a) the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to do so, and (b) the modification or revocation is in accord with the order. (*Prob.C. 4206(a), (b).*) (On effect of nomination of conservator in durable power of attorney on subsequent conservatorship proceedings commenced in California, see *supra*, §849.)

Prob.C. 4206 is not subject to limitation in the power of attorney. (*Prob.C. 4206(d).*) (On limitations in powers of attorney generally, see *supra*, §845.)

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i. Resignation.

14 Witkin Sum. Cal. Law Wills § 861

[§ 861] Resignation.

An attorney-in-fact may resign by any of the following means:

- (1) If the principal is competent, by giving notice to the principal. (*Prob.C. 4207(a)(1).*)
- (2) If a conservator has been appointed, by giving notice to the conservator. (*Prob.C. 4207(a)(2).*)
- (3) By written agreement of a successor who is designated in the power of attorney (or under its terms) to serve as attorney-in-fact. (*Prob.C. 4207(a)(3).*) (On designation of successor attorneys-in-fact, see *supra*, §853.)
- (4) By court order. (*Prob.C. 4207(a)(4).*) (On judicial procedures for approving resignation of attorney-in-fact, see *Prob.C. 4541(e)*, *infra*, §874.)

Prob.C. 4207 is not subject to limitation by the power of attorney. (*Prob.C. 4207(b).*) (On limitations in powers of attorney generally, see *supra*, §845.)

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5. Protection of Third Persons.
a. In General.

14 Witkin Sum. Cal. Law Wills § 862

[§ 862] In General.

(1) *Dealings With Attorney-in-Fact.* A third person must accord an attorney-in-fact acting under a power of attorney "the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act." However, a third person is not required to honor the attorney-in-fact's authority or conduct business with the attorney-in-fact if the principal could not require the third person to do so in the same circumstances. (*Prob.C. 4300.*)

"Under this rule, a third person may be compelled to honor a power of attorney only to the extent that the principal, disregarding any legal disability, could bring an action to compel the third person to act. A third person who could not be forced to do business with the principal consequently may not be forced to deal with the attorney-in-fact. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the attorney-in-fact's authority." (*Law Rev. Com. Comment.*)

(2) *Reliance on General Authority.* "A third person may rely on, contract with, and deal with an attorney-in-fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power expressly authorizes the specific act, transaction, or decision by the attorney-in-fact." (*Prob.C. 4301.*)

(3) *Prior Breach by Attorney-in-Fact.* Nothing in *Prob.C. 4300* et seq. requires a third person to engage in a transaction with an attorney-in-fact who has previously breached an agreement with the third person. (*Prob.C. 4309.*)

(4) *Identification Requirements.* When requested to engage in a transaction with an attorney-in-fact, a third person may first require the attorney-in-fact to produce identification of himself or herself and the principal and to provide the current and permanent residence addresses of the principal. The identification may consist of specimens of the signatures of the principal and the attorney-in-fact, and "any other information reasonably necessary or appropriate" to identify them and to facilitate the actions of the third person in transacting business with the attorney-in-fact. The third person incurs no duty to comply with the power until the attorney-in-fact satisfies these requirements. (*Prob.C. 4302.*)

(5) *Duties of Financial Institution Regarding Deposit Account or Loan.* Nothing in *Prob.C. 4300* et seq. requires a financial institution to (a) open a deposit account for a principal at the request of an attorney-in-fact if the principal is not currently a depositor, or (b) make a loan to the attorney-in-fact on the principal's behalf if the principal is not

currently a borrower. (*Prob.C. 4310.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Dealings With Attorney-in-Fact.* See C.E.B., Powers of Attorney and Health Care Directives, §10.2 et seq.



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b. Certified Copy of Power.

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[§ 863] Certified Copy of Power.

A copy of the power of attorney may be certified by an attorney authorized to practice law in California, a California notary public, or an official of California (or a political subdivision) who is authorized to make certifications. (*Prob.C. 4307(b)*.) The certification must state that the certifying person has examined the original power and the copy, and that the copy is a true and correct copy of the original. (*Prob.C. 4307(c)*.)

The certified copy has the same force and effect as the original. (*Prob.C. 4307(a)*.) However, nothing in the statute is intended to imply that a person is liable for relying on a power that does not meet the statute's requirements. (*Prob.C. 4307(d)*.)

A notary public is under a legal duty to certify copies of powers of attorney authorized by *Prob.C. 4307*, and must sign the certification in his or her own handwriting. (*Govt.C. 8205(a)(4)*); on certification fee (\$ 10), see *Govt.C. 8211(h)*.)

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c. Immunity From Liability.

14 Witkin Sum. Cal. Law Wills § 864

[§ 864] Immunity From Liability.

(1) *In General. Prob.C. 4303* provides for immunity as follows:

(a) Persons acting in good faith reliance on a power of attorney are immune from liability if the power (1) is presented to the person by the attorney-in-fact named in the power, (2) appears on its face to be valid, and (3) includes a notary public's certificate of acknowledgment, or is signed by two witnesses. (*Prob.C. 4303(a)*.) The Law Revision Commission Comment notes that the first requirement does not apply if the person purporting to be the attorney-in-fact is an impostor. (See *Kaneko v. Yager (2004) 120 C.A.4th 970, 980, 981, 16 C.R.3d 183* [despite claim of good faith, immunity under *Prob.C. 4303(a)* was not available where power of attorney was neither acknowledged before notary nor signed by witnesses; nothing in *Prob.C. 4303(a)* alters express requirement of *Prob.C. 4121* (*supra*, §846) that power of attorney be "legally sufficient"].)

(b) Nothing in the statute is intended to imply that a person is liable for relying on a power that does not meet these requirements, and nothing in the statute affects any other existing immunity. (*Prob.C. 4303(b)*.)

(2) *When Third Person Is Charged With Employee's Knowledge.* A third person who conducts activities through employees does not act with actual knowledge of any fact relating to a power of attorney, or of a change in the authority of an attorney-in-fact, unless both of the following requirements are satisfied:

(a) "The information is received at a home office or a place where there is an employee with responsibility to act on the information." (*Prob.C. 4308(a)(1)*.)

(b) "The employee has a reasonable time in which to act on the information using the procedure and facilities that are available to the third person in the regular course of operations." (*Prob.C. 4308(a)(2)*.)

"Knowledge of an employee in one branch or office of an entity that conducts business through branches or multiple offices is not attributable to an employee in another branch or office." (*Prob.C. 4308(b)*.)

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d. Power Not Revoked Until Notice.

14 Witkin Sum. Cal. Law Wills § 865

[§ 865] Power Not Revoked Until Notice.

(1) *Death of Principal.* "The death of a principal who has executed a power of attorney, whether durable or nondurable, does not revoke or terminate the agency as to the attorney-in-fact or a third person who, without actual knowledge of the principal's death, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal's successors in interest." (*Prob.C. 4304(a).*)

(2) *Incapacity of Principal.* "The incapacity of a principal who has previously executed a nondurable power of attorney does not revoke or terminate the agency as to the attorney-in-fact or a third person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power of attorney. Any action so taken unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest." (*Prob.C. 4304(b).*)

(3) *Proof of Power by Affidavit.* For the protection of third persons acting in good faith reliance on the exercise of a power of attorney, an affidavit executed by an attorney-in-fact is conclusive proof that the power was not revoked or terminated at the time of the exercise of the power. The affidavit must state that, at that time, the attorney-in-fact did not have actual knowledge of (a) the revocation of the power, (b) the revocation of the attorney-in-fact's authority, (c) the principal's death, or (d) the principal's incapacity. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit, when authenticated for record, is also recordable. (*Prob.C. 4305(a).*)

Prob.C. 4305 does not affect any provision in a power of attorney for termination by expiration of time or the occurrence of an event other than (a) express revocation, or (b) a change in the principal's capacity. (*Prob.C. 4305(b).*)

The failure of a third person to demand an affidavit does not affect the protection of third persons provided by *Prob.C. 4300* et seq., and no inference about "whether a third person has acted in good faith may be drawn from the failure to demand an affidavit." (*Prob.C. 4306(b).*)

If the attorney-in-fact furnishes an affidavit, a third person who refuses to accept the attorney-in-fact's authority is liable for attorneys' fees in an action necessary to confirm the attorney-in-fact's qualifications or authority, unless the court determines "that the third person believed in good faith that the attorney-in-fact was not qualified or was

attempting to exceed or improperly exercise the attorney-in-fact's authority." (*Prob.C. 4306(a)*.) (See generally C.E.B., Durable Powers of Attorney, §3.80 et seq.)

(4) *Federal Absentees*. *Prob.C. 3721* provides special protections on termination of a power of attorney executed by a principal who subsequently becomes a federal "absentee" (see *Prob.C. 1403*). For purposes of *Prob.C. 4300* et seq., the attorney-in-fact or third person will be deemed to be without actual knowledge of the absentee's revocation, death, or incapacity "while the absentee continues in missing status and until the person receives notice of the determination of the absentee's death" by the appropriate secretary or department or agency head. (On setting aside personal property of federal absentee generally, see *infra*, §1073 et seq.; on special termination rules for absentee who designates spouse as attorney-in-fact in the power of attorney, see *supra*, §852.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Proof of Power by Affidavit*. See C.E.B., Powers of Attorney and Health Care Directives, §10.12 et seq.



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1. Statutory Development.

14 Witkin Sum. Cal. Law Wills § 866

[§ 866] Statutory Development.

(1) *1984 Statute.* On a recommendation of the California Law Revision Commission, the 1984 Legislature enacted statutes authorizing a statutory form power of attorney, based on a similar New York statute. (Former C.C. 2450 et seq.; see 17 Cal. Law Rev. Com. Reports, p. 707.) The prescribed form gave the named attorney-in-fact the power to act in 13 specific types of transactions, as well as in "all other matters." Constructional provisions elaborately defined the scope of the powers granted with respect to each type of transaction.

"This form can be understood and used by a person without the necessity of having a document prepared by a lawyer. At the same time, the proposed legislation will be useful to lawyers, for the statute will provide a series of detailed statements of authority with respect to particular property matters that can be incorporated by reference in a lawyer-drafted document. These detailed statutory statements provide some assurance that nothing will be overlooked in granting the attorney-in-fact all the authority necessary with respect to a particular category of transaction." (17 Cal. Law Rev. Com. Reports, p. 708.)

(2) *1990 Revision.* On a recommendation of the California Law Revision Commission, the 1990 Legislature repealed the Statutory Short Form Power of Attorney statutes (former C.C. 2450 et seq.) and replaced them with former C.C. 2475 et seq. (See 22 *Pacific L. J.* 679.) The 1990 Act was based on the Uniform Statutory Form Power of Attorney Act approved by the National Conference of Commissioners on Uniform State Law in 1988. (See 20 Cal. Law Rev. Com. Reports, p. 419; 8B U.L.A. (Master Ed.), p. 191.) The 1990 form was designed to be simpler. (20 Cal. Law Rev. Com. Reports, p. 424.) Numbered section headings were eliminated, and a special effort was made to make its language as informal as possible without impairing its effectiveness. For example, after an introductory phrase, the term "agent" was used throughout the form instead of the longer and less familiar "attorney-in-fact." (Law Rev. Com. Comment to former C.C. 2475.)

"This simplicity, together with the advantage of having a uniform form that will receive national acceptance, outweigh any benefit that might be thought to exist because of the broader scope, the additional provisions, and the more complex execution requirements" of the old form. (20 Cal. Law Rev. Com. Reports, p. 424.)

(3) *1994 Revision.* As part of its extensive revision of the power of attorney statutes (see *supra*, §837 et seq.), the 1994 Legislature repealed the prior version of the Uniform Statutory Form Power of Attorney Act (former C.C. 2475 et

seq.), and replaced it with provisions in the Probate Code (*Prob.C. 4400 et seq.*). The substantive provisions of the prior version of the Act were largely unchanged. (See 24 Cal. Law Rev. Com. Reports, p. 354.) Although the Power of Attorney Law generalizes certain rules applicable to all powers of attorney (see *supra*, §840), the Uniform Statutory Form Power of Attorney Act remains largely self-contained. (See 24 Cal. Law Rev. Com. Reports, p. 335.) Like its predecessor, the current Act is based on the Uniform Statutory Form Power of Attorney Act approved by the National Conference of Commissioners on Uniform State Law in 1988. (See Law Rev. Com. Comments to *Prob.C. 4400 et seq.*; 8B U.L.A. (Master Ed.), p. 191.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Nature and Scope.

14 Witkin Sum. Cal. Law Wills § 867

[§ 867] Nature and Scope.

(1) *Organization. Prob.C. 4400* et seq., the Uniform Statutory Form Power of Attorney Act (*Prob.C. 4400*), consists of the following:

- (a) A prescribed short form (*Prob.C. 4401*; *infra*, §869).
- (b) Sections specifying the requirements for validity (*Prob.C. 4402* et seq.; *infra*, §868).
- (c) A section authorizing an action to compel a third person to honor an agent's authority (*Prob.C. 4406*; *infra*, §872).
- (d) Provisions explaining the scope of the attorney-in-fact's power to act in 13 specific types of transactions listed on the form (*Prob.C. 4450* et seq.; *infra*, §871).

(2) *Springing Power of Attorney.* A principal may include language stating that the power of attorney becomes effective at a future time or on the occurrence of a particular event specified in the instrument. (*Prob.C. 4405*.) This language may be inserted in the "Special Instructions" portion of the form set out in *Prob.C. 4401*. (*Prob.C. 4405(c)*.) *Prob.C. 4405* is nearly identical to *Prob.C. 4129* (*supra*, §848).

(3) *Applicability of Other Provisions of Power of Attorney Law.* Other provisions of the Power of Attorney Law generally apply to the statutory form. (*Prob.C. 4101*.) However, in the event of a conflict with the Uniform Statutory Form Power of Attorney Act, the Act governs. (*Prob.C. 4407*.)

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3. Requirements for Validity of Form.

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[§ 868] Requirements for Validity of Form.

SUPPLEMENT: [This section is current through the latest supplement]

In *Torres v. Torres* (2006) 135 C.A.4th 870, 37 C.R.3d 754, the principal executed a power of attorney on the form set forth in *Prob.C. 4401* (text, §869) but selected all authorized transactions by marking an X on line N rather than using her initials as indicated on the statutory form. *Held*, the power was valid. The form here was not "properly completed" as required by *Prob.C. 4402(b)* because it did not "comply substantially" with the wording of the statutory form as required by *Prob.C. 4402(a)*. (135 C.A.4th 875.) Nevertheless, the form created a valid power of attorney. It satisfied the requirements for legal sufficiency set forth in *Prob.C. 4121* (text, §846) and clearly expressed the principal's intent to grant all the powers listed for purposes of *Prob.C. 4123(a)* (text, §847). (135 C.A.4th 876.) Further, there was no evidence of fraud or undue influence and the conveyance of full powers to the agents was consistent with the principal's will, executed at the same time. (135 C.A.4th 877.)



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3. Requirements for Validity of Form.

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[§ 868] Requirements for Validity of Form.

A form used to create a power of attorney under the Act is valid if:

- (1) The wording substantially complies with the language of the form prescribed in *Prob.C. 4401*. (*Prob.C. 4402(a)*.) Minor variances, including deviations that comply with the official text of the Uniform Act, will not invalidate a form. (Law Rev. Com. Comments to *Prob.C. 4401, 4402*.)
- (2) The form is properly completed. (*Prob.C. 4402(b)*.)
- (3) The principal's signature is acknowledged. (*Prob.C. 4402(c)*.)

However, any form complying with the requirements of any other law may be used in lieu of the form set forth in *Prob.C. 4401*. (*Prob.C. 4408*.) Prior forms complying with earlier versions of the Act, as specified, are valid. (*Prob.C. 4409*.)

A power of attorney legally sufficient under the Act is durable to the extent that it contains language indicating the principal's intent that the power granted may be exercised notwithstanding later incapacity. (*Prob.C. 4404*.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Torres v. Torres* (2006) 135 C.A.4th 870, 37 C.R.3d 754, the principal executed a power of attorney on the form set forth in *Prob.C. 4401* (text, §869) but selected all authorized transactions by marking an X on line N rather than using her initials as indicated on the statutory form. *Held*, the power was valid. The form here was not "properly completed" as required by *Prob.C. 4402(b)* because it did not "comply substantially" with the wording of the statutory form as required by *Prob.C. 4402(a)*. (135 C.A.4th 875.) Nevertheless, the form created a valid power of attorney. It satisfied the requirements for legal sufficiency set forth in *Prob.C. 4121* (text, §846) and clearly expressed the principal's intent to grant all the powers listed for purposes of *Prob.C. 4123(a)* (text, §847). (135 C.A.4th 876.) Further, there was no evidence of fraud or undue influence and the conveyance of full powers to the agents was consistent with the principal's will, executed at the same time. (135 C.A.4th 877.)



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[§ 869] Statutory Form.

SUPPLEMENT: [This section is current through the latest supplement]

(8) *Execution. Prob.C. 4401* was amended in 2005 to delete the requirement of providing the principal's Social Security number, and to add a statement to the principal's declaration that a third party may seek identification.



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[§ 869] Statutory Form.

The statutory form is set forth in *Prob.C. 4401*. (See generally C.E.B., Durable Powers of Attorney, §3.15 et seq.)

(1) *Notice*. The form begins with the following notice in capital letters: "Notice: The powers granted by this document are broad and sweeping. They are explained in the Uniform Statutory Form Power of Attorney Act (*California Probate Code sections 4400-4465*). If you have any questions about these powers, obtain competent legal advice. This document does not authorize anyone to make medical and other health-care decisions for you. You may revoke this power of attorney if you later wish to do so."

(2) *Appointment of Agent*. The form provides for the appointment of one or more agents.

(3) *Statement of Authority*. The form lists (on lines A through M) 13 kinds of transactions in which an attorney-in-fact may act:

- (A) Real property transactions.
- (B) Tangible personal property transactions.
- (C) Stock and bond transactions.
- (D) Commodity and option transactions.
- (E) Banking and other financial institution transactions.
- (F) Business operating transactions.
- (G) Insurance and annuity transactions.
- (H) Estate, trust, and other beneficiary transactions.
- (I) Claims and litigation.

(J) Personal and family maintenance.

(K) Benefits from social security, Medicare, Medicaid, or other governmental programs, or civil or military service.

(L) Retirement plan transactions.

(M) Tax matters.

The form permits the principal to initial specific kinds of transactions or to select all (by initialing line N). An initial appearing both on line N and on any line before a specific transaction does not limit the powers granted by line N. (*Prob.C. 4403.*)

(4) *Special Instructions.* The form includes a space for the insertion of special instructions to limit or extend the general powers listed on the form. For example, language may be inserted to make the instrument a "springing power of attorney." (*Prob.C. 4405; supra, §867.*) "If the space provided is not sufficient, a reference can be made in this space to an attached sheet or sheets, and the special provisions can be included on the attached sheet or sheets." (Law Rev. Com. Comment to *Prob.C. 4401.*)

(5) *Effective Date and Duration.* The form warns that, unless the principal directs otherwise, the power is effective immediately, continues until revoked, and remains in effect even if the principal is incapacitated.

(6) *Exercise of Power of Attorney Where More Than One Agent Is Designated.* The form contains space for the principal to state whether designated multiple agents are to act separately or jointly,; and advises that the failure to specify will require that the agents act or sign jointly. However, the omission of language permitting the designation of multiple agents does not invalidate the form. (*Prob.C. 4402(a).*)

(7) *Protection of Third Persons.* The form includes the following language: "I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney."

This language is consistent with similar protection afforded third parties under *Prob.C. 4300 et seq.* (*supra, §862 et seq.*), which are made applicable to *Prob.C. 4401* by *Prob.C. 4100* and *4407* (*supra, §867*). The substitution of "learns of the revocation" for "actual notice" does not invalidate the form. (*Prob.C. 4402(a).*)

(8) *Execution.* The form includes space for the date and place of execution and the principal's signature and Social Security number, and notes that a certificate of acknowledgment by a notary public must be included.

(9) *Warning to Agent.* A warning to the agent is included: "By accepting or acting under this appointment, the agent assumes the fiduciary and other legal responsibilities of an agent."

SUPPLEMENT: [This section is current through the latest supplement]

See C.E.B., Powers of Attorney and Health Care Directives, §§4.18 et seq., 5.71.(8) *Execution.* *Prob.C. 4401* was amended in 2005 to delete the requirement of providing the principal's Social Security number, and to add a statement to the principal's declaration that a third party may seek identification.



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5. General Powers.

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[§ 870] General Powers.

By executing a statutory form power of attorney with respect to listed kinds of transactions, the principal, "except as limited or extended by the principal in the power," empowers the agent to do all of the following for those kinds of transactions:

(1) *Property*. "Demand, receive, and obtain" money or property to which the principal is or may be entitled, and "conserve, invest, disburse, or use" it for appropriate purposes. (*Prob.C. 4450(a).*)

(2) *Contracts*. Contract "in any manner with any person" for an appropriate purpose and "perform, rescind, reform, release, or modify" a contract made by or on behalf of the principal. (*Prob.C. 4450(b).*)

(3) *Instruments*. "Execute, acknowledge, seal, and deliver" instruments to accomplish a transaction. (*Prob.C. 4450(c).*)

(4) *Claims*. Prosecute, defend, arbitrate, settle, compromise, or intervene in litigation related to a claim "existing in favor of or against the principal." (*Prob.C. 4450(d).*)

(5) *Court Action*. Seek the assistance of a court to carry out an act authorized by the power. (*Prob.C. 4450(e).*)

(6) *Employees*. "Engage, compensate, and discharge" attorneys, accountants, expert witnesses, and other assistants. (*Prob.C. 4450(f).*)

(7) *Recordkeeping*. Keep a record of transactions including an accounting of receipts and disbursements. (*Prob.C. 4450(g).*)

(8) *Documents*. "Prepare, execute, and file" records or other documents to "safeguard or promote the principal's interest under a statute or governmental regulation." (*Prob.C. 4450(h).*)

(9) *Reimbursement*. Reimburse himself or herself for proper expenditures. (*Prob.C. 4450(i).*)

(10) *Other Lawful Acts*. "In general, do any other lawful act with respect to the subject." (*Prob.C. 4450(j).*)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Particular Powers.

14 Witkin Sum. Cal. Law Wills § 871

[§ 871] Particular Powers.

(1) *In General. Prob.C. 4451* et seq. explain each of the 13 specific types of transactions listed on the prescribed form (*Prob.C. 4401*) in which an agent may be empowered to act, subject to any conditions set by the principal. The Law Revision Commission Comment states:

"The language in Sections 4451-4463 makes explicit reference to authority that would be appropriate for each class of transaction. The language in those sections identifies activities that are typical responsibilities for the particular class of transaction."

"Any of Sections 4451-4463, together with the general authority in Section 4450, gives the agent complete power for the class of transactions. The recitation of particular powers in each section explains the scope of the individual section and assures the user of this part and the form provided by this part that the matters that are the user's particular concern are covered by the part."

"A general effect of this chapter is that the agent can exercise authority subject to the same conditions and limitations as the principal. In a few instances the limiting conditions are made explicit."

(2) *Estate Planning Transactions.* The pre-1990 version of the Act granted broad estate planning powers. (Law Rev. Com. Comment to former C.C. 2475.) *Prob.C. 4458* omits provisions granting an agent the authority to establish a trust; to make gifts or other transfers without consideration; and to engage in transactions for the benefit of the principal's spouse, descendants, or other designated individuals or entities. That authority must be granted by a specific statement added to the form. (See Law Rev. Com. Comment to *Prob.C. 4401*, suggesting appropriate language.) Under *Prob.C. 4465*, the agent may not modify or revoke a trust unless (a) the form expressly grants that power, and (b) the trust instrument expressly so permits.

(3) *Claims and Litigation Transactions.* Former C.C. 2494 (now *Prob.C. 4459*), which construes the power of an agent to act on behalf of the principal with respect to enumerated "claims and litigation," does not authorize the agent to act as an attorney at law on behalf of the principal, even though the principal could appear in a legal proceeding in pro. per. (*Drake v. Superior Court* (1994) 21 C.A.4th 1826, 1830, 1831, 26 C.R.2d 829; *In re Marriage of Caballero* (1994) 27 C.A.4th 1139, 1151, 33 C.R.2d 46 [citing *Drake*].)

(4) *After-Acquired Interests*. The powers described in the Act are equally exercisable whether the interest the principal owns is acquired before or after the power of attorney is executed, and whether the property is located, the powers are exercised, or the power of attorney is executed in or outside the state. (*Prob.C. 4464.*)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Action To Compel Third Person To Honor Agent's Authority.

14 Witkin Sum. Cal. Law Wills § 872

[§ 872] Action To Compel Third Person To Honor Agent's Authority.

Prob.C. 4406 authorizes an action to compel a third person to honor an agent's authority under a statutory form power of attorney whenever that person has refused to do so within a reasonable time, unless the principal could not compel the person to act in the same circumstances. (*Prob.C. 4406(a)*.) This remedy is cumulative and nonexclusive. (*Prob.C. 4406(e)*.)

Refusal to honor an agent's authority is not unreasonable if it is authorized or required by a state or federal statute or regulation. (*Prob.C. 4406(c)*.) However, refusal is unreasonable if the only reason for it is that the power of attorney is not on a form prescribed by the third person. (*Prob.C. 4406(d)*.) If the court finds that refusal was unreasonable, it may award attorneys' fees to the agent. (*Prob.C. 4406(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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XV. POWER OF ATTORNEY LAW
F. Judicial Proceedings.
1. In General.

14 Witkin Sum. Cal. Law Wills § 873

[§ 873] In General.

(1) *Statutory Development.* Court enforcement of the duties of attorneys in fact was originally governed by former C.C. 2410 et seq. In 1994, these provisions were repealed and former Prob.C. 4900 et seq. were enacted. The provisions were transferred to *Prob.C. 4500* et seq. in 1999, effective July 1, 2000, with minor changes to accommodate the repeal of the durable power of attorney for health care statutes and their replacement by the Health Care Decisions Law. (See *infra*, §876 et seq.; on judicial proceedings concerning health care decisions, see *infra*, §897 et seq.) (On judicial proceedings generally, see C.E.B., *Durable Powers of Attorney*, §7.1 et seq.)

(2) *Judicial Intervention Restricted.* Subject to *Prob.C. 4500* et seq., a "power of attorney is exercisable free of judicial intervention." (*Prob.C. 4500.*) The statutes provide for a proceeding in the superior court, and specify the authority of the court to make various types of orders. The remedies provided are cumulative and nonexclusive. (*Prob.C. 4501.*)

(3) *Limitations on Authority To Petition.* The power of attorney may expressly limit the authority of a person listed in *Prob.C. 4540* (*infra*, §874) to petition if both of the following requirements are met:

(a) The instrument is executed with the advice of an attorney authorized to practice law in the state of execution. (*Prob.C. 4503(a)(1).*)

(b) The principal's lawyer signs a certificate that states in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney." (*Prob.C. 4503(a)(2).*)

The power to limit the authority to petition may not be used to preclude the attorney-in-fact, the principal, the conservator of the person or estate of the principal, or the public guardian from filing a petition under *Prob.C. 4500* et seq. (*Prob.C. 4503(b).*)

The Law Revision Commission Comment observes that a provision limiting the power to petition does not affect

the right to resort to other available judicial remedies.

Subject to *Prob.C. 4503*, *Prob.C. 4500* et seq. apply notwithstanding any contrary provision in the power of attorney. (*Prob.C. 4502*; on limitations in powers of attorney generally, see *supra*, §845.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Development.* See C.E.B., Powers of Attorney and Health Care Directives, §11.1 et seq.



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F. Judicial Proceedings.
2. Petition.

Witkin Sum. Cal. Law Wills § 874

[§ 874] Petition.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Who May File Petition.*

(New) Filing fee: The fee for filing a petition concerning a power of attorney under *Prob.C. 4541* or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(8)*, added in 2005.)



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F. Judicial Proceedings.
2. Petition.

14 Witkin Sum. Cal. Law Wills § 874

[§ 874] Petition.

(1) *Jurisdiction.* The superior court has jurisdiction in proceedings concerning powers of attorney. (*Prob.C. 4520(a).*) It sits as a court of general jurisdiction, with the same powers and authority otherwise granted a superior court, including the matters authorized by *C.C.P. 128* (see 2 *Cal. Proc. (4th)*, *Courts*, §177 et seq.). (*Prob.C. 4520(b).*)

The court may exercise jurisdiction on any basis permitted by *C.C.P. 410.10* (see 2 *Cal. Proc. (4th)*, *Jurisdiction*, §8). (*Prob.C. 4521.*) Without limiting that jurisdiction, an attorney-in-fact under a power of attorney governed by the Power of Attorney Law is subject to the personal jurisdiction of a California court with respect to matters relating to acts and transactions performed by the attorney-in-fact in California, or affecting property or a principal in California. (*Prob.C. 4522.*) The exercise of personal jurisdiction over the attorney-in-fact is subject to constitutional limitations, including the requirement of appropriate notice. (Law Rev. Com. Comment.)

(2) *Venue.* The proper court for commencement of a proceeding is determined in the following order of priority: (a) the county of the principal's residence, (b) the county of the attorney-in-fact's residence, (c) a county in which property subject to the power of attorney is located, (d) any other county that is in the principal's best interest. (*Prob.C. 4523.*)

(3) *Who May File Petition.* Under *Prob.C. 4540*, the petition may be filed by any of the following:

- (a) The attorney-in-fact.
- (b) The principal.
- (c) The principal's spouse.
- (d) A relative of the principal.
- (e) The conservator of the person or estate of the principal.

(f) The court investigator (see *Prob.C. 1454*) of the county where the power of attorney was executed or the principal resides.

(g) The public guardian of that county.

(h) The personal representative or trustee of the principal's estate.

(i) The principal's successor in interest.

(j) A person who is requested in writing by an attorney-in-fact to take action.

(k) Any other interested person or friend of the principal.

(4) *Purposes of Petition.* A petition may be filed for any of the following purposes:

(a) Determining whether the power of attorney is in effect or has terminated. (*Prob.C. 4541(a).*)

(b) Passing on the acts or proposed acts of the attorney-in-fact, including approval of authority to disobey the principal's instructions under *Prob.C. 4234* (commingling of property; see *supra*, §856). (*Prob.C. 4541(b).*)

(c) If the attorney-in-fact has failed to submit accounts or a report within 60 days after request from the petitioner, compelling the attorney-in-fact to submit the accounts or report to the principal, the principal's spouse, the conservator of the person or estate, "or to any other person required by the court in its discretion." (*Prob.C. 4541(c).*)

(d) Declaring that the authority of the attorney-in-fact is revoked on a determination by the court of all of the following: (1) the attorney-in-fact has violated or is unfit to perform his or her fiduciary duties; (2) the principal lacks the capacity to give or revoke a power of attorney; and (3) revocation is in the best interests of the principal or the principal's estate. (*Prob.C. 4541(d).*)

(e) Approving the resignation of the attorney-in-fact, subject to any orders necessary to protect the principal's interests if the attorney-in-fact was under a duty to act, or if under no duty, subject to notice to other interested persons. (*Prob.C. 4541(e).*)

(f) Compelling a third person to honor the authority of an attorney-in-fact (see *supra*, §872). (*Prob.C. 4541(f).*)

(5) *Form and Content of Petition.* The petition must state facts showing that it is authorized by *Prob.C. 4500* et seq., the grounds for the petition, and the terms of the power of attorney if known to the petitioner. (*Prob.C. 4542.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Jurisdiction. Powers and authority of superior court:*

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §173 et seq.

Bases of jurisdiction:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §9.

(3) *Who May File Petition.*

(*New*) *Filing fee:* The fee for filing a petition concerning a power of attorney under *Prob.C. 4541* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(8)*, added in 2005 and amended in 2008.)



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F. Judicial Proceedings.
3. Hearing, Determination, and Appeal.

14 Witkin Sum. Cal. Law Wills § 875

[§ 875] Hearing, Determination, and Appeal.

(1) *In General.* Except as otherwise provided in the Power of Attorney Law, the proceeding is subject to general probate practice and procedures (*Prob.C. 1000* et seq.; supra, §371 et seq.). (*Prob.C. 4505.*) There is no right to a jury trial. (*Prob.C. 4504.*)

(2) *Service of Notice.* The petitioner must serve notice and a copy of the petition at least 15 days before the time set for the hearing on (a) the attorney-in-fact (if the attorney-in-fact is not the petitioner), and (b) the principal (if the principal is not the petitioner). (*Prob.C. 4544(a).*) However, if the petition is filed to compel a third person to honor the authority of an attorney-in-fact (see supra, §872), notice and a copy of the petition must be served on the third person in the manner provided by *C.C.P. 413.10* et seq. (see 3 *Cal. Proc. (4th), Actions*, §919 et seq.). (*Prob.C. 4544(b).*)

(3) *Orders.* As in the case of probate proceedings generally, the court may make appropriate orders. (See *Prob.C. 1046*, supra, §379.) The court is expressly authorized to do the following:

(a) Dismiss the petition "if it appears that the proceeding is not reasonably necessary for the protection of the interests of the principal or the principal's estate," and stay or dismiss the proceeding when required by *C.C.P. 410.30* (inconvenient forum). (*Prob.C. 4543.*)

(b) If the petitioner is not the attorney-in-fact, award reasonable attorneys' fees to either: (1) the attorney-in-fact, if the proceeding was commenced "without any reasonable cause"; or (2) the petitioner, if the attorney-in-fact clearly violated his or her fiduciary duties or failed without reasonable cause or justification to submit accounts or report acts after written request. (*Prob.C. 4545.*)

(4) *Appeal.* Under *Prob.C. 1302*, an appeal may be taken from:

(a) A final order made pursuant to *Prob.C. 4541* (supra, §874), except an order under *Prob.C. 4541(c)* (compelling account or report).

(b) An order dismissing or denying a motion to dismiss under *Prob.C. 4543.*

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Service of Notice.*

Manner of service:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1001 et seq.



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XVI. HEALTH CARE DECISIONS LAW
A. In General.
1. Former Law.

14 Witkin Sum. Cal. Law Wills § 876

[§ 876] Former Law.

(1) *Original Civil Code Provisions.* In 1983, the California Law Revision Commission noted that some lawyers advised the use of a durable power of attorney to delegate the authority to make health care decisions, but added that the existing law was unclear on that use of the power. (17 Cal. Law Rev. Com. Reports, pp. 101, 105.) The Commission recommended that the statute be revised to provide expressly that a durable power of attorney may authorize the attorney-in-fact to make health care decisions for the principal. The following year, the Commission recommended the enactment of a statutory short form. (See 17 Cal. Law Rev. Com. Reports, p. 709.) The 1983 Legislature followed the Commission's initial recommendation by enacting former C.C. 2430 et seq. (See 15 *Pacific L. J.* 526.) The 1984 Legislature enacted a statutory form, former C.C. 2500 et seq., known as Keene Health Care Agent Act.

(2) *Probate Code Provisions.* The 1994 Legislature repealed the former statutes dealing with durable powers of attorney for health care and the statutory form durable powers of attorney for health care. The repealed statutes were replaced with Probate Code provisions entitled "Durable Powers of Attorney for Health Care." (Former Prob.C. 4600 et seq.) The revised statutes continued prior law with only minor changes. (24 Cal. Law Rev. Com. Reports, p. 354.) The Law Revision Commission noted at the time that "it would have been premature to undertake a detailed review of the health care power statutes before the National Conference of Commissioners on Uniform State Laws completed its work on the Uniform Health-Care Decisions Act." (24 Cal. Law Rev. Com. Reports, p. 335.)

(3) *Natural Death Act.* The Natural Death Act (former Health & Saf.C. 7185 et seq.), enacted in 1976, addressed a related topic: an adult's right to make advance decisions regarding the withholding or withdrawal of life-sustaining treatment. (See 5 *Summary* (10th), *Torts*, §127 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Law Revision Commission Recommendation.

14 Witkin Sum. Cal. Law Wills § 877

[§ 877] Law Revision Commission Recommendation.

In 1998, the California Law Revision Commission recommended enactment of the Health Care Decisions Law. (See 29 Cal. Law Rev. Com. Reports, p. 1 et seq.) The Commission Report (pp. 11, 12) noted that, although California had been a pioneer in the area of health care decisionmaking for adults lacking decisionmaking capacity, the enactment of laws in other jurisdictions and the promulgation of a new Uniform Health-Care Decisions Act suggested a need to address several gaps and uncertainties in current California law:

- (1) "Existing law does not provide a convenient mechanism for making health care treatment wishes known and effective, separate from the procedure for appointing an agent."
- (2) "The principles governing family consent or surrogate decisionmaking in the absence of a power of attorney for health care are not clear."
- (3) "There are no general rules governing health care decisions for incapacitated persons who have no advance directive or known family or friends to act as surrogates."
- (4) "Statutes governing court-authorized medical treatment for patients without conservators are unduly limited."

The proposed new law "provides procedures and standards for making decisions in these situations, and adopts consistent rules governing health care decisionmaking by surrogates, whether they are family members, agents, public or private conservators, surrogate committees, or courts. The proposed law makes many revisions to promote the use and recognition of advance directives, to improve effectuation of patients' wishes once they become incapable of making decisions for themselves, to simplify the statutory form and make it easier to use and understand, and to modernize terminology. However, the scope of the proposed law is limited: it governs health care decisions to be made for adults at a time when they are incapable of making decisions on their own and provides mechanisms for directing their health care in anticipation of a time when they may become incapacitated. It does not govern health care decisions for minors or adults having capacity." (29 Cal. Law Rev. Com. Reports, p. 12.)

SUPPLEMENT: [This section is current through the latest supplement]



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XVI. HEALTH CARE DECISIONS LAW
A. In General.
3. Enactment.

14 Witkin Sum. Cal. Law Wills § 878

[§ 878] Enactment.

(1) *In General.* Effective July 1, 2000, the 1999 Legislature repealed both the Natural Death Act (former Health & Saf.C. 7185 et seq.) and those portions of the Power of Attorney Law relating to durable powers of attorney for health care (former Prob.C. 4600 et seq.). In their place, it enacted the Health Care Decisions Law (*Prob.C. 4600 et seq.*). (See 31 *McGeorge L. Rev.* 501, 733.)

(2) *Organization.* The Health Care Decisions Law (HCDL) is organized into five parts:

Part 1. Definitions and General. (*Prob.C. 4600 et seq.*; *infra*, §879 et seq.)

Part 2. Uniform Health Care Decisions Act. (*Prob.C. 4670 et seq.*; *infra*, §882 et seq.)

Part 3. Judicial Proceedings. (*Prob.C. 4750 et seq.*; *infra*, §897 et seq.)

Part 4. Request to Forgo Resuscitative Measures. (*Prob.C. 4780 et seq.*; *infra*, §900.)

Part 5. Advance Health Care Directive Registry. The Secretary of State must establish a system allowing persons who have executed written advance health care directives to register them in a central information center. (*Prob.C. 4800 et seq.*)

(3) *Transitional Provisions.* *Prob.C. 4665* provides rules for resolving issues arising from the repeal of the former law and the enactment of the HCDL:

(a) *All advance health care directives are subject to HCDL.* On and after July 1, 2000, all advance health care directives are subject to the HCDL, whether they were given or executed before, on, or after that date. This includes durable powers of attorney for health care and declarations under the Natural Death Act. (*Prob.C. 4665(a).*) The Law Revision Commission Comment characterizes this as the general rule. However, an advance health care directive executed before July 1, 2000, that was valid under prior law is not invalidated by the HCDL. (*Prob.C. 4665(d).*)

(b) *Durable power of attorney for health care on printed form remains valid.* A durable power of attorney for health care executed on a printed form that was valid under prior law remains valid under the HCDL, whether execution

occurred before, on, or after July 1, 2000. (*Prob.C. 4665(e).*)

(c) *Judicial proceedings.* The HCDL applies to proceedings concerning advance health care directives commenced on or after July 1, 2000. (*Prob.C. 4665(b).*) Proceedings commenced before July 1, 2000, are also subject to the HCDL, unless the court determines that application of a particular provision "would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons." (*Prob.C. 4665(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

4. Legislative Findings and Intent.

14 Witkin Sum. Cal. Law Wills § 879

[§ 879] Legislative Findings and Intent.

(1) *Legislative Findings.* The Legislature based the HCDL on the following findings (*Prob.C. 4650*):

- (a) An adult has a fundamental right to control decisions relating to his or her own health care.
- (b) Modern medical technology is often able to prolong life by artificial means in a way that violates patient dignity, causes unnecessary pain and suffering, and provides nothing medically necessary or beneficial to the patient.
- (c) In the absence of controversy, health care decisions, including those regarding life-sustaining treatment, are not best made by the courts.

(2) *Legislative Intent.* *Prob.C. 4651* et seq. draw together elements of former California law and the Uniform Health-Care Decisions Act to specify, in unusual detail, what the HCDL is and is not intended to accomplish:

(a) *HCDL is restricted to decisions for incompetent adults.* The HCDL applies to health care decisions for adults who lack capacity to make health care decisions for themselves. It does not affect the right of competent adults to make health care decisions for themselves, nor does it affect the law governing emergency health care or health care for unemancipated minors. (*Prob.C. 4651.*)

(b) *Consent to mental health treatment, sterilization, or abortion is not authorized.* The HCDL does not authorize consent to commitment or placement in a mental health treatment facility, convulsive treatment, psychosurgery, sterilization, or abortion. (*Prob.C. 4652.*)

(c) *Mercy killing is not authorized.* The HCDL does not condone, authorize, or approve mercy killing, assisted suicide, or euthanasia. It is "not intended to permit any affirmative or deliberate act or omission to end life other than withholding or withdrawing health care pursuant to an advance health care directive, by a surrogate, or as otherwise provided, so as to permit the natural process of dying." (*Prob.C. 4653.*) (See generally C.E.B., Durable Powers of Attorney, §6.21 et seq.)

(d) *Only generally accepted health care standards are authorized.* The HCDL neither authorizes nor requires a health care provider or institution to provide health care contrary to generally accepted health care standards. (*Prob.C.*

4654.)

(e) *No presumptions arise from attempted suicide or failure to make directive.* The HCDL does not create a presumption regarding the intentions of a patient who has not made, or who has revoked, an advance health care directive, and a patient's attempted suicide is not to be construed to indicate a desire that health care be restricted or inhibited. (*Prob.C. 4655.*)

(f) *Death resulting from HCDL procedures is not deemed suicide or homicide.* Death resulting from the withholding or withdrawing of health care in accordance with the HCDL does not constitute suicide or homicide or legally impair or invalidate a policy of insurance or annuity providing a death benefit, notwithstanding any contrary term in the policy or annuity. (*Prob.C. 4656.*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Legislative Intent.*

(c) *Mercy killing is not authorized.* See C.E.B., Powers of Attorney and Health Care Directives, §8.31 et seq.



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A. In General.
5. Definitions.

14 Witkin Sum. Cal. Law Wills § 880

[§ 880] Definitions.

The following definitions govern the construction of the HCDL, unless the provision or context "otherwise requires." (*Prob.C. 4603.*) (For additional definitions, see *Prob.C. 4611 et seq.*)

(1) *Advance health care directive* or *advance directive* means "either an individual health care instruction or a power of attorney for health care." (*Prob.C. 4605.*)

(2) *Agent* means an individual designated in a power of attorney for health care to make health care decisions for the principal, whether or not the person is known as an agent or attorney-in-fact or by some other term. The term includes a successor or alternate agent. (*Prob.C. 4607.*)

(3) *Capacity* means a person's ability to understand the nature and consequences of a decision, and includes, in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives. (*Prob.C. 4609.*) The Law Revision Commission Comment notes that the definition applies to an individual's capacity to make or revoke an advance health care directive, as well as to make a health care decision.

(4) *Health care* means "any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a persons physical or mental condition." (*Prob.C. 4615.*)

(5) *Health care decision* means a decision by the patient or patient's agent, conservator, or surrogate, regarding the patient's health care. It includes selection and discharge of health care providers and institutions, approval or disapproval of diagnostic tests, surgical procedures, and programs of medication, and directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation. (*Prob.C. 4617.*)

(6) *Health care provider* means an individual "licensed, certified, or otherwise authorized or permitted by the law of this state to provide health care in the ordinary course of business or practice of a profession." (*Prob.C. 4621.*)

(7) *Power of attorney for health care* means a written instrument designating an agent to make health care decisions for the principal. (*Prob.C. 4629.*)

(8) *Principal* means an adult who executes a power of attorney for health care. (*Prob.C. 4633.*)

(9) *Reasonably available* means readily able to be contacted without undue effort, and willing and able to act in a timely manner in light of the urgency of the patient's health care needs. (*Prob.C. 4635.*)

(10) *Supervising health care provider* means the primary physician or, where there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility for the patient's health care. (*Prob.C. 4641.*)

(11) *Surrogate* means an adult, other than a patient's agent or conservator, authorized under the HCDL to make a health care decision for the patient. (*Prob.C. 4643.*)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

6. Who May Act as Decisionmaker.

14 Witkin Sum. Cal. Law Wills § 881

[§ 881] Who May Act as Decisionmaker.

(1) *Patient*. The patient is presumed to have the capacity to make his or her own health care decisions, to give or revoke an advance health care directive, and to designate or disqualify a surrogate. This presumption is one affecting the burden of proof. (*Prob.C. 4657*.)

(2) *Primary Physician*. "Unless otherwise specified in a written advance health care directive," a determination that the patient lacks or has recovered capacity, or that another condition exists that affects an individual health care instruction or an agent's or surrogate's authority, must be made by the primary physician. (*Prob.C. 4658*.)

(3) *Conservator Under Lanterman-Petris-Short Act*. Under *Prob.C. 4659(c)*, a conservator under the Lanterman-Petris-Short Act (*Welf.C. 5000 et seq.*) may be designated as an agent or surrogate to make health care decisions by the conservatee, but only under the following conditions:

(a) The advance health care directive is otherwise valid.

(b) The conservatee is represented by counsel.

(c) The attorney representing the conservatee signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and the principal or patient was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive."

(4) *Prohibited Persons*. The following persons may not make health care decisions as an agent under a power of attorney for health care or as a surrogate: (a) the supervising health care provider (for definition, see *supra*, §880); (b) an employee of a health care institution where the patient is receiving care; (c) an operator or employee of a community care facility or residential care facility where the patient is receiving care. (*Prob.C. 4659(a)*.) This prohibition, however, does not apply to employees (other than the supervising health care provider) who are related to the patient by blood, marriage, or adoption, or to employees (other than the supervising health care provider) employed by the same health care institution, community care facility, or residential care facility as the patient. The prohibition is also inapplicable to

an employee who is the patient's registered domestic partner. (*Prob.C. 4659(b)*.) Thus, for example, a nurse employed by a hospital treating his or her spouse may serve as an agent.

The Law Revision Commission Comment to *Prob.C. 4659(b)* notes that the bar on supervising health care providers is absolute: "If a supervising health care provider is the spouse of a patient, he or she would need to cease acting as the patient's primary physician or other supervising health care provider in order to undertake responsibilities as an agent under a power of attorney for health care or as a surrogate health care decisionmaker."

SUPPLEMENT: [This section is current through the latest supplement]



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B. Uniform Health Care Decisions Act.
1. In General.

14 Witkin Sum. Cal. Law Wills § 882

[§ 882] In General.

Prob.C. 4670 et seq., entitled Uniform Health Care Decisions Act, covers the following subjects:

- (1) Advance health care directives (*infra*, §884).
- (2) Powers of attorney for health care (*infra*, §§885, 886).
- (3) Advance health care directive forms (*infra*, §888 et seq.).
- (4) Surrogates (*infra*, §891).
- (5) Duties and liabilities of health care providers and others (*infra*, §892 et seq.).

The Act is drawn, to a large extent, from the Uniform Health-Care Decisions Act of 1993, and a number of the Law Revision Commission Comments incorporate material entitled "Background from Uniform Act." (For Uniform Health-Care Decisions Act of 1993, see 9 (Part IB) U.L.A. (Master Ed.), p. 147 et seq.) (See C.E.B., Elder Law Resources, §4.29 et seq.; C.E.B., Durable Powers of Attorney, §5.1 et seq.; Rutter Group, 1 Cal. Practice Guide: Probate §1:90 et seq. and Form 16:E et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See C.E.B., Powers of Attorney and Health Care Directives, §7.1 et seq.



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B. Uniform Health Care Decisions Act.
2. Right To Give Instructions and Execute Powers.

14 Witkin Sum. Cal. Law Wills § 883

[§ 883] Right To Give Instructions and Execute Powers.

(1) *In General. Prob.C. 4670 et seq.* establish the right of adult individuals to give or execute advance health care directives, which, under *Prob.C. 4605* (supra, §880), include both individual health care instructions and powers of attorney for health care.

(a) An adult having capacity may give an individual health care instruction. The instruction may be oral or written, and may be limited to take effect only if a specified condition arises. (*Prob.C. 4670.*)

(b) An adult having capacity may also execute a power of attorney for health care. The power may authorize the agent to make health care decisions and may also include individual health care instructions. (*Prob.C. 4671(a).*)

(c) A written advance health care directive may include a nomination of a conservator of the person or estate or both, or a guardian of the person or estate or both, "if protective proceedings for the individual's person or estate are thereafter commenced." (*Prob.C. 4672.*) (For requirements generally applicable to advance health care directives, see *infra*, §884; for requirements specifically applicable to powers of attorney for health care, see *infra*, §885.)

(2) *Execution or Revocation May Not Be Required or Prohibited.* A health care provider or insurer may not require or prohibit the execution or revocation of an advance health care directive as a condition for providing health care, admission to a facility, or furnishing insurance. (*Prob.C. 4677.*) "This section is intended to eliminate the possibility that duress might be used by a health care provider, insurer, plan, or other entity to cause the patient to execute or revoke an advance directive." (Law. Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Uniform Health Care Decisions Act.
3. Advance Health Care Directives.

Witkin Sum. Cal. Law Wills § 884

[§ 884] Advance Health Care Directives.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirements for Legal Sufficiency.* *Prob.C. 4673* was subdivided in 2006. The provisions discussed in the text are now in *Prob.C. 4673(a)*.

(*New*) *Electronic format:* An advance health care directive or a power of attorney for health care may be in electronic form. In that circumstance, the document must be notarized. (*Prob.C. 4673(b)*, added in 2006 [specifying requirements for digital signature].)



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B. Uniform Health Care Decisions Act.
3. Advance Health Care Directives.

14 Witkin Sum. Cal. Law Wills § 884

[§ 884] Advance Health Care Directives.

(1) *Requirements for Legal Sufficiency.* To be legally sufficient, a written advance health care directive must: (a) contain the date of its execution; (b) be signed either by the patient or in the patient's name by another adult in the patient's presence and at the patient's direction; and (c) be acknowledged before a notary public or properly by at least two witnesses. (*Prob.C. 4673.*)

(2) *Witness Requirements.* Where a written advance health care directive is signed by witnesses, the following requirements apply:

(a) The witnesses must be adults. (*Prob.C. 4674(a).*)

(b) Each witness must witness either the signing of the advance directive by the patient or the patient's acknowledgment of the signature or the advance directive. (*Prob.C. 4674(b).*)

(c) A witness may not be: (1) the patient's health care provider or the provider's employee; (2) the operator or an employee of a community care facility; (3) the operator or an employee of a residential care facility for the elderly; (4) the agent, where the advance directive is a power of attorney for health care. (*Prob.C. 4674(c).*)

(d) Each witness must make a declaration stating in substance: "I declare under penalty of perjury under the laws of California (1) that the individual who signed or acknowledged this advance health care directive is personally known to me, or that the individual's identity was proven to me by convincing evidence, (2) that the individual signed or acknowledged this advance directive in my presence, (3) that the individual appears to be of sound mind and under no duress, fraud, or undue influence, (4) that I am not a person appointed as agent by this advance directive, and (5) that I am not the individual's health care provider, an employee of the individual's health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly." (*Prob.C. 4674(d).*)

(e) At least one witness must be an individual who is not related to the patient by blood, marriage, or adoption, or entitled to any portion of the patient's estate by operation of law or under a then existing will. (*Prob.C. 4674(e).*) The witness satisfying this requirement must sign a declaration stating in substance: "I further declare under penalty of

perjury under the laws of California that I am not related to the individual executing this advance health care directive by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the individual's estate upon his or her death under a will now existing or by operation of law." (*Prob.C. 4674(f)*.)

The witness requirements of *Prob.C. 4674* do not apply to a notary public before whom an advance health care directive is acknowledged. (*Prob.C. 4674(g)*.)

(3) *Directive Executed in Skilled Nursing Facility*. If the individual executing the advance directive is a patient in a skilled nursing home, the directive must be signed by a patient advocate or ombudsman, either as one of two witnesses or in addition to notarization. The patient advocate or ombudsman must declare that he or she is serving as a witness, but may rely on representations of the nursing facility administrators or staff, or family members, as convincing evidence of the patient's identity. (*Prob.C. 4675*.)

(4) *Directive Executed in Another Jurisdiction*. "A written advance health care directive or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of this state, is valid and enforceable in this state to the same extent as a written advance directive validly executed in this state." (*Prob.C. 4676(a)*.)

(5) *Presumption of Validity*. A physician or other health care provider may, in the absence of knowledge to the contrary, presume that a written advance health care directive or similar instrument, executed in California or elsewhere, is valid. (*Prob.C. 4676(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirements for Legal Sufficiency*. *Prob.C. 4673* was subdivided in 2006. The provisions discussed in the text are now in *Prob.C. 4673(a)*.

See 102 Proof of Facts 3d 95 [advance directives for medical and psychiatric care].

(*New*) *Electronic format*: An advance health care directive or a power of attorney for health care may be in electronic form. In that circumstance, the document must be notarized. (*Prob.C. 4673(b)*), added in 2006 [specifying requirements for digital signature].)



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B. Uniform Health Care Decisions Act.
4. Powers of Attorney for Health Care.
a. In General.

14 Witkin Sum. Cal. Law Wills § 885

[§ 885] In General.

(1) *Requirements for Legal Sufficiency.* A power of attorney for health care is legally sufficient if it meets the requirements of *Prob.C. 4673* (supra, §884). (*Prob.C. 4680.*) The Law Revision Commission Comment notes that a power of attorney for health care must be in writing. (See generally Cal. Transactions Forms, 2 Estate Planning §8:60 et seq.; C.E.B., Durable Powers of Attorney, §5.1 et seq.; C.E.B., 1 Will Drafting 3d, §3.49 et seq.; C.E.B., 2 Estate Planning §29.1 et seq.)

(2) *Principal's Power To Limit Application of Statute.* The principal may limit the application of any provision of the HCDL by including an express statement to that effect or an inconsistent rule in the power of attorney. However, application of the following may not be limited:

(a) A statute specifically providing that it is not subject to limitation in the power of attorney. (*Prob.C. 4681(b).*) (See, e.g., *Prob.C. 4752* [except as provided in *Prob.C. 4753*, a directive may not limit the statutes governing judicial proceedings].)

(b) A statute concerning (1) statements required to be included in a power of attorney; (2) operative dates of statutory enactments or amendments; (3) formalities for execution of a power of attorney for health care; (4) qualifications of witnesses; (5) qualifications of agents; (6) protection of third persons from liability. (*Prob.C. 4681(b).*)

(3) *Law of Agency Applies.* Where the HCDL fails to provide a rule governing agents under powers of attorney for health care, the law of agency applies. (*Prob.C. 4688.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirements for Legal Sufficiency.* See C.E.B., Powers of Attorney and Health Care Directives, §7.15 et seq.



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4. Powers of Attorney for Health Care.
b. Agent's Authority.

Witkin Sum. Cal. Law Wills § 886

[§ 886] Agent's Authority.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Scope*. The agent may also make decisions that are effective after the principal's death authorizing the release of the principal's medical records. (*Prob.C. 4683(b)*, as amended in 2006.)

See *Garrison v. Superior Court* (2005) 132 C.A.4th 253, 265, 33 C.R.3d 350 [attorney in fact under broadly written durable power of attorney for health care was authorized to enter into binding arbitration agreement on behalf of principal admitted to residential care facility]; *Hogan v. Country Villa Health Services* (2007) 148 C.A.4th 259, 264, 55 C.R.3d 450 [following *Garrison*; attorney in fact under durable power of attorney for health care using statutory language of *Prob.C. 4701* was authorized to enter into binding arbitration agreement on behalf of principal admitted to skilled nursing facility; provision permitting agent to select and discharge health care providers and institutions encompasses authority to execute admission forms, including arbitration agreements].



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B. Uniform Health Care Decisions Act.
4. Powers of Attorney for Health Care.
b. Agent's Authority.

14 Witkin Sum. Cal. Law Wills § 886

[§ 886] Agent's Authority.

(1) *Effectiveness.* Unless otherwise provided in the power of attorney, the agent's authority becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has recovered capacity. (*Prob.C. 4682.*) "[T]he default rule is that the agent is not authorized to make health care decisions if the principal has the capacity to make health care decisions. The power of attorney may, however, give the agent authority to make health care decisions for the principal even though the principal does have capacity, but the power of attorney is always subject to Section 4695 (revocation of advance directive)." (Law Rev. Com. Comment on *Prob.C. 4682*; on revocation, see *infra*, §887.)

The agent's authority continues notwithstanding any lapse of time since execution of the power of attorney, unless the power of attorney provides a time of termination. (*Prob.C. 4686.*)

(2) *Scope.* The power of attorney may grant authority to the agent to make decisions relating to the principal's personal care, "including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment." (*Prob.C. 4671(b).*) With respect to health care, the agent may make decisions "to the same extent the principal could make health care decisions if the principal had the capacity to do so." (*Prob.C. 4683(a).*) The agent may also make decisions that are effective after the principal's death, including making an anatomical gift, authorizing an autopsy, and directing the disposition of remains. (*Prob.C. 4683(b).*)

Unless the power of attorney provides otherwise, an agent who is designated in the power of attorney and is known to the health care provider to be reasonably available and willing to make health care decisions has priority over any other person in making health care decisions for the principal. (*Prob.C. 4685*; see *Prob.C. 4678* [agent's right to request, receive, and consent to disclosure of information]; *Prob.C. 4690* [right to consult with others regarding matters covered by power of attorney].)

The agent also retains any authority he or she may have apart from the power of attorney to make or participate in making health care decisions for the principal. (*Prob.C. 4687.*)

(3) *Standards for Exercise*. If possible, the agent must make health care decisions in accordance with the principal's individual health care instructions, if any, and the principal's other wishes to the extent known to the agent. Otherwise, the agent must be guided by his or her determination of the principal's best interest. "In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent." (*Prob.C. 4684*.)

(4) *Effect of Principal's Objection*. If the principal objects to a health care decision taken by the agent, "the matter shall be governed by the law that would apply if there were no power of attorney for health care." (*Prob.C. 4689*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Scope*. The agent may also make decisions that are effective after the principal's death authorizing the release of the principal's medical records. (*Prob.C. 4683(b)*, as amended in 2006.)

See *Garrison v. Superior Court* (2005) 132 C.A.4th 253, 265, 33 C.R.3d 350 [attorney in fact under broadly written durable power of attorney for health care was authorized to enter into binding arbitration agreement on behalf of principal admitted to residential care facility]; *Hogan v. Country Villa Health Services* (2007) 148 C.A.4th 259, 264, 55 C.R.3d 450 [following *Garrison*; attorney in fact under durable power of attorney for health care using statutory language of *Prob.C. 4701* was authorized to enter into binding arbitration agreement on behalf of principal admitted to skilled nursing facility; provision permitting agent to select and discharge health care providers and institutions encompasses authority to execute admission forms, including arbitration agreements].



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B. Uniform Health Care Decisions Act.
5. Revocation of Directive or Designation.

14 Witkin Sum. Cal. Law Wills § 887

[§ 887] Revocation of Directive or Designation.

An advance health care directive may be revoked by the patient, or by operation of law, as follows:

(1) *Revocation of Agent Designation.* A patient who has capacity may revoke the designation of an agent either by a signed writing, or by personally informing the supervising health care provider. (*Prob.C. 4695(a).*)

(2) *Revocation of Directive Other Than Agent Designation.* A patient who has capacity may revoke all or part of an advance health care directive, other than an agent designation, at any time and in any manner that communicates an intent to do so. (*Prob.C. 4695(b).*)

(3) *Effect of Marital Dissolution.* If the agent designated in the power of attorney is the principal's spouse, dissolution or annulment of the marriage has the effect of revoking the designation. (*Prob.C. 4697(a).*) However, remarriage between the principal and agent revives the agent's authority. (*Prob.C. 4697(b).*)

(4) *Effect of Conflict With Earlier Directive.* An advance health care directive that conflicts with an earlier directive revokes the earlier directive to the extent of the conflict. (*Prob.C. 4698.*)

A health care provider, agent, conservator, or surrogate who is informed of a revocation must promptly communicate the fact of the revocation to the supervising health care provider and to any health care institution where the patient is receiving care. (*Prob.C. 4696.*)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Uniform Health Care Decisions Act.
6. Statutory Form.
a. In General.

14 Witkin Sum. Cal. Law Wills § 888

[§ 888] In General.

Prob.C. 4701 sets forth an optional statutory form for advance health care directives. It supersedes the statutory form in former *Prob.C. 4771*, and is drawn largely from section 4 of the Uniform Health-Care Decisions Act (see 9 (Part IB) U.L.A. (Master Ed.), p. 147 et seq.).

"An individual may complete all or any [of the first four] parts of the form. Any part of the form left blank is not to be given effect. For example, an individual may complete the instructions for health care part of the form alone. Or an individual may complete the power of attorney for health care part of the form alone. Or an individual may complete both the instructions and power of attorney for health care parts of the form. An individual may also, but need not, complete the parts of the form pertaining to donation of bodily organs and tissue and the designation of a primary physician." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 984, third line of section, "Heath-Care Decisions" should be "Health-Care Decisions".



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b. Explanatory Section.

14 Witkin Sum. Cal. Law Wills § 889

[§ 889] Explanatory Section.

The optional statutory form for advance health care directives (*Prob.C. 4701*) begins with the following explanation:

"You have the right to give instructions about your own health care. You also have the right to name someone else to make health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form."

"Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or your supervising health care provider or employee of the health care institution where you are receiving care, unless your agent is related to you or is a coworker.)"

"Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:"

"(a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition."

"(b) Select or discharge health care providers and institutions."

"(c) Approve or disapprove diagnostic tests, surgical procedures, and programs of medication."

"(d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation."

"(e) Make anatomical gifts, authorize an autopsy, and direct disposition of remains."

"Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, as well as the provision of pain relief. Space is also provided for you to add to the choices you have made or for you to write out any additional wishes. If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out Part 2 of this form."

"Part 3 of this form lets you express an intention to donate your bodily organs and tissues following your death."

"Part 4 of this form lets you designate a physician to have primary responsibility for your health care."

"After completing this form, sign and date the form at the end. The form must be signed by two qualified witnesses or acknowledged before a notary public. Give a copy of the signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care, and to any health care agents you have named. You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take responsibility." (For legal requirements regarding execution and witnesses, see *supra*, §884.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Body of Form.

14 Witkin Sum. Cal. Law Wills § 890

[§ 890] Body of Form.

The substantive portion of the optional statutory form for advance health care directives (*Prob.C. 4701*) covers the following subjects (quoted material is drawn from the Law Revision Commission Comments):

(1) *Designation of Agent*. Part 1.1 "requires only the designation of a single agent, but with opportunity given to designate a single first alternate and a single second alternate, if the individual chooses. No provision is made in the form for the designation of co-agents in order not to encourage the practice. ... If co-agents are appointed, the instrument should specify that either is authorized to act if the other is not reasonably available. It should also specify a method for resolving disagreements."

(2) *Agent's Authority*. Part 1.2 "grants the agent authority to make all health-care decisions for the individual subject to any limitations which the individual may state in the form."

(3) *When Agent's Authority Becomes Effective*. Part 1.3 "provides that the agent's authority becomes effective upon a determination that the individual lacks capacity, but ... a box is provided for the individual to indicate that the authority of the agent takes effect immediately."

(4) *Agent's Obligation*. Part 1.4 incorporates the agent's decisionmaking standards set forth in *Prob.C. 4684*. (See *supra*, §886.)

(5) *Agent's Postdeath Authority*. Part 1.5 implements *Prob.C. 4683*, which specifies that the agent's authority includes decisions effective after the principal's death. (See *supra*, §886.)

(6) *Nomination of Conservator*. Part 1.6 "nominates the agent, if available, able, and willing to act, otherwise the alternate agents in order of priority stated, as [conservators] of the person for the individual. This provision is included in the form for two reasons. First, if an appointment of a [conservator] becomes necessary the agent is the one whom the individual would most likely want to serve in that role. Second, the nomination of the agent as [conservator] will reduce the possibility that someone other than the agent will be appointed as [conservator] who could use the position to thwart the agent's authority."

(7) *Instructions for Health Care*. Part 2 "does not attempt to be comprehensive, but is directed at the types of treatment for which an individual is most likely to have special wishes. Part [2.1] of the form, entitled "End-of-Life Decisions," provides two alternative choices for the expression of wishes concerning the provision, withholding, or withdrawal of treatment. ... Part [2.2] of the form provides space for an individual to specify any circumstances when the individual would prefer not to receive pain relief. ... Part [2.3] of the form provides space for the individual to write out his or her own instructions or to supplement the instructions given in the previous subparts."

(8) *Donation of Organs at Death*. Part 3 "provides the individual an opportunity to express an intention to donate bodily organs and tissues at death. The options provided are derived from a suggested form in the Comment to Section 2 of the Uniform Anatomical Gift Act (1987)." (See *Health & Saf.C. 7150 et seq.*, 13 *Summary* (10th), *Personal Property*, §6 et seq.)

(9) *Designation of Primary Physician*. Part 4 provides spaces for designation of a primary physician and an alternate primary physician.

(10) *Effect and Execution*. Part 5.1 indicates, in conformity with *Prob.C. 4660*, that a copy of the form has the same effect as an original. The remainder of Part 5 provides spaces for signatures, and statements by witnesses and patient advocates or ombudsmen. "The form does not require formal acceptance by an agent. ... However, practitioners who wish to adapt this form for use by their clients are strongly encouraged to add a formal acceptance." (On execution and witness requirements, see *supra*, §884.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Uniform Health Care Decisions Act.
7. Heath Care Surrogates.

14 Witkin Sum. Cal. Law Wills § 891

[§ 891] Heath Care Surrogates.

(1) *In General.* A patient may designate an adult to make health care decisions by personally informing the supervising health care provider. The designation must be promptly recorded in the patient's health care record. (*Prob.C. 4711(a)*.) "Personally informing," as used in the statute, includes both oral and written communications. (Law Rev. Com. Comment.)

(2) *Duration of Designation.* Unless the patient specifies a shorter period, a surrogate designation is effective for the duration of the course of treatment or illness or during the stay in the health care institution when the surrogate decision is made, or for 60 days, whichever is shorter. (*Prob.C. 4711(b)*.) The expiration of the surrogate designation, however, does not affect any role the designated person may have in making health care decisions under any other law or standards of practice. (*Prob.C. 4711(c)*.)

(3) *Decisionmaking Standards.* In making health care decisions, the surrogate is bound by the same standards applicable to agents for health care (see *supra*, §886). Each decision must be made in accordance with the patient's individual health care instructions, if any, and other wishes to the extent known to the surrogate. Otherwise, the decision must be made in accordance with the surrogate's determination of the patient's best interest. In determining the patient's best interest, the surrogate must consider the patient's personal values, to the extent known to the surrogate. (*Prob.C. 4714*.)

(4) *Disqualification.* A patient with capacity may, at any time, disqualify another person, including a family member, from acting as a surrogate. This can be done either by a signed writing or by personally informing the supervising health care provider. (*Prob.C. 4715*.)

(5) *Coordination Between Surrogate and Agent.* A surrogate has priority over an agent under a power of attorney for health care for the duration of the surrogate designation, but the designation of a surrogate does not revoke the designation of an agent unless the patient communicates the intent to revoke under *Prob.C. 4695(a)* (*supra*, §887). (*Prob.C. 4711(d)*.)

(6) *Authority of Domestic Partner of Patient.* If a patient lacks the capacity to make a health care decision, the patient's domestic partner (see *Family C. 297, 11 Summary* (10th), *Husband and Wife*, §25 et seq.) has the same

authority to make a health care decision that a spouse has for his or her incapacitated spouse. (*Prob.C. 4716* [noting that statute does not expand or restrict ability of spouse to make health care decision for incapacitated spouse].)

(7) *Hospital's Duty To Contact Unconscious Patient's Health Care Decisionmaker.* Within 24 hours of the arrival in the emergency department of a general acute care hospital of a patient who is unconscious or otherwise incapable of communication, the hospital must make reasonable efforts to contact the agent, surrogate, family member, or other person the hospital reasonably believes has the authority to make health care decisions for the patient. (*Prob.C. 4717(a).*) A hospital that does the following will be deemed to have fulfilled this requirement:

(a) Examines any personal effects accompanying the patient and any medical records about the patient in the hospital's possession, and reviews any verbal or written report made by emergency medical technicians or the police, in order to identify the name of a health care decisionmaker required to be contacted under the statute. (*Prob.C. 4717(a)(1).*)

(b) Contacts or attempts to contact the health care decisionmaker. (*Prob.C. 4717(a)(2).*)

(c) Contacts the Secretary of State to inquire whether the patient has registered a directive with the Advance Health Care Directive Registry. (*Prob.C. 4717(a)(3).*)

The hospital also must document in the patient's medical record all contact efforts. (*Prob.C. 4717(b).*)

All of these requirements are suspended during any period in which a hospital implements its disaster and casualty program or its fire and internal disaster program. (*Prob.C. 4717(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

Corrections: Page 987, section title should be "Health Care Surrogates"; page 988, line 8, "heath care provider" should be "health care provider".



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a. Duty To Communicate and Record.

14 Witkin Sum. Cal. Law Wills § 892

[§ 892] Duty To Communicate and Record.

(1) *Communication of Decision.* Before implementing a health care decision, the supervising health care provider must, if possible, promptly communicate to the patient the decision made and the identity of the person making it. (*Prob.C. 4730.*) (On duty of hospital to contact unconscious patient's health care decisionmaker and document contact efforts, see *Prob.C. 4717*, *supra*, §891.)

(2) *Recording of Directive, Revocation, Designation, or Disqualification.* A supervising health care provider knowing of the existence of an advance health care directive, the revocation of a directive, or the designation or disqualification of a surrogate, must promptly record its existence in the patient's health care record and, if it is in writing, request a copy. If a copy is furnished, the provider must arrange for its maintenance in the patient's health care record. (*Prob.C. 4731(a).*) If the provider knows of a revocation of a power of attorney for health care or a disqualification of a surrogate, the provider must make a reasonable effort to notify the agent or surrogate. (*Prob.C. 4731(b).*)

(3) *Recording and Communication of Capacity Determination.* A primary physician who makes or is informed of a determination that the patient lacks or has recovered capacity, "or that another condition exists affecting an individual health care instruction or the authority of an agent, conservator of the person, or surrogate," must promptly record the determination in the patient's health care record and communicate it to the patient, if possible, and to a person who is then authorized to make health care decisions for the patient. (*Prob.C. 4732.*) The determinations covered by these requirements are those specified in *Prob.C. 4658* (*supra*, §881) and *Prob.C. 4682* (*supra*, §886). (Law Rev. Com. Comment.)

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b. Duty To Comply With Instructions.

14 Witkin Sum. Cal. Law Wills § 893

[§ 893] Duty To Comply With Instructions.

(1) *In General.* A health care provider or institution must comply with (a) the patient's individual health care instruction and a reasonable interpretation of that instruction by a person then authorized to make health care decisions for the patient; and (b) a health care decision made for the patient by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity. (*Prob.C. 4733.*)

(2) *Where Noncompliance Is Permitted.* A health care provider or institution may decline to comply in two situations:

(a) A health care provider may decline to comply for reasons of conscience, and a health care institution may decline to comply if the instruction or decision at issue is contrary to a policy of the institution that is expressly based on reasons of conscience, provided the policy was timely communicated to the patient or a person then authorized to make health care decisions for the patient. (*Prob.C. 4734.*)

(b) A provider or institution may decline to comply with a health care instruction or decision "that requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution." (*Prob.C. 4735.*) "Medically ineffective health care" means treatment that would not offer the patient any significant benefit. (Law Rev. Com. Comment.) (See 75 *So. Cal. L. Rev.* 1217 [ethical considerations facing health care providers when future treatment appears futile].)

(3) *Procedure Upon Noncompliance.* A health care provider or institution that declines to comply with a health care instruction or decision must take the following steps:

(a) Promptly inform the patient, if possible, and any person then authorized to make health care decisions for the patient. (*Prob.C. 4736(a).*)

(b) Unless the patient or person then authorized to make health care decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or

institution that is willing to comply with the instruction or decision. (*Prob.C. 4736(b).*)

(c) Provide continuing care to the patient until a transfer can be accomplished or until it appears that a transfer cannot be accomplished. "In all cases, appropriate pain relief and other palliative care shall be continued." (*Prob.C. 4736(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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9. Immunities and Liabilities.
a. Immunity of Health Care Provider or Institution.

14 Witkin Sum. Cal. Law Wills § 894

[§ 894] Immunity of Health Care Provider or Institution.

A health care provider or institution acting in good faith and in accordance with generally accepted health care standards is not subject to criminal or civil liability or professional discipline for any of the following conduct:

(1) Complying with a health care decision of a person that the provider or institution believes in good faith has the authority to make the decision, including a decision to withhold or withdraw health care. (*Prob.C. 4740(a).*)

(2) Declining to comply with a health care decision, based on a belief that the person who made the decision lacked the authority to do so. (*Prob.C. 4740(b).*)

(3) Complying with an advance health care directive and assuming that the directive was valid when made and has not been revoked or terminated. (*Prob.C. 4740(c).*)

(4) Declining to comply with an individual health care instruction or decision, as permitted under *Prob.C. 4734* et seq. (*supra*, §893). (*Prob.C. 4740(d).*)

Prob.C. 4740 does not protect a health care provider from liability for malpractice; this is made clear by the reference to acting in accordance with generally accepted health care standards. However, "[a]bsent bad faith or actions taken that are not in accord with generally accepted health-care standards, a health care provider or institution has no duty to investigate a claim of authority or the validity of an advance health-care directive." (Law Rev. Com. Comment.)

In *Duarte v. Chino Community Hosp.* (1999) 72 C.A.4th 849, 85 C.R.2d 521, a patient was admitted, comatose, to a hospital emergency room after she suffered severe head injuries in an automobile accident, and eventually died. Plaintiffs (the patient's surviving family members) sued defendants (the patient's attending physician and the hospital) for damages for negligently failing to comply either with plaintiffs' request to terminate use of a respirator or to transfer the patient to a health care provider who would comply. Relying on the immunity afforded by former *Prob.C. 4750(c)* (physician may decline to withdraw health care necessary to keep principal alive), the trial judge refused to give a special jury instruction concerning a physician's duty of care when presented with a request to withdraw life-sustaining medical care. By a special verdict, the jury found that defendants had not been negligent, and the judge entered

judgment for them. *Held*, failure to give the instruction was proper.

(a) The patient had not prepared a durable power of attorney for health care, and thus plaintiffs' instruction to withdraw life support was not given by an attorney-in-fact. (72 C.A.4th 854.) However, former Prob.C. 4750(c) immunized a health care provider whether the instruction came from an attorney-in-fact appointed by the patient or from the patient's family members. (72 C.A.4th 855.)

(b) That immunity was not limited to refusals to withdraw treatment to which the patient or a surrogate decisionmaker had expressly consented. In this case, there was no evidence that the patient was placed on the respirator without plaintiffs' consent. (72 C.A.4th 856.) Further, the patient's consent was presumed, because she was placed on a respirator immediately on being admitted to the emergency room. (72 C.A.4th 857.)

(c) That immunity was not contrary to the Natural Death Act (former Health & Saf.C. 7185 et seq.; see 5 *Summary* (10th), *Torts*, §127 et seq.). Former Health & Saf.C. 7191 suggested that there was no immunity in civil damage actions for wilful failure to comply with a *patient's* declaration to transfer care to a health care provider willing to provide life support. But that section was irrelevant to the instruction at issue here, because it concerned the failure to terminate treatment, not the failure to transfer care. Even if the instruction had involved the failure to transfer, there could be no liability. Immunity under the former Act was circumscribed and conditional, because it only applied if a health care provider believed in good faith that its failure to transfer care was consistent with the Act and with the patient's declaration. By contrast, immunity under former Prob.C. 4750(c) was broad and unconditional, because it involved a directive from the patient's attorney-in-fact, who may or may not have received specific life support instructions from the patient. In this case, the patient's wishes were not recorded in writing, and she did not designate any person whom she trusted to interpret her wishes in her behalf. Thus, the scope of defendants' immunity was at least as broad as that afforded to those who refuse to comply with instructions from attorneys-in-fact. (72 C.A.4th 858, 859.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 895

[§ 895] Immunity of Agent or Surrogate.

A person acting as an agent or surrogate under the Uniform Health Care Decisions Act (*Prob.C. 4670 et seq.*) is not subject to civil or criminal liability or professional discipline for health care decisions made in good faith. (*Prob.C. 4741.*) *Prob.C. 4741* "protects agents and surrogates acting in good faith from liability for making a health-care decision for a patient. Also protected from liability are individuals who mistakenly but in good faith believe they have the authority to make a health-care decision for a patient. For example, an individual who has been designated as agent in a power of attorney for health care might assume authority unaware that the power has been revoked. Or a family member might assume authority to act as surrogate unaware that a family member having a higher priority was reasonably available and authorized to act." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Civil and Criminal Penalties.

14 Witkin Sum. Cal. Law Wills § 896

[§ 896] Civil and Criminal Penalties.

(1) *Civil Liability. Prob.C. 4742* imposes liability for damages for the following violations:

(a) *Intentional violation by health care provider or institution.* A health care provider or institution that intentionally violates *Prob.C. 4670* et seq. may be found liable to the injured party for damages of \$ 2,500 or actual damages, whichever amount is greater, plus reasonable attorneys' fees. (*Prob.C. 4742(a).*)

(b) *Intentional violation involving advance health care directive or revocation.* "A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual's advance health care directive or a revocation of an advance health care directive without the individual's consent, or who coerces or fraudulently induces an individual to give, revoke, or not to give an advance health care directive," may be found liable for damages of \$ 10,000 or actual damages, whichever amount is greater, plus reasonable attorneys' fees. (*Prob.C. 4742(b).*)

The civil damages available under *Prob.C. 4742* are cumulative and not exclusive of any other available remedies. (*Prob.C. 4742(c).*)

(2) *Criminal Liability. Prob.C. 4743* authorizes a prosecution for unlawful homicide against "[a]ny person who alters or forges a written advance health care directive of another, or willfully conceals or withholds personal knowledge of a revocation of an advance directive, with the intent to cause a withholding or withdrawal of health care necessary to keep the patient alive contrary to the desires of the patient, and thereby directly causes health care necessary to keep the patient alive to be withheld or withdrawn and the death of the patient thereby to be hastened." (See 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §95.)

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C. Judicial Proceedings.
1. In General.

14 Witkin Sum. Cal. Law Wills § 897

[§ 897] In General.

(1) *Availability of Judicial Recourse.* An advance health care directive is effective and exercisable free of judicial intervention, and the health care decision of an agent or surrogate is effective without judicial approval. (*Prob.C. 4750*; see Law Rev. Com. Comment ["judicial involvement in health care decisionmaking is disfavored"].) Nevertheless, *Prob.C. 4750* et seq. authorize a proceeding in the superior court concerning advance health care directives, and specify the authority of the court to make various types of orders. The remedies provided are cumulative and nonexclusive. (*Prob.C. 4751.*) *Prob.C. 4750* et seq. apply notwithstanding any contrary provision in an advance health care directive. (*Prob.C. 4752.*) (On judicial proceedings generally, see C.E.B., Durable Powers of Attorney, §7.1 et seq.)

(2) *Limitations on Authority To Petition.* The advance health care directive may expressly limit the authority to petition if both of the following requirements are met:

(a) The directive is executed with the advice of an attorney authorized to practice law in the state of execution. (*Prob.C. 4753(a)(1).*)

(b) The attorney signs a certificate that states in substance: "I am a lawyer authorized to practice law in the state where this advance health care directive was executed, and [insert name] was my client at the time this advance directive was executed. I have advised my client concerning his or her rights in connection with this advance directive and the applicable law and the consequences of signing or not signing this advance directive, and my client, after being so advised, has executed this advance directive." (*Prob.C. 4753(a)(2).*)

The Law Revision Commission Comment observes that a provision limiting the power to petition does not affect the right to resort to other available judicial remedies.

(3) *Qualification.* The power to limit the authority to petition is subject to the qualification that it may not be used to preclude (a) a conservator of the person from petitioning for a purpose specified in *Prob.C. 4766(b)* or (d); or (b) an agent from petitioning for a purpose specified in *Prob.C. 4766(b)* or (c). (*Prob.C. 4753(b).*) (On *Prob.C. 4766*, see *infra*, §898.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Availability of Judicial Recourse.* See C.E.B., Powers of Attorney and Health Care Directives, §11.1 et seq.



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C. Judicial Proceedings.
2. Petition.

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[§ 898] Petition.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Who May File Petition.*

(New) Filing fee: The fee for filing a petition concerning an adult health care directive under *Prob.C. 4766* or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(7)*, added in 2005.)



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2. Petition.

14 Witkin Sum. Cal. Law Wills § 898

[§ 898] Petition.

(1) *Jurisdiction*. The superior court has jurisdiction in proceedings concerning advance health care directives. (*Prob.C. 4760(a)*.) It sits as a court of general jurisdiction, with the same powers and authority otherwise granted a superior court, including the matters authorized by *C.C.P. 128* (see 2 *Cal. Proc. (4th)*, *Courts*, §177 et seq.). (*Prob.C. 4760(b)*.)

The court may exercise jurisdiction on any basis permitted by *C.C.P. 410.10* (see 2 *Cal. Proc. (4th)*, *Jurisdiction*, §8). (*Prob.C. 4761*.) Without limiting that jurisdiction, an agent under a power of attorney for health care or a surrogate is subject to the personal jurisdiction of a California court with respect to matters relating to acts and transactions performed by the agent or surrogate in California, or affecting a patient in California. (*Prob.C. 4762*.) The exercise of personal jurisdiction over an agent or surrogate is subject to constitutional limitations, including the requirement of appropriate notice. (Law Rev. Com. Comment on *Prob.C. 4762*.)

(2) *Venue*. The proper court for commencement of a proceeding is determined in the following order of priority: (a) the county of the patient's residence, (b) the county of residence of the agent or surrogate, (c) any other county that is in the patient's best interest. (*Prob.C. 4763*.)

(3) *Who May File Petition*. The petition may be filed by any of the following: (a) the patient; (b) the patient's spouse, unless legally separated; (c) a relative of the patient; (d) the patient's agent or surrogate; (e) the conservator of the person of the patient; (f) the court investigator (see *Prob.C. 1454*) of the county where the patient resides; (g) the public guardian of that county; (h) the supervising health care provider or health care institution involved with the patient's care; (i) any other interested person or friend of the patient. (*Prob.C. 4765*.)

(4) *Purposes of Petition*. A petition may be filed for any of the following purposes:

(a) Determining whether or not the patient has capacity to make health care decisions. (*Prob.C. 4766(a)*.)

(b) Determining whether an advance health care directive is in effect or has terminated. (*Prob.C. 4766(b)*.)

(c) Determining whether the acts or proposed acts of the agent or surrogate are consistent with the patient's desires (as expressed in an advance health care directive or otherwise made known to the court), or, where the patient's desires

are unknown or unclear, whether the acts or proposed acts are in the patient's best interest. (*Prob.C. 4766(c).*)

(d) Declaring that the authority of the agent or surrogate is terminated, based on the court's determination that the agent or surrogate has made a health care decision for the patient that authorized anything illegal, or a determination by the court of both of the following: (1) the agent or surrogate has violated or is unfit to perform the duty under an advance health care directive to act consistent with the patient's desires, or, where the patient's desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest; (2) the patient lacks the capacity to execute or revoke an advance health care directive or disqualify a surrogate. (*Prob.C. 4766(d).*)

(e) Compelling a third person to honor health care instructions or the authority of an agent or surrogate. (*Prob.C. 4766(e).*)

(5) *Form and Content of Petition.* The petition must state facts showing that it is authorized by *Prob.C. 4750* et seq., the grounds for the petition, and the terms of any advance health care directive known to the petitioner. (*Prob.C. 4767.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Jurisdiction.*

Powers and authority of superior court:

Cross-Reference: 2 *Cal. Proc.* (5th), *Courts*, §173 et seq.

Bases of jurisdiction:

Cross-Reference: 2 *Cal. Proc.* (5th), *Jurisdiction*, §9.(3) *Who May File Petition.*

(*New*) *Filing fee:* The fee for filing a petition concerning an adult health care directive under *Prob.C. 4766* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(7)*, added in 2005 and amended in 2008.)



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
XVI. HEALTH CARE DECISIONS LAW
C. Judicial Proceedings.
3. Hearing, Determination, and Appeal.

14 Witkin Sum. Cal. Law Wills § 899

[§ 899] Hearing, Determination, and Appeal.

(1) *In General.* Except as otherwise provided in the Health Care Decisions Law (*Prob.C. 4600* et seq.), the proceeding is subject to the general probate practice and procedures of *Prob.C. 1000* et seq. (*supra*, §371 et seq.). (*Prob.C. 4755.*) There is no right to a jury trial. (*Prob.C. 4754.*)

(2) *Service of Notice.* The petitioner must serve notice and a copy of the petition at least 15 days before the time set for the hearing on: (a) the agent or surrogate (if the agent or surrogate is not the petitioner), and (b) the patient (if the patient is not the petitioner). (*Prob.C. 4769(a).*) However, if the petition is filed to compel a third person to honor health care instructions or the authority of an agent or surrogate, notice and a copy of the petition must be served on the third person in the manner provided by *C.C.P. 413.10* et seq. (see 3 *Cal. Proc. (4th), Actions*, §919 et seq.). (*Prob.C. 4769(b).*)

(3) *Orders.* As in the case of probate proceedings generally, the court may make appropriate orders. (See *Prob.C. 1046*, *supra*, §379.) The court is expressly authorized to do the following:

(a) Dismiss a petition "if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient," and stay or dismiss the proceeding when required by *C.C.P. 410.30* (inconvenient forum). (*Prob.C. 4768.*)

(b) On a showing of good cause, issue a temporary order prescribing health care for the patient until the disposition of the petition. If a power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the principal, the court that appoints the conservator may, on a showing of good cause, issue a temporary order prescribing health care for the principal, but the order may not continue in effect longer than necessary to permit filing and determination of a petition under *Prob.C. 4766*. (*Prob.C. 4770.*)

(c) If the petitioner is not the agent or surrogate, award reasonable attorneys' fees to either: (1) the agent or surrogate, if the proceeding was commenced "without any reasonable cause"; or (2) the petitioner, if the court determines that the agent or surrogate clearly violated his or her fiduciary duties under the advance health care directive. (*Prob.C. 4771.*)

(4) *Appeal*. Under *Prob.C. 1302.5*, an appeal may be taken from:

(a) A final order made pursuant to *Prob.C. 4766* (supra, §898).

(b) An order dismissing or denying a motion to dismiss under *Prob.C. 4768*.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Service of Notice*.

Manner of service:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §1001 et seq.



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
XVI. HEALTH CARE DECISIONS LAW
D. Request To Forgo Resuscitative Measures.

14 Witkin Sum. Cal. Law Wills § 900

[§ 900] Request To Forgo Resuscitative Measures.

(1) *General Rule.* A health care provider who honors a request to forgo resuscitative measures is not subject to criminal prosecution, civil liability, professional disciplinary action, administrative sanction, or any other sanction for relying on that request. (*Prob.C. 4782.*)

(2) *Conditions of Immunity.* The immunity provided by *Prob.C. 4782* is conditioned on the satisfaction of two requirements:

(a) The health care provider must believe in good faith that the action or decision in question is consistent with *Prob.C. 4780* et seq.

(b) The health care provider must have no knowledge that the action or decision would be inconsistent with a health care decision that the individual signing the request would have made under similar circumstances.

(3) *"Request To Forgo Resuscitative Measures" Defined.* A "request to forgo resuscitative measures" is a written document that directs a health care provider to forgo resuscitative measures. It must be signed by (a) the individual or a legally recognized surrogate health care decisionmaker and (b) a physician. The request may be embodied in a prehospital "do not resuscitate" form developed by the Emergency Medical Services Authority or a substantially similar form. The request may also be evidenced by a medallion engraved with the words "do not resuscitate" (or the letters "DNR"), a patient identification number, and a 24-hour toll-free telephone number, issued by a person under an agreement with the Emergency Medical Services Authority. (*Prob.C. 4780.*)

(4) *Content and Validity of Printed Form.* Forms printed after January 1, 1995, must contain the words: "By signing this form, the surrogate acknowledges that this request to forgo resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form." (*Prob.C. 4783(a).*)

A substantially similar printed form is valid and enforceable if it satisfies all of the following requirements:

(a) It is signed either by the individual or by the individual's legally recognized surrogate health care decisionmaker and a physician. (*Prob.C. 4783(b)(1).*)

(b) It directs health care providers to forgo resuscitative measures. (*Prob.C. 4783(b)(2).*)

(c) It contains all other information required by *Prob.C. 4783*. (*Prob.C. 4783(b)(3)*.)

In the absence of knowledge to the contrary, a health care provider may presume that a request is valid and unrevoked. (*Prob.C. 4784*.)

(5) *Applicability and Effect of Statute*. *Prob.C. 4780* et seq. are applicable whether the individual making the request is within or outside a hospital or other health care facility. (*Prob.C. 4785*.) *Prob.C. 4780* et seq. do not repeal or narrow the laws relating to health care decisionmaking. (*Prob.C. 4786*.)

Health care providers subject to *Prob.C. 4780* et seq. include (a) persons meeting the definition of that term under the Health Care Decisions Law (*Prob.C. 4615*, supra, §880), and (b) emergency response employees. (*Prob.C. 4781*.)

SUPPLEMENT: [This section is current through the latest supplement]

In 2008, *Prob.C. 4780* et seq. were amended to use the term "request regarding resuscitative measures" and expanded to encompass orders for life sustaining treatment.

(3) *"Request To Forgo Resuscitative Measures" Defined*. *Prob.C. 4780* was extensively revised in 2008. In now provides as follows:

(a) A "request regarding resuscitative measures" is a written document signed by an individual with capacity or a legally recognized health care decisionmaker and by the individual's physician. The request directs a health care provider regarding resuscitative measures but is not an advance health care directive. (*Prob.C. 4780(a)(1)*.)

(b) A request includes one or both of the following: (1) A prehospital "do not resuscitate" form developed by the Emergency Medical Services Authority or a substantially similar form, or (2) a "physicians orders for life sustaining treatment" form approved by the Authority. (*Prob.C. 4780(a)(2)*.)

(c) A "physicians orders for life sustaining treatment" form directs a health care provider regarding resuscitative and life-sustaining measures. (*Prob.C. 4780(a)(3)*.) The form may be executed by a legally recognized health care decisionmaker only if the individual lacks capacity or the individual has designated that the decisionmaker's authority is effective pursuant to *Prob.C. 4682* (lack of capacity; see text, §886). (*Prob.C. 4780(b)*.) An individual with capacity may revoke the form at any time and in any manner that communicates intent to revoke, consistent with *Prob.C. 4695* (revocation of power of attorney for health care; see text, §887). (*Prob.C. 4780(d)*.) (On requirements for executing form and providing information to patient, see *Prob.C. 4780(c)*; on requirements for providing services under form, see *Prob.C. 4781.2*, added in 2008.)

(d) The portion of the statute discussed in the text regarding a "do not resuscitate" medallion is now in *Prob.C. 4780(e)*.

(4) *Content and Validity of Printed Form*. The portion of *Prob.C. 4783(a)* quoted in the text was amended in 2008 to read: "By signing this form, the legally recognized health care decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interests of, the individual who is the subject of the form."(6) *(New) Coordination With Health Care Instructions*. If an individual's request regarding resuscitative measures is in conflict with his or her individual health care instruction, the most recent request or instruction is effective to the extent of the conflict. (*Prob.C. 4781.4*, added in 2008.) A legally recognized health care decisionmaker must make health care decisions pursuant to *Prob.C. 4780* et seq. in accord with *Prob.C. 4684* (standards for exercise of agent's authority; see text, §886) and *Prob.C. 4714* (standards for exercise of surrogate's authority; see text, §891). (*Prob.C. 4781.5*, added in 2008.) (On duty of health care providers to inform terminally ill persons about end-of-life options, see *Health & Saf.C. 442* et seq., added in 2008.) (See generally C.E.B., Powers of Attorney and Health Care Directives, §8.39 et seq.)



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law XVII. GUARDIANSHIP AND CONSERVATORSHIP

A. Former Law.

1. Former Law of Guardianship.

14 Witkin Sum. Cal. Law Wills § 901

[§ 901] Former Law of Guardianship.

(1) *In General.* The original guardianship statute was enacted in 1872 as part of the Civil Code (former C.C. 236 et seq.), and was transferred in 1931 to the Probate Code (former Prob.C. 1400 et seq.). It provided for the appointment of a guardian either for a minor or for an adult who was found to be incompetent. The original conservatorship statute (former Prob.C. 1701 et seq.) was enacted in 1957 and provided for the protection of the person or estate of an adult without an adjudication of incompetency. For adults, the two proceedings were available in the alternative. (See *Guardianship of Reynolds* (1943) 60 C.A.2d 669, 673, 141 P.2d 498; 54 Cal. L. Rev. 741; 33 Stanf. L. Rev. 905.) The Guardianship-Conservatorship Law (Prob.C. 1400 et seq.; see infra, §903 et seq.), enacted in 1979, limited guardianship to minors, retained conservatorships for adults, and made other substantive and procedural changes. (On guardianship, see infra, §916 et seq.; on conservatorship, see infra, §932 et seq.)

(2) *Nature and Kinds of Guardians.* A guardian was a person appointed to take care of the person or property of another, called the ward of the guardian. (Former Prob.C. 1400.) A general guardian was a guardian of the person or general estate of the ward or both; every other guardian was a special guardian. (Former Prob.C. 1401; see *Brainard v. Brainard* (1936) 17 C.A.2d 520, 522, 62 P.2d 403.) The terms "general guardian" and "special guardian" are not used in the Guardianship-Conservatorship Law.

One who, without appointment but in good faith, took care of the property of a minor or an incompetent was considered a guardian de facto, with many of the obligations and rights of a guardian de jure. (See *Guardianship of Giambastiani* (1934) 1 C.A.2d 639, 645, 37 P.2d 142; *Guardianship of Jacobson* (1947) 30 C.2d 312, 320, 322, 182 P.2d 537; *Guardianship of Bayly* (1949) 95 C.A.2d 174, 177, 212 P.2d 587; 25 A.L.R.2d 752 [guardian de facto or de son tort of minor].)

(3) *Veteran's Guardian.* The Uniform Veterans' Guardianship Act (former Prob.C. 1650 et seq.) was enacted in California in 1929 and continued in 1979 as former Prob.C. 2900 et seq. The Act covered guardianship of veterans who were wards of the United States Veterans' Administration. The purpose of the Act was to protect the benefit payments to these veterans; detailed provisions stated the procedure for appointment, and the powers, duties, liabilities, and compensation of guardians. The administrator of veterans' affairs was by federal law given the right to appear in the proceedings on behalf of the veteran whenever, in his opinion, the guardian was acting improperly. (See 8C U.L.A. (Master Ed.), p. 281; *Guardianship of Copsey* (1936) 7 C.2d 199, 201, 60 P.2d 121; *Estate of Vaell* (1958) 158 C.A.2d

204, 209, 322 P.2d 579.)

If a minor or other incompetent person receiving benefits also had other estate assets, it was necessary to establish a guardianship or conservatorship under the general law. As a result, the Uniform Act was seldom used, and the Law Revision Commission recommended repeal of the Act as a separate statute, with retention of necessary provisions by amendment of the general law. (See 15 Cal. Law Rev. Com. Reports, p. 1289.) The Commission's recommendation was followed in 1980.

(4) *Distinction Between Incompetency and Insanity.* *In re Zanetti* (1949) 34 C.2d 136, 208 P.2d 657, explained the distinction between guardianship proceedings under former Prob.C. 1400 et seq. and commitment proceedings under former Welf.C. 5407 et seq. The two statutes created distinct proceedings for distinct purposes. The Probate Code proceeding was intended to protect the person and property of an incompetent, not necessarily insane, from others; the Welfare Code proceeding was designed to confine an insane person who was dangerous to himself and others, and thereby to protect society. The issues in the proceedings were entirely different; hence, a decision terminating guardianship could not terminate the prior, and still effective, order of commitment. Discharge of the patient could only be ordered by the medical superintendent of the hospital or by a court in a habeas corpus proceeding to determine sanity. (34 C.2d 143.)

(5) *What Constitutes Incompetency.* Guardianship was not limited to an insane person, but extended to an incompetent, defined as "any person, whether insane or not, who by reason of old age, disease, weakness of mind, or other cause, is unable, unassisted, properly to manage and take care of himself or his property, and by reason thereof is likely to be deceived or imposed upon by artful or designing persons." (Former Prob.C. 1460; cf. Unif.Prob.C., §5-101(1); see *In re Coburn* (1913) 165 C. 202, 208, 131 P. 352; *Guardianship of Schulmeyer* (1915) 171 C. 340, 342, 153 P. 233; *Guardianship of Peterson* (1948) 84 C.A.2d 541, 545, 191 P.2d 98; *Estate of Hubbard* (1950) 97 C.A.2d 321, 325, 217 P.2d 744 [chronic alcoholic, incompetent while intoxicated].)

However, a person retained the right to manage and dispose of property as he or she pleased, and there had to be a showing of more than poor business judgment. (*Guardianship of Waite* (1939) 14 C.2d 727, 731, 97 P.2d 238.) The alleged incompetent had a right to testify to show capacity for rational thought and intelligent action, and denial of this opportunity was reversible error. (*Guardianship of Waite*, *supra*, 14 C.2d 729; cf. *Guardianship of Levi* (1942) 52 C.A.2d 832, 833, 127 P.2d 15 [no error where opportunity was afforded but refused].)

Former Prob.C. 1460 was amended in 1976 to delete the reference to insanity, and to define incompetency in terms of "a legal, not a medical disability ... measured by functional inabilities." More specifically, it meant "an adult person who, in the case of a guardianship of the person, is unable properly to provide for his own personal needs for physical health, food, clothing or shelter, and, in the case of a guardianship of the estate, is substantially unable to manage his own financial resources. 'Substantial inability' shall not be evidenced solely by isolated incidents of negligence or improvidence." (See 8 *Pacific L. J.* 175.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law XVII. GUARDIANSHIP AND CONSERVATORSHIP

A. Former Law.

2. Former Law of Conservatorship.

14 Witkin Sum. Cal. Law Wills § 902

[§ 902] Former Law of Conservatorship.

(1) *Nature and Purpose of Law.* Former Prob.C. 1701 et seq., enacted in 1957, created the relation of conservatorship. The chief object of the statute was to provide a modernized law of guardianship for persons in need of it, without characterizing them as "incompetent." This was accomplished by substitution of the term "conservator" for guardian and "conservatee" for ward, and by other terminology. (See *Place v. Trent* (1972) 27 C.A.3d 526, 531, 103 C.R. 841 [quoting report of Senate Interim Committee]; *Board of Regents v. Davis* (1975) 14 C.3d 33, 38, 120 C.R. 407, 533 P.2d 1047; 37 So. Cal. L. Rev. 181 [planning for incompetency]; cf. Unif.Prob.C., §5-401 et seq.)

(2) *Conditions for Conservatorship.* The court, on a sufficient showing, was required to appoint a conservator of the person or property or both for "any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons, or for whom a guardian could be appointed ... or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor, or who is an absentee." (Former Prob.C. 1751; cf. Unif.Prob.C., §5-401.) Imprisonment, or parole with limitation of civil rights, was a disability for this purpose. (*Hillman v. Stults* (1968) 263 C.A.2d 848, 873, 70 C.R. 295.)

Former Prob.C. 1460 was amended in 1976 to provide that the phrases "incompetent person," "incompetent," or "conservatee" meant "a legal, not a medical disability and shall be measured by functional disabilities." In addition, former Prob.C. 1751 was amended to authorize a conservator for "any adult person who, in the case of a conservatorship of the person, is unable properly to provide for his personal needs for physical health, food, clothing or shelter, and, in the case of a conservatorship of the property, is substantially unable to manage his own financial resources, or resist fraud or undue influence, or for whom a guardian could be appointed ... , or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor, or who is an absentee."

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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XVII. GUARDIANSHIP AND CONSERVATORSHIP
B. Guardianship-Conservatorship Law.
1. Nature of Revision.
a. In General.

14 Witkin Sum. Cal. Law Wills § 903

[§ 903] In General.

(1) *Law Revision Commission Report.* California formerly had two kinds of protective proceedings for adults: the original guardianship and the later conservatorship. The conservatorship statute duplicated many provisions of the guardianship statute, but in some instances the two statutes were inconsistent without apparent reason. (See 14 Cal. Law Rev. Com. Reports, p. 519.)

Studies and recommendations were made by the Law Revision Commission, the Assembly Interim Committee on Judiciary, and a State Bar Committee. (See 14 Cal. Law Rev. Com. Reports, pp. 505, 506, 520.) The Commission recommended a complete new law to replace the existing statutes, and its recommendations were embodied in legislation enacted in 1979. (*Prob.C. 1400* et seq.) (See 11 *Pacific L. J.* 272.) The California Law Revision Commission Report (14 Cal. Law Rev. Com. Reports, p. 965) contains a table showing the disposition of each section of the former law.

(2) *Statutory Purpose.* The Commission Report states the major purposes of the new law as follows: "(1) to clarify the standard for appointment of a guardian of the person of a minor, (2) to limit guardianships to minors and to retain conservatorships for adults, and (3) to consolidate procedural and other provisions common to guardianship and conservatorship law." (14 Cal. Law Rev. Com. Reports, p. 509.) The Report adds: "The proposed law largely continues the substance of existing guardianship and conservatorship law, but makes some substantive changes and numerous minor, technical, and drafting improvements."

(3) *Conforming Legislation.* Enactment of the comprehensive Guardianship-Conservatorship Law was accompanied by extensive conforming legislation, repealing and amending many sections in various codes. These revisions reflect the elimination of guardianships for adults, insert references to conservatorship where appropriate, adjust references to provisions of existing law superseded by the new law, and eliminate other inconsistencies. (For a list of the significant conforming revisions, see 14 Cal. Law Rev. Com. Reports, p. 925 et seq.; and see 11 *Pacific L. J.* 288.)

(4) *Operative Date.* The operative date of the new law was January 1, 1981.

(5) *Uniform Act.* The Uniform Guardianship and Protective Proceedings Act was adopted in 1997. (See 8A U.L.A. (Master Ed.), p. 301.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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XVII. GUARDIANSHIP AND CONSERVATORSHIP

B. Guardianship-Conservatorship Law.

1. Nature of Revision.

b. Principal Changes.

14 Witkin Sum. Cal. Law Wills § 904

[§ 904] Principal Changes.

The Law Revision Commission's 1978 Report (14 Cal. Law Rev. Com. Reports, pp. 509 et seq., 522 et seq.) contains a detailed summary of the revised law and a brief statement emphasizing the following major changes:

(1) Duplicated provisions of the old law were eliminated by consolidation of the common provisions into a uniform statute. (See *infra*, §960.)

(2) Guardianship for incompetent adults was eliminated and replaced by conservatorship. (See *infra*, §933 et seq.) Under former Prob.C. 1485, existing adult guardianships were deemed to be conservatorships. (See *Union Bank of Calif. v. Superior Court* (2004) 115 C.A.4th 484, 489, 9 C.R.3d 137 [later repeal of former Prob.C. 1485 did not undo automatic conversion to conservatorship and did not require conservator to file new conservatorship petition].)

(3) Guardianship of the person of a married minor was eliminated and replaced by conservatorship. Guardianship of the person was retained for unmarried minors, and guardianship of the estate was retained for both married and unmarried minors. (See *infra*, §916 et seq.)

(4) Appointment of a guardian by will or deed was changed as follows: (a) The guardian is "nominated" and the appointment is made by the court. (b) The nomination may be made with respect to any property the minor may receive from the nominator, whether inter vivos or on death. (c) A will nominating a guardian may grant additional powers, subject to limitation by the court. (See *infra*, §§917, 926, 960.)

(5) Standards for appointment of a guardian of the person of a minor were made consistent with the standards applicable to awarding custody. (See *infra*, §924.)

(6) The statutory order of preference for appointment of a guardian of the estate of a minor was replaced by the requirement that the guardian be selected in accordance with the best interest of the minor. Also, a person nominated must be appointed unless the court determines that he or she is unsuitable, and the preference of a minor of sufficient age to form an intelligent preference must be considered. (See *infra*, §924 et seq.)

(7) Practical problems arising from the 1976 procedural reforms, including right to counsel, investigation by a court

investigator, and periodic court review of guardianships and conservatorships, were resolved. (See *infra*, §§908, 909, 941, 950.)

(8) The conservatee's capacity to affect the estate was clarified. (See *infra*, §953 et seq.)

(9) The authority of a guardian or conservator to require the ward or conservatee to submit to medical treatment was clarified. (See *infra*, §991 et seq.)

(10) The authority of a guardian or conservator to enter into certain types of transactions without prior court authorization was clarified. (See *infra*, §1029 et seq.)

(11) The doctrine of "substituted judgment," which allows a conservator to make gifts of surplus income or assets in accordance with the presumed intent of the conservatee, was codified. (See *infra*, §1025 et seq.)

(12) Procedural changes and clarifications were made in connection with (a) venue (*infra*, §981); (b) notice requirements (*infra*, §910 et seq.); (c) right to jury trial (*infra*, §907); (d) authority of a guardian or conservator, with court approval, to submit a dispute to arbitration (*infra*, §998); (e) reference of a claim against the ward or conservatee or estate to a commissioner, referee, or judge pro tem. for summary determination (*infra*, §998); (f) court authorization of periodic payments on account for fees of a guardian, conservator, or attorney (*infra*, §1047); (g) authority of a guardian or conservator, with court authorization or approval, to make a contingent fee contract with an attorney (*infra*, §1046); and (h) appealable orders (*infra*, §988).

(13) The law on transfer of a guardianship or conservatorship proceeding of a nonresident ward or conservatee was revised to permit transfer of assets rather than the proceeding itself. (See *infra*, §1053.)

(14) The statutes governing community property of an incompetent spouse were revised to reflect the legislation giving each spouse the right of management and control. (See *infra*, §1062; 11 *Summary* (10th), *Community Property*, §158 et seq.)

(15) A new optional procedure was provided to obtain court authorization of medical treatment for an adult who has no conservator but is unable to give informed consent. (See *infra*, §1063 et seq.)

(16) The law on compromise of a disputed claim of a minor and disposition of the proceeds was revised. (See *infra*, §1069.)

(17) The law on administration of a small estate of a minor was revised to increase the amount that the court may order paid directly to a parent to hold in trust. (See *infra*, §1067.)

(18) The amount of personal property of an absentee that may be set aside to his or her family was increased. (See *infra*, §1073.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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XVII. GUARDIANSHIP AND CONSERVATORSHIP
B. Guardianship-Conservatorship Law.
2. Statutory Framework.

14 Witkin Sum. Cal. Law Wills § 905

[§ 905] Statutory Framework.

Division 4 of the Probate Code (*Prob.C. 1400 et seq.*) is entitled *Guardianship, Conservatorship, and Other Protective Proceedings*. It consists of the following parts:

Part 1. Definitions and General Provisions. (See *infra*, §906 et seq.)

Part 2. Guardianship. (See *infra*, §916 et seq.)

Part 3. Conservatorship. (See *infra*, §932 et seq.)

Part 4. Provisions Common to Guardianship and Conservatorship. (See *infra*, §960 et seq.)

Part 5. Public Guardian. (See *infra*, §971 et seq.)

Part 6. Management and Disposition of Community Property Where Spouse Lacks Legal Capacity. (See *infra*, §1062.)

Part 7. Capacity Determinations and Health Care Decisions for Adult Without Conservator. (See *infra*, §1063 et seq.)

Part 8. Other Protective Proceedings. (See *infra*, §1066 et seq.)

Part 9. California Uniform Transfers to Minors Act. (See 13 *Summary* (10th), *Personal Property*, §140 et seq.)

The first four parts of Division 4 of the Probate Code may be cited as the Guardianship-Conservatorship Law. (*Prob.C. 1400.*)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Definitions.

14 Witkin Sum. Cal. Law Wills § 906

[§ 906] Definitions.

Under *Prob.C. 20*, the definitions in *Prob.C. 21* et seq. apply to the entire Probate Code, including the Guardianship-Conservatorship Law. (See *supra*, §48.) Under *Prob.C. 1401*, the definitions in *Prob.C. 1403* et seq. apply to the Guardianship-Conservatorship Law and the various protective proceedings set forth in Division 4 (*Prob.C. 1400* et seq.) of the Probate Code. The following definitions are of general application:

- (1) *Conservatee*. The term "conservatee" includes a limited conservatee. (*Prob.C. 29*.)
- (2) *Conservator*. The term "conservator" includes a limited conservator. (*Prob.C. 30*.)
- (3) *Court*. When used in connection with guardianship or conservatorship proceedings, "court" means the court in which the proceeding is pending. (*Prob.C. 1418*.)
- (4) *Custodial parent*. "Custodial parent" means the parent who has been awarded sole legal and physical custody of the child or the parent with whom the child resides if there is no current custody order. If the child resides with both parents, they are jointly the custodial parent. (*Prob.C. 1419.5*.)
- (5) *Developmental disability*. A "developmental disability" is a disability that "originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual." The term includes "mental retardation, cerebral palsy, epilepsy, and autism," and "handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals," but does not include "other handicapping conditions that are solely physical in nature." (*Prob.C. 1420*.)
- (6) *Interested person*. An "interested person" includes, but is not limited to, an interested state, local, or federal entity or agency, and an interested public officer or employee of the State of California, of a local public entity in California, or of the federal Government. (*Prob.C. 1424*.)
- (7) *Petition*. A petition includes an application or request in the nature of a petition. (*Prob.C. 1430*.)
- (8) *Proceedings to establish a limited conservatorship*. This term includes proceedings to modify or revoke the powers or duties of a limited conservator. (*Prob.C. 1431*.) (On limited conservatorship, see *infra*, §1054 et seq.)

(9) *Single-premium deferred annuity*. This term means "an annuity offered by an admitted life insurer for the payment of a one-time lump-sum premium and for which the insurer neither assesses any initial charges or administrative fees against the premium paid nor exacts or assesses any penalty for withdrawal of any funds by the annuitant after a period of five years." (*Prob.C. 1446.*)

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SUPPLEMENT: [This section is current through the latest supplement]



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4. Rules of Practice.

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[§ 907] Rules of Practice.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Appointment of investigator*. On qualifications of court investigator, see C.R.C., Rules 10.776 and 10.777, added in 2007; on continuing education requirements, see C.R.C., Rule 10.478, added in 2007.



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[§ 907] Rules of Practice.

Generally, the rules of practice in civil actions and the general procedural provisions set forth in Division 3 of the Probate Code (*Prob.C. 1000 et seq.*) govern proceedings under the Code, including guardianship and conservatorship proceedings and the various protective proceedings in Division 4 (*Prob.C. 1400 et seq.*). These general provisions cover topics such as pleadings, notices, hearings, orders, accounts, and appeals. (See *supra*, §371 et seq.) Additional procedural provisions apply specifically to guardianship, conservatorship, and protective proceedings. The following topics are covered:

- (1) *Trial by jury.* Unless specifically provided by statute, there is no right to a jury trial in proceedings under Division 4. (*Prob.C. 1452.*) (On right to jury trial on petition to establish or terminate conservatorship, see *infra*, §§943, 952.)
- (2) *Motion for new trial.* A motion for new trial is authorized in proceedings under Division 4 only when "a right to jury trial is expressly granted, whether or not the case was tried by a jury." (*Prob.C. 1453.*)
- (3) *Appointment of investigator.* The court must appoint a court investigator when one is required under Division 4. The investigator must have no personal or other beneficial interest in the proceedings. (*Prob.C. 1454(a)*; on qualifications, see *Prob.C. 1454(b)*.)
- (4) *Petition for instructions or authority.* Any petition for instructions or to grant any power or authority to a guardian or conservator that may be filed by a guardian or conservator may also be filed by a person who petitions for appointment as a guardian or conservator. (*Prob.C. 1455.*)
- (5) *Appointment of counsel.* (See *infra*, §§908, 909.)
- (6) *Notices.* (See *infra*, §910 et seq.)

West's Key Number Digest, Guardian and Ward k.13(4), 13(7)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Appointment of investigator.* On qualifications of court investigator, see C.R.C., Rules 10.776 and 10.777, added in

2007; on continuing education requirements, see C.R.C., Rule 10.478, added in 2007.



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5. Appointment of Counsel.

a. Discretionary Appointment.

Witkin Sum. Cal. Law Wills § 908

[§ 908] Discretionary Appointment.

SUPPLEMENT: [This section is current through the latest supplement]

On qualifications and continuing education requirements for appointed counsel in guardianship and conservatorship proceedings, including proceedings under the Lanterman-Petris-Short Act, see C.R.C., Rule 7.1101, added in 2007.

Compensation of counsel for minor: In a guardianship proceeding, the court must determine the extent to which the minor's parents and the minor's estate are financially unable to pay the costs of appointed counsel. To the extent the parents and estate are unable to do so, the costs are to be paid by the county. (*Prob.C. 1470(c)*, as amended in 2007.)



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14 Witkin Sum. Cal. Law Wills § 908

[§ 908] Discretionary Appointment.

The court may appoint private legal counsel for the subject of a guardianship or conservatorship proceeding if it determines that the 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." (*Prob.C. 1470(a)*.) A guardianship proceeding involving the custody of a minor is an example of a proceeding in which appointment might be appropriate. (See Law Rev. Com. Comment.) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §25:38 [ex parte application for appointment of attorney], §25:39 [order appointing attorney].)

At the conclusion of the matter, the court must fix a reasonable sum for the compensation and expenses of counsel, which may include compensation for services rendered and expenses incurred before the date of appointment. (*Prob.C. 1470(b)*.) The sum is payable (a) from the person's estate, if the person is an adult; or (b) by the parent or parents or from the person's estate, if the person is a minor. (*Prob.C. 1470(c)*.) But the parent or parents first must be given notice and an opportunity to be heard "on whether the order would be just under the circumstances of the particular case." (*Prob.C. 1470(d)*.) (See *Guardianship of Elan E. (2000) 85 C.A.4th 998, 1001, 102 C.R.2d 528* [court lacked authority under *Prob.C. 1470(c)* to order grandparents to pay fees of minor's attorney, even though grandparents were named guardians]; Cal. Civil Practice, 4 Probate and Trust Proceedings, §25:40 [petition for fees and reimbursement].)

The right to court-appointed counsel in a conservatorship proceeding is limited to the representation of the conservatee or proposed conservatee. (*Conservatorship of Sides (1989) 211 C.A.3d 1086, 1090, 260 C.R. 16* [indigent parent of proposed conservatee had no statutory or constitutional right to representation by public defender or to court-appointed private legal counsel].)

SUPPLEMENT: [This section is current through the latest supplement]

On qualifications, continuing education requirements, and reporting obligations for appointed counsel in guardianship and conservatorship proceedings, including proceedings under the Lanterman-Petris-Short Act, see C.R.C., Rule 7.1101, added in 2007.

The Judicial Council added the following forms in 2008:

Judicial Council Form No. GC-010 [Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships or Guardianships].

Judicial Council Form No. GC-011 [Annual Certification of Court-Appointed Attorney (Probate--Guardianships and Conservatorships)].

Compensation of counsel for minor: In a guardianship proceeding, the court must determine the extent to which the minor's parents and the minor's estate are financially unable to pay the costs of appointed counsel. To the extent the parents and estate are unable to do so, the costs are to be paid by the county. (*Prob.C. 1470(c)*, as amended in 2007.)



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b. Mandatory Appointment.

Witkin Sum. Cal. Law Wills § 909

[§ 909] Mandatory Appointment.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Applicable Proceedings*. On qualifications and continuing education requirements for appointed counsel in guardianship and conservatorship proceedings, including proceedings under the Lanterman-Petris-Short Act, see C.R.C., Rule 7.1101, added in 2007.



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b. Mandatory Appointment.

14 Witkin Sum. Cal. Law Wills § 909

[§ 909] Mandatory Appointment.

(1) *Applicable Proceedings.* The court must appoint counsel for a conservatee, proposed conservatee, or "person alleged to lack capacity" in proceedings: (a) to establish a conservatorship or to appoint a conservator; (b) to terminate a conservatorship; (c) to remove a conservator; (d) for an order affecting the legal capacity of a conservatee; and (e) for an order authorizing removal of a temporary conservatee from his or her residence. (*Prob.C. 1471(a)*.) The appointment of counsel is also required in certain proceedings brought on petition of the conservatee (see *Prob.C. 1852*, *infra*, §950), proceedings involving community property (*Prob.C. 3140*; *infra*, §1062), and proceedings to authorize medical treatment of an adult without a conservator (*Prob.C. 3205*; *infra*, §1063).

(2) *Request for Counsel.* If a conservatee, proposed conservatee, or person alleged to lack legal capacity "is unable to retain legal counsel and requests the appointment of counsel to assist" in one of these matters, the court must appoint the public defender or private counsel to represent the person's interest, whether or not the person lacks or appears to lack legal capacity. (*Prob.C. 1471(a)*.)

(3) *No Request for Counsel.* If a conservatee or proposed conservatee "does not plan to retain legal counsel and has not requested the court to appoint legal counsel," the court must appoint counsel to represent the person's interest in one of these matters if, on information in the investigator's report or obtained from any other source, the court determines that "the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee." (*Prob.C. 1471(b)*.)

In *Wendland v. Superior Court* (1996) 49 C.A.4th 44, 56 C.R.2d 595, a man was severely brain-damaged in an automobile accident, but was neither terminally ill nor in a permanent vegetative state. His wife petitioned to be appointed his conservator, with authority to withdraw nutrition and hydration. The court appointed her temporary conservator, but continued the request for authority to withdraw nutrition and hydration pending further therapy for the conservatee. Meanwhile, the conservatee's mother petitioned for the appointment of independent counsel, and sought a writ of mandamus when that petition was denied. *Held*, independent counsel should have been appointed.

(a) *Prob.C. 1471(b)* is applicable because, given the wife's plans to withdraw life-sustaining treatment, her appointment as conservator could lead to the conservatee's death. (49 C.A.4th 50.) The appropriate standard of review

under the statute is abuse of discretion. Although no conservatorship cases are on point, the appointment of counsel for minors in proceedings to terminate parental rights, in which the court considers the interests of the child, is "somewhat analogous." Here, *Prob.C. 1471(b)* implicitly requires the court to consider the interests of the conservatee. (49 C.A.4th 51.)

(b) The conservatee's interests are not necessarily represented by counsel for his mother; thus, he is entitled to independent counsel, and this is so even though he may be incapable of "communicating meaningfully" with counsel. Here, because the conservatee's "very life is at stake, he is entitled to counsel to represent his interests, whatever those interests might be." (49 C.A.4th 52.)

(4) *Limited Conservatorship*. In a proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to do so, the court must "immediately appoint" the public defender or private counsel to represent the proposed limited conservatee. If able to do so, the proposed limited conservatee must pay the cost. These provisions apply "irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee" under *Prob.C. 1825*. (*Prob.C. 1471(c)*.)

(5) *Compensation and Expenses of Appointed Counsel*. The court must fix a reasonable sum for the compensation and expenses of appointed counsel and determine the ability to pay (all or part of the sum) of the person for whom counsel was appointed. The sum fixed by the court may include compensation for services rendered and expenses incurred before the date of appointment. (*Prob.C. 1472(a)(1)*.) The Legislative Committee Comment points out that *Prob.C. 1472* does not refer to the person's "present" ability to pay, and thus permits the court to order payment if the person has the ability to pay later. If the court determines that the person has the ability to pay all or part of the sum, it must order the conservator of the estate or, if none, the person to pay "in any installments and in any manner the court determines to be reasonable and compatible with the person's financial ability." (*Prob.C. 1472(a)(2)*.)

If the court does not appoint a conservator for the person who is furnished legal counsel, the order for payment may be enforced in the same manner as a money judgment. (*Prob.C. 1472(a)(4)*.) In a proceeding under *Prob.C. 3100* et seq. for court authorization of a proposed transaction involving community property, the court may order payment out of the proceeds of the transaction. (*Prob.C. 1472(a)(3)*.)

The county must compensate court-appointed counsel to the extent the court determines that the person for whom counsel was appointed is unable to pay. (*Prob.C. 1472(b)*.)

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 that counsel, payment must be made to the county. In the case of other court-appointed counsel, payment must be made to the counsel. (*Prob.C. 1472(c)*.)

Where the case does not come within the mandatory provisions of *Prob.C. 1471* and the conservatee is financially able to employ private counsel, an order appointing the public defender is in excess of the court's jurisdiction. (*Brown v. Superior Court (1981) 119 C.A.3d 189, 192, 173 C.R. 803*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Applicable Proceedings*. On qualifications, continuing education requirements, and reporting obligations for appointed counsel in guardianship and conservatorship proceedings, including proceedings under the Lanterman-Petris-Short Act, see C.R.C., Rule 7.1101, added in 2007.

The Judicial Council added the following forms in 2008:

Judicial Council Form No. GC-010 [Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships or Guardianships].

Judicial Council Form No. GC-011 [Annual Certification of Court-Appointed Attorney (Probate--Guardianships]

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6. Notices.

a. General Notice Requirement.

14 Witkin Sum. Cal. Law Wills § 910

[§ 910] General Notice Requirement.

(1) *General Rule.* Generally, if notice of a hearing is required under Division 4 (*Prob.C. 1400 et seq.*) but the manner of giving notice is not fixed, notice of the time and place of the hearing must be given at least 15 days before the day of the hearing. However, this provision is subject to *Prob.C. 1202* (court may require further or additional notice; *supra*, §385) and *Prob.C. 1203* (court may shorten time for giving notice; *supra*, §385). (*Prob.C. 1460(a).*)

(2) *Who Must Be Given Notice.* Unless the court dispenses with notice for good cause, the petitioner (which includes a person filing a petition, report, or account) must cause notice to be mailed to the following:

(a) The guardian or conservator. (*Prob.C. 1460(b)(1).*)

(b) The ward or conservatee. (*Prob.C. 1460(b)(2).*)

(c) The spouse, if any, of the ward or conservatee, or the domestic partner, if any, of the conservatee. (*Prob.C. 1460(b)(3).*)

(d) Those who have requested special notice (see *infra*, §987). (*Prob.C. 1460(b)(4).*)

(e) For a hearing on a petition to terminate a guardianship, to remove the guardian, or to accept the resignation of the guardian, notice must be given to the persons described in *Prob.C. 1510(c)* (*infra*, §919). (*Prob.C. 1460(b)(5).*)

(f) For a hearing on a petition to terminate a conservatorship, to remove the conservator, or to accept the resignation of the conservator, notice must be given to the persons described in *Prob.C. 1821(b)* (*infra*, §938). (*Prob.C. 1460(b)(6).*)

If a guardian or conservator has been appointed for a person entitled to notice, the notice must be sent to the guardian or conservator and, unless the court dispenses with notice or notice in a decedent's estate proceeding is personally served on a California-resident guardian or conservator of the estate, to the ward or conservatee. (C.R.C., Rule 7.51(c).)

(3) *Exception for Minor Under 12.* Notice need not be given to a minor under the age of 12 if the court determines that either (a) notice was properly given to a parent, guardian, or legal custodian with whom the minor resides, or (b) the petition is brought by a parent, guardian, or legal custodian with whom the minor resides. (*Prob.C. 1460.1.*) *Prob.C. 1460.1* is an exception to the general rule that notice to a minor must be sent directly to the minor. (See C.R.C., Rule 7.51(d), *supra*, §390.)

(4) *Good Cause Exception.* The court may dispense with notice where good cause is shown. (*Prob.C. 1460(e).*) The Legislative Committee Comment to *Prob.C. 1460* gives examples: (a) "where the person specified to receive the notice is in such mental or physical condition that giving the person notice would be useless or detrimental to the person," and (b) "where, after the exercise of reasonable diligence, the whereabouts of the person is unknown."

(5) *Special Notice.* Except as provided in *Prob.C. 1460(e)*, nothing in *Prob.C. 1460* excuses compliance with the requirements for notice to a person who has requested special notice pursuant to *Prob.C. 2700 et seq.* (*Prob.C. 1460(d).*)

(6) *When Service Is Complete.* If service is made by mail in the manner authorized by *C.C.P. 415.30*, "service is complete on the date a written acknowledgment of receipt is executed." (*Prob.C. 1467*; compare requirement of *C.C.P. 415.30* that acknowledgment be returned "to the sender"; see 3 *Cal. Proc. (4th), Actions*, §932.)

(7) *Effect of Reference to General Notice Provisions.* When a provision of Division 4 applies the provisions of the Probate Code applicable to personal representatives to proceedings under Division 4, a reference to *Prob.C. 1220* in the provisions applicable to personal representatives is deemed to be a reference to the notice provisions of *Prob.C. 1460 et seq.* (*Prob.C. 1469.*) The Law Revision Commission Comment explains that the intended effect of this provision is to ensure that the notice provisions of *Prob.C. 1460 et seq.* are used in all proceedings under the guardianship and conservatorship law. (Law Rev. Com. Comment.)

(8) *Judicial Council Forms.* The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-020 [Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(MA) [Attachment to Notice of Hearing Proof of Service by Mail (Probate--Decedents' Estates and Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(P) [Proof of Personal Service of Notice of Hearing (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(PA) [Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships)].

Judicial Council Form No. GC-021 [Order Dispensing With Notice--Guardianship or Conservatorship].

Judicial Council Form No. GC-022 [Order Prescribing Notice].

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SUPPLEMENT: [This section is current through the latest supplement]

(6) *When Service Is Complete.*

Acknowledgement returned to sender:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §1017.



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b. When Conservatee or Ward Is State Hospital Patient.

14 Witkin Sum. Cal. Law Wills § 911

[§ 911] When Conservatee or Ward Is State Hospital Patient.

(1) *Notice Requirement.* Notice of the time and place of the hearing on a petition, report, or account (with a copy of the petition, report, or account) must be mailed to the Sacramento office of the Director of Mental Health or the Director of Developmental Services at least 15 days before the hearing if both of the following conditions exist:

(a) "The ward or conservatee is or has been during the guardianship or conservatorship proceeding a patient in, or on leave from, a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services." (*Prob.C. 1461(b)(1).*)

(b) The petition, report, or account is filed under any of the statutes listed in *Prob.C. 1461(b)(2).* (*Prob.C. 1461(b)(2).*)

(2) *Exception: Accounting.* Notice is not required in the case of an accounting pursuant to *Prob.C. 2620* (see *infra*, §1036) if (a) the total guardianship or conservatorship assets are below \$ 1,500; (b) the gross annual income, exclusive of any public assistance income, is less than \$ 6,000; and (c) the ward or conservatee is not a patient in, outpatient from, or on leave from, a state hospital at the time the petition is filed. (*Prob.C. 1461(b)(2).*)

(3) *Exception: Discharge From Hospital.* If the ward or conservatee has been discharged from the state hospital, the director may file a certificate stating that the ward or conservatee is not indebted to the state and waiving further notices. Once the certificate is filed, compliance with *Prob.C. 1461* is excused unless the certificate is revoked and notice of the revocation is filed. (*Prob.C. 1461(c).*)

(4) *Tolling of Statute of Limitations.* The statute of limitations does not run against any claim of the State Department of Mental Health or the State Department of Developmental Services against the estate of a ward or conservatee for board, care, maintenance, or transportation with respect to an account that is settled without giving the notice required by *Prob.C. 1461.* (*Prob.C. 1461(d).*)

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c. When Conservatee or Ward Is Developmentally Disabled.

14 Witkin Sum. Cal. Law Wills § 912

[§ 912] When Conservatee or Ward Is Developmentally Disabled.

(1) *Notice to Director of Regional Center.* Notice of the time and place of the hearing on a petition for appointment of a guardian or conservator with a copy of the petition must be mailed or personally served on the director of the regional center for the developmentally disabled at least 30 days before the day of the hearing where all of the following conditions exist:

(a) The proposed ward or conservatee has developmental disabilities. (*Prob.C. 1461.4(a)(1).*) (See *Prob.C. 1420*, supra, §906 ["developmental disability" defined].)

(b) The proposed guardian or conservator is not the natural parent of the proposed ward or conservatee. (*Prob.C. 1461.4(a)(2).*)

(c) The proposed guardian or conservator is a provider of board and care, treatment, habilitation, or other services to persons with developmental disabilities or is a spouse or employee of a provider. (*Prob.C. 1461.4(a)(3).*)

(d) The proposed guardian or conservator is not a public entity. (*Prob.C. 1461.4(a)(4).*)

(2) *Report by Regional Center.* The regional center must file a written report and recommendation with the court regarding the suitability of the petitioner to meet the needs of the proposed ward or conservatee. (*Prob.C. 1461.4(b).*) (On assessment of developmentally disabled person, see infra, §942.)

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d. Notice to Veterans Administration.

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[§ 913] Notice to Veterans Administration.

Notice of the time and place of the hearing on a petition, report, or account, and notice of the filing of an inventory (with a copy of the petition, report, account, or inventory) must be mailed to the local Veterans Administration office at least 15 days before the hearing, or within 15 days after the inventory is filed, if: (1) the guardianship or conservatorship estate consists or will consist in whole or in part of money received from the Veterans Administration, or money or property derived from it; and (2) the petition, report, inventory, or account is filed under any of the statutes listed in *Prob.C. 1461.5(b)*. (*Prob.C. 1461.5*.)

West's Key Number Digest, Guardian and Ward k.13(3)

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Witkin Summary of California Law
XVII. GUARDIANSHIP AND CONSERVATORSHIP

B. Guardianship-Conservatorship Law.

6. Notices.

e. Notice in Missing Person Proceedings.

14 Witkin Sum. Cal. Law Wills § 914

[§ 914] Notice in Missing Person Proceedings.

Unless the court for good cause dispenses with notice, notice of the time and place of the hearing on a petition, report, or account (with a copy of the petition, report, or account) must be given to the same persons who are required to be given notice under *Prob.C. 2581* (substituted judgment; see *infra*, §1026) for the period and in the manner provided in *Prob.C. 1460* et seq. if: (1) a conservator of the estate has been appointed under *Prob.C. 1845* et seq. (*infra*, §949) for a person who is missing and whose whereabouts are unknown, and (2) the petition, report, or account is filed in the conservatorship proceeding under any of the statutes listed in *Prob.C. 1461.7(b)*. (*Prob.C. 1461.7*.) (See *infra*, §949.)

West's Key Number Digest, Guardian and Ward k.13(3)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
XVII. GUARDIANSHIP AND CONSERVATORSHIP
B. Guardianship-Conservatorship Law.
7. Judicial Council Forms.

Witkin Sum. Cal. Law Wills § 915

[§ 915] Judicial Council Forms.

SUPPLEMENT: [This section is current through the latest supplement]

The portion of C.R.C., Rule 7.101 discussed in the text is now C.R.C., Rule 7.101(a). It was amended in 2006 to add that, where the Judicial Council has adopted a mandatory form in alternative versions, one of the alternate versions must be used. (On alternative mandatory forms, see C.R.C., Rule 7.101(b); on electronic generation of mandatory Judicial Council Form orders under California Case Management System, see C.R.C., Rule 7.101.5.)

The following Judicial Council forms have been added or renamed:

Form Number	Title
GC-005	Declaration of Private Professional Conservator or Guardian--Qualifications (Probate--Guardianships and Conservatorships) [added]
GC-006	Declaration of Private Professional Conservator or Guardian--Continuing Education (Probate--Guardianships and Conservatorships) [added]
GC-042	Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [added]
GC-042(M A)	Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [added]
GC-045	Objections to Inventory and Appraisal of Conservator or Guardian [added]
GC-051	Notice of Opening or Changing a Guardianship or Conservatorship

- Account or Safe-Deposit Box (Probate--Guardianships and Conservatorships) [renamed]
- GC-060 Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
- GC-065 Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships) [renamed]
- GC-079 Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward [added]
- GC-079(M A) Attachment to Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward [added]
- GC-080(M A) Attachment to Post-Move Notice of Change of Residence of Conservatee or Ward [added]
- GC-110(P) Petition for Appointment of Temporary Guardian of the Person [added]
- GC-210(C A) Guardianship Petition--Child Information Attachment (Probate--Guardianships and Conservatorships) [added]
- GC-210(P) Petition for Appointment of Guardian of the Person [added]
- GC-212 Confidential Guardian Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-255 Petition for Termination of Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-260 Order Terminating Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-310 Petition for Appointment of Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-314 Confidential Conservator Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-320 Citation for Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-322 Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [added]
- GC-340 Order Appointing Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-341 Notice of Conservatee's Rights [added]
- GC-341(M A) Attachment to Notice of Conservatee's Rights [added]

- GC-395 Ex Parte Petition for Final Discharge and Order
(Probate--Decedents' Estates and Conservatorships and
Guardianships) [added]
- GC-400(A Schedule A, Receipts, Dividends--Standard Account [added]
) (1)
- GC-400(A Schedule A, Receipts, Interest--Standard Account [added]
) (2)
- GC-400(A Schedule A, Receipts, Pensions, Annuities, and Other Regular
) (3) Periodic Payments--Standard Account [added]
- GC-400(A Schedule A, Receipts, Rent--Standard Account [added]
) (4)
- GC-400(A Schedule A, Receipts, Social Security, Veterans' Benefits, Other
) (5) Public Benefits--Standard Account [added]
- GC-400(A Schedule A, Receipts, Other Receipts--Standard Account [added]
) (6)
- GC-400(A Schedule A and C, Receipts and Disbursements Worksheet--Standard
) (C) Account [added]
- GC-400(A Additional Property Received During Period of Account--Standard
) (P) and Simplified Accounts [added]
- GC-400(B Schedule B, Gains on Sales--Standard and Simplified Accounts [
) added]
- GC-400(C Schedule C, Disbursements, Conservatee's Caregiver
) (1) Expenses--Standard Account [added]
- GC-400(C Schedule C, Disbursements, Conservatee's Residential or Long-Term
) (2) Care Facility Living Expenses--Standard Account [added]
- GC-400(C Schedule C, Disbursements, Ward's Education Expenses--Standard
) (3) Account [added]
- GC-400(C Schedule C, Disbursements, Fiduciary and Attorney Fees--Standard
) (4) Account [added]
- GC-400(C Schedule C, Disbursements, General Administration
) (5) Expenses--Standard Account [added]
- GC-400(C Schedule C, Disbursements, Investment Expenses--Standard Account [
) (6) added]
- GC-400(C Schedule C, Disbursements, Living Expenses--Standard Account [
) (7) added]
- GC-400(C Schedule C, Disbursements, Medical Expenses--Standard Account [
) (8) added]
- GC-400(C Schedule C, Disbursements, Property Sale Expenses--Standard

-) (9) Account [added]
- GC-400(C Schedule C, Disbursements, Rental Property Expenses--Standard
-) (10) Account [added]
- GC-400(C Schedule C, Disbursements, Other Expenses--Standard Account [
-) (11) added]
- GC-400(D Schedule D, Losses on Sales--Standard and Simplified Accounts [
-) added]
- GC-400(D Distributions to Conservatee or Ward--Standard and Simplified
- IST) Accounts [added]
- GC-400(E Cash Assets on Hand at End of Account Period--Standard and
-) (1) Simplified Accounts [added]
- GC-400(E Non-Cash Assets on Hand at End of Account Period--Standard and
-) (2) Simplified Accounts [added]
- GC-400(F Schedule F, Changes in Form of Assets--Standard and Simplified
-) Accounts [added]
- GC-400(G Schedule G, Liabilities at End of Account Period--Standard and
-) Simplified Accounts [added]
- GC-400(N Net Income From a Trade or Business--Standard Account [added]
- I)
- GC-400(N Net Loss From a Trade or Business--Standard Account [added]
- L)
- GC-400(O Other Charges--Standard and Simplified Accounts [added]
- CH)
- GC-400(O Other Credits--Standard and Simplified Accounts [added]
- CR)
- GC-400(P Cash Assets on Hand at Beginning of Account Period--Standard and
- H) (1) Simplified Accounts [added]
- GC-400(P Non-Cash Assets on Hand at Beginning of Account Period--Standard
- H) (2) and Simplified Accounts [added]
- GC-400(S Summary of Account--Standard and Simplified Accounts [added]
- UM)
- GC-405(A Schedule A, Receipts--Simplified Account [added]
-)
- GC-405(A Additional Property Received During Period of Account--Standard
-) (P) and Simplified Accounts [added]
- GC-405(B Schedule B, Gains on Sales--Standard and Simplified Accounts [
-) added]
- GC-405(C Schedule C, Disbursements--Simplified Account [added]

-)
- GC-405(D Schedule D, Losses on Sales--Standard and Simplified Accounts [
 -) added]
- GC-405(D Distributions to Conservatee or Ward--Standard and Simplified
 - IST) Accounts [added]
- GC-405(E Cash Assets on Hand at End of Account Period--Standard and
 -)(1) Simplified Accounts [added]
- GC-405(E Non-Cash Assets on Hand at End of Account Period--Standard and
 -)(2) Simplified Accounts [added]
- GC-405(F Schedule F, Changes in Form of Assets--Standard and Simplified
 -) Accounts [added]
- GC-405(G Schedule G, Liabilities at End of Account Period--Standard and
 -) Simplified Accounts [added]
- GC-405(O Other Charges--Standard and Simplified Accounts [added]
 - CH)
- GC-405(O Other Credits--Standard and Simplified Accounts [added]
 - CR)
- GC-405(P Cash Assets on Hand at Beginning of Account Period--Standard and
 - H)(1) Simplified Accounts [added]
- GC-405(P Non-Cash Assets on Hand at Beginning of Account Period--Standard
 - H)(2) and Simplified Accounts [added]
- GC-405(S Summary of Account--Standard and Simplified Accounts [added]
 - UM)
- GC-505 Forms You Need to Ask the Court to Appoint a Guardian of the
 - Person (Probate--Conservatorships and Guardianships) [added]
- GC-510 What is "Proof of Service" in a Guardianship?
 - (Probate--Conservatorships and Guardianships) [added]



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XVII. GUARDIANSHIP AND CONSERVATORSHIP
B. Guardianship-Conservatorship Law.
7. Judicial Council Forms.

14 Witkin Sum. Cal. Law Wills § 915

[§ 915] Judicial Council Forms.

The Judicial Council may prescribe forms for guardianship and conservatorship proceedings. (See *Prob.C. 1001*, supra, §373.) If a document to be submitted to the court is one for which the Judicial Council has adopted a form, the form must be used. If the form is "inadequate in a particular situation," an addendum may be attached. (C.R.C., Rule 7.101.) The following Judicial Council Forms have been adopted:

Form Number

Title

Forms Common to Both Guardianships and Conservator- ships

GC-020	Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)
GC-020(C)	Clerk's Certificate of Posting Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships or Conservatorships)
GC-020(MA)	Attachment to Notice of Hearing Proof of Service by Mail (Probate--Decedents' Estates and Guardianships and Conservatorships)
GC-020(P)	Proof of Personal Service of Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)
GC-020(PA)	Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships)
GC-021	Order Dispensing With Notice
GC-022	Order Prescribing Notice

GC-035	Request for Special Notice
GC-040	Inventory and Appraisal
GC-041	Inventory and Appraisal Attachment
GC-050	Notice of Taking Possession or Control of an Asset of Minor or Conservatee
GC-051	Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box
GC-060	Report of Sale and Petition for Order Confirming Sale of Real Property
GC-065	Order Confirming Sale of Real Property
GC-070	Ex Parte Petition for Authority to Sell Securities and Order
GC-075	Ex Parte Petition for Approval of Sale of Personal Property and Order
GC-080	Change of Residence Notice
GC-085	Petition to Fix Residence Outside the State of California
GC-090	Order Fixing Residence Outside the State of California
GC-100	Petition for Appointment of Guardian Ad Litem--Probate
GC-101	Order Appointing Guardian Ad Litem--Probate
<i>Forms for Temporary Guardianships or Conservatorships</i>	
GC-110	Petition for Appointment of Temporary Guardian or Conservator
GC-140	Order Appointing Temporary Guardian or Conservator
GC-150	Letters of Temporary Guardianship or Conservatorship
<i>Forms for Guardianships</i>	
GC-205	Guardianship Pamphlet
GC-210	Petition for Appointment of Guardian of Minor
GC-211	Consent of Proposed Guardian, Nomination of Guardian, and Consent to Appointment of Guardian and Waiver of Notice
GC-212	Confidential Guardian Screening Form (Probate Guardianship)
GC-226	Spousal Property Order
GC-240	Order Appointing Guardian of Minor
GC-248	Duties of Guardian (Probate)
GC-250	Letters of Guardianship
GC-251	Confidential Guardianship Status Report
GC-255	Petition for Termination of Guardianship
GC-260	Order Terminating Guardianship

Forms for Conser-

vatorships

GC-310	Petition for Appointment of Probate Conservator
GC-312	Confidential Supplemental Information (Probate Conservatorship)
GC-313	Attachment Requesting Special Orders Regarding Dementia
GC-314	Confidential Conservator Screening Form (Probate Conservatorship)
GC-320	Citation for Conservatorship and Proof of Service
GC-330	Order Appointing Court Investigator
GC-333	Ex Parte Application for Order Authorizing Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)
GC-334	Ex Parte Order Re Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)
GC-335	Capacity Declaration--Conservatorship
GC-335A	Dementia Attachment to Capacity Declaration--Conservatorship
GC-340	Order Appointing Probate Conservator
GC-348	Duties of Conservator and Acknowledgement of Receipt of Handbook
GC-350	Letters of Conservatorship
GC-380	Petition for Exclusive Authority to Give Consent to Medical Treatment
GC-385	Order Authorizing Conservator to Give Consent to Medical Treatment

SUPPLEMENT: [This section is current through the latest supplement]

The portion of C.R.C., Rule 7.101 discussed in the text is now C.R.C., Rule 7.101(a). It was amended in 2006 to add that, where the Judicial Council has adopted a mandatory form in alternative versions, one of the alternate versions must be used. (On alternative mandatory forms, see C.R.C., Rule 7.101(b); on electronic generation of mandatory Judicial Council Form orders under California Case Management System, see C.R.C., Rule 7.101.5.)

The following Judicial Council forms have been added or renamed:

Form Number	Title
GC-005	Declaration of Private Professional Conservator or Guardian--Qualifications (Probate--Guardianships and Conservatorships) [added]
GC-006	Declaration of Private Professional Conservator or Guardian--Continuing Education (Probate--Guardianships and Conservatorships) [added]
GC-010	Certification of Attorney Concerning Qualifications for Court Appointment in Conservatorships or Guardianships [added]

- GC-011 Annual Certification of Court-Appointed Attorney
(Probate--Guardianships and Conservatorships) [added]
- GC-042 Notice of Filing of Inventory and Appraisal and How to Object to
the Inventory or the Appraised Value of Property [added]
- GC-042(Attachment to Notice of Filing of Inventory and Appraisal and How
MA) to Object to the Inventory or the Appraised Value of Property [added]
- GC-045 Objections to Inventory and Appraisal of Conservator or Guardian [added]
- GC-050 Notice of Taking Possession or Control of an Asset of Minor or
Conservatee (Probate--Guardianships and Conservatorships) [renamed]
- GC-051 Notice of Opening or Changing a Guardianship or Conservatorship
Account or Safe-Deposit Box (Probate--Guardianships and
Conservatorships) [renamed]
- GC-060 Report of Sale and Petition for Order Confirming Sale of Real
Property (Probate--Decedents' Estates and Guardianships and
Conservatorships) [renamed]
- GC-065 Order Confirming Sale of Real Property (Probate--Decedents' Estates
and Guardianships and Conservatorships) [renamed]
- GC-079 Pre-Move Notice of Proposed Change of Personal Residence of
Conservatee or Ward [added]
- GC-079(Attachment to Pre-Move Notice of Proposed Change of Personal
MA) Residence of Conservatee or Ward [added]
- GC-080(Attachment to Post-Move Notice of Change of Residence of
MA) Conservatee or Ward [added]
- GC-110(Petition for Appointment of Temporary Guardian of the Person
P) (Probate--Guardianships and Conservatorships) [added]
- GC-112 Ex Parte Application for Good Cause Exception to Notice of Hearing
on Petition for Appointment of Temporary Conservator
(Probate--Guardianships and Conservatorships) [added]
- GC-112(Declaration in Support of Ex Parte Application for Good Cause
A-1) Exception to Notice of Hearing on Petition for Appointment of
Temporary Conservator (Probate--Guardianships and Conservatorships)
[added]
- GC-112(Declaration Continuation Page (Probate--Guardianships and
A-2) Conservatorships) [added]
- GC-115 Order on Ex Parte Application for Good Cause Exception to Notice of
Hearing on Petition for Appointment of Temporary Conservator

- (Probate--Guardianships and Conservatorships) [added]
- GC-140 Order Appointing Temporary Guardian (Probate--Guardianships and Conservatorships) [renamed]
- GC-141 Order Appointing Temporary Conservator (Probate--Guardianships and Conservatorships) [added]
- GC-150 Letters of Temporary Guardianship or Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-210(Guardianship Petition--Child Information Attachment
CA) (Probate--Guardianships and Conservatorships) [added]
- GC-210(Petition for Appointment of Guardian of the Person [added]
P)
- GC-212 Confidential Guardian Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-250 Letters of Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-255 Petition for Termination of Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-260 Order Terminating Guardianship (Probate--Guardianships and Conservatorships) [renamed]
- GC-310 Petition for Appointment of Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-314 Confidential Conservator Screening Form (Probate--Guardianships and Conservatorships) [renamed]
- GC-320 Citation for Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-322 Citation--Probate (Probate--Decedents' Estates and Guardianships and Conservatorships) [added]
- GC-340 Order Appointing Probate Conservator (Probate--Guardianships and Conservatorships) [renamed]
- GC-341 Notice of Conservatee's Rights [added]
- GC-341(Attachment to Notice of Conservatee's Rights [added]
MA)
- GC-350 Letters of Conservatorship (Probate--Guardianships and Conservatorships) [renamed]
- GC-395 Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships) [added]
- GC-400(Schedule A, Receipts, Dividends--Standard Account [added]
A)(1)

- GC-400(Schedule A, Receipts, Interest--Standard Account [added]
A)(2)
- GC-400(Schedule A, Receipts, Pensions, Annuities, and Other Regular
A)(3) Periodic Payments--Standard Account [added]
- GC-400(Schedule A, Receipts, Rent--Standard Account [added]
A)(4)
- GC-400(Schedule A, Receipts, Social Security, Veterans' Benefits, Other
A)(5) Public Benefits--Standard Account [added]
- GC-400(Schedule A, Receipts, Other Receipts--Standard Account [added]
A)(6)
- GC-400(Schedule A and C, Receipts and Disbursements Worksheet--Standard
A)(C) Account [added]
- GC-400(Additional Property Received During Period of Account--Standard and
AP) Simplified Accounts [added]
- GC-400(Schedule B, Gains on Sales--Standard and Simplified Accounts [
B) added]
- GC-400(Schedule C, Disbursements, Conservatee's Caregiver
C)(1) Expenses--Standard Account [added]
- GC-400(Schedule C, Disbursements, Conservatee's Residential or Long-Term
C)(2) Care Facility Living Expenses--Standard Account [added]
- GC-400(Schedule C, Disbursements, Ward's Education Expenses--Standard
C)(3) Account [added]
- GC-400(Schedule C, Disbursements, Fiduciary and Attorney Fees--Standard
C)(4) Account [added]
- GC-400(Schedule C, Disbursements, General Administration
C)(5) Expenses--Standard Account [added]
- GC-400(Schedule C, Disbursements, Investment Expenses--Standard Account [
C)(6) added]
- GC-400(Schedule C, Disbursements, Living Expenses--Standard Account [
C)(7) added]
- GC-400(Schedule C, Disbursements, Medical Expenses--Standard Account [
C)(8) added]
- GC-400(Schedule C, Disbursements, Property Sale Expenses--Standard Account
C)(9) [added]
- GC-400(Schedule C, Disbursements, Rental Property Expenses--Standard
C)(10) Account [added]
- GC-400(Schedule C, Disbursements, Other Expenses--Standard Account [added]
C)(11)

- GC-400(Schedule D, Losses on Sales--Standard and Simplified Accounts [D) added]
- GC-400(Distributions to Conservatee or Ward--Standard and Simplified DIST) Accounts [added]
- GC-400(Cash Assets on Hand at End of Account Period--Standard and E)(1) Simplified Accounts [added]
- GC-400(Non-Cash Assets on Hand at End of Account Period--Standard and E)(2) Simplified Accounts [added]
- GC-400(Schedule F, Changes in Form of Assets--Standard and Simplified F) Accounts [added]
- GC-400(Schedule G, Liabilities at End of Account Period--Standard and G) Simplified Accounts [added]
- GC-400(Net Income From a Trade or Business--Standard Account [added] NI)
- GC-400(Net Loss From a Trade or Business--Standard Account [added] NL)
- GC-400(Other Charges--Standard and Simplified Accounts [added] OCH)
- GC-400(Other Credits--Standard and Simplified Accounts [added] OCR)
- GC-400(Cash Assets on Hand at Beginning of Account Period--Standard and PH)(1) Simplified Accounts [added]
- GC-400(Non-Cash Assets on Hand at Beginning of Account Period--Standard PH)(2) and Simplified Accounts [added]
- GC-400(Summary of Account--Standard and Simplified Accounts [added] SUM)
- GC-405(Schedule A, Receipts--Simplified Account [added] A)
- GC-405(Additional Property Received During Period of Account--Standard and AP) Simplified Accounts [added]
- GC-405(Schedule B, Gains on Sales--Standard and Simplified Accounts [B) added]
- GC-405(Schedule C, Disbursements--Simplified Account [added] C)
- GC-405(Schedule D, Losses on Sales--Standard and Simplified Accounts [D) added]
- GC-405(Distributions to Conservatee or Ward--Standard and Simplified DIST) Accounts [added]

- GC-405(E)(1) Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts [added]
- GC-405(E)(2) Non-Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts [added]
- GC-405(F) Schedule F, Changes in Form of Assets--Standard and Simplified Accounts [added]
- GC-405(G) Schedule G, Liabilities at End of Account Period--Standard and Simplified Accounts [added]
- GC-405(OCH) Other Charges--Standard and Simplified Accounts [added]
- GC-405(OCR) Other Credits--Standard and Simplified Accounts [added]
- GC-405(PH)(1) Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts [added]
- GC-405(PH)(2) Non-Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts [added]
- GC-405(SUM) Summary of Account--Standard and Simplified Accounts [added]
- GC-505 Forms You Need to Ask the Court to Appoint a Guardian of the Person (Probate--Conservatorships and Guardianships) [added]
- GC-510 What is "Proof of Service" in a Guardianship? (Probate--Conservatorships and Guardianships) [added]



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CHAPTER XXI - Wills and Probate

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XVII. GUARDIANSHIP AND CONSERVATORSHIP
B. Guardianship-Conservatorship Law.
8. (New) Special Provisions Applicable to Indian Children.

14 Witkin Sum. Cal. Law Wills § 915A

[§ 915A] (New) Special Provisions Applicable to Indian Children.

Where a guardianship or conservatorship involves a person who might be an Indian child, special provisions apply. (See *Prob.C. 1449*, added in 2006 [definitions]; *Prob.C. 1459*, added in 2006 [legislative findings]; *Prob.C. 1459.5*, added in 2006 [application of Indian Child Welfare Act]; *Prob.C. 1460.2*, added in 2006 [notice]; *Prob.C. 1474*, added in 2006 [appointment of counsel]; *Prob.C. 1500.1*, added in 2006 [consent to nomination of guardian]; *Prob.C. 1510(c)(6)* and (i), added in 2006 [contents of guardianship petition]; *Prob.C. 1511(i)*, added in 2006 [notice of guardianship petition]; *Prob.C. 1513(h)*, added in 2006 [guardianship investigation and report]; *Prob.C. 1601*, as amended in 2006 [petition for termination of guardianship]; C.R.C., Rules 5.480 et seq., 7.1015, adopted in 2007; 10 *Summary* (10th), *Parent and Child*, Supp., §522 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

Witkin Summary of California Law
XVII. GUARDIANSHIP AND CONSERVATORSHIP
C. Guardianship of Minors.
1. In General.

Witkin Sum. Cal. Law Wills § 916

[§ 916] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Application of Probate Code to Guardianship Under Juvenile Court Law.* C.R.C., Rule 1400 et seq. were renumbered C.R.C., Rule 5.500 et seq. in 2006.(5) *(New) Education Program.* To assist persons who may seek appointment as nonprofessional guardians or conservators, the Judicial Council must develop a free, user-friendly education program for proposed guardians and conservators and for court-appointed guardians and conservators who are not required to be licensed under *B. & P.C. 6500* et seq. (Supp., *infra*, §970A). (*Prob.C. 1457*, added in 2006.)



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C. Guardianship of Minors.
1. In General.

14 Witkin Sum. Cal. Law Wills § 916

[§ 916] In General.

(1) *Statutory Framework.* Part 2 of Division 4 of the Probate Code (*Prob.C. 1500 et seq.*) sets forth provisions specific to guardianship. (See C.E.B., *Guardianship Practice*, §1.1 et seq.) It has three chapters:

Chapter 1. Establishment of Guardianship. (See *infra*, §917 et seq.)

Chapter 2. Termination. (See *infra*, §930.)

Chapter 3. Permanent and Stable Home. (Vexatious litigants; see *infra*, §931.)

(2) *Effect of Marriage on Guardianship Under Probate Code.* A guardian of the person may not be appointed for a minor who is married or whose marriage has been dissolved. This provision does not apply to a minor whose marriage has been adjudged a nullity. (*Prob.C. 1515.*) Nor does it preclude the appointment of a guardian of the estate of a married minor. (See Law Rev. Com. Comment.) (On continuation of conservatorship if minor's marriage is dissolved or adjudged a nullity, see *infra*, §951.)

(3) *Application of Probate Code to Guardianship Under Juvenile Court Law.* *Prob.C. 1500 et seq.* are not applicable to guardianships resulting from the implementation of a permanent plan under Welf.C. 366.26 (dependent children; see 10 *Summary* (10th), *Parent and Child*, §680 et seq.). For those minors, the exclusive procedures for establishing, modifying, and terminating guardianships are specified by the Welfare and Institutions Code and C.R.C., Rule 1400 et seq. (see 10 *Summary* (10th), *Parent and Child*, §444.). However, if no specific provision of the Welfare and Institutions Code or the California Rules of Court is applicable, the Probate Code provisions applicable to the administration of guardianship estates under *Prob.C. 2100 et seq.* (*infra*, §960 et seq.) govern "as far as they are applicable to like situations." (*Prob.C. 1517.*) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §26:1 et seq.)

(4) *Judicial Council Guardianship Pamphlet.* The Judicial Council has prepared a pamphlet explaining in plain language the nature of guardianship and the rights, duties, and obligations of a person serving as a guardian. (See Judicial Council Form No. GC-205.)

West's Key Number Digest, Guardian and Ward k.3

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Application of Probate Code to Guardianship Under Juvenile Court Law.* C.R.C., Rule 1400 et seq. were renumbered C.R.C., Rule 5.500 et seq. in 2006.

Prob.C. 1517 was subdivided and amended in 2008. The provision discussed in the text was designated *Prob.C. 1517(a)* and amended to refer to C.R.C., Rule 5.500 et seq.

Prob.C. 1500 et seq. may not be construed to prevent a court that takes jurisdiction of a minor under Welf.C. 300 (dependent children) or a probate court from making appropriate orders or appointments "necessary to ensure the appropriate administration of funds for the benefit of the child." These orders or appointments may continue after the court's jurisdiction is terminated pursuant to Welf.C. 391 (termination of dependency jurisdiction). (*Prob.C. 1517(b)*, added in 2008.) (5) (*New Education Program*. To assist persons who may seek appointment as nonprofessional guardians or conservators, the Judicial Council must develop a free, user-friendly education program for proposed guardians and conservators and for court-appointed guardians and conservators who are not required to be licensed under *B. & P.C. 6500* et seq. (Supp., infra, §970A). (*Prob.C. 1457*, added in 2006.)



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2. Appointment.
a. Nomination.

Witkin Sum. Cal. Law Wills § 917

[§ 917] Nomination.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) Guardianship of Indian Child.* Where a guardianship involves a person who might be an Indian child, special provisions apply. (See *Prob.C. 1500.1*, added in 2006 [consent to nomination of guardian].)



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2. Appointment.

a. Nomination.

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[§ 917] Nomination.

(1) *Nomination by Parent.* A parent may nominate a guardian of the person or estate of a minor child in the following circumstances:

(a) Where the other parent nominates the same guardian for the same child, or consents to the nomination in writing. (*Prob.C. 1500(a).*)

(b) Where the other parent is dead or lacks legal capacity to consent to the nomination, or the consent of the other parent would not be required for the child's adoption. (*Prob.C. 1500(b).*) (See *Guardianship of Joaquin (1959) 168 C.A.2d 99, 101, 335 P.2d 507* [former statute; nomination by will without consent of the other parent was ineffective, even though parties were divorced and decedent had been awarded custody].)

(2) *Nomination for Particular Property.* A parent or any other person may nominate a guardian for property that a minor receives from or by designation of the nominator, including property received by virtue of a gift, deed, trust, will, succession, insurance, or "benefits of any kind." (*Prob.C. 1501.*) The nomination may be made with respect to any property, whether inter vivos or on death, including proceeds from an insurance policy. This changes the former common law rule. (Law Rev. Com. Comment.)

If a parent attempts to nominate a general guardian of the estate under *Prob.C. 1500*, but fails to obtain the written consent of the other parent as required by that provision, the nomination may nevertheless permit appointment with respect to the particular property that the child takes from the nominating parent. (Law Rev. Com. Comment.)

(3) *Nomination Procedure.* The nomination may be made (a) in the petition for appointment of the guardian, or (b) at the hearing on the petition, or (c) in a writing signed either before or after the petition is filed. (*Prob.C. 1502(a).*) (See Judicial Council Form No. GC-211 [Consent of Guardian, Nomination, and Waiver of Notice]; for testamentary nomination, see C.E.B., 2 Will Drafting 3d, §§24.1 et seq., 25.1 et seq.)

(4) *When Nomination Is Effective.* Ordinarily, the nomination is effective when made. (*Prob.C. 1502(b).*) However, a writing may provide that the nomination becomes effective only on the occurrence of conditions stated in the writing,

such as "the subsequent legal incapacity or death of the person making the nomination." (*Prob.C. 1502(b)*.) Unless the writing making the nomination otherwise provides, a nomination remains effective notwithstanding the subsequent legal incapacity or death of the nominator. (*Prob.C. 1502(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) (*New*) *Guardianship of Indian Child*. Where a guardianship involves a person who might be an Indian child, special provisions apply. (See *Prob.C. 1500.1*, added in 2006 [consent to nomination of guardian].)



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2. Appointment.

b. Petition.

1. Who May File.

Witkin Sum. Cal. Law Wills § 918

[§ 918] Who May File.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* Govt.C. 26827, as amended and renumbered in 2005, no longer applies to guardianships. The fee for filing a petition for the appointment of a guardian or a paper in opposition to the petition is now set forth in Govt.C. 70653 and 70654. Generally, the fee in proceedings to appoint a guardian of the person only is \$ 180 and the fee in proceedings to appoint a guardian of the estate or a guardian of the person and estate is \$ 320. (See Supp., supra, §380D.)



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b. Petition.

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[§ 918] Who May File.

(1) *In General.* "A relative or other person on behalf of the minor, or the minor if 12 years of age or older, may file a petition for appointment of a guardian of the minor." (*Prob.C. 1510(a)*; on filing fee, see *Govt.C. 26827*, *supra*, §585.)

(2) *Petition by Nonresident.* The statute governing appointment of administrators contains a residence requirement (see *supra*, §433), but no such provision applies to guardians. The differing requirements are based on distinctions in duties and functions. "An administrator is interested primarily in winding up the estate of an intestate. The cardinal consideration governing the court in its appointment of a guardian for the person and estate of a minor is how to serve most effectively the best interests and temporal, moral, and mental welfare of the child. ... It may sometimes be for the best interests of the child that a nonresident should be appointed, either as one most closely related to it, or as one highly qualified to act and nominated by the deceased parents, or as one best able to educate and support the child, or for any other significant advantage that might accrue to the child. ... While the place of residence of the prospective guardian is not to be ignored, the mere fact that he is a nonresident cannot inhibit the court from appointing him when the circumstances are such as, in the court's discretion, make it appear for the best interests of the minor to do so." (*Guardianship of Levy (1955) 137 C.A.2d 237, 247, 290 P.2d 320*; see *Guardianship of Boutz (1938) 24 C.A.2d 644, 646, 76 P.2d 154*; *12 So. Cal. L. Rev. 477*; *39 Am.Jur.2d (1999 ed.)*, *Guardian and Ward* §52.)

(3) *Separate Petitions.* Where two separate petitions are filed by persons seeking appointment, the attempted voluntary dismissal of the first does not deprive the court of jurisdiction to proceed, for the second constitutes a request for "affirmative relief" within the meaning of former C.C.P. 581(1) (now C.C.P. 581(i)). (*Guardianship of Lyle (1946) 77 C.A.2d 153, 154, 174 P.2d 906*; see *6 Cal. Proc. (4th), Proceedings Without Trial*, §258.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Govt.C. 26827*, as amended and renumbered in 2005, no longer applies to guardianships. The fee for filing a petition for the appointment of a guardian or a paper in opposition to the petition is now set forth in *Govt.C. 70653* and *70654*. Generally, the fee in proceedings to appoint a guardian of the person only is \$ 200 and the fee in proceedings to appoint a guardian of the estate or a guardian of the person and estate is \$ 350. (See *Supp.*, *supra*, §380D.)

(2) *Petition by Nonresident.* See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §50.

(3) *Separate Petitions.* Affirmative relief:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §288.



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b. Petition.

2. Content and Form.

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[§ 919] Content and Form.

SUPPLEMENT: [This section is current through the latest supplement]

(7a) (*New*) *Guardianship of Indian Child*. Where a guardianship involves a person who might be an Indian child, special provisions apply. (See *Prob.C. 1510(c)(6)* and (i), added in 2006 [contents of petition].)

(9) *Judicial Council Forms*. Judicial Council Form No. GC-212 has been renamed Confidential Guardian Screening Form (Probate--Guardianships and Conservatorships).

Three additional forms have been adopted:

Form No. GC-110(P) [Petition for Appointment of Temporary Guardian of the Person].

Form No. GC-210(P) [Petition for Appointment of Guardian of the Person].

Form No. GC-505 [Forms You Need to Ask the Court to Appoint a Guardian of the Person (Probate--Conservatorships and Guardianships)].

A party petitioning for the appointment of a general guardian of the person of a minor may use either Judicial Council Form No. GC-210 or Judicial Council Form No. GC-210(P). A party petitioning for the appointment of a general guardian of the estate of a minor or the person and estate of a minor must use Judicial Council Form No. GC-210. (C.R.C., Rule 7.101(c), adopted in 2006.) (On petition for appointment of temporary guardian, see Supp., *infra*, §975.)



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[§ 919] Content and Form.

(1) *In General.* The petition must request that a guardian of the person or estate of the minor, or both, be appointed, must specify the name and address of the proposed guardian and the name and date of birth of the proposed ward, and must state that the appointment is "necessary or convenient." (*Prob.C. 1510(b).*)

(2) *Names and Addresses of Relevant Persons.* The petition must set forth, so far as known to the petitioner, the names and addresses of (a) the proposed ward's parents and relatives within the second degree; (b) the person having legal custody and, if that person does not have the care of the proposed ward, the person having that care; (c) any person nominated under *Prob.C. 1500* or *1501* (*supra*, §917); and, (d) for a guardianship of the estate, the spouse of the proposed ward. (*Prob.C. 1510(c).*)

(3) *Patient in Mental Institution.* If the proposed ward is a patient in or on leave of absence from a state mental institution, and the fact is known to the petitioner, the petition must state that fact and name the institution. (*Prob.C. 1510(d).*)

(4) *Receipt of Veteran's Benefits.* The petition must state, so far as known to the petitioner, whether the proposed ward is receiving or is entitled to receive benefits from the Veterans Administration, and the estimated amount of the monthly benefit payable. (*Prob.C. 1510(e).*)

(5) *Intent To Adopt.* If the petitioner has accepted or intends to accept physical care or custody of the child with intent to adopt, whether formed at the time of placement or subsequent to placement, the petition must say so, whether or not an adoption petition has been filed. (*Prob.C. 1510(g).*)

(6) *Pending Proceedings.* The petition must disclose knowledge of "any pending adoption, juvenile court, marriage dissolution, domestic relations, custody, or other similar proceeding affecting the proposed ward." (*Prob.C. 1510(f).*) If the proposed ward "is or becomes the subject of an adoption petition," the court must order the guardianship petition consolidated with the adoption petition. (*Prob.C. 1510(h).*) "Within 10 days after the petitioner in the guardianship proceeding becomes aware of any proceeding not disclosed in the guardianship petition affecting the custody of the

proposed ward (including an adoption, juvenile court, marriage dissolution, domestic relations, or other similar proceeding affecting the proposed ward), the petitioner shall amend the guardianship petition to disclose the other proceeding." (*Prob.C. 1512.*)

(7) *Additional Requirements for Nonrelative Guardian of the Person.* Additional requirements apply to a petition for guardianship of the person filed by a nonrelative. (See *Prob.C. 1541*, *infra*, §923.)

(8) *Nature of Petition.* Rules of pleading are not to be strictly enforced in guardianship proceedings. (See *Guardianship of Cantwell* (1954) 125 C.A.2d 866, 867, 271 P.2d 168 ["This is not a case of private litigants who may delimit the scope of the issues by narrowly stating what they plead and pray for"].) And, while the petition must give adequate notice of the specific issues presented in order to permit a reasonable opportunity to prepare for the hearing, it need not include a detailed statement of the underlying specific facts upon which the petition is based. (*Guardianship of Phillip B.* (1983) 139 C.A.3d 407, 425, 188 C.R. 781.)

(9) *Judicial Council Forms.* The Judicial Council has adopted forms for the petition. (See Judicial Council Form No. GC-110 [Petition for Appointment of Temporary Guardian or Conservator], Judicial Council Form No. GC-210 [Petition for Appointment of Guardian of Minor].)

Judicial Council Form No. GC-212 [Confidential Guardian Screening Form (Probate Guardianship)] contains confidential information about the proposed guardian, used in determining whether to make the appointment. The form must be submitted with the petition for appointment, and must be maintained in a manner that will protect and preserve confidentiality. The public guardian and trust companies are exempt. (C.R.C., Rule 7.1001.)

West's Key Number Digest, Guardian and Ward k.13(3)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Pending Proceedings.* *Prob.C. 1510(h)* was amended in 2008 to add that a consolidated proceeding for guardianship and adoption is heard in the court in which the adoption proceeding is pending.(7a) (*New*) *Guardianship of Indian Child.* Where a guardianship involves a person who might be an Indian child, special provisions apply. (See *Prob.C. 1510(c)(6)* and (i), added in 2006 [contents of petition].)

(9) *Judicial Council Forms.* Judicial Council Form No. GC-212 has been renamed: Confidential Guardian Screening Form (Probate--Guardianships and Conservatorships).

Three additional forms have been adopted:

Form No. GC-110(P) [Petition for Appointment of Temporary Guardian of the Person (Probate--Guardianships and Conservatorships)].

Form No. GC-210(P) [Petition for Appointment of Guardian of the Person].

Form No. GC-505 [Forms You Need to Ask the Court to Appoint a Guardian of the Person (Probate--Conservatorships and Guardianships)].

A party petitioning for the appointment of a general guardian of the person of a minor may use either Judicial Council Form No. GC-210 or Judicial Council Form No. GC-210(P). A party petitioning for the appointment of a general guardian of the estate of a minor or the person and estate of a minor must use Judicial Council Form No. GC-210. (C.R.C., Rule 7.101(c), adopted in 2006.) (On petition for appointment of temporary guardian, see *Supp.*, *infra*, §975.)



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c. Notice of Hearing.

1. In General.

Witkin Sum. Cal. Law Wills § 920

[§ 920] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Judicial Council Forms*. An additional form has been adopted:

Form No. GC-510 [What is "Proof of Service" in a Guardianship? (Probate--Conservatorships and Guardianships)].



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[§ 920] In General.

(1) *Time for Notice.* Notice of the time and place of the hearing on a petition for appointment of a guardian, with a copy of the petition, must be given at least 15 days before the hearing. The time may not be shortened. (*Prob.C. 1511(a).*) If there is urgency, a temporary guardian may be appointed. (Legislative Com. Comment.) (On requirement of notice generally, see *39 Am.Jur.2d (1999 ed.), Guardian and Ward §37 et seq.; supra, §910 et seq.*)

(2) *Who Must Be Served.* Notice must be served on (a) the proposed ward, if 12 years of age or older; (b) the parents; (c) a person having legal custody or serving as the guardian of the estate; and (d) any person nominated as a guardian under *Prob.C. 1500 or 1501* (*supra, §917*). (*Prob.C. 1511(b).*) Additional requirements apply to a petition for guardianship of the person filed by a nonrelative. (See *Prob.C. 1542, infra, §923.*) In the case of a guardianship of the person, notice and a copy of the petition must be mailed, at least 15 days before the hearing, to the local agency designated to investigate guardianships for the court. The local child protective services agency must screen the name of the guardian for prior referrals for the neglect or abuse of minors. (*Prob.C. 1516.*)

(3) *Manner of Service.* Notice must be served as provided in *C.C.P. 415.10* (personal delivery) or *C.C.P. 415.30* (service by mail), or "in any manner authorized by the court." (*Prob.C. 1511(b).*)

Guardianship of Debbie V. (1986) 182 C.A.3d 781, 227 C.R. 554, was a proceeding to appoint a guardian for two children who had been declared dependent children pursuant to *Welf.C. 300(a)* (see *10 Summary (10th), Parent and Child, §538 et seq.*). The judge directed that notice of the hearing be mailed to the children's parents and other relatives at least 15 days before the hearing in the manner prescribed by former *Prob.C. 1200.5*. The notices were mailed but no written acknowledgments of receipt were filed; and the judge granted the guardianship petition without the children's mother being present. She appealed, claiming that the notice was defective. *Held*, judgment appointing guardian reversed. The question on appeal was whether service by mail on the parents, in accordance with former *Prob.C. 1200.5*, was sufficient under *Prob.C. 1511(b)*, allowing service "in such manner as may be authorized by the court." (*182 C.A.3d 784.*) The court concluded that mailed service had to conform to the requirements of *C.C.P. 415.30*, and that compliance with former *Prob.C. 1200.5* was not sufficient.

(a) Under either *C.C.P. 415.10* or *415.30*, actual receipt of the notice is assured; the subject of the notice will either be personally served or will acknowledge receipt of a mailed notice. (*182 C.A.3d 786*.) Service under former Prob.C. 1200.5 did not assure actual notice and, moreover, the statute was expressly inapplicable to guardianship proceedings. Because the purpose of *Prob.C. 1511(b)* is to give the parents actual notice of the proceedings if possible, the phrase "in such manner as may be authorized by the court" cannot be construed to nullify the specified methods of service. "[I]t can only be interpreted to provide for a court-authorized method of service that is different from ... those specifically listed in the statute if service by one of the two named methods is not possible. For example, the address of a long absent parent may be unobtainable. In such a situation, the court, upon proof that diligent efforts have failed to achieve the completion of personal service ... or service by mail ... , may authorize an alternative method of service." (*182 C.A.3d 786, 787*.)

(b) Notice to the parents or proof showing why it could not be made was necessary to give the judge jurisdiction to issue the order appointing a guardian. (*182 C.A.3d 787*, citing *In re Dahnke* (1923) 64 C.A. 555, 559, 222 P. 381.) Because service of the notice was never completed, and no explanation was made as to the impossibility of giving notice, the judge lacked jurisdiction to issue the order. (*182 C.A.3d 787*.) (See 2 Cal. Proc. (4th), *Jurisdiction*, §272.)

(4) *Mailed Notice*. Notice by mail must be sent to the spouse and relatives named in the petition, "except that if the petition is for the appointment of a guardian of the estate only the court may dispense with the giving of notice to any one or more or all of the relatives." Notice must also be mailed to the person having care of the proposed ward if other than the person having legal custody. (*Prob.C. 1511(c)*.) Mailed notice is appropriate whenever notice is required to be given to the Director of Mental Health or the Director of Developmental Services under *Prob.C. 1461* (supra, §911), the Director of Social Services under *Prob.C. 1542* (infra, §923), or the Veterans Administration under *Prob.C. 1461.5* (supra, §913). (*Prob.C. 1511(d), (e)*.)

(5) *Proof of Notice or Excuse*. Before the guardian is appointed, proof must be made that each person entitled to notice either (a) has been given the required notice; or (b) has not been given notice "because the person cannot with reasonable diligence be given the notice or because the giving of notice to that person would be contrary to the interest of justice." (*Prob.C. 1511(h)*.) (See infra, §921.)

(6) *Judicial Council Forms*. The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-020 [Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(MA) [Attachment to Notice of Hearing Proof of Service by Mail (Probate--Decedents' Estates and Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(P) [Proof of Personal Service of Notice of Hearing (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(PA) [Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships)].

Judicial Council Form No. GC-021 [Order Dispensing With Notice--Guardianship or Conservatorship].

Judicial Council Form No. GC-022 [Order Prescribing Notice].

West's Key Number Digest, Guardian and Ward k.3

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Time for Notice*. See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §52 et seq. (3) *Manner of Service*. No jurisdiction without notice:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §281.

(6) *Judicial Council Forms*. An additional form has been adopted:

Form No. GC-510 [What is "Proof of Service" in a Guardianship? (Probate--Conservatorships and Guardianships)].



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2. When Notice Is Not Required.

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[§ 921] When Notice Is Not Required.

(1) *Persons Not Entitled to Notice Unless Court Orders Notice.* Unless the court orders otherwise, notice need not be given (a) to parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agency, or (b) to parents of a proposed ward who has been judicially declared free from parental custody and control. (*Prob.C. 1511(f).*)

(2) *Notice Excused by Court Order.* The court may order that notice need not be given if the person cannot "with reasonable diligence be given the notice" or if giving notice would be "contrary to the interest of justice." (*Prob.C. 1511(g).*) Notice might be contrary to the interest of justice, e.g., "if the parents or relatives of the proposed ward were in a hostile country ... and the giving of the notice might be dangerous to them or where a mother had abandoned the proposed ward, remarried, established a new family, and indicated in writing that she wanted to receive no further communications concerning her child because she was concealing its existence from her new family." (Legislative Com. Comment.)

The Judicial Council has approved a form for the order. (See Judicial Council Form No. GC-021 [Order Dispensing With Notice].)

SUPPLEMENT: [This section is current through the latest supplement]



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[§ 922] Investigation and Report.

SUPPLEMENT: [This section is current through the latest supplement]

(8) *(New) Substance Abuse Testing.* In a guardianship proceeding under the Probate Code, the court may, in specified circumstances, order a person seeking custody or visitation of the child to undergo drug and alcohol testing. (*Family C. 3041.5*, as amended in 2005; see 10 *Summary* (10th), *Parent and Child*, §199.)



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[§ 922] Investigation and Report.

(1) *Investigation and Report Authorized.* Unless waived by the court, a court investigator, probation officer, or domestic relations investigator may make an investigation and file a report and recommendation concerning each proposed guardianship. Where the proposed guardian is a relative, the investigation must be made by a court investigator. Where the proposed guardian is a nonrelative, the investigation must be made by the county agency designated to investigate potential dependency. (*Prob.C. 1513(a).*) (See *Prob.C. 1513(g)* [defining "relative" for this purpose].) *Prob.C. 1513* is inapplicable to guardianships resulting from a permanency plan for a dependent child (see 10 *Summary* (10th), *Parent and Child*, §680 et seq.). (*Prob.C. 1513(f).*) Additional requirements apply to a petition for guardianship of the person filed by a nonrelative. (See *Prob.C. 1543*, *infra*, §923.)

(2) *Contents of Report.* The report for a guardianship of the person must include, but need not be limited to, an investigation and discussion of all of the following:

(a) "A social history of the guardian." (*Prob.C. 1513(a)(1).*)

(b) "A social history of the proposed ward, including, to the extent feasible, an assessment of any identified developmental, emotional, psychological, or educational needs of the proposed ward and the capability of the petitioner to meet those needs." (*Prob.C. 1513(a)(2).*)

(c) "The relationship of the proposed ward to the guardian, including the duration and character of the relationship, where applicable, the circumstances whereby physical custody of the proposed ward was acquired by the guardian, and a statement of the proposed ward's attitude concerning the proposed guardianship, unless the statement of the attitude is affected by the proposed ward's developmental, physical, or emotional condition." (*Prob.C. 1513(a)(3).*)

(d) "The anticipated duration of the guardianship and the plans of both natural parents and the proposed guardian for the stable and permanent home for the child. The court may waive this requirement for cases involving relative guardians." (*Prob.C. 1513(a)(4).*)

(3) *Access to Records.* For purposes of the report, the investigator is entitled to access to the proposed ward's

school, probation, and public and private social service records. The investigator is also entitled to a written or oral summary of medical and psychological records prepared by the physician, psychologist, or psychiatrist who made or maintains the records, who must be available to clarify information regarding those records. (*Prob.C. 1513(e)*.) (See 24 *Pacific L. J.* 603.) (On access to family court records, see *Prob.C. 1514.5*.)

(4) *Report Is Confidential*. The report is confidential and may only be made available to persons who have been served in the proceedings or their attorneys. The clerk of the court must provide for the limitation of the report exclusively to persons entitled to its receipt. (*Prob.C. 1513(d)*.) (See *Tracy A. v. Superior Court* (2004) 117 C.A.4th 1309, 1317, 1318, 12 C.R.3d 684 [probate court practice of denying litigants and their lawyers copy of report or opportunity to make copy and allowing them to see report only on day of hearing was improper; in guardianship proceeding brought by grandparents, child's mother and her lawyer were entitled to receive or make copy of report at "sufficient time before any hearing to permit proper preparation"].)

(5) *Court's Consideration of Report*. The report must be read and considered by the court prior to ruling on the petition for guardianship, and the report must be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. (*Prob.C. 1513(b)*.)

(6) *Referral to County Agency*. If the investigation finds that any party to the proposed guardianship alleges that the minor's parent is unfit, as defined by Welf.C. 300 (see 10 *Summary* (10th), *Parent and Child*, §538 et seq.), the case must be referred to the county agency designated to investigate potential dependencies. Guardianship proceedings must not be completed until the investigation required by Welf.C. 328 and 329 (see 10 *Summary* (10th), *Parent and Child*, §561) is completed and a report is provided to the court in which the guardianship proceeding is pending. (*Prob.C. 1513(c)*.)

(7) *Assessment of Costs of Investigation*. *Prob.C. 1513.1* governs the costs of investigation:

(a) Each court or county assesses the parent or other person charged with the support and maintenance of the ward or proposed ward, and the guardian, proposed guardian, or estate of the ward or proposed ward for court and county expenses incurred for investigation or review by the court investigator, probation officer, or domestic relations investigator. (*Prob.C. 1513.1(a)*.)

(b) The court orders reimbursement to the court or county in the amount of the assessment, unless all or part of the assessment would impose a hardship on the ward or the ward's estate. A county may waive all or part of an assessment against a guardianship on the basis of hardship. There is a rebuttable presumption that an assessment would impose a hardship if the ward is receiving Medi-Cal benefits. (*Prob.C. 1513.1(a)*.)

(c) Any amount chargeable as state mandated local costs incurred by the county for the cost of investigation or review is reduced by any assessment collected by the county. (*Prob.C. 1513.1(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(8) *(New) Substance Abuse Testing*. In a guardianship proceeding under the Probate Code, the court may, in specified circumstances, order a person seeking custody or visitation of the child to undergo drug and alcohol testing. (*Family C. 3041.5*, as amended in 2008; see 10 *Summary* (10th), *Parent and Child*, §199.)



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e. Additional Requirements for Nonrelative Guardianship.

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[§ 923] Additional Requirements for Nonrelative Guardianship.

(1) *Scope of Additional Requirements.* Requirements for establishing a nonrelative guardianship are set forth in *Prob.C. 1540* et seq. These provisions do not apply where (a) the petition is for a guardianship of the estate only; (b) the appointed guardian is either the Director of Developmental Services, the director of the county social service agency, or the public guardian; or (c) the guardianship results from a permanency plan for a dependent child (see 10 *Summary* (10th), *Parent and Child*, §680 et seq.). (*Prob.C. 1540.*)

(2) *Additional Contents of Petition.* In addition to the general requirements (see *supra*, §919), a guardianship petition must contain: (a) a statement that, on a request for information from an agency investigating the suitability of a proposed guardian under *Prob.C. 1543*, the proposed guardian will promptly submit it; (b) a disclosure of any petition for adoption of the minor; and (c) a statement whether the proposed guardian's home is licensed as a foster family home. (*Prob.C. 1541.*)

(3) *Notice to Director of Social Services and to Local Agency.* In each case involving a petition for guardianship of the person, the petitioner must mail a notice of the hearing and a copy of the petition, at least 15 days prior to the hearing, to the Sacramento office of the Director of Social Services and to the local agency designated by the board of supervisors to investigate guardianships for the court. (*Prob.C. 1542.*)

(4) *Report.* If the guardianship petition states that an adoption petition has been filed, a report on the proposed guardian's suitability must be filed with the court by the agency investigating the adoption. In any other case, the county social service agency must file a report of the same kind required for an applicant for foster home family licensure. (*Prob.C. 1543(a).*) The report is confidential. It may only be made available to persons who have been served and persons who have appeared and their attorneys; and it may be received in evidence only on stipulation of counsel or on consent of any person present who is not represented by counsel. (*Prob.C. 1543(b).*)

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f. Factors Considered in Appointment.

14 Witkin Sum. Cal. Law Wills § 924

[§ 924] Factors Considered in Appointment.

(1) *In General: Necessity or Convenience.* On hearing a petition for appointment, the court may appoint a guardian of the person or estate or both "if it appears necessary or convenient." (*Prob.C. 1514(a).*) (On degree of proof, see *infra*, §925; on consideration of religion, see *Guardianship of Walsh (1950) 100 C.A.2d 194, 197, 223 P.2d 322; Guardianship of Minnicar (1956) 141 C.A.2d 703, 709, 297 P.2d 105; 22 A.L.R.2d 696* [religious affiliation as factor in appointing or removing guardian of child].)

(2) *Guardian of Person: Custody Statutes Applicable.* In appointing a guardian of the person, the court is governed by the custody statutes, *Family C. 3020 et seq. and 3040 et seq.* (see 10 *Summary (10th), Parent and Child*, §194 et seq.). (*Prob.C. 1514(b).*) If a person is to be appointed as a guardian of both the person and the estate, the appointment is governed by *Prob.C. 1514(b).* (Law Rev. Com. Comment.) (For decisions under former law applying custody statutes to guardianship contest involving parent, see *infra*, §928.)

(3) *Guardian of Estate: Best Interests and Preference of Ward.* Subject to *Prob.C. 1514(c)* and (d) (*infra*, §926), the following provisions apply to the appointment of a guardian of the estate:

(a) "The court is to be guided by what appears to be in the best interest of the proposed ward, taking into account the proposed guardian's ability to manage and to preserve the estate as well as the proposed guardian's concern for and interest in the welfare of the proposed ward." (*Prob.C. 1514(e)(1).*) (On best interests of ward under former statute, see *Guardianship of Walsh, supra; Guardianship of Aviles (1955) 133 C.A.2d 277, 281, 284 P.2d 176; Guardianship of Brown (1962) 199 C.A.2d 262, 264, 18 C.R. 613.*)

(b) "If the proposed ward is of sufficient age to form an intelligent preference as to the person to be appointed as guardian, the court shall give consideration to that preference in determining the person to be so appointed." (*Prob.C. 1514(e)(2).*) (See 85 *A.L.R.2d 921* [right to select own guardian].)

The Law Revision Commission Comment makes the following observations:

(1) *Prob.C. 1514(e)* "provides the standards for appointing a guardian of the general estate of a minor. A guardian

of the general estate may coexist with a guardian as to particular property nominated under Section 1501, with the latter controlling the property received from the person making the nomination. See Section 2109. However, no new guardian of the general estate may be appointed when an existing guardian of the general estate is serving unless the existing guardian is removed or the appointment is vacated."

(2) If a guardian of the estate is nominated under *Prob.C. 1500* or *1501* (see *supra*, §917), "the provisions of subdivision (e) are subject to subdivisions (c) and (d), so that the court must appoint the nominee unless the court determines that the nominee is unsuitable. In such a case, the court is not bound by the requirements of subdivision (e). The court may thus disregard the minor's preference, although nothing precludes the court from taking it into account in determining whether the nominee is unsuitable." (On minor's preference and nomination under former statutes, see *In re Kirkman* (1914) 168 C. 688, 689, 144 P. 745; *Guardianship of Meiklejohn* (1915) 171 C. 247, 248, 152 P. 734; *Guardianship of De Brath* (1937) 18 C.A.2d 697, 706, 64 P.2d 968; *Guardianship of MacLean* (1952) 111 C.A.2d 144, 145, 244 P.2d 63; *Guardianship of Kentera* (1953) 41 C.2d 639, 262 P.2d 317; *Guardianship of Kostors* (1959) 167 C.A.2d 389, 390, 334 P.2d 305; *Guardianship of Rose* (1959) 171 C.A.2d 677, 686, 340 P.2d 1045; on best interests of child under former statutes, see *Guardianship of Walsh* (1950) 100 C.A.2d 194, 197, 223 P.2d 322; *Guardianship of Aviles* (1955) 133 C.A.2d 277, 281, 284 P.2d 176; *Guardianship of Brown* (1962) 199 C.A.2d 262, 264, 18 C.R. 613.)

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[§ 925] Degree of Proof.

Cynthia D. v. Superior Court (1993) 5 C.4th 242, 19 C.R.2d 698, 851 P.2d 1307, 10 Summary (10th), *Parent and Child*, §691, held that, in dependency proceedings, a preponderance of the evidence is sufficient to support termination of parental custody. *Guardianship of Diana B.* (1994) 30 C.A.4th 1766, 1773, 36 C.R.2d 447, relied on *Cynthia D.* in holding that the grant of a guardianship petition may be based on findings supported by a preponderance of the evidence rather than clear and convincing evidence, taking into consideration the private interests affected, the risk of error, and the governmental interest at stake.

Guardianship of Diana B. was rejected and proof by clear and convincing evidence was required in *Guardianship of Stephen G.* (1995) 40 C.A.4th 1418, 47 C.R.2d 409. The creation of a guardianship offers fewer protections for parental interests than dependence or termination proceedings, which include detailed substantive standards and procedural safeguards like appointed counsel and neutral assessment by a state officer. (40 C.A.4th 1429, 1430.) "[A] trial court may not grant a petition for guardianship, over the objection of a natural parent, in the absence of clear and convincing evidence that an award of custody to the parent would be detrimental to the child, and that an award to the prospective guardian is in the child's best interest." (40 C.A.4th 1432.) (See *Guardianship of Jenna G.* (1998) 63 C.A.4th 387, 394, 74 C.R.2d 47 [rejecting *Diana B.* and following *Stephen G.*].)

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h. Determination and Order.

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[§ 926] Determination and Order.

(1) *Preference in Appointment.* With respect to a guardianship of the estate, the court must appoint a guardian nominated under *Prob.C. 1500* unless the court determines that the nominee is unsuitable. (*Prob.C. 1514(c)*.) With respect to a guardian for particular property, the court must appoint a guardian nominated under *Prob.C. 1501* unless the court determines that the nominee is unsuitable. If the person so nominated is appointed only as to particular property, the letters of guardianship must so indicate. (*Prob.C. 1514(d)*.) (On nomination, see *supra*, §917; on appointment of nonprofit charitable corporation, see *infra*, §966.)

(2) *Order of Appointment and Letters.* The court, on a proper showing, appoints the guardian. (*Prob.C. 1514(a)*; see *supra*, §924.) The Judicial Council has approved a form for the order. (See Judicial Council Form No. GC-240 [Order Appointing Guardian of Minor].) In its discretion, the court may appoint one guardian for several wards. (*Prob.C. 2106(a)*; on request in petition, see *Prob.C. 2106(b)*.) (On appointment of multiple guardians for one ward, see *infra*, §963; on oath, letters, and bond, see *infra*, §982 et seq.)

(3) *Duties of Guardian.* Judicial Council Form No. GC-248 [Duties of Guardian (Probate)] sets forth the duties of the guardian of the person. Before the court issues letters, the guardian must execute and file an acknowledgement of receipt of the form. (C.R.C., Rule 7.1002.)

(4) *Custody Determination.* In probate guardianship proceedings, the court must determine what custody placement is in the best interests of the child, but it lacks authority to order reunification services, which are reserved to dependency proceedings. (*Guardianship of Kaylee J. (1997) 55 C.A.4th 1425, 1432, 64 C.R.2d 662.*) Attorneys' fees and costs may be awarded when a guardianship proceeding is consolidated with a family law proceeding, and the issue to be resolved is custody of a minor child of the marriage. (*Paduano v. Paduano (1989) 215 C.A.3d 346, 352, 263 C.R. 589* [\$ 10,000 award for fees and costs was not abuse of discretion].)

(5) *Freedom From Parental Control.* In specified circumstances, a proceeding to have a child declared free from the custody and control of one or both parents may be brought in a guardianship proceeding. (See *Prob.C. 1516.5*.)

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(5) *Freedom From Parental Control*. *Prob.C. 1516.5* authorizes a proceeding to free a child from parental custody and control in a probate guardianship proceeding where one or both parents do not have legal custody, the child has been in the physical custody of the guardian for at least 2 years, and the court finds that the child would benefit from being adopted by the guardian. In making that determination, the court must consider "all factors relating to the best interest of the child." (*Prob.C. 1516.5(a)*.) The constitutionality of the statute was upheld in *Guardianship of Ann S.* (2009) 45 C.4th 1110, 90 C.R.3d 701, 202 P.3d 1089. Both parents of a child consented to a permanent guardianship, without visitation by the child's mother, with the father's sister and her husband as guardians; the father consented to adoption. Over 2 years later, the guardians petitioned to terminate the mother's parental rights and adopt the child. The mother resisted the petition, contending that *Prob.C. 1516.5* unconstitutionally interferes with the substantive due process rights of parents to the care, custody, and control of their children. *Held*, the statute is not facially unconstitutional.

(a) The mother contended that the statute is facially unconstitutional because it allows the termination of parental rights based only on the child's best interest, and that due process requires a showing that the parent is presently unfit and a showing that terminating parental rights is the least detrimental alternative for the child. (45 C.4th 1127.) However, *Quilloin v. Walcott* (1978) 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511, 7 Summary (10th), *Constitutional Law*, §650, establishes the principle that a finding of parental unfitness is not always constitutionally required when parental rights are terminated and that "the best interest of the child is a constitutionally permissible basis for terminating parental rights in some circumstances." (45 C.4th 1128, 1129.)

(b) Due process requires a showing of parental unfitness before a termination of parental rights "in order to protect the integrity of a natural family, i.e., one in which there is a custodial relationship between parent and child." (45 C.4th 1129.) However, *Prob.C. 1516.5* has no application to custodial parents. It applies only to parents whose rights have been suspended for an extended period under a probate guardianship, i.e., to parents who have surrendered custody to the guardian and have not exercised parental care or custody for at least 2 years. (45 C.4th 1130, 1131.)

(c) The mother relied on a number of dependency decisions to support her claim that a finding of parental unfitness is constitutionally required in a probate guardianship proceeding under *Prob.C. 1516.5*. But these authorities do not support that claim. Under the dependency cases, a finding of parental unfitness is not necessarily required at the point where parental rights are terminated. Unfitness can be established at an earlier stage, and parental rights terminated later, in the best interest of the child. (45 C.4th 1134.)

(d) The holding here is narrow. Because due process does not require a finding of parental unfitness at a *Prob.C. 1516.5* hearing, the statute is not unconstitutional on its face, but the statute may be open to a constitutional challenge as applied to particular parents. (45 C.4th 1132.) Further, whether the guardianship statutes provide sufficient protection to parental rights in advance of a *Prob.C. 1516.5* hearing is not before the court and is beyond the scope of this case. (45 C.4th 1135.)



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1. Nature of Problem.

14 Witkin Sum. Cal. Law Wills § 927

[§ 927] Nature of Problem.

A parent ordinarily has a right to the custody of his or her child, which could seem to be superior to and more desirable than the court-supervised right of guardianship. Because there are several methods of enforcing the parental custody right (see 10 *Summary* (10th), *Parent and Child*, §358 et seq.), a question arises why, and under what circumstances, would a parent seek appointment as the guardian of his or her own child. Several situations may be distinguished:

(1) *Where Custody Proceeding Is Not Available.* There may be situations in which a foreign divorce decree does not adjudicate custody. The parties no longer can bring the custody action available to married persons (see 10 *Summary* (10th), *Parent and Child*, §363) and instead resort to guardianship proceedings.

(2) *Where Custody Proceeding Is Available.* In *Guardianship of Denny* (1950) 97 C.A.2d 763, 218 P.2d 792, two concurring justices had this to say of the choice of remedies:

(a) "The legal relationship of guardian and ward is not in all respects identical with that of parent and child even when the parent is entitled to the child's exclusive custody. The other parent can always secure an order changing custody upon a showing of changed circumstances ... , while a guardian, once appointed, can only be removed for the reasons specified in ... the Probate Code and changed circumstances is not one of the grounds there enumerated." (97 C.A.2d 765.)

(b) "Because a guardianship creates new and different legal rights a petition for guardianship does not seem to us to be the most appropriate method by which to enforce one parent's present right to custody against the other parent. Habeas corpus or a motion for an order pendente lite in the pending custody proceedings would restore the custody to the father without creating a new and different legal relationship. We are satisfied that the probate court's discretion in determining whether the appointment of a guardian is 'necessary or convenient' is not exclusively controlled by the single fact that a petitioning parent has the legal right to the minor's custody." (97 C.A.2d 765.)

(3) *Between Parents and Nonparents.* It would seem that in almost any situation in which a parent would be

entitled to letters of guardianship as against a stranger, the parent would equally be entitled to custody, and election of the lesser remedy would serve no useful purpose. (See *Guardianship of Rutherford* (1961) 188 C.A.2d 202, 209, 10 C.R. 270; *Guardianship of Rose* (1959) 171 C.A.2d 677, 679, 340 P.2d 1045.)

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2. Illustrations.

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[§ 928] Illustrations.

(1) *Appointment of Parent Under Unfitness Rule.* The original statutes governing guardianship contained conflicting provisions on the custody issue when the contestants were a parent and a stranger or relative. Former C.C. 246 made the "best interest of the child" the controlling consideration; former C.C.P. 1751 gave the parent a preferential right. The cases resolved the conflict by holding that the natural parent had a prior right unless affirmatively found unfit; that present and not past fitness was the controlling consideration; and that the mere fact that another may offer better surroundings, training, and education was insufficient to justify taking custody from a parent who was a fit person. (See *Guardianship of De Brath* (1937) 18 C.A.2d 697, 706, 64 P.2d 968; *Guardianship of De Ruff* (1940) 38 C.A.2d 529, 530, 101 P.2d 521; *Guardianship of McCoy* (1941) 46 C.A.2d 494, 497, 116 P.2d 103; *Guardianship of Case* (1943) 57 C.A.2d 844, 848, 135 P.2d 681; *Guardianship of Kerns* (1946) 74 C.A.2d 862, 867, 169 P.2d 975 [failure to support due to poverty or misfortune did not constitute abandonment]; *Guardianship of Romine* (1949) 91 C.A.2d 389, 392, 205 P.2d 733 [same]; *Guardianship of Sloat* (1949) 92 C.A.2d 296, 297, 206 P.2d 862; *In re Harmon* (1953) 121 C.A.2d 646, 649, 263 P.2d 649; *Guardianship of Willis* (1954) 123 C.A.2d 446, 451, 266 P.2d 944; *Guardianship of Morris* (1951) 107 C.A.2d 758, 763, 237 P.2d 989; *Guardianship of Smith* (1954) 42 C.2d 91, 92, 265 P.2d 888; *Guardianship of Joaquin* (1959) 168 C.A.2d 99, 101, 335 P.2d 507 [father's parental right upheld even though he had no home and intended to place child in home of another son]; *Guardianship of Kostors* (1959) 167 C.A.2d 389, 390, 334 P.2d 305 [mother's right upheld although child was ward of juvenile court]; *Guardianship of Turk* (1961) 194 C.A.2d 736, 740, 15 C.R. 256; 28 So. Cal. L. Rev. 96; 42 Cal. L. Rev. 514.)

The statutory conflict was eliminated by the adoption of former Prob.C. 1406 and 1407, using the "best interest" test and giving preference to the parent only where the persons were "equally entitled in other respects." However, the view persisted that in custody and guardianship proceedings a natural parent not affirmatively found unfit had a right to appointment. (See *Roche v. Roche* (1944) 25 C.2d 141, 143, 152 P.2d 999; 10 Summary (10th), *Parent and Child*, §216.)

(2) *Appointment of Nonparent Under Unfitness Rule.* Even under the rule requiring a showing of actual unfitness of the parent, a number of cases upheld the award to relatives or strangers. The question of fitness was one of fact, and there were no statutory or judicial criteria to apply. "[M]any things, including such matters as the parent's character, his

disposition, his emotional stability, his neglect or indifference toward the child, his trustworthiness, and his acts and conduct, may have a bearing on his present fitness." (*Guardianship of Wisdom* (1956) 146 C.A.2d 635, 639, 304 P.2d 221 [father emotionally unstable and unsuccessful in three marriages, neglected child until mother died leaving estate]; see *Guardianship of Casad* (1951) 106 C.A.2d 134, 136, 234 P.2d 647 [mother had illicit love affair, deserted children, showed no remorse]; *Guardianship of Marshall* (1954) 124 C.A.2d 807, 810, 269 P.2d 160 [mother wilfully abandoned child]; *Guardianship of Minnicar* (1956) 141 C.A.2d 703, 709, 297 P.2d 105 [mother convicted of felony showed no interest in seeing child when on parole, was willing to surrender child for adoption]; *Guardianship of Smith* (1956) 147 C.A.2d 686, 306 P.2d 86 [though acquitted of murder, mother admittedly was in some sort of association with her husband's confessed slayer, and had bad character habits; appointment of aunt upheld]; *Guardianship of Newell* (1960) 187 C.A.2d 425, 430, 10 C.R. 29 [appointment of grandfather affirmed; mother gave up illegitimate child 3 months after its birth, did not claim child for 7 years, visited only infrequently; mother had several unsuccessful marriages, many extramarital affairs, and was occasionally intoxicated].)

(3) *Appointment of Nonparent Under Custody Statutes.* *Guardianship of Marino* (1973) 30 C.A.3d 952, 106 C.R. 655, held that the best interests test applicable in custody proceedings (former C.C. 4600; now *Family C. 3020* et seq.), applied to guardianship as well as other custody proceedings, and that the unfitness test had been abrogated. (30 C.A.3d 958.) In *Marino*, the child's mother died 2 weeks after he was born. His aunt and uncle took him into their home and raised him as their own son. His father saw little of the child until he was 6; thereafter he began to visit him, and on remarriage, insisted that the child come into his new home. The boy objected, ran away several times, and constantly stated his preference for the home of his aunt and uncle. When the boy was 8 years of age the aunt and uncle petitioned for guardianship. The judge, relying in part on a psychiatrist's report that the father's interest was possessory rather than parental, made the award. *Held*, affirmed. (30 C.A.3d 961.) (See *Guardianship of Pankey* (1974) 38 C.A.3d 919, 934, 935, 113 C.R. 858 [award to maternal aunts rather than father, where defaulting father did not assert right to custody].) (On custody determinations, see 10 *Summary* (10th), *Parent and Child*, §218 et seq.)

In *Guardianship of Phillip B.* (1983) 139 C.A.3d 407, 419, 188 C.R. 781, Phillip, a victim of Down's Syndrome, was institutionalized by his parents, and spent years in various facilities. Petitioners, Mr. and Mrs. H, became acquainted with the child through their efforts as volunteers in the institution in which he had been placed, and a close relationship developed between them and the child. After various unsuccessful efforts to improve the conditions of his care and treatment, they petitioned for guardianship of Phillip, then 14 years of age. The trial judge granted the petition. *Held*, affirmed. The trial judge found that an award of custody to the parents would be harmful to Phillip in the light of the "psychological" or "de facto" parental relationship established between him and Mr. and Mrs. H. This kind of relationship has long been recognized in the fields of law and psychology. (139 C.A.3d 419, 420.) The fact of detriment cannot be proved solely by evidence that the biological parent has elected to institutionalize a handicapped child, or that nonparents are able and willing to offer the child the advantages of a home. The detriment here "was due not to appellants' choice to institutionalize but their calculated decision to remain emotionally and physically detached--abdication of the conventional role of competent decisionmaker in times of demonstrated need--thus effectively depriving him of any of the substantial benefits of a true parental relationship." (139 C.A.3d 424.) (See *Guardianship of Olivia J.* (2000) 84 C.A.4th 1146, 1157, 101 C.R.2d 364, 10 *Summary* (10th), *Parent and Child*, §220 [guardianship petition by former lesbian partner of child's natural mother should not have been dismissed; allegation that parental custody was "detrimental to the child" was not insufficient as matter of law, even though it did not allege "serious abuse, neglect or abandonment by the parent"].)

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[§ 929] Annual Status Report.

(1) *Requirement.* To the extent resources are available, the court must implement procedures to ensure that every guardian files an annual status report. (*Prob.C. 1513.2(a).*) Each guardian required to file a status report must do so no later than 1 month after the annual anniversary of the date of his or her appointment. Coguardians may file status reports jointly. (C.R.C., Rule 7.1003(a).)

(2) *Content and Form.* The Judicial Council must develop a form for the status report including, at a minimum, the guardian's present address, the name and birth date of the child, the name of the child's school, and, if the child is not in the guardian's home, why the child was moved and the name, address, telephone number, and relationship of the person or persons with whom the child resides. (*Prob.C. 1513.2(b).*) (See Judicial Council Form No. GC-251 [Confidential Guardianship Status Report].)

(3) *Notice.* Not less than 1 month before the report is due, the clerk mails a notice and a blank form to the guardian. (*Prob.C. 1513.2(a).*) The clerk determines the annual due date and enters the date on the form to be mailed to the guardian. (C.R.C., Rule 7.1003(b).)

(4) *Report Is Confidential.* The report is confidential and may only be made available to those who have been served and their attorneys. (*Prob.C. 1513.2(c).*)

(5) *Enforcement.* If the report is not submitted or more information is needed, the court must attempt to obtain the information from the guardian or other sources. If the court is unable to do so within 30 days after the due date, it must either order the guardian to be available to an investigator or to show cause why the guardian should not be removed. (*Prob.C. 1513.2(a).*)

(6) *Criminal Penalty.* A guardian who wilfully submits material information known to be false is guilty of a misdemeanor. (*Prob.C. 1513.2(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Termination of Guardianship.

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[§ 930] Termination of Guardianship.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Court Order.* On order for continued visitation between guardian and ward after termination of guardianship, see C.R.C., Rule 7.1008, adopted in 2006; on transfer of custody or visitation order to family court on termination of probate guardianship, see C.R.C., Rule 5.475, adopted in 2006.

(3) *Judicial Council Forms.* Judicial Council Form No. GC-255 has been renamed: Petition for Termination of Guardianship (Probate--Guardianships and Conservatorships); Judicial Council Form No. GC-260 has been renamed: Order Terminating Guardianship (Probate--Guardianships and Conservatorships). See Judicial Council Form No. GC-395 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships.)].

(4) *Burden of Proof.* In *Guardianship of L.V. (2006) 136 C.A.4th 481, 38 C.R.3d 894*, the aunt and uncle of a minor had been appointed her guardians. Eighteen months later, her parents petitioned to terminate the guardianship and regain custody. *Held*, denial of petition affirmed. Termination would not be in the minor's best interest.

(a) *Scope of review.* Under *Prob.C. 1601*, the decision whether to terminate a guardianship is committed to the sound discretion of the trial court, and if the trial court applies the appropriate legal standard, its determination is subject to deferential review on appeal, not de novo review. Thus, the trial court's decision will be affirmed if supported by substantial evidence. (*136 C.A.4th 488.*)

(b) *Best interest of minor.* Under *Prob.C. 1601*, the sole criterion for terminating a guardianship is the best interest of the minor. Here, there is substantial evidence that returning the minor to the custody of her parents will not be in her best interest. (*136 C.A.4th 491.*) The trial court was not required to terminate the guardianship even if, as the parents contend, they could provide adequate food, clothing, shelter, and guidance. The fundamental right of parents to make decisions concerning the care, custody, and control of their children applies to custodial parents. (*136 C.A.4th 492, 493.*) Here, the parents relinquished their day-to-day parental relationship when the guardianship was created and any constitutional protection of that right no longer applies to them. (*136 C.A.4th 495.*)



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4. Termination of Guardianship.

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[§ 930] Termination of Guardianship.

(1) *Majority, Adoption, Emancipation, or Death of Ward.* A guardianship of the person terminates on the adoption, emancipation (under *Family C. 7002*), majority, or death of the ward. A guardianship of the estate terminates on the majority or death of the ward. (*Prob.C. 1600.*) (Cf. *Unif.Prob.C.*, §5-210; see generally *39 Am.Jur.2d (1999 ed.)*, *Guardian and Ward* §80 et seq.; *Cal. Civil Practice*, 4 Probate and Trust Proceedings, §16:16 et seq.; *C.E.B.*, *Guardianship Practice*, §16.1 et seq.; *13 Am.Jur. P.P. Forms (1999 ed.)*, *Guardian and Ward*, §179 et seq.; *9A Am.Jur. Legal Forms 2d (2002 ed.)*, *Guardian and Ward*, §133:45 et seq.) (On continuing jurisdiction of court despite termination of the guardianship, see *Prob.C. 2630*, *infra*, §1042; on petition for appointment of conservator if married minor is in need of protective supervision of the person, see *Prob.C. 1800.3* and *1820(b)*, *infra*, §§933, 937.)

When a ward attains majority, becomes emancipated, is adopted, or dies, a guardianship of the person terminates by operation of law and a petition for termination is not required. (*C.R.C.*, Rule 7.1004(b).)

(2) *Court Order.* On petition of the guardian, a parent, or the ward, the court may order termination of the guardianship if it determines that termination is in the ward's best interest. Notice of the hearing on the petition must be given pursuant to *Prob.C. 1460* et seq. (*supra*, §910 et seq.). (*Prob.C. 1601.*) (See *C.R.C.*, Rule 7.1004(a) [guardianship of person or estate may terminate by operation of law or may be terminated by court order in ward's best interest].) (On order for continued visitation between guardian and ward after termination of guardianship, see *Prob.C. 1602.*)

(3) *Judicial Council Forms.* The Judicial Council has adopted forms for termination. (See Judicial Council Form No. GC-255 [Petition for Termination of Guardianship], Judicial Council Form No. GC-260 [Order Terminating Guardianship].)

(4) *Burden of Proof.* In *Guardianship of Simpson (1998)* 67 *C.A.4th* 914, 79 *C.R.2d* 389, S was jailed after being charged with the murder of his former wife and her friend, and a guardianship was established for his children. After his acquittal on the murder charge, S requested termination of the guardianship. In ordering termination, the trial court refused to hear evidence involving the murder. *Held*, reversed and remanded.

(a) The trial court erroneously placed the burden on the guardians to prove by clear and convincing evidence that it would be detrimental to the children to be returned to S. Instead, the trial court should have examined the totality of

evidence bearing on S's fitness, with the burden on him to show sufficient overall fitness to justify termination of the guardianship. Moreover, in using *clear and convincing evidence*, rather than a *preponderance of the evidence*, as the standard of proof, the trial court relied on juvenile dependency law (applying *Family C. 3401*, rather than *Prob.C. 1601*), where the higher standard is needed to justify an involuntary deprivation of custody. However, where the parent has voluntarily established a relationship that need not move toward the absolute termination of all parental rights, the concerns that mandate the clear and convincing standard in the juvenile dependency context do not apply. (67 C.A.4th 930, 934.)

(b) The doctrines of res judicata and collateral estoppel are not applicable here. The standard of proof in a criminal trial is *beyond a reasonable doubt*. In a guardianship termination proceeding, it is a *preponderance of the evidence*. Hence, where, as here, the standard of proof is higher in the first case than in the second case, an issue litigated in the first may be relitigated in the second. (67 C.A.4th 934.)

(c) If S committed the murder, that information was highly relevant to whether the children should be returned to him. That crime showed great violence and rage, and it is not necessary to conclude that S committed the murder to say that if he did, that fact is relevant to show a propensity toward violence on his part. Indeed, the question whether one parent has actually murdered the other is about as relevant as it is possible to imagine in any case involving whether the surviving parent should be allowed any form of child custody. Moreover, aside from bearing on S's overall moral fitness, the murder evidence, *from the children's point of view*, was relevant on such matters as how they had been affected by the publicity, who might better protect them from adverse media attention, and how best to cope with the world-wide media attention that the case had already received. The reasoning of *In re James M.* (1976) 65 C.A.3d 254, 135 C.R. 222, 10 Summary (10th), *Parent and Child*, §200, is not inconsistent, because, although that case stated that the killing of the children's mother did not automatically render the father unfit to retain his parental relationship with the children, it illustrated the process of considering the totality of the circumstances before making a decision. (67 C.A.4th 925, 934.)

(d) The trial court did not consider the murder issue, believing that the guardians had waived it. However, the record contained no waiver, and the question whether S committed the murders was raised numerous times. Perhaps the murder issue could have been more squarely placed on the judge's agenda, but any doubt about whether the guardians had raised the issue should have been resolved in their favor, because the purpose of this or any other proceeding is to arrive at the truth, not to display cleverness and technical adherence to the rules. (67 C.A.4th 929, 935.)

(e) Besides waiver, the trial judge gave undue consumption of time as a reason to avoid considering the murder. However, a trial judge's discretionary authority in the management of evidence does not extend to arbitrarily refusing to consider the most salient issue in the case. Moreover, the trial of a question by a court sitting in equity would be private and would be held in a well-secured courtroom, without a jury. More importantly, because a local court rule allowed for "issue conferences" in all cases, many undisputed issues could be stipulated to. Thus, arriving at the truth would not necessarily involve a reenactment of S's criminal trial. (67 C.A.4th 936.) (See *Guardianship of Kassandra H.* (1998) 64 C.A.4th 1228, 1238, 75 C.R.2d 668 [termination of guardianship on ground that it is "no longer necessary" under former wording of *Prob.C. 1601* required showing of "overall fitness" of natural parent "sufficient to overcome the inherent trauma of removing a successful caregiver"; standard in juvenile dependency proceedings (return to parental custody "would not be detrimental") is not appropriate in voluntary guardianship context].)

(5) *Death, Resignation, or Removal of Guardian.* The relationship of guardian and ward automatically terminates by the death of the guardian; there is no necessity for an order of termination. Hence, the vacancy may be filled without such an order. (*Estate of Mims* (1962) 202 C.A.2d 332, 337, 340, 20 C.R. 667 [construing prior law].) (On removal or resignation of guardian, see *Prob.C. 2650* et seq., *infra*, §1048 et seq.; on appointment of successor guardian, see *Prob.C. 2670*, *infra*, §1051.)

(6) *Account or Report by Guardian of the Estate.* When a guardianship of the estate terminates, either by court order or by operation of law, the guardian must file and the court must approve a final account or report of

administration. (C.R.C., Rule 7.1004(c).) The guardian must serve a copy of the account and the petition for settlement on the minor. If the minor is deceased, the guardian must serve a notice of hearing and a copy of the account and the petition for settlement on the minor's personal representative. If no personal representative has been appointed or qualified, or if the guardian is the personal representative, the guardian must serve the notice of hearing and a copy of the account and the petition for settlement on the persons entitled to succeed to the minor's estate. These requirements are in addition to the notice required by *Prob.C. 1460(b)* (supra, §910), but the court may dispense with service. (C.R.C., Rule 7.1006.) A guardian who resigns or is removed must serve a copy of the final account and the petition for settlement along with the notice of hearing served on the successor guardian under *Prob.C. 1460(b)* (supra, §910), unless the court dispenses with notice. (C.R.C., Rule 7.1005.) (On settlement of accounts, see *Prob.C. 2626, 2627*, infra, §1039.)

West's Key Number Digest, Guardian and Ward k.18, 23, 25-

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Majority, Adoption, Emancipation, or Death of Ward.* See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §74 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §182 et seq. (2) *Court Order.* On order for continued visitation between guardian and ward after termination of guardianship, see C.R.C., Rule 7.1008, adopted in 2006; on transfer of custody or visitation order to family court on termination of probate guardianship, see C.R.C., Rule 5.475, adopted in 2006.

(3) *Judicial Council Forms.* Judicial Council Form No. GC-255 has been renamed: *Petition for Termination of Guardianship (Probate--Guardianships and Conservatorships)*; Judicial Council Form No. GC-260 has been renamed: *Order Terminating Guardianship (Probate--Guardianships and Conservatorships)*. See Judicial Council Form No. GC-395 [*Ex Parte* *Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)*].

(4) *Burden of Proof.* In *Guardianship of L.V.* (2006) 136 *C.A.4th* 481, 38 *C.R.3d* 894, the aunt and uncle of a minor had been appointed her guardians. Eighteen months later, her parents petitioned to terminate the guardianship and regain custody. *Held*, denial of petition affirmed. Termination would not be in the minor's best interest.

(a) *Scope of review.* Under *Prob.C. 1601*, the decision whether to terminate a guardianship is committed to the sound discretion of the trial court, and if the trial court applies the appropriate legal standard, its determination is subject to deferential review on appeal, not de novo review. Thus, the trial court's decision will be affirmed if supported by substantial evidence. (136 *C.A.4th* 488.)

(b) *Best interest of minor.* Under *Prob.C. 1601*, the sole criterion for terminating a guardianship is the best interest of the minor. Here, there is substantial evidence that returning the minor to the custody of her parents will not be in her best interest. (136 *C.A.4th* 491.) The trial court was not required to terminate the guardianship even if, as the parents contend, they could provide adequate food, clothing, shelter, and guidance. The fundamental right of parents to make decisions concerning the care, custody, and control of their children applies to custodial parents. (136 *C.A.4th* 492, 493.) Here, the parents relinquished their day-to-day parental relationship when the guardianship was created and any constitutional protection of that right no longer applies to them. (136 *C.A.4th* 495.)



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5. Vexatious Litigants.

14 Witkin Sum. Cal. Law Wills § 931

[§ 931] Vexatious Litigants.

If a person files a petition for visitation, termination of a guardianship, or instruction to a guardian that is unmeritorious, or "intended to harass or annoy the guardian," and the person has previously filed pleadings in the guardianship proceeding that were unmeritorious, or intended to harass or annoy the guardian, the petition provides grounds for the court to determine that the person is a vexatious litigant. (*Prob.C. 1611.*) (See *Prob.C. 1610* [unwarranted petitions, applications, and motions after guardianship has been established (other than discovery motions) "create an environment that can be harmful to children"]; *Prob.C. 1000* [rules governing vexatious litigants apply to proceedings under the Probate Code]; on vexatious litigants generally, see *C.C.P. 391* et seq., 3 *Cal. Proc.* (4th), *Actions*, §339 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
For comparable statute with respect to conservatorship, see Supp., *infra*, §959A.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §365 et seq.



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D. Conservatorship.

1. Organization and Purpose of Statutes.

14 Witkin Sum. Cal. Law Wills § 932

[§ 932] Organization and Purpose of Statutes.

(1) *Statutory Framework.* Part 3 of Division 4 of the Probate Code (*Prob.C. 1800* et seq.) sets forth provisions specific to conservatorship. (On limited conservatorship for developmentally disabled adults, see *infra*, §1054 et seq.; on conservatorship for gravely disabled persons, see 3 *Cal. Proc.* (4th), *Actions*, §46 et seq.) It has six chapters:

Chapter 1. Establishment of Conservatorship. (See *infra*, §933 et seq.)

Chapter 2. Periodic Review of Conservatorship. (See *infra*, §950.)

Chapter 3. Termination. (See *infra*, §§951, 952.)

Chapter 4. Legal Capacity of Conservatee. (See *infra*, §953 et seq.)

Chapter 5. Disqualification From Voting. (See *infra*, §959.)

Chapter 6. Sterilization. (See *infra*, §§1059, 1060.)

(2) *Statutory Purposes.* The conservatorship statutes are intended to do the following:

(a) "Protect the rights of persons who are placed under conservatorship." (*Prob.C. 1800(a)*.)

(b) "Provide that an assessment of the needs of the person is performed in order to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible." (*Prob.C. 1800(b)*.)

(c) "Provide that the health and psychosocial needs of the proposed conservatee are met." (*Prob.C. 1800(c)*.)

(d) "Provide that community-based services are used to the greatest extent to allow the conservatee to remain as independent and in the least restrictive setting as possible." (*Prob.C. 1800(d)*.)

(e) "Provide that the periodic review of the conservatorship by the court investigator shall consider the best interest of the conservatee." (*Prob.C. 1800(e)*.)

(f) "Ensure that the conservatee's basic needs for physical health, food, clothing, and shelter are met." (*Prob.C. 1800(f).*)

(g) "Provide for the proper management and protection of the conservatee's real and personal property." (*Prob.C. 1800(g).*)

West's Key Number Digest, Guardian and Ward k.3

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Framework.*

Conservatorship of gravely disabled persons:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §97 et seq.



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2. When Conservatorship Is Appropriate.

Witkin Sum. Cal. Law Wills § 933

[§ 933] When Conservatorship Is Appropriate.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Showing Required.*(d) *(New) Express finding.* Neither a conservatorship of the person nor a conservatorship of the estate may be granted without an express finding that the conservatorship is the "least restrictive alternative needed for the protection of the conservatee." (*Prob.C. 1800.3(b)*, as amended in 2007.)



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2. When Conservatorship Is Appropriate.

14 Witkin Sum. Cal. Law Wills § 933

[§ 933] When Conservatorship Is Appropriate.

(1) *Persons for Whom Appointment May Be Made.* Conservatorships may be appropriate in many situations. (See generally 61 *So. Cal. L. Rev.* 273; C.E.B., 1 *Conservatorship Practice*, §1.1 et seq.) Conservatorships are authorized for the following persons:

(a) *Adults.* A conservator of the person or estate or both may be appointed for an adult. (*Prob.C. 1800.3(a)(1).*)

(b) *Minors.* A conservator of the person may be appointed for a minor who is married or whose marriage has been dissolved. (*Prob.C. 1800.3(a)(2).*) If a minor's marriage is adjudged a nullity, guardianship is the appropriate protective proceeding. (See *supra*, §916 et seq.) However, if a conservatorship is established for a married minor and the marriage is later dissolved or adjudged a nullity, the conservatorship does not terminate. (*Prob.C. 1860(b)*; see *infra*, §951.)

(c) *Absentees.* A conservator of the estate may be appointed for an absentee. (*Prob.C. 1803*; for special provisions, see *infra*, §948.)

(d) *Missing persons.* A conservator of the estate may be appointed for a missing person. (*Prob.C. 1804*; for special provisions, see *infra*, §949.)

(e) *Persons requesting appointment.* A conservator of the person or estate or both may be appointed for a person who "voluntarily requests the appointment and who, to the satisfaction of the court, establishes good cause for the appointment." (*Prob.C. 1802.*)

(2) *Showing Required.* The following showing is required for appointment of a conservator:

(a) *Conservator of the person.* A conservator of the person may be appointed for a person who is "unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter." (*Prob.C. 1801(a).*) (On exception for limited conservatorship, see *infra*, §1054 et seq.)

(b) *Conservator of the estate.* A conservator of the estate may be appointed for a person who is "substantially unable to manage his or her own financial resources or resist fraud or undue influence." However, "substantial inability" may not be proved solely by "isolated incidents of negligence or improvidence." (*Prob.C. 1801(b).*) (On exception for

limited conservatorship, see *infra*, §1054 et seq.) (See *Katz v. Superior Court* (1977) 73 C.A.3d 952, 961, 141 C.R. 234 [claim that proposed conservatee was subjected to brainwashing by religious organization]; 66 Cal. L. Rev. 845; 44 A.L.R.4th 1207 [validity of guardianship proceeding based on brainwashing of subject by religious, political, or social organization]; 9 A.L.R.3d 774 [mental condition justifying appointment of guardian or conservator of estate of incompetent or spendthrift]; 6 Proof of Facts 245, 253 [Idiocy and Other Mental Deficiency, Proof 1 et seq.]; 8 Proof of Facts 1, 92 [Mental Disorder and Incapacity, Proof 4]; 10 Proof of Facts 373, 378 [Senile Dementia, Proof 1].)

(c) *Conservator of both person and estate.* A conservator of the person and estate may be appointed for a person described in both *Prob.C. 1801(a)* and *Prob.C. 1801(b)*. (*Prob.C. 1801(c)*.)

West's Key Number Digest, Guardian and Ward k.9.5

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Showing Required.*(d) *(New) Express finding.* Neither a conservatorship of the person nor a conservatorship of the estate may be granted without an express finding that the conservatorship is the "least restrictive alternative needed for the protection of the conservatee." (*Prob.C. 1800.3(b)*, as amended in 2007.)



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3. Appointment.

a. Nomination.

14 Witkin Sum. Cal. Law Wills § 934

[§ 934] Nomination.

(1) *Nomination by Proposed Conservatee.* If capable of forming an intelligent preference, a proposed conservatee may nominate a conservator, either in the petition for appointment or in a signed writing. The court must appoint the nominee unless it finds that the appointment is not in the best interests of the proposed conservatee. (*Prob.C. 1810.*) In contrast to prior law, the writing containing the nomination need not be executed in the same manner as a witnessed will. The only formal requirements are a writing signed by the proposed conservatee at a time when he or she had sufficient capacity to form an intelligent preference. (Legislative Com. Comment.) (See *Conservatorship of Ramirez (2001) 90 C.A.4th 390, 401, 108 C.R.2d 581* [despite long-term conflict between conservatee's son and daughter, court abused discretion in appointing professional conservators rather than competent, caring son who had been nominated in power of attorney].)

(2) *Nomination by Spouse, Domestic Partner, or Relative.* The spouse, domestic partner, adult child, parent, brother, or sister of a proposed conservatee may nominate a conservator in the petition for appointment or at the hearing. (*Prob.C. 1811(a).*) In addition, a spouse, domestic partner, or parent may nominate a conservator in a signed writing that remains effective notwithstanding the subsequent death or incapacity of the spouse, domestic partner, or parent. (*Prob.C. 1811(b).*) Both of these provisions are subject to *Prob.C. 1813* (limitation on appointment of spouse; see *infra*, §935). A nomination under *Prob.C. 1811* merely entitles the nominee to some preference for appointment. (Law Rev. Com. Comment.)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Appointment.

b. Limitation on Appointment of Spouse or Domestic Partner.

14 Witkin Sum. Cal. Law Wills § 935

[§ 935] Limitation on Appointment of Spouse or Domestic Partner.

(1) *Status of Conservatee and Spouse.* The spouse of a proposed conservatee may not petition for the appointment of a conservator and may not be appointed as the conservator unless the petitioner alleges in the petition for appointment and the court finds that the spouse is not a party to a proceeding against the proposed conservatee for separation, dissolution, or nullity of the marriage. However, the court may appoint the spouse, despite participation by the spouse or a judgment for the spouse in one of these proceedings, if there is clear and convincing evidence that the appointment is in the best interests of the proposed conservatee. Before making the appointment, the court must appoint counsel to consult with and advise the proposed conservatee and report to the court about the suitability of the appointment. (*Prob.C. 1813(a).*) (On appointment of counsel, see *supra*, §909.)

Within 10 days of filing an action or proceeding against a conservatee for separation, dissolution, or nullity of the marriage, the conservatee's spouse must disclose the proceeding to the conservator or, if the spouse is the conservator, to the court, by filing a notice with the court and serving the notice as required. The court may set the matter for hearing on an order to show cause why the appointment of the conservator-spouse should not be terminated. (*Prob.C. 1813(b).*)

(2) *Status of Conservatee and Domestic Partner.* The domestic partner of a proposed conservatee may not petition for the appointment of a conservator and may not be appointed as the conservator unless the petitioner alleges in the petition for appointment and the court finds that the domestic partner has not terminated and is not intending to terminate the domestic partnership under *Family C. 299*. However, the court may appoint the domestic partner, despite termination or intended termination of the domestic partnership, if there is clear and convincing evidence that the appointment is in the best interests of the proposed conservatee. Before making the appointment, the court must appoint counsel to consult with and advise the proposed conservatee and report to the court about the suitability of the appointment. (*Prob.C. 1813.1(a).*) (On appointment of counsel, see *supra*, §909.)

Within 10 days of the termination of a domestic partnership under *Family C. 299*, the conservatee's domestic partner must disclose the termination to the conservator or, if the domestic partner is the conservator, to the court, by filing a notice with the court and serving the notice as required. The court may set the matter for hearing on an order to show cause why the appointment of the conservator-domestic partner should not be terminated. (*Prob.C. 1813.1(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Court's Discretion and Statutory Preference.

14 Witkin Sum. Cal. Law Wills § 936

[§ 936] Court's Discretion and Statutory Preference.

(1) *Court's Guided Discretion.* Subject to *Prob.C. 1810* (nomination by proposed conservatee; supra, §934) and *Prob.C. 1813* (appointment of spouse; supra, §935), the selection of a conservator is "solely in the discretion of the court." In making the selection, the court is to be guided by "what appears to be for the best interests of the proposed conservatee." (*Prob.C. 1812(a)*.) (See *Guardianship of Brown* (1976) 16 C.3d 326, 336, 128 C.R. 10, 546 P.2d 298 [decided under former law; failure to find on material issue whether appointment of mother or wife would be in best interest of incompetent was reversible error].) (On appointment of nonprofit charitable corporation, see *infra*, §966.) In its discretion, the court may appoint one conservator for several conservatees. (*Prob.C. 2106(a)*); on request in petition, see *Prob.C. 2106(b)*.) (On appointment of multiple conservators for one conservatee, see *infra*, §963.)

(2) *Order of Preference Where Persons Are Equally Qualified.* Subject to *Prob.C. 1810* (nomination by proposed conservatee; supra, §934) and *Prob.C. 1813* (appointment of spouse; supra, §935), of persons equally qualified in the court's opinion for appointment as a conservator, preference must be given in the following order:

(a) The spouse or domestic partner or a person nominated by the spouse or domestic partner. (*Prob.C. 1812(b)(1)*.)

(b) An adult child or a person nominated by the child. (*Prob.C. 1812(b)(2)*.)

(c) A parent or a person nominated by the parent. (*Prob.C. 1812(b)(3)*.)

(d) A brother or sister or a person nominated by the brother or sister. (*Prob.C. 1812(b)(4)*.)

(e) Any other person or entity eligible for appointment under the Probate Code or, if no such person or entity is willing to act, then one eligible for appointment under the Welfare and Institutions Code. (*Prob.C. 1812(b)(5)*.) (For other persons or entities eligible for appointment as conservators, see *Prob.C. 300* [trust company as conservator of estate]; *Prob.C. 2104* [nonprofit charitable corporation as conservator]; *Prob.C. 2920* [public guardian as conservator]; *Health & Saf.C. 416* [Director of Developmental Services as conservator]; *Mil. & Vet.C. 1046* [Veterans' Home as conservator of estate]; *Welf.C. 7284* [State Department of Mental Health as conservator of estate].)

(3) *Preference of Nominee.* The preference of the nominee of a parent, child, brother, or sister "is subordinate to the

preference for any other parent, child, brother, or sister in that class." (*Prob.C. 1812(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Who May File.

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[§ 937] Who May File.

(1) *In General.* A petition for appointment of a conservator may be filed by (a) the proposed conservatee, (b) the spouse or domestic partner, (c) a relative or friend, (d) specified public agencies or officials, or (e) any other interested person. (*Prob.C. 1820(a)*.) But a creditor of the proposed conservatee may not file a petition unless the creditor is a spouse, domestic partner, or relative of the proposed conservatee, or one of the specified public agencies or officials. (*Prob.C. 1820(c)*.) (See *Prob.C. 48* and *1424* ["interested person" defined]; Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:10 et seq.; C.E.B., 1 Conservatorship Practice, §5.1 et seq.)

(2) *Where Minor Is Approaching Majority.* *Prob.C. 1820(b)* permits the uninterrupted continuation of protective proceedings for a minor under guardianship who is approaching majority and is in need of a conservator. The petition may be filed during the ward's minority so that the appointment of a conservator may be made effective immediately when the minor attains the age of majority. An existing guardian may be appointed as the conservator, even though the guardian's accounts have not been settled. (On continuing jurisdiction to settle accounts, see *Prob.C. 2630*, *infra*, §1042.)

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SUPPLEMENT: [This section is current through the latest supplement]



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[§ 938] Content and Form.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* Govt.C. 26827, as amended and renumbered in 2005, no longer applies to conservatorships. The fee for filing a petition for the appointment of a conservator or a paper in opposition to the petition is now set forth in Govt.C. 70653. Generally, the fee is \$ 320. (See Supp., supra, §380D.)(3) *Judicial Council Forms.* Judicial Council Form No. GC-310 has been renamed: Petition for Appointment of Probate Con- servator (Probate--Guardianships and Conservatorships); Judicial Council Form No. GC-314 has been renamed: Confidential Conservator Screening Form (Probate--Guardianships and Conservatorships).



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[§ 938] Content and Form.

(1) *In General.* The contents of a conservatorship petition are set forth in *Prob.C. 1821*. (See C.E.B., 1 Conservatorship Practice, §5.12 et seq.; cf. *Unif.Prob.C.*, §5-404(b).) Additional requirements apply in particular situations. (On petition where proposed conservatee is absentee, see *Prob.C. 1841*, infra, §948; on petition where proposed conservatee is missing person, see *Prob.C. 1846*, infra, §949; on petition for limited conservatorship for developmentally disabled adult, see infra, §1055; on filing fee, see *Govt.C. 26827*, supra, §585.) The following provisions apply:

(a) The petition must request that a conservator be appointed for the person or estate or both, must specify the names, addresses, and telephone numbers of the proposed conservator and the proposed conservatee, and must state the reasons why a conservatorship is necessary. (*Prob.C. 1821(a)*.)

(b) The petition must set forth, as far as known to the petitioner, the names and addresses of the spouse or domestic partner and relatives of the proposed conservatee within the second degree. If no such persons are known, the petition must set forth, as far as known to the petitioner, the names and addresses of the following persons who are deemed to be relatives for purposes of *Prob.C. 1822* (infra, §939): (1) The spouse or domestic partner of a predeceased parent of the proposed conservatee. (2) The children of a predeceased spouse or domestic partner of the proposed conservatee. (3) The siblings of the proposed conservatee's parents, if any, but if none, then the natural and adoptive children of the proposed conservatee's parents' siblings. (4) The natural and adoptive children of the proposed conservatee's siblings. (*Prob.C. 1821(b)*.)

(c) The petition must state whether the petitioner is a creditor, debtor, or agent of a creditor or debtor of the proposed conservatee. (*Prob.C. 1821(c)*.)

(d) To facilitate compliance with notice requirements (see infra, §939), the petition must state, as far as known to the petitioner, (1) whether the proposed conservatee is a patient in or on leave of absence from a state mental institution (*Prob.C. 1821(d)*), and (2) whether the proposed conservatee is entitled to receive benefits from the Veterans Administration and the estimated amount of the monthly benefit payable (*Prob.C. 1821(e)*).

(e) The petition may contain an application for any order authorized by the Guardianship-Conservatorship Law, including but not limited to an order relating to the legal capacity of the conservatee under *Prob.C. 1870* et seq. (infra, §953 et seq.). (*Prob.C. 1821(f)*.) An application may include, for example, a request for an order under *Prob.C. 2592* (infra, §1029 et seq.) authorizing the independent exercise of powers. (Legislative Com. Comment.)

(f) The petition may include a statement that the proposed conservatee "is not willing to attend the hearing on the petition, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator." (*Prob.C. 1821(g)*.) This allegation will trigger an investigation and report by the court investigator (*Prob.C. 1826*; see infra, §941), which may result in a court determination that the proposed conservatee need not attend the hearing (*Prob.C. 1825*; see infra, §944). (Legislative Com. Comment.)

(2) *Confidential Supplemental Information.* Unless the petitioner is a bank or other entity authorized to conduct the business of a trust company, the petition must include, in a separate and distinct form, supplemental information explaining why the appointment of a conservator is required. The supplemental information must include a brief statement of facts addressed to each of the following categories:

(a) "The inability of the proposed conservatee to properly provide for his or her needs for physical health, food, clothing, and shelter." (*Prob.C. 1821(a)(1)*.)

(b) "The location of the proposed conservatee's residence and the ability of the proposed conservatee to live in the residence while under conservatorship." (*Prob.C. 1821(a)(2)*.)

(c) "Alternatives to conservatorship considered by the petitioner and reasons why those alternatives are not available." (*Prob.C. 1821(a)(3)*.)

(d) "Health or social services provided to the proposed conservatee during the year preceding the filing of the petition, when the petitioner has information as to those services." (*Prob.C. 1821(a)(4)*.)

(e) "The inability of the proposed conservatee to substantially manage his or her own financial resources, or to resist fraud or undue influence." (*Prob.C. 1821(a)(5)*.)

If the petitioner lacks personal knowledge of the required facts, the petition must be supported by affidavits or declarations of persons with knowledge of those facts. If any of the enumerated factual categories are not applicable, the petitioner must indicate the reasons. (*Prob.C. 1821(a)*.)

The supplemental information is confidential and may be made available only to the parties, persons given notice who have requested the supplemental information or who have appeared in the proceeding, and their attorneys. The court has discretion at any other time to release supplemental information to others, if it would serve the interests of the conservatee. (*Prob.C. 1821(a)*.)

(3) *Judicial Council Forms.* The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-310 [Petition for Appointment of Probate Conservator].

Judicial Council Form No. GC-312 [Confidential Supplemental Information (Probate Conservatorship)].

Judicial Council Form No. GC-314 [Confidential Conservator Screening Form (Probate Conservatorship)].

Both Judicial Council Form No. GC-312 and Judicial Council Form No. GC-314 must be submitted with the petition for appointment, and must be maintained in a manner that will protect and preserve confidentiality. (C.R.C., Rule 7.1050.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* *Govt.C. 26827*, as amended and renumbered in 2005, no longer applies to conservatorships. The fee for filing a petition for the appointment of a conservator or a paper in opposition to the petition is now set forth in *Govt.C. 70653*. Generally, the fee is \$ 350. (See *Supp.*, *supra*, §380D.)

In 2008, *Prob.C. 1821(c)*, (d), (e), (f), and (g), were relettered *Prob.C. 1821(e)*, (f), (g), (h), and (i), respectively.

(New) Professional fiduciary: If the petitioner is licensed under the Professional Fiduciaries Act, the petition must state the petitioner's license information and must explain how the petitioner was engaged to file the petition and any relationship with the proposed conservatee, family, or friends. (*Prob.C. 1821(c)*, added in 2008.)

(New) Declaration of due diligence: The petition must include a declaration of due diligence showing (a) efforts to find the proposed conservatee's relatives or why it is not feasible to contact them, and (b) the proposed conservatee's preferences concerning the appointment or why it is not feasible to ascertain them. (*Prob.C. 1821(d)*, added in 2008.)(3)
Judicial Council Forms. Judicial Council Form No. GC-310 has been renamed: Petition for Appointment of Probate Conservator (Probate--Guardianships and Conservatorships); Judicial Council Form No. GC-314 has been renamed: Confidential Conservator Screening Form (Probate--Guardianships and Conservatorships).



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[§ 939] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Manner of Service. Prob.C. 1822(b)* was amended in 2006 to refer to the spouse or *registered* domestic partner of the proposed conservatee.



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[§ 939] In General.

(1) *Time for Notice.* Notice of the time and place of the hearing on a petition for appointment of a conservator, with a copy of the petition, must be given at least 15 days before the hearing. The time for giving the notice may not be shortened by the court. (*Prob.C. 1822(a).*) If there is urgency, a temporary conservator may be appointed. (Law Rev. Com. Comment; on temporary conservator, see *Prob.C. 2250*, *infra*, §975.) (See C.E.B., 1 Conservatorship Practice, §5.61 *et seq.*)

(2) *Manner of Service.* Notice must be mailed to the spouse or domestic partner of the proposed conservatee and relatives named in the petition. (*Prob.C. 1822(b).*) In specified circumstances, notice is also mailed to the Director of Mental Health, the Director of Developmental Services, and the Veterans Administration. (*Prob.C. 1822(c)*, (d); see *Prob.C. 1461*, *1461.5*, *supra*, §911 *et seq.*) (For notice requirements where proposed conservatee is absentee, see *Prob.C. 1842*, *infra*, §948; for notice requirements where proposed conservatee is missing person, see *Prob.C. 1847*, *infra*, §949; for notice requirements where proposed conservatee is developmentally disabled adult, see *Prob.C. 1461.4*, *supra*, §912.)

(3) *Judicial Council Forms.* The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-020 [Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(MA) [Attachment to Notice of Hearing Proof of Service by Mail (Probate--Decedents' Estates and Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(P) [Proof of Personal Service of Notice of Hearing (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-020(PA) [Attachment to Notice of Hearing Proof of Personal Service (Probate--Decedents' Estates and Guardianships and Conservatorships)].

Judicial Council Form No. GC-021 [Order Dispensing With Notice--Guardianship or Conservatorship].

Judicial Council Form No. GC-022 [Order Prescribing Notice].

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Manner of Service*. *Prob.C. 1822(b)* was amended in 2006 to refer to the spouse or *registered* domestic partner of the proposed conservatee.

Notice must be mailed to the public guardian if the petition states that the petitioner and the proposed conservator have no relationship with the proposed conservatee and are not nominated by a family member, friend, or other person with a relationship to the proposed conservatee. (*Prob.C. 1822(f)*, added in 2008.)



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[§ 940] Citation to Proposed Conservatee.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Judicial Council Form*. Judicial Council Form No. GC-320 has been renamed: Citation for Conservatorship (Probate--Guardianships and Conservatorships).



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[§ 940] Citation to Proposed Conservatee.

(1) *Issuance.* If someone other than the proposed conservatee is the petitioner, the clerk must issue a citation to the proposed conservatee setting forth the time and place of the hearing. (*Prob.C. 1823(a).*) No citation is necessary if the proposed conservatee is an absentee. (*Prob.C. 1843*; see *infra*, §948.) (See C.E.B., 1 Conservatorship Practice, §5.61 et seq.)

(2) *Contents.* The citation must set forth the legal standards for appointing a conservator under *Prob.C. 1801* (see *supra*, §933) and must state the substance of the following:

(a) "The proposed conservatee may be adjudged unable to provide for personal needs or to manage financial resources and, by reason thereof, a conservator may be appointed for the person or estate or both." (*Prob.C. 1823(b)(1).*)

(b) "Such adjudication may affect or transfer to the conservator the proposed conservatee's right to contract, in whole or in part, to manage and control property, to give informed consent for medical treatment, and to fix a residence." (*Prob.C. 1823(b)(2).*)

(c) "The proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration." (*Prob.C. 1823(b)(3).*)

(d) "The court or a court investigator will explain the nature, purpose, and effect of the proceeding to the proposed conservatee and will answer questions concerning the explanation." (*Prob.C. 1823(b)(4).*)

(e) "The proposed conservatee has the right to appear at the hearing and to oppose the petition, and in the case of an alleged developmentally disabled adult, to oppose the petition in part, by objecting to any or all of the requested duties or powers of the limited conservator." (*Prob.C. 1823(b)(5).*)

(f) "The proposed conservatee has the right to choose and be represented by legal counsel and has the right to have legal counsel appointed by the court if unable to retain legal counsel." (*Prob.C. 1823(b)(6).*)

(g) "The proposed conservatee has the right to a jury trial if desired." (*Prob.C. 1823(b)(7)*.)

(3) *Service*. At least 15 days before the hearing, the citation and a copy of the petition must be served on the proposed conservatee as provided in *C.C.P. 415.10* (personal service) or *C.C.P. 415.30* (service by mail), or as authorized by the court. If the proposed conservatee is outside the state, service may also be made as provided in *C.C.P. 415.40* (service by mail). (*Prob.C. 1824*.) (See *Conservatorship of Wyatt (1987) 195 C.A.3d 391, 395, 240 C.R. 632* [service by first-class mail, postage prepaid, in accordance with local court rule, did not conflict with *Prob.C. 1824*, but was specifically allowed by it]; on personal service under *C.C.P. 415.10* and service by mail under *C.C.P. 415.30* and *C.C.P. 415.40*, see 3 *Cal. Proc. (4th), Actions*, §§930, 942.)

(4) *Judicial Council Form*. The Judicial Council has adopted a form for the citation and service. (See Judicial Council Form No. GC-320 [Citation for Conservatorship and Proof of Service].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Service*.

Personal service and service by mail:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §§1008, 1015 et seq.

(4) *Judicial Council Form*. Judicial Council Form No. GC-320 has been renamed: Citation for Conservatorship (Probate--Guardianships and Conservatorships).



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[§ 941] Investigation and Report.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Nature of Investigation.* *Prob.C. 1826(a)* was amended in 2006 and 2007 to expand the scope of the investigation. The investigator must also interview (a) all petitioners and all proposed conservators who are not petitioners, (b) the proposed conservatee's spouse or registered domestic partner, (c) relatives of the proposed conservatee within the first degree, (d) to the "greatest extent possible," relatives of the proposed conservatee within the second degree if the proposed conservatee does not have a spouse, registered domestic partner, or relatives within the first degree, and (e) to the "greatest extent practical and taking into account the conservatee's wishes," relatives of the proposed conservatee within the second degree (not otherwise interviewed), neighbors, and known close friends.(3) *Report.* The report must also be mailed (a) to the proposed conservatee and (b) to the spouse, registered domestic partner, and relatives in the first degree required to be named in the petition for appointment of the conservator, unless the court determines that the mailing will result in harm to the conservatee. (*Prob.C. 1826(l)*, as amended in 2006.)

(4) *Confidentiality of Report.* The report must also be made available to the persons described in *Prob.C. 1826(l)*. (*Prob.C. 1826(n)*, as amended in 2006.)



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[§ 941] Investigation and Report.

(1) *In General.* Unless the proposed conservatee attends the hearing and has personally executed the petition or has nominated the conservator, the court investigator must make an investigation and report. (*Prob.C. 1826(o).*) If the investigator has performed an investigation and provided a report within the preceding 6 months, the court may order that an investigation is not required or that only a limited investigation be performed. (*Prob.C. 1826(p).*) (On appointment and duties of court investigator, see C.E.B., 1 Conservatorship Practice, §8.1 et seq.; Judicial Council Form No. GC-330 [Order Appointing Court Investigator].)

(2) *Nature of Investigation.* The court investigator must do all of the following:

(a) Personally interview the proposed conservatee. (*Prob.C. 1826(a).*)

(b) Inform the proposed conservatee of his or her procedural rights. (*Prob.C. 1826(b).*)

(c) Determine whether the proposed conservatee is able and willing to attend the hearing. (*Prob.C. 1826(c).*)

(d) Review the allegations of the petition, consider the facts set forth in the supplemental information form that address the categories specified in *Prob.C. 1821(a)* (*supra*, §938), consider whether the proposed conservatee suffers from a mental function deficit listed in *Prob.C. 811(a)* (*supra*, §9) that significantly impairs the ability to appreciate the consequences of his or her actions with respect to the functions described in *Prob.C. 1801(a)* or (b) (*supra*, §933), and identify the observations that support the investigator's belief. (*Prob.C. 1826(d).*)

(e) Determine whether the proposed conservatee wishes to contest the establishment of the conservatorship. (*Prob.C. 1826(e).*)

(f) Determine whether the proposed conservatee objects to the proposed conservator or prefers another person to act as conservator. (*Prob.C. 1826(f).*)

(g) Determine whether the proposed conservatee wishes to be represented by legal counsel and, if so, whether he or she has retained legal counsel and, if not, the name of an attorney he or she wishes to retain. (*Prob.C. 1826(g).*)

(h) If the proposed conservatee has not retained legal counsel, determine whether he or she desires the court to appoint legal counsel. (*Prob.C. 1826(i).*)

(i) In any case where counsel is neither retained nor requested, determine "whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the proposed conservatee." (*Prob.C. 1826(j)*; on mandatory appointment of counsel, see *supra*, §909.)

(j) Determine whether the proposed conservatee is capable of completing an affidavit of voter registration. (*Prob.C. 1826(h)*; on disqualification of conservatee from voting, see *Elec.C. 2208* et seq.)

(3) *Report.* At least 5 days before the hearing, the court investigator must report to the court in writing. The report must include the proposed conservatee's express communications concerning (a) representation by legal counsel and (b) "[w]hether the proposed conservatee is not willing to attend the hearing, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator." (*Prob.C. 1826(k).*) At least 5 days before the hearing, the report must be mailed to the attorneys for the petitioner and proposed conservatee, and other persons as the court orders. (*Prob.C. 1826(l).*)

(4) *Confidentiality of Report.* The report is confidential and may only be made available to the parties, persons given notice who have requested the report or appeared in the proceedings, and their attorneys. The court has discretion at any other time to release the report, if it would serve the interests of the conservatee. (*Prob.C. 1826(n).*) The court investigator has discretion to release the report to the public conservator, interested public agencies, and the long-term care ombudsman. (*Prob.C. 1826(m).*)

(5) *Court Investigator Is Not Personally Liable.* In *Fisher v. Pickens* (1990) 225 C.A.3d 708, 275 C.R. 487, an action by a conservatee's father against the court investigator, plaintiff alleged fraud and negligence in the preparation of the report and sought money damages. The trial judge dismissed the action after judgment on the pleadings. *Held*, affirmed; defendant was immune.

(a) The court investigator is a quasi-judicial official, entitled to absolute, common law immunity. Under *Greene v. Zank* (1984) 158 C.A.3d 497, 204 C.R. 770, investigators from the Committee of Bar Examiners are performing functions normally performed by a judge and are entitled to absolute immunity. "The reasoning in *Greene* is precisely applicable to this case." The investigator here serves as an arm of the court, and his function, gathering evidence about the proposed conservatee, is an integral part of the process of appointing a conservator. (225 C.A.3d 713, 714.)

(b) The investigator's common law immunity is not abrogated by the Tort Claims Act (*Govt.C. 810* et seq.; see 5 *Summary* (10th), *Torts*, §216 et seq.). Plaintiff could not allege breach of a statutory duty resulting in a waiver of immunity, and the Legislature has not expressed an intent to expand judicial liability by enacting the *Tort Claims Act*. (225 C.A.3d 717, 718.) In addition, plaintiff failed to file a claim, as required by the Act. (225 C.A.3d 718.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Nature of Investigation.* *Prob.C. 1826(a)* was amended in 2006 and 2007 to expand the scope of the investigation. The investigator must also interview (a) all petitioners and all proposed conservators who are not petitioners, (b) the proposed conservatee's spouse or registered domestic partner, (c) relatives of the proposed conservatee within the first degree, (d) to the "greatest extent possible," relatives of the proposed conservatee within the second degree if the proposed conservatee does not have a spouse, registered domestic partner, or relatives within the first degree, and (e) to the "greatest extent practical and taking into account the conservatee's wishes," relatives of the proposed conservatee within the second degree (not otherwise interviewed), neighbors, and known close friends. (3) *Report.* The report must also be mailed (a) to the proposed conservatee and (b) to the spouse, registered domestic partner, and relatives in the first degree required to be named in the petition for appointment of the conservator, unless the court determines that the mailing will result in harm to the conservatee. (*Prob.C. 1826(l)*, as amended in 2006.)

(4) *Confidentiality of Report.* The report must also be made available to the persons described in *Prob.C. 1826(l)*. (*Prob.C. 1826(n)*, as amended in 2006.)



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14 Witkin Sum. Cal. Law Wills § 942

[§ 942] Assessment of Developmentally Disabled Person.

(1) *Assessment by Regional Center.* In a proceeding to establish a general conservatorship for a developmentally disabled person, "the regional center, with the consent of the proposed conservatee, may prepare an assessment" as provided in Welf.C. 4620 et seq. (*Prob.C. 1827.5(b).*) (See *Prob.C. 1420*, supra, §906 ["developmental disability" defined].)

(2) *Report to Court.* The regional center submits to the court a report of its findings and recommendations, including a description of the proposed conservatee's "specific areas, nature, and degree of disability." (*Prob.C. 1827.5(b), (c).*) If the petitioner is a provider of services to developmentally disabled persons (or a spouse or employee of a provider), and is not the proposed conservatee's natural parent or a public entity, the regional center's report must also include a recommendation as to the provider's suitability to meet the proposed conservatee's needs. The findings and recommendations in the report are not binding on the court. (*Prob.C. 1827.5(c).*) (On confidentiality of report, see *Prob.C. 1827.5(e).*)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

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[§ 943] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Who May Attend. Prob.C. 1829(b)* was amended in 2006 to refer to the spouse or *registered* domestic partner of the proposed conservatee.(4) *Contents of Order.* Judicial Council Form No. GC-340 has been renamed: Order Appointing Probate Conservator (Probate--Guardianships and Conservatorships).

(5) *(New) Notice of Rights of Conservatee.* A form providing information about the rights of the conservatee must be attached to the order. Within 30 days after issuance of the order, the conservator must mail the order and the form to the conservatee and to the relatives specified in *Prob.C. 1821(b)* (text, §938). (*Prob.C. 1830(c)*, added in 2006 and amended in 2007.) The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-341 [Notice of Conservatee's Rights].

Judicial Council Form No. GC-341(MA) [Attachment to Notice of Conservatee's Rights] (showing persons to whom notice was mailed).



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14 Witkin Sum. Cal. Law Wills § 943

[§ 943] In General.

(1) *Role of Court and Jury.* The court hears and determines the matter of the establishment of the conservatorship according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the proposed conservatee. (*Prob.C. 1827.*) However, who is to be appointed as the conservator is a matter for determination by the court. (*Prob.C. 1452, 1810 et seq.*; see *supra*, §936.) Likewise, there is no right to a jury trial on matters relating to the legal capacity of the conservatee (see *infra*, §953 *et seq.*). (Legislative Com. Comment to *Prob.C. 1827.*) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §25:34 [demand for jury trial in conservatorship proceeding].)

(2) *Who May Attend.* The proposed conservatee, the spouse or domestic partner, relatives, friends, and other interested persons may appear at the hearing to support or oppose the petition. (*Prob.C. 1829.*) (See *Prob.C. 48 and 1424* ["interested person" defined]; C.E.B., 1 Conservatorship Practice, §5.77 *et seq.*)

(3) *Use of Ex Parte Information.* In *Conservatorship of Schaeffer (2002) 98 C.A.4th 159, 119 C.R.2d 547*, the wife of a conservatee petitioned to remove his conservator of the person and estate and have herself appointed. In ruling on the petition, the trial court considered a confidential report, prepared by the conservatee's appointed counsel, opposing the wife's appointment. *Held*, keeping the report from her was a violation of due process.

(a) Nothing in *Prob.C. 1470(a)* (*supra*, §908), authorizing the court to appoint counsel in a conservatorship proceeding, or any other provision of law permits appointed counsel to make reports to the court that are not available to the parties. In other instances, to the contrary, the Probate Code requires reports likely to contain sensitive information about a conservatee to be provided to the parties, e.g., *Prob.C. 1821(a)* (*supra*, §938), requiring confidential information in the petition for appointment to be made available to the parties. (*98 C.A.4th 163.*)

(b) The court's consideration of the report here amounted to either an *ex parte* proceeding, which is "highly disfavored," or an independent investigation by the court, which is restricted on due process grounds. (*98 C.A.4th 164.*) The court's ruling forbidding the wife from seeing the report handicapped her ability to counter unfavorable evidence. (*98 C.A.4th 165.*)

(4) *Contents of Order*. The order appointing the conservator must contain, among other things, the names, addresses, and telephone numbers of the conservator, the conservatee's attorney, and the court investigator. (*Prob.C. 1830(a)*; see Judicial Council Form No. GC-340 [Order Appointing Probate Conservator].)

West's Key Number Digest, Guardian and Ward k.13(4), 13(7)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Who May Attend*. *Prob.C. 1829(b)* was amended in 2006 to refer to the spouse or *registered* domestic partner of the proposed conservatee. (4) *Contents of Order*. Judicial Council Form No. GC-340 has been renamed: Order Appointing Probate Conservator (Probate--Guardianships and Conservatorships).

(5) *(New) Notice of Rights of Conservatee*. A form providing information about the rights of the conservatee must be attached to the order. Within 30 days after issuance of the order, the conservator must mail the order and the form to the conservatee and to the relatives specified in *Prob.C. 1821(b)* (text, §938). (*Prob.C. 1830(c)*, added in 2006 and amended in 2007.) The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-341 [Notice of Conservatee's Rights].

Judicial Council Form No. GC-341(MA) [Attachment to Notice of Conservatee's Rights] (showing persons to whom notice was mailed).



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14 Witkin Sum. Cal. Law Wills § 944

[§ 944] Attendance of Proposed Conservatee.

(1) *In General.* As a general rule, the proposed conservatee must be produced at the hearing to establish a conservatorship. Exceptions apply where the proposed conservatee is (a) out of the state when served and not the petitioner; (b) medically unable to attend; or (c) unwilling to attend. (*Prob.C. 1825(a).*)

Medical inability to attend is shown by an affidavit or certificate of a licensed physician or, in some instances, of an accredited practitioner of a religion that relies on prayer alone for healing. But the statement of inability to attend may not be considered in determining the issue of incompetency. (*Prob.C. 1825(b).*) Emotional or psychological instability is not good cause for absence from the hearing unless it is "likely to cause serious and immediate physiological damage" to the proposed conservatee. (*Prob.C. 1825(c).*) (See *Guardianship of Mosier (1966) 246 C.A.2d 164, 175, 54 C.R. 447* [former statute; court did not abuse discretion in proceeding with trial without incompetent where doctor stated that appearance of more than 2 hours would have adverse effect].)

The California Law Revision Commission observed that, under the former statute, doctors were reluctant to certify that a proposed conservatee was medically unable to attend a hearing except in the most extreme situations. "The Commission has been informed that proposed conservatees have been brought into the courtroom in an unconscious or semi-conscious state and that, in other cases, the court appearance has been a degrading, shameful or traumatic experience for a person humiliated by public exposure of his or her infirmity." (14 Cal. Law Rev. Com. Reports, p. 531.) Under the current statute, the court has discretion to excuse the proposed conservatee from attending if the court investigator reports that the proposed conservatee is not willing to attend, does not wish to contest the establishment of the conservatorship, and neither objects to the person proposed as conservator nor prefers that another be appointed. (See *Prob.C. 1825(a)(3).*)

(2) *Judicial Council Forms.* The Judicial Council has adopted the following forms for capacity declarations in conservatorship proceedings:

Judicial Council Form No. GC-333 [Ex Parte Application for Order Authorizing Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-334 [Ex Parte Order Re Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-335 [Capacity Declaration--Conser-vatorship].

Judicial Council Form No. GC-335A [Dementia Attachment to Capacity Declaration--Conservatorship].

SUPPLEMENT: [This section is current through the latest supplement]



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3. Degree of Proof.

14 Witkin Sum. Cal. Law Wills § 945

[§ 945] Degree of Proof.

(1) *Grave Disability Proceedings Under Lanterman-Petris-Short (LPS) Act.* In *Conservatorship of Roulet* (1979) 23 C.3d 219, 152 C.R. 425, 590 P.2d 1, the Santa Barbara Public Guardian was named conservator of the person and estate of appellant, a woman of 58. She was placed in Camarillo State Hospital for a year, and thereafter the Public Guardian petitioned under Welf.C. 5350 and 5361 to reestablish the conservatorship for an additional year. Appellant then demanded a jury trial under Welf.C. 5350 on the issue whether she was gravely disabled, and at the trial requested instructions on proof beyond a reasonable doubt and a unanimous verdict. The trial judge, however, instructed on preponderance of evidence and sufficiency of a verdict agreed to by nine jurors. The jury verdict was that appellant was gravely disabled, and the order reestablishing the conservatorship was made. *Held*, reversed. The Due Process Clause of the California Constitution requires proof beyond a reasonable doubt and a unanimous jury verdict in conservatorship proceedings under the LPS Act. (23 C.3d 235.) (See 68 Cal. L. Rev. 716; 6 Hastings Const. L. Q. 1061; *Conservatorship of Davis* (1981) 124 C.A.3d 313, 329, 177 C.R. 369 [following *Conservatorship of Roulet*; conservatee was entitled to unanimous jury determination of all questions involved in imposition of conservatorship, not just issue of grave disability]; cf. *Baber v. Superior Court* (1980) 113 C.A.3d 955, 963, 170 C.R. 353 [on petition for rehearing under Welf.C. 5364, conservatee is not entitled to jury trial]; on commitment under LPS Act, see Welf.C. 5000 et seq., 3 Cal. Proc. (4th), Actions, §29 et seq.; on conservatorship for gravely disabled persons, see Welf.C. 5350 et seq., 3 Cal. Proc. (4th), Actions, §46 et seq.)

A jury finding that an individual is *not* gravely disabled need not be unanimous; a three-fourths majority is sufficient. (*Conservatorship of Rodney M.* (1996) 50 C.A.4th 1266, 1270, 58 C.R.2d 513.) (See 33 U.S.F. L. Rev. 59 [erosion of *Conservatorship of Roulet*].)

(2) *Probate Code Conservatorship Proceedings.* In *Conservatorship of Sanderson* (1980) 106 C.A.3d 611, 165 C.R. 217, appellant's daughter obtained an order for appointment as her conservator, on the trial judge's finding that the petition was supported by "substantial evidence." Appellant contended that the requirement of proof beyond a reasonable doubt, established for grave disability proceedings under the LPS Act, should also be applied in Probate Code conservatorship proceedings. *Held*, order reversed. (a) The *Roulet* opinion based its conclusion on the deprivation of liberty and the stigma resulting from a finding of mental disorder; the deprivation and stigma are not as great in

probate conservatorships. (b) However, some rights and privileges are restricted, and the standard of proof for ordinary civil actions is improper; "clear and convincing proof" should be required. (106 C.A.3d 620.)

(3) *Codification.* The standard of proof for appointment of a conservator is clear and convincing evidence. (Prob.C. 1801(e).)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Grave Disability Proceedings Under Lanterman-Petris-Short (LPS) Act.* Commitment under LPS Act:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §80 et seq.

Conservatorship of gravely disabled persons:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §97 et seq.



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i. Required Disclosures.

1. Disclosures to Conservatee.

14 Witkin Sum. Cal. Law Wills § 946

[§ 946] Disclosures to Conservatee.

Prior to ordering a conservatorship of the person or the estate, the court must inform the proposed conservatee of all of the following:

(1) The nature and purpose of the proceeding. (*Prob.C. 1828(a)(1).*)

(2) "The establishment of a conservatorship is a legal adjudication of the conservatee's inability properly to provide for the conservatee's personal needs or to manage the conservatee's own financial resources, or both, depending on the allegations made and the determinations requested in the petition, and the effect of such an adjudication on the conservatee's basic rights." (*Prob.C. 1828(a)(2).*)

(3) The proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration. (*Prob.C. 1828(a)(3).*)

(4) The identity of the proposed conservator. (*Prob.C. 1828(a)(4).*)

(5) The effect on the conservatee's basic rights of an order relating to the conservatee's legal capacity under *Prob.C. 1870* et seq. (infra, §953 et seq.) and, in the case of an allegedly developmentally disabled adult (see infra, §1054 et seq.), the specific effects of each limitation requested in the order. (*Prob.C. 1828(a)(5).*)

(6) "The proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel." (*Prob.C. 1828(a)(6).*)

The court must also consult with the proposed conservatee to determine his or her opinion concerning (a) the establishment of the conservatorship; (b) the appointment of the proposed conservator; and (c) any order requested under *Prob.C. 1870* et seq. (see infra, §953 et seq.), and, for an allegedly developmentally disabled adult (see infra, §1054 et seq.), each limitation requested in an order. (*Prob.C. 1828(b).*)

Prob.C. 1828 does not apply where (a) the proposed conservatee is absent from the hearing and is not required to attend under *Prob.C. 1825(a)*, and (b) any showing required by *Prob.C. 1825* has been made (see *supra*, §944). (*Prob.C. 1828(c)*.) (See C.E.B., 1 Conservatorship Practice, §5.83.)

The advisements required by *Prob.C. 1828* are validly waived by counsel; explicit waiver by the proposed conservatee is not required. (See *Conservatorship of Mary K. (1991) 234 C.A.3d 265, 271, 285 C.R. 618.*)

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2. Disclosures to Conservator.

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[§ 947] Disclosures to Conservator.

SUPPLEMENT: [This section is current through the latest supplement]

Prob.C. 1835(a) and *1835(d)*, as amended in 2005, impose the duty to provide written information to private conservators on the superior court. *Prob.C. 1835(f)*, as amended in 2005, fixes the fee at \$ 20.

(New) Education program: To assist persons who may seek appointment as nonprofessional guardians or conservators, the Judicial Council must develop a free, user-friendly education program for proposed guardians and conservators and for court-appointed guardians and conservators who are not required to be licensed under *B. & P.C. 6500* et seq. (Supp., infra, §970A). (*Prob.C. 1457*, added in 2006.)



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2. Disclosures to Conservator.

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[§ 947] Disclosures to Conservator.

Every county, either through the appropriate court or the office of the public conservator, must provide private conservators with written information concerning the conservator's rights, duties, limitations, and responsibilities. (*Prob.C. 1835(a)*; on information to be included, see *Prob.C. 1835(b)*.) To cover the costs of doing so, counties may charge a fee of no more than \$ 20. (*Prob.C. 1835(f)*.)

The failure of a court, or a public officer, agency, employee, or agent to provide information required by *Prob.C. 1835* does not (a) relieve the conservator of any statutory duty, or (b) make the court, etc., liable, in either a personal or official capacity, for damage to a conservatee, conservator, the conservatorship, or any other person or entity. (*Prob.C. 1835(d)*.)

The Judicial Council's *Handbook for Conservators* was first published in 1992. It is available for sale in each county and contains the information required by *Prob.C. 1835*. It explains the rights of the conservatee and the duties of the conservator, contains sample letters, inventory, and accounting, and includes information about community resources. Counties may prepare and sell a local supplement called "Directory of Community Resources." An electronic version of the handbook is available on the judicial branch website: www.courtinfo.ca.gov.

Before the court issues letters, a conservator (other than a trust company or public conservator) must execute and file an acknowledgment of receipt of a statement of duties and liabilities and the information required by *Prob.C. 1835*, on a form provided by the Judicial Council. (*Prob.C. 1834(a)*; C.R.C., Rule 7.1051.) Local rules may require the acknowledgment to include the conservator's birth date and driver's license number, provided that the court ensures their confidentiality. (*Prob.C. 1834(b)*.) (See Judicial Council Form No. GC-348 [Duties of Conservator and Acknowledgement of Receipt of Handbook (Probate Conservatorship)].) (See C.E.B., 1 Conservatorship Practice, §5.103 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

Prob.C. 1835(a) and *1835(d)*, as amended in 2005, impose the duty to provide written information to private conservators on the superior court. *Prob.C. 1835(f)*, as amended in 2005, fixes the fee at \$ 20.

(New) Education program: To assist persons who may seek appointment as nonprofessional guardians or conservators, the Judicial Council must develop a free, user-friendly education program for proposed guardians and conservators and for court-appointed guardians and conservators who are not required to be licensed under *B. & P.C. 6500 et seq.* (Supp., infra, §970A). (*Prob.C. 1457*, added in 2006.)



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j. Where Proposed Conservatee Is Absentee.

14 Witkin Sum. Cal. Law Wills § 948

[§ 948] Where Proposed Conservatee Is Absentee.

(1) *General Law and Special Provisions.* With certain exceptions, the general provisions relating to the establishment of a conservatorship (*Prob.C. 1820 et seq.*; see *supra*, §933 *et seq.*) apply to the appointment of a conservator for an absentee. (*Prob.C. 1840*; for termination of conservatorship of absentee, see *Prob.C. 1864*, *infra*, §952; on setting aside absentee's personal property for support of dependents, see *infra*, §1073 *et seq.*) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:23 *et seq.*; C.E.B., 1 Conservatorship Practice, §5.107 *et seq.*)

(2) *Definition.* The term "absentee" means either a member of a uniformed service or a U.S. government employee determined in accordance with federal law "to be in missing status" as missing status is defined in federal law. (*Prob.C. 1403*; for applicable federal law, see 37 U.S.C., Chap. 10 [service member]; 5 U.S.C., Chap. 55, Subchapter VII [government employee].)

(3) *Official Record as Evidence.* An official written report or record, complying with *Ev.C. 1283* and showing that the absentee is an absentee, is admissible as conclusive evidence of that status. (*Prob.C. 1844(a)*.) Inability to attend the hearing is also established by the report or record. (*Prob.C. 1844(b)*.)

(4) *Additional Contents of Petition.* In addition to meeting the requirements of *Prob.C. 1821* and *1822* (*supra*, §§938, 939), the petition and notice must set forth the last known military rank or grade and Social Security number of the proposed conservatee. (*Prob.C. 1841(a)*.) To assist in implementing *Prob.C. 1813* (appointment of spouse; see *supra*, §935), the petition must also state whether the absentee's spouse has commenced any action or proceeding for judicial or legal separation, dissolution, annulment, or adjudication of nullity of their marriage. (*Prob.C. 1841(b)*.)

(5) *Additional Notice of Hearing.* In addition to notice to the persons and entities entitled to notice under *Prob.C. 1822* (*supra*, §939), a copy of the petition and notice must be mailed at least 15 days before the hearing date to the secretary or head of the United States department concerned. Notice must also be published, pursuant to *Govt.C. 6061*, in a newspaper of general circulation in the county where the proceedings will be held. (*Prob.C. 1842*.) The term "secretary concerned" is defined in 37 U.S.C., §101. (*Prob.C. 1440*.)

(6) *Citation Is Not Required.* No citation is required under *Prob.C. 1823* (*supra*, §940) if the proposed conservatee

is an absentee. (*Prob.C. 1843.*)

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k. Where Proposed Conservatee Is Missing Person.

14 Witkin Sum. Cal. Law Wills § 949

[§ 949] Where Proposed Conservatee Is Missing Person.

(1) *In General. Prob.C. 1845 et seq.* apply to persons who are missing and whose whereabouts are unknown, except absent federal personnel. (*Prob.C. 1845.*) (On absent federal personnel, see *supra*, §948.) *Prob.C. 1845 et seq.* apply regardless of when the person became missing or how long the person has been missing. (*Prob.C. 1849.5(a).*) (See 16 Cal. Law Rev. Com. Reports, p. 105; Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:27 et seq.; 15 *Pacific L. J.* 461.)

(2) *Procedure for Appointment.* Except as otherwise provided by *Prob.C. 1845 et seq.*, the procedure for appointment of a conservator of the estate of a missing person is the same as that required for conservators generally (*Prob.C. 1820 et seq.*; see *supra*, §934 et seq.). (*Prob.C. 1845(a).*) *Prob.C. 1848* excludes performance of those general requirements that depend upon knowledge of the whereabouts of the proposed conservatee. (Law Rev. Com. Comment.)

(3) *Additional Contents of Petition.* In addition to the contents required of conservatorship petitions generally (see *supra*, §938), the petition must (a) describe the missing person's property in California that requires supervision, (b) describe the time and circumstances of the person's disappearance, (c) state that the person has not been heard from and that his or her whereabouts are unknown by those most likely to hear (naming them and their relationship), (d) state the last known residence, and (e) describe any search or inquiry to find the person. (*Prob.C. 1846.*)

(4) *Additional Notice of Hearing.* In addition to the general notice requirements for conservatorship hearings under *Prob.C. 1822* (*supra*, §939), a copy of the petition and notice of the hearing must be mailed to the missing person's last known address at least 15 days before the hearing and, if the last known address is in California, notice must be published in a newspaper of general circulation in the county of residence pursuant to *Govt.C. 6061*. Additional notice may be required pursuant to *Prob.C. 1202* (*supra*, §385). (*Prob.C. 1847.*)

The Law Revision Commission Comment reads in part: "Nothing in this section limits the authority of the court in determining the need to establish a conservatorship to require that a search be made for the missing person before a conservator is appointed. Whether to require such a search and the type of search to be required is left to the court's discretion. In exercising this discretion, the court can take into consideration all the circumstances of the particular case,

including the nature of the disappearance, the character and amount of the estate, and the circumstances of the persons who have an interest in the proceeding. For example, the court may dispense with a search if the missing person's estate is nominal, there are dependents entitled to support, and the funds necessary for support would be significantly reduced by the cost of the search. In other cases, no purpose would be served by a court-ordered search, as where the proposed conservatee is lost at sea."

(5) *Conditions for Appointment.* A conservator of the estate of a missing person may be appointed only if the court finds all of the following: (a) the missing person owns or is entitled to real or personal property in California, (b) the person is missing and his or her whereabouts are unknown, and (c) the estate requires supervision. (*Prob.C. 1849.*)

(6) *Notice of Designated Transactions.* Where a conservator of the estate of a missing person has been appointed, and a petition, report, or account is filed under specified statutes, notice of the hearing and a copy of the petition, report, or account must be given to persons entitled to notice under *Prob.C. 2581* (persons interested in the estate if the conservatee were dead; see *infra*, §1026) as provided in *Prob.C. 1460 et seq.* (*supra*, §910 et seq.), unless the court dispenses with notice for good cause. (*Prob.C. 1461.7(a).*) (For transactions requiring notice, see *Prob.C. 1461.7(b).*)

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SUPPLEMENT: [This section is current through the latest supplement]



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4. Periodic Review of Conservatorship.

Witkin Sum. Cal. Law Wills § 950

[§ 950] Periodic Review of Conservatorship.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement of Court Review.* The statutes governing court review were extensively revised in 2006 as follows:

(a) *Initial review:* Six months after the initial appointment of the conservator, the court investigator must visit the conservatee, conduct an investigation, and report to the court. In response, the court may take appropriate action, including ordering a review of the conservatorship and ordering the conservator to submit an accounting. (*Prob.C. 1850(a)(1).*)

(b) *Annual review:* One year after the initial appointment and annually thereafter, the court must review the conservatorship. However, at the first 1-year review and at subsequent reviews, the court may set the next review for 2 years, if the court determines that the conservator is acting in the best interests of the conservatee. Where the next review is set for 2 years, the court investigator must conduct an investigation within 1 year and file a status report. If the investigator determines that the conservatorship appears to be warranted and that the conservator is acting in the best interests of the conservatee, no court action in response to the report is required. (*Prob.C. 1850(a)(2).*)

(c) *Review on court order:* On its own motion or on the request of any interested person, the court may take appropriate action, including ordering a review of the conservatorship with a noticed hearing and ordering the conservator to present an accounting. (*Prob.C. 1850(b)*; on notice of hearing, see *Prob.C. 1850(c).*)

(d) *Scope of requirement:* The provisions of *Prob.C. 1850(b)* discussed in the text are now in *Prob.C. 1850(d).*

(e) *Review of limited conservatorship:* A limited conservatorship for a developmentally disabled adult (see text, §1054 et seq.) is reviewed 1 year after the appointment and biennially thereafter. However, on its own motion or on the request of any interested person, the court may take appropriate action, including ordering a review of the conservatorship with a noticed hearing at any time. (*Prob.C. 1850.5.*)

(2) *Investigation and Report.* The statutes governing the investigation and report were expanded in 2006 as follows:

(a) *Visit without prior notice:* The court investigator visits the conservatee without prior notice to the conservator, except as ordered by the court for necessity or to prevent harm to the conservatee. (*Prob.C. 1851(a)*), as amended in

2006.)

(b) *Scope of investigation:* In determining whether the conservator is acting in the best interests of the conservatee, the court investigator must examine the conservatee's placement, the quality of care (including physical and mental treatment), and the conservatee's finances. To the greatest extent possible, the investigator must interview the individuals listed in *Prob.C. 1826(a)* (Supp., supra, §941). (*Prob.C. 1851(a)*, as amended in 2006.) (On requirement of coordination, so that investigator may review accounting before visiting conservatee, see *Prob.C. 1851.2*, added in 2007.)

(c) *Examination of books and records:* On request, the conservator must make available for inspection and copying the books and records of the conservatorship, including receipts and expenditures. (*Prob.C. 1851(a)*, as amended in 2006.)

(d) *Copies of report:* Unless the court determines that mailing will result in harm to the conservatee, copies of the report must be mailed to the conservatee's spouse or registered domestic partner and relatives of the first degree (or the next closest relative if there are no relatives of the first degree). However, confidential medical information and confidential information from the California Law Enforcement Telecommunications System must be in a separate attachment, which is not provided to those who receive copies of the report. (*Prob.C. 1851(b)*, as amended in 2006 and 2007.)

(3) *Report Is Confidential.* *Prob.C. 1851(e)* was amended in 2006 to add that the report must be made available to the persons described in *Prob.C. 1851(b)*.



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CHAPTER XXI - Wills and Probate

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4. Periodic Review of Conservatorship.

14 Witkin Sum. Cal. Law Wills § 950

[§ 950] Periodic Review of Conservatorship.

(1) *Requirement of Court Review.* The court must review each conservatorship 1 year after appointment of the conservator, and biennially thereafter. (*Prob.C. 1850(a).*) But this requirement does not apply to a conservatorship for an absentee (see *supra*, §948), or a conservatorship of the estate for a nonresident where the conservatee is not present in the state. (*Prob.C. 1850(b).*) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:44 et seq.; C.E.B., 1 Conservatorship Practice, §8.18 et seq.)

(2) *Investigation and Report.* When court review is required, the court investigator must visit the conservatee and determine whether (a) the conservatee desires to petition for termination, (b) the conservatee is in need of the conservatorship, (c) the conservator is acting in the best interests of the conservatee, and (d) the conservatee is capable of completing a voter registration affidavit. (*Prob.C. 1851(a).*) The court investigator may personally visit the conservator and other persons to determine whether the conservator is acting in the best interests of the conservatee. (*Prob.C. 1851(d).*) If there has been an order expanding, limiting, or withdrawing the legal capacity of the conservatee under *Prob.C. 1870* et seq. (*infra*, §953 et seq.), the investigator must determine whether the conservatee's present condition is such that the order should be modified or revoked. (*Prob.C. 1851(a).*)

The investigator must report his or her findings and supporting facts to the court in writing not less than 15 days prior to the date of review. At the same time, the investigator must mail copies of the report to the conservator and to the attorneys of record for the conservator and conservatee. (*Prob.C. 1851(b).*)

(3) *Report Is Confidential.* The report is confidential and may only be disclosed to the parties, persons given notice who have requested the report or appeared in the proceedings, and their attorneys. However, the court has discretion "to release the report, if it would serve the interest of the conservatee." (*Prob.C. 1851(e).*)

(4) *Assessment for Cost of Investigation.* The court assesses each conservatee in the county for investigation or review conducted by the court investigator for that person. The court orders reimbursement to the court in the amount of the assessment, unless all or part of the assessment would impose a hardship on the conservatee or the conservatee's estate. There is a rebuttable presumption that an assessment would impose a hardship if the conservatee is receiving Medi-Cal benefits. (*Prob.C. 1851.5.*)

(5) *Trial or Hearing.* Based either on the conservatee's wishes or the court's independent determination, a trial or hearing may be held to terminate the conservatorship, to remove the conservator, to make, modify, or revoke a court order affecting the conservatee's legal capacity, or to restore the conservatee's right to register to vote. The court must notify the conservatee's attorney, if any, or appoint the public defender or private counsel to file the petition and to represent the conservatee. (*Prob.C. 1852*; on mandatory appointment of counsel, see *supra*, §909.)

(6) *Failure To Locate Conservatee.* If the court investigator cannot locate the conservatee, the court must order the investigator to serve notice on the conservator of the person (or the conservator of the estate if there is no conservator of the person) to make the conservatee available to the investigator within 15 days or to show cause why the conservatorship should not be terminated. (*Prob.C. 1853(a)*.) "What constitutes good cause depends upon the circumstances of the particular case. For example, good cause would be shown where it was established that the conservatee had disappeared from his or her place of residence and a diligent search was in progress to find the conservatee or where the conservatee was out of state to receive necessary medical treatment." (Legislative Com. Comment.)

(7) *Failure To Produce Conservatee.* If, without good cause, the conservatee is not made available within the time prescribed, the court must terminate the conservatorship. If the conservatorship is of the estate, the conservator must file an accounting and surrender the estate to the person legally entitled to it. (*Prob.C. 1853(b)*.) But termination does not preclude a new proceeding to appoint a conservator, or limit the power of the court to appoint a temporary conservator. (*Prob.C. 1853(c)*; on appointment of a temporary conservator, see *infra*, §975 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement of Court Review.* The statutes governing court review were extensively revised in 2006 as follows:

(a) *Initial review:* Six months after the initial appointment of the conservator, the court investigator must visit the conservatee, conduct an investigation, and report to the court. In response, the court may take appropriate action, including ordering a review of the conservatorship and ordering the conservator to submit an accounting. (*Prob.C. 1850(a)(1)*.)

(b) *Annual review:* One year after the initial appointment and annually thereafter, the court must review the conservatorship. However, at the first 1-year review and at subsequent reviews, the court may set the next review for 2 years, if the court determines that the conservator is acting in the best interests of the conservatee. Where the next review is set for 2 years, the court investigator must conduct an investigation within 1 year and file a status report. If the investigator determines that the conservatorship appears to be warranted and that the conservator is acting in the best interests of the conservatee, no court action in response to the report is required. (*Prob.C. 1850(a)(2)*.)

(c) *Review on court order:* On its own motion or on the request of any interested person, the court may take appropriate action, including ordering a review of the conservatorship with a noticed hearing and ordering the conservator to present an accounting. (*Prob.C. 1850(b)*; on notice of hearing, see *Prob.C. 1850(c)*.)

(d) *Scope of requirement:* The provisions of *Prob.C. 1850(b)* discussed in the text are now in *Prob.C. 1850(d)*.

(e) *Review of limited conservatorship:* A limited conservatorship for a developmentally disabled adult (see text, §1054 et seq.) is reviewed 1 year after the appointment and biennially thereafter. However, on its own motion or on the request of any interested person, the court may take appropriate action, including ordering a review of the conservatorship with a noticed hearing at any time. (*Prob.C. 1850.5*.)

(2) *Investigation and Report.* The statutes governing the investigation and report were expanded in 2006 as follows:

(a) *Visit without prior notice:* The court investigator visits the conservatee without prior notice to the conservator, except as ordered by the court for necessity or to prevent harm to the conservatee. (*Prob.C. 1851(a)*, as amended in 2006.)

(b) *Scope of investigation:* In determining whether the conservator is acting in the best interests of the conservatee, the court investigator must examine the conservatee's placement, the quality of care (including physical and mental treatment), and the conservatee's finances. To the greatest extent possible, the investigator must interview the individuals listed in *Prob.C. 1826(a)* (Supp., supra, §941). (*Prob.C. 1851(a)*, as amended in 2006.) (On requirement of coordination, so that investigator may review accounting before visiting conservatee, see *Prob.C. 1851.2*, added in 2007.)

(c) *Examination of books and records:* On request, the conservator must make available for inspection and copying the books and records of the conservatorship, including receipts and expenditures. (*Prob.C. 1851(a)*, as amended in 2006.)

(d) *Copies of report:* Unless the court determines that mailing will result in harm to the conservatee, copies of the report must be mailed to the conservatee's spouse or registered domestic partner and relatives of the first degree (or the next closest relative if there are no relatives of the first degree). However, confidential medical information and confidential information from the California Law Enforcement Telecommunications System must be in a separate attachment, which is not provided to those who receive copies of the report. (*Prob.C. 1851(b)*, as amended in 2006 and 2007.)

(3) *Report Is Confidential.* *Prob.C. 1851(e)* was amended in 2006 to add that the report must be made available to the persons described in *Prob.C. 1851(b)*.



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D. Conservatorship.

5. Termination of Conservatorship.

a. In General.

14 Witkin Sum. Cal. Law Wills § 951

[§ 951] In General.

(1) *When Conservatorship Terminates.* "A conservatorship continues until terminated by the death of the conservatee or by order of the court." (*Prob.C. 1860(a)*.) (See generally Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:48 et seq.; C.E.B., 2 Conservatorship Practice, §21.1 et seq.) *Prob.C. 1860* does not apply to limited conservatorships. (*Prob.C. 1860(c)*; see *infra*, §1061.) (On termination of conservatorship of absentee, see *Prob.C. 1864*, *infra*, §952.)

The Law Revision Commission Comment notes that "death of the conservator merely terminates the relationship of conservator and conservatee but does not terminate the conservatorship proceeding. The court retains jurisdiction of the conservatorship proceeding despite termination of the relationship of conservator and conservatee."

A conservatorship of the person or estate may terminate by operation of law or may be terminated by court order if the court determines that the conservatorship is no longer required. (C.R.C., Rule 7.1052(a).)

(2) *Married Minor.* Although a conservatorship cannot be established for a minor whose marriage has been adjudged a nullity (see *supra*, §916), a conservatorship of the person may continue if the marriage is dissolved or adjudged a nullity after the conservatorship has been established. (*Prob.C. 1860(b)*.) *Prob.C. 1860(b)* makes no reference to a conservatorship of the estate; guardianship is the appropriate protective proceeding for the estate of a minor, whether married or unmarried. (Law Rev. Com. Comment.)

(3) *Absentee.* In the case of the conservatorship of an absentee (see *supra*, §948), if the petition states and the court finds that the absentee has returned to the controllable jurisdiction of the military or civilian department or agency concerned, or is deceased, the conservatorship must be terminated. An official written report or record of the military or civilian department or agency that the absentee has returned to controllable jurisdiction or is deceased must be received as evidence of that fact. (*Prob.C. 1864(b)*.)

(4) *Notification of Right To Vote.* If the conservatee was disqualified from voting pursuant to *Elec.C. 2208* or *2209*, on termination of the conservatorship the court must notify the county elections official that the former conservatee's right to register to vote is restored. (*Prob.C. 1865*.) (For court authority to disqualify conservatee from voting due to inability to complete voter registration affidavit, see *Prob.C. 1910*, *infra*, §959.)

West's Key Number Digest, Guardian and Ward k.18, 22 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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5. Termination of Conservatorship.

b. Procedure.

14 Witkin Sum. Cal. Law Wills § 952

[§ 952] Procedure.

(1) *Petition.* A petition to terminate a conservatorship may be filed by (a) the conservator, (b) the conservatee, (c) the spouse or domestic partner of the conservatee, (d) a relative or friend of the conservatee, or (e) any other interested person. (*Prob.C. 1861(a).*) The petition must state facts showing that the conservatorship is "no longer required." (*Prob.C. 1861(b).*) (See *Prob.C. 48* and *1424* ["interested person" defined]; Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:52; C.E.B., 2 Conservatorship Practice, §21.35 et seq.) In the case of an absentee (see *supra*, §948), the petition may also be filed by any officer or agency of the state or federal Government. (*Prob.C. 1864(a).*)

When a conservatee dies, a conservatorship of the person terminates by operation of law and a petition for termination is not required. (C.R.C., Rule 7.1052(b).)

(2) *Notice of Hearing.* Notice of the hearing on the petition is governed by the general notice provisions (*Prob.C. 1460* et seq.; see *supra*, §910 et seq.). (*Prob.C. 1862.*)

(3) *Hearing and Judgment.* Proceedings to terminate a conservatorship are conducted like other civil actions, including trial by jury if demanded by the conservatee. The conservator, the conservatee, the spouse or domestic partner, relatives, friends, and other interested persons may appear and support or oppose the petition. (*Prob.C. 1863(a).*) If the court determines that the conservatorship is no longer required or that grounds for establishment of a conservatorship no longer exist, it must make that finding and enter judgment terminating the conservatorship. (*Prob.C. 1863(b).*) On settlement and approval of the conservator's final account, the conservator may be discharged and bond exonerated. (*Prob.C. 1863(c).*) The termination of a conservatorship does not preclude a new proceeding for appointment of a conservator on the same or other grounds. (*Prob.C. 1863(d).*) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:53.)

(4) *Account by Conservator of the Estate.* When a conservatorship of the estate terminates, either by court order or by operation of law, the conservator must file and the court must approve a final account of administration. (C.R.C., Rule 7.1052(c).) The conservator must serve a notice of hearing and a copy of the account and the petition for settlement on the former conservatee and his or her spouse or domestic partner, unless the court dispenses with notice. (C.R.C., Rule 7.1054.) A conservator of the estate who resigns or is removed must serve a copy of the final account and

the petition for settlement with the notice of hearing served on the successor conservator under *Prob.C. 1460(b)* (*supra*, §910), unless the court dispenses with notice. (C.R.C., Rule 7.1053; on accounting at termination, see *infra*, §1042.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Conservatorship.

6. Legal Capacity of Conservatee.

a. Capacity To Bind Estate.

1. In General.

14 Witkin Sum. Cal. Law Wills § 953

[§ 953] In General.

(1) *Purpose.* *Prob.C. 1870* et seq. clarify the division of responsibilities between the conservator and conservatee, and the legal capacity of the conservatee to bind the conservatorship estate. (See 14 Cal. Law Rev. Com. Reports, p. 532; Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:56 et seq.; C.E.B., 1 Conservatorship Practice, §11.6 et seq.) (On capacity of conservatee with respect to community property, see *Prob.C. 3012*, 11 Summary (10th), *Community Property*, §158 et seq.; on court order broadening capacity, see *infra*, §955.)

(2) *Scope.* For purposes of *Prob.C. 1870* et seq., "transaction" is defined broadly to mean any type of transaction including making a gift, contract, sale, transfer, or conveyance, incurring a debt, encumbering property, delegating a power, and waiving a right. (*Prob.C. 1870*.)

(3) *Appointment as Adjudication of Incapacity.* Except as otherwise provided in *Prob.C. 1870* et seq., "the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate." (*Prob.C. 1872(a)*.) This section codifies prior law that appointment of a guardian for an adult is an adjudication of incapacity under C.C. 40 that renders void any contract entered into by the ward after that determination. (See *Hellman Commercial Trust & Savings Bank v. Alden* (1929) 206 C. 592, 275 P. 794, 1 Summary (10th), *Contracts*, §53; *Place v. Trent* (1972) 27 C.A.3d 526, 532, 103 C.R. 841 [conservatee's deed of gift of conservatorship real property was void].)

(4) *Rights Retained.* Among the rights of a conservatee not affected by the creation of a conservatorship are the following:

(a) The right to control an allowance under *Prob.C. 2421* (*infra*, §1008). (*Prob.C. 1871(a)*.)

(b) The right to control wages or salary under *Prob.C. 2601* (*infra*, §1032). (*Prob.C. 1871(b)*.)

(c) The right to make a will (see *Prob.C. 6100*; *supra*, §120 et seq.). (*Prob.C. 1871(c)*.)

(d) The right to enter into transactions to provide the "necessaries of life" to the conservatee and the conservatee's

spouse and minor children and to provide basic living expenses to the conservatee's domestic partner. (*Prob.C. 1871(d)*.) (On duty of conservator to pay reasonable debts of conservatee relating to necessities of life, see *Prob.C. 2430*, *infra*, §1010.)

(5) *Bona Fide Purchaser or Encumbrancer*. If a good faith purchaser or encumbrancer enters into a transaction affecting real property of a conservatorship estate without knowledge of the conservatorship, the transaction is not affected by any provision of the statute or an order under the statute unless a notice of the conservatorship or temporary conservatorship has previously been recorded in the county in which the property is located. (*Prob.C. 1875*.)

(6) *Other Governing Law*. *Prob.C. 1870* et seq. are not the exclusive rules by which the validity of a transaction entered into by the conservatee is measured. These provisions are intended to supplement, not displace, general principles of law and equity relating to transactions "including, but not limited to, capacity to contract, joinder or consent requirements, estoppel, fraud, misrepresentation, duress, coercion, mistake, or other validating or invalidating cause." (*Prob.C. 1876*.) Thus, the ability of the conservatee to obligate the estate for a transaction specified by court order under *Prob.C. 1873* (see *infra*, §955) is subject to the limitation that the transaction may be void or voidable due to the lack of contractual capacity of the conservatee under C.C. 38 or 39. (Legislative Com. Comment to *Prob.C. 1876*.)

West's Key Number Digest, Guardian and Ward k.37 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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6. Legal Capacity of Conservatee.
 - a. Capacity To Bind Estate.
2. Limited or Temporary Conservatee.

14 Witkin Sum. Cal. Law Wills § 954

[§ 954] Limited or Temporary Conservatee.

(1) *Capacity of Limited Conservatee.* A limited conservatee retains legal capacity to make transactions except as otherwise provided in the court order appointing a conservator of the estate. (*Prob.C. 1872(b)*; see *infra*, §1054.)

(2) *Capacity of Temporary Conservatee.* In *O'Brien v. Dudenhoeffer* (1993) 16 C.A.4th 327, 19 C.R.2d 826, plaintiff petitioned *ex parte* to be appointed temporary conservator of his mother's estate. Four days after the petition was granted, the conservatee deeded her real property to defendant without consideration, and a month later plaintiff was appointed permanent conservator. After the conservatee died intestate, plaintiff sued to void the deed. The trial judge found that the temporary conservatorship did not affect the conservatee's legal capacity to convey real property. *Held*, reversed; the appointment constituted an adjudication that the conservatee lacked the capacity to give away her real property.

(a) *Board of Regents v. Davis* (1975) 14 C.3d 33, 120 C.R. 407, 533 P.2d 1047, 1 Summary (10th), *Contracts*, §54, held that legal capacity had not been adjudicated by the appointment of a temporary conservator. However, the statutory scheme on which *Davis* was based was significantly changed in 1979. Under *Prob.C. 1872(a)*, the appointment of a conservator of the estate is an adjudication that the conservatee lacks legal capacity, and C.C. 40 provides that the establishment of a conservatorship under *Prob.C. 1400 et seq.* is a judicial determination that the conservatee lacks legal capacity. Both temporary and permanent conservatorships are contained in *Prob.C. 1400 et seq.* (16 C.A.4th 331.) These statutory amendments supersede the holding in *Davis*. (16 C.A.4th 332.)

(b) The legislative history of *Prob.C. 1872(a)* demonstrates that the statute applies to temporary conservatorships. The original recommendation of the California Law Revision Commission was to continue existing law, the law stated in *Davis*. That recommendation was rejected, the proposed statute was rewritten, and the report of the Assembly Judiciary Committee referred to *Davis* as prior law. (16 C.A.4th 333, 334.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Legal Capacity of Conservatee.

a. Capacity To Bind Estate.

3. Court Order Broadening Capacity.

Witkin Sum. Cal. Law Wills § 955

[§ 955] Court Order Broadening Capacity.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Petition for Order*. The filing fee for a petition, application, or opposition to an order affecting the legal capacity of a conservatee under *Prob.C. 1870* et seq. is \$ 180. (*Govt.C. 70658(a)(13)*, added in 2007.)



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3. Court Order Broadening Capacity.

14 Witkin Sum. Cal. Law Wills § 955

[§ 955] Court Order Broadening Capacity.

(1) *In General.* The court may authorize a conservatee, subject to *Prob.C. 1876* (supra, §953), to enter into "transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate." It may also modify the legal capacity a conservatee would otherwise have under *Prob.C. 1872* (supra, §954) by broadening or restricting the conservatee's power to enter into transactions. (*Prob.C. 1873(a)*.) The Legislative Committee Comment suggests that the court might authorize transactions not exceeding specified amounts, e.g., contracts not in excess of \$ 500.

(2) *Limitations and Conditions.* The court may include appropriate limitations or conditions on the conservatee's authority, such as a requirement that the conservatee obtain prior approval of the court or the conservator before acting, or a provision authorizing the conservator to avoid a transaction by the conservatee if it is not one into which "a reasonably prudent person might enter." (*Prob.C. 1873(b)*.) In determining this issue, the conservator and the court should consider all the circumstances of the particular conservatee and conservatorship estate. An important circumstance is the extent to which the transaction might impair the ability to provide for the support, maintenance, and education of the conservatee and of the persons the conservatee is legally obligated to support, maintain, or educate. (Legislative Com. Comment; see *Prob.C. 2430(b)*, infra, §1010.)

(3) *Petition for Order.* After a conservator has been appointed, a petition requesting an order broadening the legal capacity of the conservatee may be filed by the conservator, the conservatee, the spouse or domestic partner of the conservatee, or a relative or friend. (*Prob.C. 1874(a)*.) The order may be modified or revoked on a petition filed by any of the persons authorized to request the initial order, as well as "any interested person." (*Prob.C. 1873(e)*; see *Prob.C. 48* and *1424* ["interested person" defined].)

(4) *Notice of Hearing.* Notice of the hearing on a petition to issue, modify, or revoke the order must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (supra, §910 et seq.). (*Prob.C. 1873(e), 1874(b)*.)

(5) *Duration of Order.* The order continues in effect until the earliest of (a) the time specified in the order, (b) the time the order is modified or revoked, or (c) the time the conservatorship of the estate is terminated. (*Prob.C. 1873(c)*),

(d.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Petition for Order*. The fee for filing a petition, application, or opposition concerning an order affecting the legal capacity of a conservatee under *Prob.C. 1870* et seq. is \$ 350. (*Govt.C. 70658(a)(13)*, added in 2007 and amended in 2008.)



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6. Legal Capacity of Conservatee.

b. Capacity To Consent to Medical Treatment.

1. Determination by Court.

14 Witkin Sum. Cal. Law Wills § 956

[§ 956] Determination by Court.

The 1995 Legislature enacted a comprehensive statute governing legal capacity, known as the Due Process in Competence Determinations Act. (See *supra*, §8 et seq.) The Act encompasses the capacity of a conservatee to consent to medical treatment.

(1) *Appropriate Order.* If the court determines that there is no form of medical treatment for which the conservatee has the capacity to give informed consent, it must (a) adjudge that the conservatee lacks that capacity, and (b) by order, give the conservator of the person the powers specified in *Prob.C. 2355* (*infra*, §992). (*Prob.C. 1880.*) The order may be made at or after the time the conservatorship is established. (*Prob.C. 1890(a).*) If the order is made, the letters of conservatorship must state that the conservator has those powers. (*Prob.C. 1880.*)

An order under *Prob.C. 1880* is not appropriate if the conservatee has the capacity to give informed consent to some forms of medical treatment; in that case a court order authorizing particular treatment under *Prob.C. 2357* (*infra*, §994) must be obtained. (Law Rev. Com. Comment.) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:62 et seq.; C.E.B., 1 Conservatorship Practice, §12.30 et seq.; C.E.B., Elder Law Resources, §4.70 et seq.; C.E.B., Durable Powers of Attorney, §6.14 et seq.)

(2) *Inability To Give Informed Consent.* A conservatee is unable to give informed consent to any form of medical treatment under *Prob.C. 1880* if, for all medical treatments, "the conservatee is unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in a treatment decision by means of a rational thought process." (*Prob.C. 1881(a).*)

(3) *Factors Considered.* In determining that a conservatee is unable to give informed medical consent, a court must do both of the following:

(a) Determine that, for all medical treatments, the conservatee is unable to understand either (1) the nature and seriousness of an illness, disorder, or defect, (2) the nature of medical treatment recommended by the conservatee's health care providers, (3) the probable degree and duration of benefits and risks of medical intervention recommended

by the conservatee's health care providers, and the consequences of lack of treatment, and (4) the nature, risks, and benefits of reasonable alternatives. (*Prob.C. 1881(b)(1).*)

(b) Determine that one or more of the conservatee's mental functions is impaired and that there is a link between the deficit and the conservatee's inability to give informed consent. For this purpose, mental functions are described in *Prob.C. 811(a)* (supra, §9). (*Prob.C. 1881(b)(2).*) However, this provision does not apply to a petition under *Prob.C. 1880* if the conservatee, after notice and an interview by a court investigator before the hearing on the petition, does not object to a proposed finding of incapacity, or waives any objections. (*Prob.C. 1881(e).*)

A deficit in mental functions may be considered only if the deficit, by itself or in combination with other mental function deficits, "significantly impairs the conservatee's ability to understand the consequences of his or her decisions regarding medical care." (*Prob.C. 1881(c).*)

"In determining whether a conservatee's mental functioning is so severely impaired that the conservatee lacks the capacity to give informed consent to any form of medical treatment, the court may take into consideration the frequency, severity, and duration of periods of impairment." (*Prob.C. 1881(d).*)

(4) *Judicial Council Forms.* The Judicial Council has adopted the following forms for capacity declarations in conservatorship proceedings:

Judicial Council Form No. GC-333 [Ex Parte Application for Order Authorizing Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-334 [Ex Parte Order Re Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-335 [Capacity Declaration--Conservatorship].

Judicial Council Form No. GC-335A [Dementia Attachment to Capacity Declaration--Conservatorship].

West's Key Number Digest, Guardian and Ward k.28, 29

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Appropriate Order.* See C.E.B., Powers of Attorney and Health Care Directives, §§3.28 et seq., 9.4 et seq.



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6. Legal Capacity of Conservatee.

b. Capacity To Consent to Medical Treatment.

2. Procedure.

14 Witkin Sum. Cal. Law Wills § 957

[§ 957] Procedure.

(1) *In General. Prob.C. 1891 et seq.* adapt the procedure for appointment of a conservator to the situation where an order affecting the conservatee's capacity to give informed consent to medical treatment is separately sought, with the exception that there is no right to jury trial on this issue. (Legislative Com. Comment to *Prob.C. 1891*.)

(2) *Petition for Order.* The proceeding is commenced by filing a petition to make, modify, or revoke an order under *Prob.C. 1880*, stating facts showing that the requested order is appropriate. The petition may be filed by the conservator, the conservatee, the conservatee's spouse or domestic partner, or a relative or friend; and it must set forth, so far as known, the names and addresses of the spouse, domestic partner, and relatives within the second degree. (*Prob.C. 1891*; see Judicial Council Form No. GC-380 [Petition for Authority to Give Consent for Medical Treatment].)

(3) *Supporting Declaration.* The petition must be supported by a declaration executed by a licensed physician or a licensed psychologist within the scope of licensure stating that the conservatee or proposed conservatee lacks the capacity to give informed consent for any form of medical treatment and giving reasons. (*Prob.C. 1890(c)*.)

(4) *Notice of Hearing.* Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob.C. 1460 et seq.* (supra, §910 et seq.). (*Prob.C. 1892*.)

(5) *Hearing.* The conservator, the conservatee, the conservatee's spouse or domestic partner, relatives, friends, and "any other interested person" may appear at the hearing to support or oppose the petition. (*Prob.C. 1895(a)*; cf. *Prob.C. 1829*, supra, §943; see *Prob.C. 48* and *1424* ["interested person" defined].) The conservatee must be produced at the hearing, except where (a) the conservatee is out of state when served and is not the petitioner; (b) the conservatee is medically unable to attend; or (c) the conservatee is unwilling to attend and does not wish to contest the petition and the court orders that the conservatee need not attend. (*Prob.C. 1893*; cf. *Prob.C. 1825*, supra, §944.) When the conservatee is present at the hearing, the court must inform him or her of the nature, purpose, and effect of the proceeding, and of his or her legal rights. (*Prob.C. 1895(b)*.) Before granting the petition, the court must consult the conservatee to determine his or her opinion concerning the order. (*Prob.C. 1895(c)*; cf. *Prob.C. 1828*, supra, §946.)

(6) *Investigation and Report.* If the petition alleges that the conservatee is unwilling to attend the hearing or it appears that the conservatee is medically unable to attend, the court investigator must personally interview the conservatee, explain the conservatee's legal rights, determine the conservatee's wishes, and submit a written report to the court at least 5 days before the hearing. (*Prob.C. 1894.*) (On investigation and report when conservatorship is established, see *Prob.C. 1826*, supra, §941.)

(7) *Order.* If the court determines that the order requested in the petition is proper, it must make the order. (*Prob.C. 1896(a)*; see Judicial Council Form No. GC-385 [Order Authorizing Conservator to Give Consent for Medical Treatment].) The order may provide that the order or specific provisions of the order terminate at a specified time. (*Prob.C. 1896(b)*.) The order continues in effect until the earliest of the following: (a) the time specified in the order; (b) the time the order is modified or revoked; or (c) the time the conservatorship is terminated. (*Prob.C. 1897*; see *Prob.C. 1898* [order may be modified or revoked after noticed hearing].)

(8) *Limited Conservatorship.* If the order, modification, or revocation applies to a limited conservatorship (see *infra*, §1054 et seq.), the order may only be made on a petition made, noticed, and heard in the manner provided by *Prob.C. 1820* et seq. (supra, §937 et seq.). (*Prob.C. 1890(b)*.)

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c. Capacity To Marry.

Witkin Sum. Cal. Law Wills § 958

[§ 958] Capacity To Marry.

SUPPLEMENT: [This section is current through the latest supplement]

Prob.C. 1900 and *1901* were amended in 2005 to also apply to the conservatee's capacity to enter into a registered domestic partnership.



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14 *Witkin Sum. Cal. Law Wills* § 958

[§ 958] Capacity To Marry.

The appointment of a conservator does not deprive the conservatee of the capacity to marry. (*Prob.C. 1900.*) Whether the conservatee has that capacity is to be determined by general law. (Legislative Com. Comment to *Prob.C. 1900.*) *Prob.C. 1901* authorizes a petition and order to determine the conservatee's capacity to marry. (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:54; C.E.B., 1 Conservatorship Practice, §11.26 et seq.) (For procedures available after conservatee marries, see *Family C. 309* [proceeding to test validity of marriage], *Family C. 2200* et seq. [proceeding to adjudge marriage a nullity], *Family C. 2211(a)(2)*, (c) [conservator authorized to commence nullity proceeding]; 11 *Summary* (10th), *Husband and Wife*, §42 et seq.; and see *Schuck v. Myers* (1965) 233 C.A.2d 151, 154, 43 C.R. 215 [prior statute; conservatee who is not incompetent may sue for divorce].)

SUPPLEMENT: [This section is current through the latest supplement]

Prob.C. 1900 and *1901* were amended in 2005 to also apply to the conservatee's capacity to enter into a registered domestic partnership.



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d. Capacity To Vote.

14 Witkin Sum. Cal. Law Wills § 959

[§ 959] Capacity To Vote.

If the court determines that the conservatee is not capable of completing an affidavit of voter registration in accordance with *Elec.C. 2150*, it must by order disqualify the conservatee from voting pursuant to *Elec.C. 2208* or *2209. (Prob.C. 1910.)* (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §27:55; C.E.B., 1 Conservatorship Practice, §11.34.)

SUPPLEMENT: [This section is current through the latest supplement]



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7. (New) Vexatious Litigants.

14 Witkin Sum. Cal. Law Wills § 959A

[§ 959A] (New) Vexatious Litigants.

If a person files a petition for termination of a conservatorship, or instruction to the conservator, that is unmeritorious, or "intended to harass or annoy the conservator," and the person has previously filed pleadings in the conservatorship proceeding that were unmeritorious, or intended to harass or annoy the conservator, the petition provides grounds for the court to determine that the person is a vexatious litigant. (*Prob.C. 1970(b)*); for comparable statute with respect to guardianship, see text, §931.) (See *Prob.C. 1970(a)* [unwarranted petitions, applications, and motions after a conservatorship has been established (other than discovery motions) "create an environment that can be harmful to the conservatee"]; *Prob.C. 1000* [rules governing vexatious litigants apply to proceedings under the Probate Code]; on vexatious litigants generally, see *C.C.P. 391* et seq., *3 Cal. Proc. (5th), Actions*, §365 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Governing Law.

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[§ 960] Governing Law.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Rules of Court.*

Chapter 21. Guardianships: Chapter 21 now includes C.R.C., Rules 7.1001-7.1010.

Chapter 22. Conservatorships: Chapter 22 now includes C.R.C., Rules 7.1050-7.1060.

(4) *Supremacy of Federal Law. Prob.C. 2112* was repealed in 2006. (On special provisions applicable to Indian children, see Supp., supra, §915A.)

(5) *(New) Wishes of Conservatee as Constraint on Conservator.* "A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate." (*Prob.C. 2113*, added in 2006.)



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14 Witkin Sum. Cal. Law Wills § 960

[§ 960] Governing Law.

(1) *In General.* The former guardianship statute contained a detailed listing of powers and duties, while the conservatorship statute largely relied on incorporation by reference of the powers and duties of guardians. The current law consolidates the powers and duties provisions into a single consistent scheme. The powers and duties of guardians and conservators of the estate are virtually identical, but a few provisions are limited to conservatorships because those provisions are not appropriate for minors. (See 14 Cal. Law Rev. Com. Reports, p. 545.)

(2) *Statutory Framework.* Provisions common to guardianship and conservatorship are set forth in *Prob.C. 2100* et seq. If no specific provision of the Guardianship-Conservatorship Law is applicable in a particular situation, the provisions applicable to estate administration (*Prob.C. 7000* et seq.; see supra, §404 et seq.) govern so far as they are applicable to like situations. (*Prob.C. 2100.*) Guardianships and conservatorships are governed by the general procedural provisions of the Probate Code (*Prob.C. 1000* et seq.; supra, §371 et seq.) except as otherwise "expressly provided by statute." (*Prob.C. 2100.*)

(3) *Rules of Court.* Title 7 of the California Rules of Court (C.R.C., Rule 7.1 et seq.) applies to proceedings under the Probate Code, including guardianship and conservatorship proceedings. (See supra, §372.) The rules specific to these proceedings include the following:

Chapter 5. Bonding of Personal Representatives, Guardians, Conservators, and Trustees: C.R.C., Rule 7.201 et seq.

Chapter 16. Compensation in All Matters Other Than Decedents' Estates: C.R.C., Rule 7.750 et seq. (See infra, §1044.)

Chapter 21. Guardianships: C.R.C., Rules 7.1001, 7.1002.

Chapter 22. Conservatorships: C.R.C., Rules 7.1050, 7.1051.

(4) *Supremacy of Federal Law.* *Prob.C. 2112* recognizes the supremacy of federal law in guardianship and conservatorship proceedings involving Indians subject to federal supervision.

West's Key Number Digest, Guardian and Ward k.3

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Rules of Court.*

Chapter 21. Guardianships: Chapter 21 now includes C.R.C., Rules 7.1001-7.1010.

Chapter 22. Conservatorships: Chapter 22 now includes C.R.C., Rules 7.1050-7.1060.

(4) *Supremacy of Federal Law. Prob.C. 2112* was repealed in 2006. (On special provisions applicable to Indian children, see Supp., supra, §915A.)

(5) *(New) Wishes of Conservatee as Constraint on Conservator.* "A conservator shall accommodate the desires of the conservatee, except to the extent that doing so would violate the conservator's fiduciary duties to the conservatee or impose an unreasonable expense on the conservatorship estate." (*Prob.C. 2113*, added in 2006.)



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b. Fiduciary Relationship.

14 Witkin Sum. Cal. Law Wills § 961

[§ 961] Fiduciary Relationship.

The relationship of guardian and ward and of conservator and conservatee is a fiduciary relationship. That relationship is governed by the law of trusts except as provided in the Guardianship-Conservatorship Law. (*Prob.C. 2101.*) (On duty to use ordinary care and diligence in managing estate, see *Prob.C. 2401*, *infra*, §1001; on removal or resignation, see *infra*, §1048 *et seq.*; and see *39 Am.Jur.2d (1999 ed.)*, *Guardian and Ward* §226 *et seq.*; Chodos, *Fiduciary Duties* §§1:5, 1:18; *13 Summary (10th), Trusts*, §63 *et seq.*; on former law, see *Guardianship of Reynolds (1943)* 60 C.A.2d 669, 674, 141 P.2d 498; *Guardianship of Carlon (1941)* 43 C.A.2d 204, 208, 110 P.2d 488; *Clark v. State Bar (1952)* 39 C.2d 161, 166, 246 P.2d 1; *Guardianship of Cookingham (1955)* 45 C.2d 367, 370, 289 P.2d 16.)

A guardian, like a trustee, is absolutely liable for estate property or funds if he or she surrenders control over them to another, and they are lost. (*Gaver v. Early (1923)* 191 C. 123, 127, 215 P. 394 [guardian negligently allowed attorney to manage estate; held liable for value of property converted by him, with compound interest]; see *Guardianship of Wood (1961)* 193 C.A.2d 260, 266, 14 C.R. 147 [liability for misappropriation]; 72 A.L.R.2d 757 [guardian's liability for interest on ward's funds]; *39 Am.Jur.2d (1999 ed.)*, *Guardian and Ward* §225.)

SUPPLEMENT: [This section is current through the latest supplement]
See *39 Am.Jur.2d (2008 ed.)*, *Guardian and Ward* §185 *et seq.*



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c. Court Supervision.

14 Witkin Sum. Cal. Law Wills § 962

[§ 962] Court Supervision.

(1) *Court Control and Authorization.* "A guardian or conservator is subject to the regulation and control of the court in the performance of the duties of the office." (*Prob.C. 2102.*)

(2) *Finality of Judgment or Order.* When a judgment or order in a guardianship or conservatorship proceeding becomes final, including an order settling an intermediate or final account, the guardian or conservator and the sureties are released. (*Prob.C. 2103(a).*) Under prior guardianship law, an order settling an intermediate account could be reopened and reexamined; the conservatorship law was unclear. (For cases decided under former law, see *Guardianship of Di Carlo* (1935) 3 C.2d 225, 232, 44 P.2d 562; *Guardianship of Vucinich* (1935) 3 C.2d 235, 240, 44 P.2d 567; *Estate of Eaton* (1940) 38 C.A.2d 180, 183, 100 P.2d 813; *Estate of Charters* (1956) 46 C.2d 227, 236, 293 P.2d 778; *Estate of Joslin* (1958) 165 C.A.2d 330, 341, 332 P.2d 151; *Conservatorship of Harvey* (1970) 3 C.3d 646, 650, 91 C.R. 510, 477 P.2d 742; *Guardianship of Slakmon* (1978) 83 C.A.3d 224, 229, 147 C.R. 777.)

However, the rule of finality does not apply where the judgment or order is obtained by fraud, conspiracy, or misrepresentation of a material fact (including the omission of a material fact) contained in the petition, account, judgment, or order. (*Prob.C. 2103(b).*) (See *Bank of America v. Superior Court* (1986) 181 C.A.3d 705, 714, 715, 226 C.R. 685 [minor could not properly rely on either "fraud" or "misrepresentation" exceptions of *Prob.C. 2103(b)* to overcome res judicata effect of order approving guardianship accounting, where minor failed to plead facts showing extrinsic fraud]; *Conservatorship of Coffey* (1986) 186 C.A.3d 1431, 1437, 231 C.R. 421 [conservator's failure to inform probate court of policy lapse was omission of material fact under *Prob.C. 2103(b)*, which effectively negated finality and releasing provisions of *Prob.C. 2102(a)* as to order settling conservator's final account].) A comparable provision relates to decedents' estates. (See *Prob.C. 7250*, supra, §469.)

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d. Joint Guardians or Conservators.

14 Witkin Sum. Cal. Law Wills § 963

[§ 963] Joint Guardians or Conservators.

(1) *Appointment.* The court may appoint two or more joint guardians or conservators of the person or estate or both. (*Prob.C. 2105(a).*) Each joint guardian or conservator must qualify in the same manner as a sole guardian or conservator. (*Prob.C. 2105(b).*) (On requirement of bond, see *Prob.C. 2326*, *infra*, §983.)

If a custodial parent has a terminal condition, the court may appoint the custodial parent and that parent's nominee as joint guardians of the person of a minor. If the noncustodial parent objects, the appointment requires a finding that the noncustodial parent's custody would be detrimental to the minor, as provided by *Family C. 3041* (see 10 *Summary* (10th), *Parent and Child*, §218). For this purpose, a terminal condition is an incurable and irreversible condition that will, without life-sustaining treatment, and within reasonable medical judgment, result in death. The condition must be evidenced by the written declaration of a licensed physician. (*Prob.C. 2105(f).*) (For definition of "custodial parent," see *Prob.C. 1419.5*.)

(2) *Exercise of Powers.* If one of the joint guardians or conservators dies, resigns, or is removed, the powers and duties continue in the others until further appointment is made by the court. (*Prob.C. 2105(d).*) If one or more are (a) absent from the state and unable to act, (b) otherwise unable to act, or (c) legally disqualified from serving, the court may authorize the others to act as to all matters embraced within its order. (*Prob.C. 2105(e).*) A similar provision applies to personal representatives. (See *Prob.C. 9630*, *supra*, §473.) Subject to *Prob.C. 2105(d)* and (e), if there are two guardians or conservators, both must concur to exercise a power. (*Prob.C. 2105(c)(1).*) If there are more than two guardians or conservators, a majority must concur to exercise a power. (*Prob.C. 2105(c)(2).*)

(3) *Liability.* If there are two or more guardians or conservators of the estate, one is not generally liable for a breach of fiduciary duty committed by another. (*Prob.C. 2105.5(a).*) However, one joint guardian or conservator may be held liable for the act of another where the guardian or conservator does any of the following:

- (a) Participates in a breach of fiduciary duty committed by another. (*Prob.C. 2105.5(b)(1).*)
- (b) Improperly delegates the administration of the estate to another. (*Prob.C. 2105.5(b)(2).*)

(c) Approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another. (*Prob.C. 2105.5(b)(3).*)

(d) Negligently enables another to commit a breach of fiduciary duty. (*Prob.C. 2105.5(b)(4).*)

(e) Knows or should have known of the breach of fiduciary duty by another and fails to take "reasonable steps to compel the other guardian or conservator to redress the breach." (*Prob.C. 2105.5(b)(5).*)

The statute is comparable to the joint liability provisions for personal representatives (see *Prob.C. 9631*, *supra*, §474) and trustees (see *Prob.C. 16402*, 13 *Summary* (10th), *Trusts*, §119).

SUPPLEMENT: [This section is current through the latest supplement]



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1. General Provisions.

e. Guardian or Conservator for Nonresident.

14 Witkin Sum. Cal. Law Wills § 964

[§ 964] Guardian or Conservator for Nonresident.

(1) *Person.* A guardian or conservator of the person of a nonresident has the same powers and duties as a guardian or conservator of the person of a resident while the nonresident is in California, unless limited by court order. (*Prob.C. 2107(a).*) Thus, if an appointment is made for a limited purpose, the court may expressly limit the powers and duties to the accomplishment of that purpose. (Law Rev. Com. Comment.) (For powers and duties when nonresident ward or conservatee is not in California, see *supra*, §63.)

(2) *Estate.* A guardian or conservator of the estate of a nonresident has, with respect to the estate in California, the same powers and duties as a guardian or conservator of the estate of a resident. Responsibilities with regard to inventory, accounting, and disposal of the estate are confined to property that comes into the hands of the guardian or conservator in California. (*Prob.C. 2107(b).*)

West's Key Number Digest, Guardian and Ward k.24

SUPPLEMENT: [This section is current through the latest supplement]



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1. General Provisions.

f. Nominated Guardian.

14 Witkin Sum. Cal. Law Wills § 965

[§ 965] Nominated Guardian.

(1) *Guardian of Person.* If a guardian of the person nominated under *Prob.C. 1500* et seq. (supra, §917) is appointed by the court, the order of appointment, to the extent provided in the nomination, must give the guardian the same authority that a custodial parent would have. The guardian may exercise that authority without notice, hearing, or court authorization. (*Prob.C. 2108(a).*) (For definition of "custodial parent," see *Prob.C. 1419.5.*)

(2) *Guardian of Estate.* If a guardian of the estate nominated under *Prob.C. 1500* et seq. (supra, §917) is appointed by the court, the order of appointment, to the extent provided in the nomination, must give the guardian the authority to exercise any of the powers listed in *Prob.C. 2591* (independent powers; see infra, §1029 et seq.). The guardian may exercise that authority without notice, hearing, or court authorization. (*Prob.C. 2108(b).*)

(3) *Guardian for Property.* If a guardian for particular property nominated under *Prob.C. 1500* et seq. (supra, §917) is appointed by the court, the order of appointment, to the extent provided in the nomination, must give the guardian the authority to exercise any of the powers listed in *Prob.C. 2591* (independent powers; see infra, §1029 et seq.). The guardian may exercise that authority without notice, hearing, or court authorization, but the authority must be limited to the property covered by the nomination. (*Prob.C. 2108(b).*)

Subject to *Prob.C. 2108*, a guardian for property has, with respect to that property, the same powers and duties as a guardian of the estate. But the guardian's responsibility for inventory, accounting, and disposal of the estate is confined to the property covered by the nomination. (*Prob.C. 2109(a).*)

(4) *Both Guardian of Estate and Guardian for Property.* If there is both a guardian for particular property and a guardian of the estate, the guardian for particular property manages and controls that property and the guardian of the estate manages and controls the balance of the guardianship estate. (*Prob.C. 2109(b)(1).*) Either guardian may seek instructions from the court concerning the allocation of duties. (*Prob.C. 2109(b)(2)*; on petition for instructions, see *Prob.C. 2403*, infra, §1001.) The court might instruct on such matters as which guardian will pay particular debts or how much each will contribute to support of the ward. (Law Rev. Com. Comment to *Prob.C. 2109.*)

(5) *Limitations.* The court for good cause may decline to make an order granting a nominated guardian the powers

provided in the nomination. (*Prob.C. 2108.*) The terms of an order under *Prob.C. 2108* must be included in the letters of guardianship. (*Prob.C. 2108(c).*)

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g. Appointment of Charitable Corporation.

14 Witkin Sum. Cal. Law Wills § 966

[§ 966] Appointment of Charitable Corporation.

A nonprofit charitable corporation may be appointed as a guardian or conservator of the person or estate or both if (1) it is incorporated in this state, (2) its articles authorize appointment, and (3) it has been providing care, counseling, or financial assistance to the proposed ward or conservatee under the supervision of a registered social worker. (*Prob.C. 2104(a)*.) The petition must include in the caption, and the court must be kept informed of, the name of a responsible corporate officer who will act on behalf of the corporation for purposes of the proceedings. (*Prob.C. 2104(b)*.) The corporation's compensation as guardian or conservator, and any fee allowed for the corporation's attorney, must be for services actually rendered. (*Prob.C. 2104(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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CHAPTER XXI - Wills and Probate

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XVII. GUARDIANSHIP AND CONSERVATORSHIP
E. Provisions Common to Guardianship and Conservatorship.
2. Private Professionals.
a. In General.

Witkin Sum. Cal. Law Wills § 967

[§ 967] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Development.* The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500 et seq.*; Supp., infra, §970A.) The Probate Code provisions currently dealing with private professionals (*Prob.C. 2340-2344*) remain in effect until July 1, 2008, and are repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500 et seq.* may be appointed as professional fiduciaries. (*Prob.C. 2340*, added in 2006 and effective July 1, 2008.)

(2) *Private Professional Conservator.* On qualifications and continuing education requirements for private professional conservators, see C.R.C., Rule 7.1060, adopted in 2006.

(3) *Private Professional Guardian.* On qualifications and continuing education requirements for private professional guardians, see C.R.C., Rule 7.1010, adopted in 2006.

Prob.C. 2341(b) was amended in 2005 to limit the definition of *private professional guardian* to a person or entity appointed as a guardian of the estate but to authorize the court to require a person who is a compensated guardian of the person of a ward not related to the guardian by blood or marriage to comply with the statute.(6) *Statewide Registry.* The Probate Code provisions currently dealing with the statewide registry (*Prob.C. 2850-2855*) remain in effect until July 1, 2008, and are repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)



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2. Private Professionals.
a. In General.

14 Witkin Sum. Cal. Law Wills § 967

[§ 967] In General.

(1) *Statutory Development.* *Prob.C. 2340* et seq. impose various reporting and registration requirements on private professionals. The original statutes applied to conservators, but were later extended to guardians and then to trustees.

(2) *Private Professional Conservator.* A *private professional conservator* is a person or entity appointed as conservator of two or more conservatees at the same time who are not related to the conservator by blood or marriage. The term does not include banks and other entities authorized to conduct the business of a trust company, and public officers and agencies, including the public guardian, public conservator, and other state agencies. In the case of an entity, the natural persons who are authorized by the entity to perform the functions of a conservator must comply with the statute. The court may also require a person who is the conservator for only one conservatee not related to the conservator by blood or marriage to comply with the statute. (*Prob.C. 2341(a).*)

(3) *Private Professional Guardian.* A *private professional guardian* is a person or entity appointed as guardian of two or more wards at the same time who are not related to the guardian by blood or marriage. The term does not include banks and other entities authorized to conduct the business of a trust company, and public officers and agencies, including the public guardian, public conservator, and other state agencies. In the case of an entity, the natural persons who are authorized by the entity to perform the functions of a guardian must comply with the statute. The court may also require a person who is the guardian for only one ward not related to the guardian by blood or marriage to comply with the statute. (*Prob.C. 2341(b).*)

Two categories of guardians are excluded from this definition: (a) a nonrelated guardian of the person of a minor appointed by the juvenile court under *Welf.C. 366.26* (dependent children; see 10 *Summary* (10th), *Parent and Child*, §680 et seq.), and (b) a nonrelated guardian of the person of a minor appointed by the probate court under *Prob.C. 1514*, if the child receives ADFC-FC payments and case management services from the county welfare department. (*Prob.C. 2341(b).*)

(4) *Private Professional Trustee.* A *private professional trustee* is a nonprofit charitable corporation appointed as a trustee under *Prob.C. 15604* (see 13 *Summary* (10th), *Trusts*, §45). (*Prob.C. 2341(c).*)

(5) *Reporting Requirements.* Private professionals are subject to reporting requirements and background checks. (See *infra*, §968.)

(6) *Statewide Registry.* *Prob.C. 2850* et seq. establish a statewide registry for private guardians and conservators and specified trustees. (See *infra*, §969.)

(7) *Restrictions on Self-Dealing.* Statutory restrictions govern self-dealing by private professional guardians and conservators. (See *infra*, §970.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Development.* The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; Supp., *infra*, §970A.) The Probate Code provisions dealing with private professionals (*Prob.C. 2340-2344*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500* et seq. or exempt from the licensing requirements may be appointed or continue as professional fiduciaries. (*Prob.C. 2340*, added in 2006, amended in 2008, and effective July 1, 2008.)

(2) *Private Professional Conservator.* On qualifications and continuing education requirements for private professional conservators, see C.R.C., Rule 7.1060, adopted in 2006.

(3) *Private Professional Guardian.* On qualifications and continuing education requirements for private professional guardians, see C.R.C., Rule 7.1010, adopted in 2006.

Prob.C. 2341(b) was amended in 2005 to limit the definition of *private professional guardian* to a person or entity appointed as a guardian of the estate but to authorize the court to require a person who is a compensated guardian of the person of a ward not related to the guardian by blood or marriage to comply with the statute.(6) *Statewide Registry.* The Probate Code provisions dealing with the statewide registry (*Prob.C. 2850-2855*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)



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b. Reporting Requirements.

Witkin Sum. Cal. Law Wills § 968

[§ 968] Reporting Requirements.

SUPPLEMENT: [This section is current through the latest supplement]

The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; Supp., infra, §970A.) The Probate Code provisions currently dealing with private professionals (*Prob.C. 2340-2344*) remain in effect until July 1, 2008, and are repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500* et seq. may be appointed as professional fiduciaries. (*Prob.C. 2340*, added in 2006 and effective July 1, 2008.)

(1) *Annual Statement.* The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-005 [Declaration of Private Professional Conservator or Guardian--Qualifications (Probate--Guardianships and Conservatorships)]

Judicial Council Form No. GC-006 [Declaration of Private Professional Conservator or Guardian--Continuing Education (Probate--Guardianships and Conservatorships)]



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[§ 968] Reporting Requirements.

(1) *Annual Statement.* Private professionals must file annual statements with the clerk of the court, under penalty of perjury, containing the following information: (a) educational background and professional experience; (b) three professional references; (c) the names of current conservatees, wards, or trusts; (d) the aggregate dollar value of assets currently under supervision; (e) the addresses and telephone numbers of place of business and residence; (f) whether the professional has ever been removed for cause or resigned, the circumstances causing removal or resignation, and details of those cases; and (g) the case names, court locations, and case numbers of all closed cases for which the professional served. (*Prob.C. 2342(a).*) (For reporting requirements of conservators authorized by tax-exempt entities, see *Prob.C. 2342.5.*)

(2) *Information Is Confidential.* The information required by *Prob.C. 2342* is confidential, but must be "made available to the court for any purpose," including determining the appropriateness of appointing, continuing, or removing the professional. (*Prob.C. 2342(d).*)

(3) *Background Checks.* *Prob.C. 2342(c)* requires the clerk of the court to order specified background checks on each private professional and provides for Department of Justice maintenance and court review of criminal background records.

(4) *Statement on Filing Petition for Appointment.* On filing a petition for appointment, a private professional must state that he or she is a private professional and that the information required by *Prob.C. 2342* is on file with the clerk of the court. (*Prob.C. 2342(b).*)

(5) *Prerequisites to Appointment.* The court may not appoint a private professional unless the professional files the required annual statement with the clerk of the court in each county where a petition for appointment has been filed and pays the required annual filing fee (see *Prob.C. 2343*). (*Prob.C. 2340.*)

West's Key Number Digest, Guardian and Ward k.10

SUPPLEMENT: [This section is current through the latest supplement]

The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; Supp., infra, §970A.) The Probate Code provisions dealing with private professionals (*Prob.C. 2340-2344*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500* et seq. or exempt from the licensing requirements may be appointed or continue as professional fiduciaries. (*Prob.C. 2340*, added in 2006, amended in 2008, and effective July 1, 2008.)

(1) *Annual Statement*. The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-005 [Declaration of Private Professional Conservator or Guardian--Qualifications (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-006 [Declaration of Private Professional Conservator or Guardian--Continuing Education (Probate--Guardianships and Conservatorships)].



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c. Statewide Registry.

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[§ 969] Statewide Registry.

SUPPLEMENT: [This section is current through the latest supplement]

The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; Supp., infra, §970A.) The Probate Code provisions currently dealing with private professionals (*Prob.C. 2340-2344*) remain in effect until July 1, 2008, and are repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500* et seq. may be appointed as professional fiduciaries. (*Prob.C. 2340*, added in 2006 and effective July 1, 2008.) The Probate Code provisions currently dealing with the statewide registry (*Prob.C. 2850-2855*) remain in effect until July 1, 2008, and are repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)

(3) *Exempt Persons*.(h) *Prob.C. 2854(f)* was repealed in 2005.

(i) *Prob.C. 2854(g)* was relettered *Prob.C. 2854(f)* in 2005.



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[§ 969] Statewide Registry.

Prob.C. 2850 et seq. establish a statewide registry for private guardians, conservators, and trustees.

(1) *Maintenance of Registry*. The Department of Justice maintains the registry. (*Prob.C. 2850(a)(1)*.) It may charge a reasonable fee and must issue a certificate of registration to each registrant. (*Prob.C. 2850(c)*.) The statewide registry does not replace any existing county registry. (*Prob.C. 2855(a)*.)

(2) *Registration Requirement*. Except as otherwise required, current and prospective guardians, conservators, and trustees must register with the registry and must reregister every 3 years, by filing a declaration. (*Prob.C. 2850(a)(3)*.) (For registration information and form, see California Attorney General website at www.ag.ca.gov.) The court may not appoint a guardian, conservator, or trustee who is required to register but has failed to do so. (*Prob.C. 2851(a)*.) (On removal of those who fail to register, see *Prob.C. 2851(b)*; on order to show cause why trustee who fails to register should not be removed, see *Prob.C. 17200(c)*; on emergency appointment without registration, see *Prob.C. 2853*; on educational requirements as condition for registration, see *Prob.C. 2344*.) In appointing, continuing, or removing a conservator, guardian, or trustee, the court must examine and consider the information about that person in the registry. (*Prob.C. 2851(c), 2852(b)*.)

(3) *Exempt Persons*. A variety of persons are exempt from the registration requirement:

(a) Public conservators and guardians. (*Prob.C. 2854(a)*.)

(b) Persons related to the ward, conservatee, or trustor by blood, marriage, adoption, registered domestic partnership, or a specified relationship under *Family C. 297*. (*Prob.C. 2854(b)*.)

(c) Trustees who serve for the benefit of no more than three people or families. For this purpose, neither the number of trust beneficiaries nor trusts excluded under *Prob.C. 2854(a)* or *2854(b)* is considered in the calculation, and "family" means related by blood, marriage, adoption, registered domestic partnership, or a specified relationship under *Family C. 297*. (*Prob.C. 2854(c)*.)

(d) Persons and entities subject to oversight by local, state, or federal Government. (*Prob.C. 2854(d)*.)

(e) Conservators and guardians who are not required to file information under *Prob.C. 2340*, governing private professionals (see *supra*, §967). (*Prob.C. 2854(d)*.)

(f) Attorneys licensed in California who act as trustees of only attorney client trust accounts. (*Prob.C. 2854(d)*.)

(g) A conservator who resided in the same home as the conservatee immediately before the condition or event that gave rise to the need for the conservatorship. (*Prob.C. 2854(e)*.)

(h) A nonrelated guardian of the person of a minor appointed by the juvenile court under Welf.C. 366.26 (dependent children; see 10 *Summary* (10th), *Parent and Child*, §680 et seq.), and a nonrelated guardian of the person of a minor appointed by the probate court under *Prob.C. 1514*, if the child receives ADFC-FC payments and case management services from the county welfare department. (*Prob.C. 2854(f)*.) (See *Prob.C. 2341(b)*, *supra*, §967 [these persons are excluded from definition of "private professional guardian"]; Stats. 2002, Chap. 1115, §1 [exemption is based on financial hardship to foster parents].)

(i) Trust companies and FDIC insured institutions and their holding companies, subsidiaries, and affiliates, and employees of these entities while serving as trustees. (*Prob.C. 2854(g)*.)

(4) *Information Provided by Registrant.* A registrant must file a signed declaration stating name, business address and telephone number, educational background, professional experience, names of current conservatees or wards, names of trusts currently administered, aggregate dollar value of assets currently under supervision, and information about cases in which the registrant has resigned or been removed for cause. Private professional guardians and private professional conservators must also show compliance with educational requirements established by the Judicial Council. (*Prob.C. 2850(b)*.)

(5) *Confidentiality.* Generally, information in the registry is confidential, but must be made available to the court "for any purpose." On request, the registry must disclose to the public whether an individual is or is not registered, the educational background and professional experience of registrants, and findings and orders under *Prob.C. 2850(d)*. (*Prob.C. 2850(a)(2)*.)

(6) *Information Provided by Court.* Where a court finds that a conservator, guardian, or trustee has not properly performed and orders removal or a surcharge for other than nominal damages, the clerk must forward a copy of the findings and order to the registry. (*Prob.C. 2850(d)*.) A court that removes a conservator, guardian, or trustee for cause or accepts a resignation must notify the registry of the removal or resignation and the reason for it. (*Prob.C. 2852(b)*.)

(7) *Criminal Penalties.* A registrant whose declaration contains a knowingly false statement of material matter is guilty of a misdemeanor, punishable by a county jail sentence up to 1 year, a fine up to \$ 2,000, or both. (*Prob.C. 2850(b)*.)

(8) *Civil Penalties.* A person required to register who serves as a conservator, guardian, or trustee without being registered, who commits fraud in registering, who falsely asserts registration, or who makes false claims or representations about the information in the registry is subject to a civil penalty of \$ 200 for the first violation and \$ 500 for subsequent violations. (*Prob.C. 2852(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]

The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; Supp., *infra*, §970A.) The Probate Code provisions dealing with private professionals (*Prob.C. 2340-2344*) remained in effect until July 1, 2008, were repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500* et seq. or exempt from the licensing requirements may be appointed or continue as professional fiduciaries. (*Prob.C. 2340*, added in 2006, amended in 2008, and effective July 1, 2008.) The Probate Code provisions dealing with the statewide registry (*Prob.C. 2850-2855*) remained in effect until July 1, 2008, and were

repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)

(3) *Exempt Persons*.(h) *Prob.C. 2854(f)* was repealed in 2005.

(i) *Prob.C. 2854(g)* was relettered *Prob.C. 2854(f)* in 2005.



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Witkin Sum. Cal. Law Wills § 970

[§ 970] Restrictions on Self-Dealing.

SUPPLEMENT: [This section is current through the latest supplement]

The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; Supp., infra, §970A.) The Probate Code provisions currently dealing with private professionals (*Prob.C. 2340-2344*) remain in effect until July 1, 2008, and are repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500* et seq. may be appointed as professional fiduciaries. (*Prob.C. 2340*, added in 2006 and effective July 1, 2008.) The Probate Code provisions currently dealing with the statewide registry (*Prob.C. 2850-2855*) remain in effect until July 1, 2008, and are repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)

Prob.C. 2401, restricting self-dealing by private guardians and conservators, was amended in 2006. The limitation to private guardians and conservators was eliminated. *Prob.C. 2401(c)*, discussed in the text, now applies to a guardian or conservator of the estate who is not a trust company. *Prob.C. 2401(d)*, added in 2006, imposes special restrictions on a guardian or conservator of the estate who is a trust company.



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[§ 970] Restrictions on Self-Dealing.

Private guardians and conservators (those required to register under *Prob.C. 2850* et seq.; see *supra*, §969) may not hire or refer business to an entity in which the guardian or conservator has a financial interest without court authorization. Prior to authorization, the interest must be disclosed to the court in writing. For this purpose, "financial interest" means (1) an ownership interest in a sole proprietorship, partnership, or closely held corporation, (2) an ownership interest of greater than 1 percent in a publicly traded corporation, or (3) being an officer or director of a corporation. (*Prob.C. 2351(d)* [guardian and conservator of person]; *Prob.C. 2401(c)* [guardian and conservator of estate].) (See *32 McGeorge L. Rev. 647*.)

SUPPLEMENT: [This section is current through the latest supplement]

The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; Supp., *infra*, §970A.) The Probate Code provisions dealing with private professionals (*Prob.C. 2340-2344*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) After July 1, 2008, only persons licensed under *B. & P.C. 6500* et seq. or exempt from the licensing requirements may be appointed or continue as professional fiduciaries. (*Prob.C. 2340*, added in 2006, amended in 2008, and effective July 1, 2008.) The Probate Code provisions dealing with the statewide registry (*Prob.C. 2850-2855*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)

Prob.C. 2401, restricting self-dealing by private guardians and conservators, was amended in 2006. The limitation to private guardians and conservators was eliminated. *Prob.C. 2401(c)*, discussed in the text, now applies to a guardian or conservator of the estate who is not a trust company. *Prob.C. 2401(d)*, added in 2006, imposes special restrictions on a guardian or conservator of the estate who is a trust company.



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2A. (New) Professional Fiduciaries Act.

14 Witkin Sum. Cal. Law Wills § 970A

[§ 970A] (New) Professional Fiduciaries Act.

(1) *In General.* The Professional Fiduciaries Act (*B. & P.C. 6500 et seq.*) was adopted in 2006 and amended in 2007. It governs those who act as professional fiduciaries. For this purpose, a professional fiduciary is "a person who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership." The term "professional fiduciary" includes a person who acts as a trustee, an agent under a durable power of attorney for health care, or an agent under a durable power of attorney for finances "for more than three people or more than three families, or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary by blood, adoption, marriage, or registered domestic partnership." (*B. & P.C. 6501(f).*) Public officers and agencies acting in the course and scope of their official duties, trust companies and specified financial institutions and their employees acting in the course and scope of their employment, and broker-dealers, agents, investment advisers, and investment adviser representatives registered and regulated under specified statutes are excluded. (*B. & P.C. 6501(f).*)

(2) *Licensing Requirement.* Beginning January 1, 2009, persons acting or holding themselves out as professional fiduciaries must be licensed under *B. & P.C. 6500 et seq.* This requirement does not apply to attorneys and certified public accountants licensed in California or to agents enrolled to practice before the Internal Revenue Service. (*B. & P.C. 6530.*) Persons required to be registered with the Statewide Registry under *Prob.C. 2850 et seq.* (text, §969) and persons required to file information with the court under *Prob.C. 2340 et seq.* (text, §967) must be licensed as professional fiduciaries under *B. & P.C. 6500 et seq.* (*B. & P.C. 6502.*) A licensed person may be identified as a "licensed professional fiduciary." (*B. & P.C. 6532.*)

(3) *Administration.* *B. & P.C. 6500 et seq.* are administered by the Professional Fiduciaries Bureau within the Department of Consumer Affairs until January 1, 2012, and by the Professional Fiduciaries Advisory Committee after that date. (*B. & P.C. 6510* [Professional Fiduciaries Bureau]; *B. & P.C. 6511* [Professional Fiduciaries Advisory Committee]; on powers and duties, see *B. & P.C. 6513 et seq.*; on authority to adopt regulations, see *B. & P.C. 6517.*) The agency administers the licensing and regulatory program established by *B. & P.C. 6500 et seq.*, approves qualifying education classes, and prepares and administers licensing examinations. (*B. & P.C. 6518.*) The bureau's website is: www.fiduciary.ca.gov.

(4) *Code of Ethics.* The licensing agency must adopt a Professional Fiduciaries Code of Ethics, consistent with

statutory requirements and requirements developed by the courts and the Judicial Council. The Code must be provided electronically on the agency's website. (*B. & P.C. 6520.*) (For Code of Ethics, see 16 Cal. Code. Reg. §4470 et seq.)

(5) *Education Requirements.* Applicants must complete 30 hours of approved prelicensing education courses to apply for a license and licensees must complete 15 hours of approved continuing education courses to renew a license. (*B. & P.C. 6538.*)

(6) *Qualifications.* The qualifications for licensure are specified in *B. & P.C. 6533* and the grounds for denial are specified in *B. & P.C. 6536*. Applicants must agree to adhere to the Professional Fiduciaries Code of Ethics. (*B. & P.C. 6533(h).*) (On requirements of college degree and professional experience with fiduciary responsibilities, see *B. & P.C. 6533(g).*)

(7) *Procedures.* Applicants must submit an application (*B. & P.C. 6533(j)*), pay a nonrefundable fee (*B. & P.C. 6533(k)*), consent to a credit check (*B. & P.C. 6533(i)*), provide fingerprints for a criminal records check under *B. & P.C. 6533.5* (*B. & P.C. 6533(d)*), and pass a licensing examination under *B. & P.C. 6539* (*B. & P.C. 6533(f)*). (On investigation, determination, and appeal, see *B. & P.C. 6535* et seq.) A license expires after 1 year. (*B. & P.C. 6541(a).*) (On renewal application, see *B. & P.C. 6541(b).*)

(8) *Records and Annual Statement.* A licensee must keep complete and accurate records of client accounts and make those records available for an audit by the licensing agency. (*B. & P.C. 6560.*) A licensee must file an annual statement with the licensing agency, under penalty of perjury, at least 60 days before the license expires. The statement may be filed electronically. (*B. & P.C. 6561, 6562*; for required contents of statement, see *B. & P.C. 6561(a).*)

(9) *Public and Private Information.* *B. & P.C. 6534* sets forth information that must be maintained in a licensee's file, including information about current and past guardianships, conservatorships, estates, and trusts for which the licensee has served as a fiduciary. Designated information must be made available to the public. (*B. & P.C. 6534(b).*) Other information is confidential, but must be made available to a court for any purpose. (*B. & P.C. 6534(a).*) (For requirement that public information be posted on website, see *B. & P.C. 6534(c).*)

(10) *Complaints and Investigation.* The licensing agency may investigate the actions of a professional fiduciary and must do so on receipt of a complaint. (*B. & P.C. 6580(a).*) Enforcement proceedings are governed by the Administrative Procedure Act (see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §34 et seq.) and are prosecuted by the Attorney General. (*B. & P.C. 6582.*) A case may also be referred to the district attorney for criminal prosecution. (*B. & P.C. 6582.5.*)

(11) *Sanctions.* The agency may impose sanctions on a finding that the fiduciary breached a fiduciary duty or violated a statute or regulation or the Professional Fiduciaries Code of Ethics. (*B. & P.C. 6580(a).*) Sanctions may include administrative citations and fines, and license suspension, probation, or revocation. (*B. & P.C. 6580(b).*) (On grounds for disciplinary action or suspension, revocation, or denial of license, see *B. & P.C. 6584.*) Information about sanctions and related enforcement actions must be provided on the Internet. (*B. & P.C. 6580(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Public Guardian.
a. Nature of Office.

Witkin Sum. Cal. Law Wills § 971

[§ 971] Nature of Office.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Grounds for Appointment.* In 2006, *Prob.C. 2920(b)* was amended to require the court to order the public guardian to apply for appointment when the statutory grounds are met, but to relieve the public guardian of that duty if, before the petition is filed, "it is discovered that there is someone else who is qualified and willing to act."

(3) *(New) Investigation.* In investigating whether the appointment of the public guardian as a conservator is necessary or appropriate, the public guardian or the adult protective services agency, on a showing of probable cause to believe that a person is in substantial danger of abuse or neglect, may petition for orders to assist in the investigation. (*Prob.C. 2910(a)*, added in 2007.) The following orders are authorized:

(a) An order authorizing health care providers or organizations to provide private medical information about the person. (*Prob.C. 2910(b)(1)*, added in 2007.)

(b) An order authorizing financial institutions and persons with financial information to provide financial information about the person. (*Prob.C. 2910(b)(2)*, added in 2007.)

Notice of the hearing and a copy of the petition must be served on the person as provided in *Prob.C. 1460* (text, §910) or, on an expedited basis, as provided by the court. The court may dispense with notice "only on a showing of facts demonstrating an immediate threat of substantial harm to the person if notice is given." (*Prob.C. 2910(c)*, added in 2007.)

The order must (a) authorize the disclosure of confidential medical information as provided under California law and under federal medical privacy regulations, (b) require that the information be kept confidential (with specified exceptions), and (c) require that all copies of written information be destroyed (or given to the person) if a conservatorship proceeding is not commenced within 60 days after the date of the order, although the 60-day period may be extended if the court finds that it is in the best interests of the person to do so. (*Prob.C. 2911*, added in 2007.)



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14 Witkin Sum. Cal. Law Wills § 971

[§ 971] Nature of Office.

(1) *In General.* Govt.C. 27430 et seq. authorize county boards of supervisors to create the office of public guardian and to appoint a public guardian to fill the office. Prob.C. 2900 et seq. provide that the public guardian may be appointed a guardian or conservator of the person or estate or both (see infra, §972) and may take temporary possession or control of property under specified circumstances (see infra, §973). (On administration of estate, see infra, §974.)

(2) *Grounds for Appointment.* The court may order appointment of the public guardian as guardian or conservator if (a) a person domiciled in the county requires a guardian or conservator; (b) there is no one else qualified and willing to act; and (c) the appointment of the public guardian would be in the best interest of the ward or conservatee. (Prob.C. 2920.) (See *Poaster v. Superior Court* (1993) 20 C.A.4th 948, 952, 24 C.R.2d 582 [trial judge had authority under Prob.C. 2920 to appoint public guardian as guardian ad litem for minor in action by district attorney to establish paternity and obtain reimbursement for public support].) (On public guardian as guardian ad litem, see Prob.C. 1003.5.)

The Law Revision Commission Comment to Prob.C. 2920 points out: (a) Prob.C. 2920 applies even though a person may be institutionalized in a facility in another county if the person is domiciled in the county of the public guardian. (b) Even though other persons may be qualified and willing to act, their appointment may not be in the best interest of the ward or conservatee, e.g., where a neutral party is needed because of family disputes.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Grounds for Appointment.* In 2006, Prob.C. 2920(b) was amended to require the court to order the public guardian to apply for appointment when the statutory grounds are met, but to relieve the public guardian of that duty if, before the petition is filed, "it is discovered that there is someone else who is qualified and willing to act."

On educational requirements applicable to public conservator, see Prob.C. 1456.2, added in 2008.

(3) *(New) Investigation.* In investigating whether the appointment of the public guardian as a conservator is necessary or appropriate, the public guardian or the adult protective services agency, on a showing of probable cause to believe that a person is in substantial danger of abuse or neglect, may petition for orders to assist in the investigation. (Prob.C. 2910(a), added in 2007.) The following orders are authorized:

(a) An order authorizing health care providers or organizations to provide private medical information about the person. (*Prob.C. 2910(b)(1)*, added in 2007.)

(b) An order authorizing financial institutions and persons with financial information to provide financial information about the person. (*Prob.C. 2910(b)(2)*, added in 2007.)

Notice of the hearing and a copy of the petition must be served on the person as provided in *Prob.C. 1460* (text, §910) or, on an expedited basis, as provided by the court. The court may dispense with notice "only on a showing of facts demonstrating an immediate threat of substantial harm to the person if notice is given." (*Prob.C. 2910(c)*, added in 2007.)

The order must (a) authorize the disclosure of confidential medical information as provided under California law and under federal medical privacy regulations, (b) require that the information be kept confidential (with specified exceptions), and (c) require that all copies of written information be destroyed (or given to the person) if a conservatorship proceeding is not commenced within 60 days after the date of the order, although the 60-day period may be extended if the court finds that it is in the best interests of the person to do so. (*Prob.C. 2911*, added in 2007.)



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b. Appointment Procedure.

Witkin Sum. Cal. Law Wills § 972

[§ 972] Appointment Procedure.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Application and Order*. In 2006, *Prob.C. 2920(a)* was amended to add that the public guardian must apply for appointment as a guardian or conservator if there is an imminent threat to the person's health or safety or to the person's estate.



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14 Witkin Sum. Cal. Law Wills § 972

[§ 972] Appointment Procedure.

(1) *Application and Order.* The public guardian may apply for appointment as a guardian or conservator of the person, the estate, or both, and must apply for appointment if the court so orders. (*Prob.C. 2920.*) (On background checks in specified circumstances, see *Prob.C. 2920.5.*) The court may order appointment of the public guardian on motion of an interested person or on the court's own motion in a pending proceeding or in a proceeding commenced for that purpose. (*Prob.C. 2920(b)*; see *Prob.C. 48* and *1424* ["interested person" defined].)

(2) *Notice and Hearing.* The order may only be made after (a) notice to the public guardian for the period and in the manner provided in *Prob.C. 1460* et seq. (supra, §910 et seq.), (b) "consideration of the alternatives," and (c) "a determination by the court that the appointment is necessary." The notice and hearing may be combined with the general notice and hearing required for appointment of a guardian or conservator. (*Prob.C. 2920(b)*.)

The Law Revision Commission Comment to *Prob.C. 2920* notes the following:

(a) The "determination of necessity" may require the court to ascertain whether there is any other alternative to public guardianship, and whether the public guardianship is simply being sought as a convenience or as a strategic litigation device by the parties involved.

(b) "Alternative means of resolving the situation," besides appointment of the public guardian, may, in an appropriate case, include such options as use of a private guardian or appointment of a guardian ad litem.

(3) *Consent of Departments of Mental Health or Developmental Services.* Where a person is under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, an application of the public guardian for guardianship or conservatorship may not be granted without the written consent of the department. (*Prob.C. 2921.*)

(4) *Letters, Oath, and Bond.* Letters must be issued in the same manner and by the same proceedings as letters are issued to other persons. Letters may be issued to "the public guardian" of the county without naming the public guardian. (*Prob.C. 2922(a)*.) Letters issued in this form are sufficient to enable a successor public guardian to act

without the issuance of new letters. (Law Rev. Com. Comment.)

The official bond and oath of the public guardian are in lieu of the ordinary bond and oath of a guardian or conservator. (*Prob.C. 2922(b)*.) The public guardian is allowed a share of the cost of the bond as an expense of administration. (See *Prob.C. 2942*, *infra*, §974.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Application and Order*. In 2006, *Prob.C. 2920(a)* was amended to add that the public guardian must apply for appointment as a guardian or conservator if there is an imminent threat to the person's health or safety or to the person's estate.



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c. Temporary Possession or Control of Property.

14 Witkin Sum. Cal. Law Wills § 973

[§ 973] Temporary Possession or Control of Property.

(1) *General Authority of Public Guardian.* If the public guardian determines that the requirements for appointment of a guardian or conservator of the estate are satisfied and the public guardian intends to apply for appointment, the public guardian may take immediate possession or control of property of a person domiciled in the county that is subject to loss, injury, waste, or misappropriation. (*Prob.C. 2900(a).*)

(2) *Authority To Deny Use of Property.* The public guardian may deny use, access, or possession of the property of an intended ward or conservatee by any person who does not have a *written rental agreement or other legal right* to the property. (*Prob.C. 2900(a).*) This authority includes the authority to terminate occupancy "immediately" and to remove any person, other than the intended ward or conservatee. (*Prob.C. 2900(b).*) If the public guardian takes possession of the residence of the intended ward or conservatee, the guardian becomes the owner's representative for purposes of P.C. 602.3 (removal of tenant; see 12 *Summary* (10th), *Real Property*, §514). (*Prob.C. 2900(c).*) The following requirements apply:

(a) The public guardian must contact the intended ward or conservatee and the occupant and advise them of the proposed removal and the grounds for it. (*Prob.C. 2900(b)(1).*)

(b) The public guardian must determine that the occupant has no written rental agreement or legal right to occupancy and has caused, contributed to, enabled, or threatened loss, injury, waste, or misappropriation of the property. (*Prob.C. 2900(b)(1).*)

(c) The public guardian must file a petition regarding removal, which is set for hearing within 10 days of filing and 15 days of removal. The occupant and the intended ward or conservatee must be personally served with notice of the hearing and a copy of the petition, subject to *Prob.C. 1200 et seq.* (*Prob.C. 2900(b)(3).*) They must also be advised at the time of removal that a hearing will be held. (*Prob.C. 2900(b)(2).*)

(d) The right of the public guardian to deny occupancy terminates 15 days after removal, unless extended by the court at the hearing. An extension may not be granted unless the public guardian has petitioned for appointment as the guardian or conservator of the estate. (*Prob.C. 2900(b)(3).*)

(3) *Certification of Authority.* A public guardian who is authorized to take possession or control of property under *Prob.C. 2900* et seq. may issue a written certification of that fact, effective for 15 days after issuance. (*Prob.C. 2901(a).*) The certificate may be recorded in any county in which real property subject to possession or control by the public guardian is located. (*Prob.C. 2901(c).*) A statutory form for the certificate is set forth in *Prob.C. 2901(b).*

(4) *Duty of Persons To Provide Information or Surrender Property.* A financial institution or other person must, without the necessity of inquiring into the truth of the written certification and without court order or letters being issued, provide the public guardian with information about property held in the sole name of the proposed ward or conservatee, and surrender to the public guardian property of the proposed ward or conservatee that is subject to loss, injury, waste, or misappropriation. (*Prob.C. 2901(d).*) Receipt of the written certification "fully discharges" the financial institution or other person from liability for any act or omission of the public guardian with respect to property. (*Prob.C. 2901(e).*)

(5) *Costs and Fees.* A public guardian who takes temporary possession or control of property is entitled to "reasonable costs incurred for the preservation of the property, together with reasonable compensation for services, in case of the subsequent appointment of another person as guardian or conservator of the estate. The costs and fees are a proper and legal charge against the estate of the ward or conservatee." (*Prob.C. 2902.*) The Law Revision Commission Comment points out that these costs and fees are subject to court approval under *Prob.C. 2430* (infra, §1010), and that, where the public guardian is ultimately appointed guardian or conservator, the costs and fees are part of the public guardian's commission under *Prob.C. 2942* (infra, §974).

(6) *Immunity of Public Guardian.* "The public guardian is not liable for failing to take possession or control of property that is beyond the ability of the public guardian to possess or control." (*Prob.C. 2944.*)

(7) *Financial Abuse of Mentally Impaired Elders.* *Prob.C. 2950* et seq. authorize the public guardian to take possession of property on the basis of a signed declaration of a peace officer that there is (a) probable cause to believe that an elder person is substantially unable to manage his or her financial resources or to resist fraud or undue influence, (b) a significant danger that the elder person will lose property as a result of fraud, misrepresentation, or mental incapacity, and (c) probable cause to believe that a crime is being committed against the elder person connected with his or her inability, due to deficits in mental functions, to manage financial resources or resist fraud or undue influence. A statutory form for the declaration is set forth in *Prob.C. 2954.* (See 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, Supp., §168.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Administration of Estate.

14 Witkin Sum. Cal. Law Wills § 974

[§ 974] Administration of Estate.

(1) *Deposit of Funds.* Funds coming into the custody of the public guardian must be deposited or invested in the same manner and subject to the same terms and conditions as deposit or investment by the public administrator of money in an estate pursuant to *Prob.C. 7640 et seq.* (supra, §421). (*Prob.C. 2940.*)

(2) *Employment of Attorneys.* The public guardian may, if necessary, employ private attorneys "where the cost of employment can be defrayed out of estate funds or where satisfactory pro bono or contingency fee arrangements can be made." (*Prob.C. 2941.*)

(3) *Expenses.* The public guardian is paid from the estate of the ward or conservatee for all of the following:

(a) "Reasonable expenses incurred in the execution of the guardianship or conservatorship." (*Prob.C. 2942(a).*)

(b) Compensation for services of the public guardian and the attorney of the public guardian, and for filing and processing services, "in the amount the court determines is just and reasonable." In determining compensation, the court must consider, among other factors, the actual costs of the services provided, the value of the estate, the special value of the services in relation to the estate, and whether the requested compensation might impose an economic hardship on the estate. The public guardian need not base a request for compensation on an hourly rate of service. (*Prob.C. 2942(b).*)

(c) An annual bond fee in the amount of \$ 25 plus one-fourth of 1 percent of the amount of an estate greater than \$ 10,000, to be remitted to the county treasury. Estates of persons eligible for Social Security Supplemental Income benefits are exempt from the bond fee. (*Prob.C. 2942(c).*) (See *Conservatorship of Cooper* (1993) 16 C.A.4th 414, 417, 20 C.R.2d 84 [*Prob.C. 2942(c)* is constitutional].)

(4) *Inventory and Appraisal.* Notwithstanding *Prob.C. 2610(c)* (infra, §1033), property described in the inventory may be appraised by the public guardian, rather than the probate referee, if the public guardian files with the inventory an appraisal showing that the estimated value of the property in the estate does not exceed the amount prescribed in *Prob.C. 13100* (\$ 100,000; see supra, §797). (*Prob.C. 2943(a).*) (On appraisal by probate referee in specified

circumstances, see *Prob.C. 2943(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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a. Appointment.

Witkin Sum. Cal. Law Wills § 975

[§ 975] Appointment.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition for Appointment*. *Prob.C. 2250(f)* was relettered in 2006 and deleted in 2007.

The fee for filing a petition for temporary letters of conservatorship or guardianship is \$ 40. (*Govt.C. 70657.5(a)(5)*, added in 2007.) (See *Govt.C. 70657.5(b)(1)* [fee does not apply to petition filed after issuance of letters of guardianship of person only or temporary guardianship of person only].)

An additional form was adopted in 2006: Judicial Council Form No. GC-110(P) [Petition for Appointment of Temporary Guardian of the Person]. A party petitioning for the appointment of a temporary guardian of the person of a minor may use either Judicial Council Form No. GC-110 or Judicial Council Form No. GC-110(P). A party petitioning for the appointment of a temporary guardian of the estate of a minor or the person and estate of a minor must use Judicial Council Form No. GC-110. (C.R.C., Rule 7.101(c), adopted in 2006.)

(New) Petition by private professional conservator: If the petitioner is a private professional conservator, the petition must state the petitioner's license information and must explain how the petitioner was engaged to file the petition and any relationship with the proposed conservatee, family, or friends, unless that information is included in a petition for the appointment of a general conservator filed at the same time. (*Prob.C. 2250(c)*, added in 2007.)

(New) Petition not filed by proposed conservatee: If the petition is not filed by the proposed conservatee, it must include a declaration of due diligence showing (a) efforts to find the proposed conservatee's relatives or why it was not feasible to contact them, and (b) the proposed conservatee's preferences concerning the appointment or why it was not feasible to ascertain them. (*Prob.C. 2250(d)*, added in 2007.) (3) *Notice.* In 2006, *Prob.C. 2250(c)* was amended (a) to specify that the notice must be given at least 5 days before the hearing on the petition rather than 5 days before the appointment, (b) to provide that the notice must not be given to a proposed ward under 12 years of age, (c) to add that the notice must be served on the persons required to be named in the petition for appointment of a conservator, and (d) to require that a copy of the petition must be served with the notice. In 2007, the notice provision was renumbered *Prob.C. 2250(e)* and amended to require notice to be served on the public guardian if the petitioner and the proposed conservator have no prior relationship with the proposed conservatee and the proposed conservator has not been

nominated by a person who has a relationship with the proposed conservatee. (On good cause exception to notice requirements, see Supp., *infra*, §975A.)

(3a) *(New) Investigation and Report.* *Prob.C. 2250.6*, added in 2006, requires an investigation and report concerning a temporary conservatorship. The statute specifies the nature and scope of the court investigator's duties in provisions somewhat comparable to *Prob.C. 1826* (text and Supp., §941).

(3b) *(New) Attendance at Hearing.* *Prob.C. 2250.4*, added in 2006, specifies the circumstances in which a proposed conservatee is not required to attend the hearing.

(4) *Court Appointment After Suspension.* *Prob.C. 2250(g)* has been relettered *Prob.C. 2250(i)*.

(5) *Court Appointment When Vacancy Occurs.* *Prob.C. 2250(h)* has been relettered *Prob.C. 2250(j)*.

(7) *Reconsideration of Ex Parte Order.* *Prob.C. 2250(d)* was relettered *Prob.C. 2250(f)* in 2007.

If a temporary conservatorship is granted *ex parte* and a petition to terminate it is filed more than 15 days before the first hearing on the general petition to appoint a conservator, the court must set a hearing within 15 days to reconsider the temporary conservatorship. Unless the court orders otherwise, notice of the hearing must be given at least 10 days before the hearing. (*Prob.C. 2250(h)(1)*, added in 2006 and relettered in 2007.) If the termination petition is filed within 15 days of the hearing on the general petition, the hearing on the termination petition is set at the same time as the hearing on the general petition. Unless the court orders otherwise, notice of the hearing must be given at least 5 court days before the hearing. (*Prob.C. 2250(h)(2)*, added in 2006 and relettered in 2007.)(8) *Visitation Order Remains Effective.* *Prob.C. 2250(e)* was relettered *Prob.C. 2250(g)* in 2007.

(10) *(New) Appointment of Temporary Conservator in LPS Proceedings.* *Prob.C. 2250.2*, added in 2006, governs the appointment of a temporary conservator in LPS proceedings. Its provisions are comparable to the provisions of *Prob.C. 2250* stated in the text. Under *Prob.C. 2250.8*, added in 2006, the provisions of *Prob.C. 2250*, *2250.4*, and *2250.6* do not apply to LPS proceedings.



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14 Witkin Sum. Cal. Law Wills § 975

[§ 975] Appointment.

(1) *Statutory Development.* Former law provided for the appointment of a special guardian of the estate (former Prob.C. 1640 et seq.) or of a temporary conservator (former Prob.C. 2201 et seq.) to serve on an interim basis pending determination of the main petition. (See *Conservatorship of Oliver* (1962) 203 C.A.2d 678, 684, 22 C.R. 111; *Conservatorship of Gray* (1970) 12 C.A.3d 513, 524, 90 C.R. 776 [provision held constitutional despite lack of notice].) The current statute provides for the appointment of a temporary guardian or conservator of the person or estate or both. (Prob.C. 2250 et seq.) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §28:19 et seq.; C.E.B., 2 Conservatorship Practice, §6.1 et seq.; C.E.B., Guardianship Practice, §6.1 et seq.)

(2) *Petition for Appointment.* A petition for temporary appointment is filed with or after the main petition for appointment of a guardian or conservator, and must state facts that establish good cause for a temporary appointment. The court may make the appointment "upon such petition or other showing as it may require." (Prob.C. 2250(a), (b).) One petition may request the appointment of a guardian or conservator and also the appointment of a temporary guardian or conservator, or the appointments may be requested in separate petitions. (Prob.C. 2250(f).) (See Judicial Council Form No. GC-110 [Petition for Appointment of Temporary Guardian or Conservator].)

(3) *Notice.* Not less than 5 days before the appointment, notice must be personally delivered to (a) the proposed ward (if 12 years of age or older) or the proposed conservatee, (b) the parents, if the proposed ward is a minor, and (c) any person with a valid visitation order effective at the time the petition was filed, unless the court for good cause orders otherwise. The appointment may be made with or without notice to other persons, in the court's discretion. Evidence in a proceeding for temporary guardianship of the person showing that the custodial parent is dead or incapacitated and that the petitioner is that parent's nominee may constitute good cause for ordering that the notice not be given. (Prob.C. 2250(c).) (See Judicial Council Form No. GC-140 [Order Appointing Temporary Guardian or Conservator]; 25 *Pacific L. J.* 394.)

(4) *Court Appointment After Suspension.* If the court suspends the powers of a guardian or conservator under Prob.C. 2334 (insufficiency of sureties; see *infra*, §985), Prob.C. 2654 (loss or injury pending hearing; see *infra*, §1049), or any other provision of the Guardianship-Conservatorship Law, the court may make a temporary appointment until the powers are restored to the original guardian or conservator or until a new guardian or conservator is appointed.

(*Prob.C. 2250(g).*)

(5) *Court Appointment When Vacancy Occurs.* If for any reason a vacancy occurs in the office of guardian or conservator, the court, either on a petition filed under *Prob.C. 2250(a)*, or on its own motion, may appoint a temporary guardian or conservator to exercise the powers of the guardian or conservator until a new guardian or conservator is appointed. (*Prob.C. 2250(h).*)

(6) *Issuance of Letters.* Letters of temporary guardianship or conservatorship are issued on taking the oath and filing a bond as in the case of a guardian or conservator. The letters must indicate the termination date of the temporary appointment. (*Prob.C. 2251.*) (See Judicial Council Form No. GC-150 [Letters of Temporary Guardianship or Conservatorship].)

(7) *Reconsideration of Ex Parte Order.* If a temporary guardianship is granted ex parte and the hearing on the general guardianship petition is not held within 30 days, the court must set a hearing within 30 days to reconsider the temporary guardianship. Notice of the reconsideration hearing must be provided pursuant to *Prob.C. 1511* (supra, §920), but the time for notice may be shortened for good cause. (*Prob.C. 2250(d).*)

(8) *Visitation Order Remains Effective.* A visitation order granted before a petition for temporary guardianship is filed remains in effect unless the court for good cause orders otherwise. (*Prob.C. 2250(e).*)

(9) *Suspension, Removal, Resignation, and Discharge.* A temporary guardian or conservator is subject to the statutes governing the suspension, removal, resignation, and discharge of a guardian or conservator. (*Prob.C. 2258*; on removal or resignation, see *Prob.C. 2650* et seq., infra, §1048 et seq.)

West's Key Number Digest, Guardian and Ward k.13(6)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition for Appointment.* *Prob.C. 2250(f)* was relettered in 2006 and deleted in 2007.

The fee for filing a petition for temporary letters of conservatorship or guardianship is \$ 40. (*Govt.C. 70657(a)(4)*, as amended in 2008.)

An additional form was adopted in 2006: Judicial Council Form No. GC-110(P) [Petition for Appointment of Temporary Guardian of the Person (Probate--Guardianships and Conservatorships)]. A party petitioning for the appointment of a temporary guardian of the person of a minor may use either Judicial Council Form No. GC-110 or Judicial Council Form No. GC-110(P). A party petitioning for the appointment of a temporary guardian of the estate of a minor or the person and estate of a minor must use Judicial Council Form No. GC-110. (C.R.C., Rule 7.101(c), adopted in 2006.)

(*New*) *Petition by private professional conservator:* If the petitioner is a private professional conservator, the petition must state the petitioner's license information and must explain how the petitioner was engaged to file the petition and any relationship with the proposed conservatee, family, or friends, unless that information is included in a petition for the appointment of a general conservator filed at the same time. (*Prob.C. 2250(c)*, added in 2007.)

(*New*) *Petition not filed by proposed conservatee:* If the petition is not filed by the proposed conservatee, it must include a declaration of due diligence showing (a) efforts to find the proposed conservatee's relatives or why it was not feasible to contact them, and (b) the proposed conservatee's preferences concerning the appointment or why it was not feasible to ascertain them. (*Prob.C. 2250(d)*, added in 2007.) (3) *Notice.* In 2006, *Prob.C. 2250(c)* was amended (a) to specify that the notice must be given at least 5 days before the hearing on the petition rather than 5 days before the appointment, (b) to provide that the notice must not be given to a proposed ward under 12 years of age, (c) to add that the notice must be served on the persons required to be named in the petition for appointment of a conservator, and (d) to require that a copy of the petition must be served with the notice. In 2007, the notice provision was renumbered

Prob.C. 2250(e) and amended to require notice to be served on the public guardian if the petitioner and the proposed conservator have no prior relationship with the proposed conservatee and the proposed conservator has not been nominated by a person who has a relationship with the proposed conservatee. (On good cause exception to notice requirements, see Supp., infra, §975A.) In 2008, *Prob.C. 2250(e)* was amended to specify 5 court days.

Order: The Judicial Council has adopted separate forms for the order:

Judicial Council Form No. GC-140 [Order Appointing Temporary Guardian (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-141 [Order Appointing Temporary Conservator (Probate--Guardianships and Conservatorships)].

(3a) *(New) Investigation and Report.* *Prob.C. 2250.6*, added in 2006, requires an investigation and report concerning a temporary conservatorship. The statute specifies the nature and scope of the court investigator's duties in provisions somewhat comparable to *Prob.C. 1826* (text and Supp., §941).

(3b) *(New) Attendance at Hearing.* *Prob.C. 2250.4*, added in 2006, specifies the circumstances in which a proposed conservatee is not required to attend the hearing.

(4) *Court Appointment After Suspension.* *Prob.C. 2250(g)* has been relettered *Prob.C. 2250(i)*.

(5) *Court Appointment When Vacancy Occurs.* *Prob.C. 2250(h)* has been relettered *Prob.C. 2250(j)*.

(6) *Issuance of Letters.* Judicial Council Form No. GC-150 has been renamed: Letters of Temporary Guardianship or Conservatorship (Probate--Guardianships and Conservatorships).

(7) *Reconsideration of Ex Parte Order.* *Prob.C. 2250(d)* was relettered *Prob.C. 2250(f)* in 2007.

If a temporary conservatorship is granted ex parte and a petition to terminate it is filed more than 15 days before the first hearing on the general petition to appoint a conservator, the court must set a hearing within 15 days to reconsider the temporary conservatorship. Unless the court orders otherwise, notice of the hearing must be given at least 10 days before the hearing. (*Prob.C. 2250(h)(1)*, added in 2006 and relettered in 2007.) If the termination petition is filed within 15 days of the hearing on the general petition, the hearing on the termination petition is set at the same time as the hearing on the general petition. Unless the court orders otherwise, notice of the hearing must be given at least 5 court days before the hearing. (*Prob.C. 2250(h)(2)*, added in 2006 and relettered in 2007.) (8) *Visitation Order Remains Effective.* *Prob.C. 2250(e)* was relettered *Prob.C. 2250(g)* in 2007.

(10) *(New) Appointment of Temporary Conservator in LPS Proceedings.* *Prob.C. 2250.2*, added in 2006, governs the appointment of a temporary conservator in LPS proceedings. Its provisions are comparable to the provisions of *Prob.C. 2250* stated in the text. Under *Prob.C. 2250.8*, added in 2006, the provisions of *Prob.C. 2250*, *2250.4*, and *2250.6* do not apply to LPS proceedings.



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a-1. (New) Good Cause Exception to Notice Requirements.

14 Witkin Sum. Cal. Law Wills § 975A

[§ 975A] (New) Good Cause Exception to Notice Requirements.

(1) *In General.* The Judicial Council has adopted uniform standards for good cause exceptions to the notice requirements of *Prob.C. 2250* for the appointment of temporary guardians and conservators. (See *Prob.C. 2250(k)* [statutory authorization]; C.R.C., Rules 7.1012(a), 7.1062(a).) C.R.C., Rule 7.1012 applies to the appointment of a temporary guardian and C.R.C., Rule 7.1062 applies to the appointment of a temporary conservator. The provisions of these rules are substantially similar.

(2) *Nature of Exception.* Good cause for an exception must be based on a showing that the exception is necessary to protect the proposed ward or conservatee or the estate from "immediate and substantial harm." (See C.R.C., Rules 7.1012(b), 7.1062(b).)

(3) *Scope of Court's Authority.* The court may waive notice to one or more persons entitled to notice, may require a different period of notice, and may change the required manner of giving notice, including requiring notice by telephone, fax, or e-mail (or a combination of methods) instead of or in addition to another required method. (See C.R.C., Rules 7.1012(c), 7.1062(c).)

(4) *Grounds for Exception.* The following grounds are specified by C.R.C., Rules 7.1012(d), 7.1062(d):

(a) *Harm Caused by Delay.* Immediate and substantial harm that could occur to the ward or conservatee or the estate during the notice period.

(b) *Harm Caused by Notified Person.* Harm that a person entitled to notice might do to the proposed ward or conservatee or the estate if notice were given.

(c) *Death on Incapacity.* The death or incapacity of the proposed ward's custodial parent where the petitioner is the custodial parent's nominee.

(d) *Medical Emergency.* An immediate and substantial medical emergency where treatment is reasonably unavailable unless a temporary guardian or conservator is appointed and where treatment cannot be deferred for the notice period because of pain, extreme discomfort, or a significant risk of harm.

(e) *Financial Emergency*. An immediate and substantial financial emergency where other means are likely to be ineffective to prevent loss during the notice period.

(5) *Format and Content of Request for Exception*. Generally, a request for an exception must be in a writing separate from the petition for appointment, containing the case caption and stating the relief requested. A declaration under penalty of perjury, based on personal knowledge, must include a factual showing in support of the application containing competent testimony and must include the information required for an ex parte application by C.R.C., Rule 3.1204(b) (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §58). The request must include a proposed order. (See C.R.C., Rules 7.1012(e), 7.1062(e).) However, when a temporary guardianship petition is prepared on Judicial Council Form No. GC-110(P) (Petition for Appointment of Temporary Guardian of the Person), the request may be included in the petition. (C.R.C., Rule 7.1012(e).)

(6) *Judicial Council Forms*. The Judicial Council has adopted the following forms:

Judicial Council Form No. GC-112 [Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-112(A-1) [Declaration in Support of Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-112(A-2) [Declaration Continuation Page (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-115 [Order on Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (Probate--Guardianships and Conservatorships)].

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 976

[§ 976] Notice in LPS Proceedings.

Edward W. v. Lamkins (2002) 99 C.A.4th 516, 122 C.R.2d 1, involved the ex parte appointment of a temporary conservator for a person determined to be gravely disabled under the Lanterman-Petris-Short Act (Welf.C. 5000 et seq.; see 3 *Cal. Proc.* (4th), *Actions*, §29 et seq.). Under Welf.C. 5350, the procedure for Probate Code conservatorships generally applies to LPS conservatorships. This includes the notice requirement of *Prob.C. 2250(c)* (supra, §975). The proposed temporary conservatee in an LPS proceeding challenged the public guardian's practice of requesting a waiver of notice to the conservatee in all applications for temporary conservatorship under the LPS Act, based on the detained person's "need for continuing treatment." *Held*, the practice was a violation of due process.

(a) "Considering the proposed temporary conservatee's liberty, personal autonomy and dignitary interests in receiving notice and an opportunity to be heard, the risk of erroneous decision making in the ex parte context, the governmental interests in protecting individuals in need of conservatorships and in providing involuntary detainees with due process, the relatively small costs associated with providing notice in most cases, and the fact that the burdens associated with holding hearings in some cases, as requested, must have been contemplated by the Legislature, we conclude that a routine practice of seeking notice waivers in temporary conservatorships violates the proposed conservatees' right to due process." (99 *C.A.4th* 543, 544.)

(b) *Prob.C. 2250* clearly states a presumption that 5 days' notice of a petition for a temporary conservatorship will be given to individuals institutionalized under the LPS Act. "This presumption may be departed from only upon a showing of good cause, that is, an individualized showing of exigent circumstances in a particular case. A blanket statement of reasons offered as a matter of routine policy does not constitute good cause." (99 *C.A.4th* 545.)

SUPPLEMENT: [This section is current through the latest supplement]
Commitment under LPS Act:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq.



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c. Powers and Duties.

Witkin Sum. Cal. Law Wills § 977

[§ 977] Powers and Duties.

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Termination of Powers.* The court may, for good cause, shorten the time for termination of the powers of a temporary guardian or conservator. (*Prob.C.* 2257, as amended in 2007.)



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14 Witkin Sum. Cal. Law Wills § 977

[§ 977] Powers and Duties.

(1) *In General.* Generally, a temporary guardian or conservator has only those powers and duties "that are necessary to provide for the temporary care, maintenance, and support of the ward or conservatee and that are necessary to conserve and protect the property of the ward or conservatee from loss or injury." (*Prob.C. 2252(a).*) Unless the court orders otherwise, a temporary guardian or conservator of the estate may marshal assets and establish accounts at financial institutions. (*Prob.C. 2252(b).*)

(2) *Medical Treatment.* Unless the court orders otherwise, a temporary guardian or conservator of the person has the powers and duties with respect to medical treatment for the ward or conservatee given by *Prob.C. 2353* (guardian; see *infra*, §991) or *Prob.C. 2354* (conservator; see *infra*, §992). (*Prob.C. 2252(b).*)

(3) *Property Transactions.* A temporary conservator may not sell or relinquish a lease or an estate or interest in real or personal property without specific approval of the court. If the property is used as or within the temporary conservatee's place of residence, notice must be served on the temporary conservatee and specified findings must be made by the court. Before any property is sold or relinquished by a temporary conservator, the court must find that the action is necessary to avert "irreparable harm" to the conservatee. A finding of irreparable harm concerning real property may be based on a showing that the property is vacant and cannot reasonably be rented, and that it is impossible or impractical to obtain fire or liability insurance on the property. (*Prob.C. 2252(e).*)

(4) *Additional Powers Ordered by Court.* A temporary guardian or conservator has "additional powers and duties as may be ordered by the court" in the order of appointment or by a subsequent order made with or without notice. (*Prob.C. 2252(c).*) Notwithstanding the limitations on property transactions set forth in *Prob.C. 2252(e)*, the powers of a temporary guardian or conservator may include relief granted under *Prob.C. 2580* et seq. (substituted judgment; see *infra*, §1025 et seq.), if that relief is requested in a petition separate from the petition for appointment. (*Prob.C. 2252(c).*)

(5) *Letters.* The terms of any order made under *Prob.C. 2252(b)* or (c) must be included in the letters of temporary guardianship or conservatorship. (*Prob.C. 2252(d).*)

(6) *Inventory, Appraisal, and Accounts.* A temporary guardian or conservator of the estate must file an inventory and appraisal of the estate as required by *Prob.C. 2610* et seq. (infra, §1033). But the estate may be inventoried in the final account, without the necessity for an appraisal, if the final account is filed within 90 days after the appointment. (*Prob.C. 2255.*)

A temporary guardian or conservator of the estate must present an account to the court for settlement and allowance within 90 days after appointment or within such other time as the court determines. But a temporary appointee who continues as guardian or conservator of the estate may account for the administration as temporary guardian or conservator in the first regular account. Accounts are subject to *Prob.C. 2621* et seq. (accounts generally; infra, §1036 et seq.), *Prob.C. 2630* et seq. (accounts on termination of relationship; infra, §1042), and *Prob.C. 2640* et seq. (compensation of guardian, conservator, and attorney; infra, §1044 et seq.). (*Prob.C. 2256.*)

(7) *Termination of Powers.* Except for rendering the account, the powers of a temporary guardian or conservator terminate at the earliest of the following times: (a) When notice is acquired that a guardian or conservator is appointed and qualified; or (b) 30 days after appointment of the temporary guardian or conservator or an earlier time specified in the appointment order. But the court may for good cause extend the time; the extension order must fix the time when the powers terminate. (*Prob.C. 2257.*)

West's Key Number Digest, Guardian and Ward k.13(6)

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Termination of Powers.* The court may, for good cause, shorten the time for termination of the powers of a temporary guardian or conservator. (*Prob.C. 2257*, as amended in 2007.)



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Witkin Sum. Cal. Law Wills § 978

[§ 978] Change of Conservatee's Residence.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* In 2006, *Prob.C. 2253(b)* was amended to require an investigation unless the court for good cause orders otherwise.



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14 Witkin Sum. Cal. Law Wills § 978

[§ 978] Change of Conservatee's Residence.

(1) *In General.* Unless required by a prior court order, a temporary conservator may not change the place of residence of a temporary conservatee without a written request to the court, notice to the conservatee, a hearing, and court approval of the move. The request must specify the place to which the temporary conservator proposes to move the conservatee, "precise reasons" why the conservatee will suffer irreparable harm if the change is not permitted, and "why no means less restrictive of the conservatee's liberty will suffice." (*Prob.C. 2253(a)*.) The court must hold a hearing within 7 days of the request. (*Prob.C. 2253(c)*.) The court may require an investigation by the court investigator, who must report to the court in writing at least 2 days before the hearing. (*Prob.C. 2253(b)*.) (On report by court investigator, see *Prob.C. 1826*, *supra*, §941.)

(2) *Conduct of Hearing.* The conservatee must be present at the hearing unless unwilling or medically unable to attend. (*Prob.C. 2253(d)*, (*e*).) (On presence at hearing, see *Prob.C. 1825*, *supra*, §944.) The conservatee has the right to be represented by counsel and to present evidence and cross-examine witnesses. (*Prob.C. 2253(f)*.)

(3) *Findings and Order.* To authorize a change in residence, the court must find that the change is required to prevent "irreparable harm" and that no less restrictive means will suffice. The order must specify where the temporary conservatee is authorized to be moved. (*Prob.C. 2253(g)*.) Subject to *Prob.C. 2252(e)* (property transactions; see *supra*, §977), the order must direct the temporary conservator to take all reasonable steps to preserve the status quo concerning the conservatee's previous place of residence. (*Prob.C. 2253(h)*.)

(4) *Removal From California.* Authorization to remove a temporary conservatee from California may not be given unless specified nonpsychiatric medical treatment is essential to the conservatee's physical survival and the conservatee consents; wilful removal of a temporary conservatee from California without court authorization is a felony. (*Prob.C. 2253(g)*.)

(5) *Emergency Exception.* Notwithstanding *Prob.C. 2253*, a temporary conservator may change the place of residence of a temporary conservatee without court authorization "if an emergency exists." (*Prob.C. 2254*.) For this purpose, an emergency exists if the residence is "unfit for habitation," or if removal from the residence is required for medical treatment to alleviate severe pain or to diagnose or treat a condition that, "if not immediately diagnosed and

treated, will lead to serious disability or death." (*Prob.C. 2254(a)*.) A written request to change the residence pursuant to *Prob.C. 2253* must be filed no later than 1 judicial day after the emergency removal. (*Prob.C. 2254(b)*.)

(6) *Medical Treatment*. A temporary conservator may remove the conservatee to a health facility without court authorization if the removal is made with the informed consent of the conservatee (*Prob.C. 2254(c)*), or if the removal is from one health facility where the conservatee is receiving medical care to another (*Prob.C. 2254(d)*). (On medical treatment of conservatee generally, see *Prob.C. 2354*, *infra*, §992.)

West's Key Number Digest, Guardian and Ward k.13(6)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. In 2006, *Prob.C. 2253(b)* was amended to require an investigation unless the court for good cause orders otherwise.



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a. Jurisdiction.

Witkin Sum. Cal. Law Wills § 979

[§ 979] Jurisdiction.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Jurisdiction in Superior Court.* The Elder Abuse and Dependent Adult Civil Protection Act provides special civil remedies against elder abuse. (See Welf.C. 15600 et seq.; 6 *Summary* (10th), *Torts*, §1686 et seq.) The superior court and the probate court have concurrent jurisdiction in an action under the Act if a conservator has been appointed for the plaintiff before the action is commenced. If the probate court determines that the matter should be resolved in a civil action, it must transfer the case to the general civil calendar of the superior court. (Welf.C. 15657.3.) (See *Conservatorship of Kayle* (2005) 134 C.A.4th 1, 7, 35 C.R.3d 671 [probate court erred in dismissing complaint without notice or hearing; proper procedure is to transfer case to superior court].)



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14 Witkin Sum. Cal. Law Wills § 979

[§ 979] Jurisdiction.

(1) *Jurisdiction in Superior Court.* The superior court has jurisdiction of guardianship and conservatorship proceedings. (*Prob.C. 2200.*) (See C.E.B., 1 Conservatorship Practice, §3.1 et seq.; C.E.B., Guardianship Practice, §3.1 et seq.)

(2) *Priority of First Court.* If proceedings are commenced in more than one county, the guardianship or conservatorship first granted, including a temporary guardianship or conservatorship, has priority, and the other proceeding must be dismissed. A guardianship or conservatorship of the estate extends to all property of the ward or conservatee within California. (*Prob.C. 2203(a), (b).*)

(3) *Proceedings Instituted in Two Counties.* Where a proceeding for guardianship or conservatorship of the person is instituted in one county and a proceeding for guardianship or conservatorship of the estate is instituted in a different county, the court that first grants the guardianship or conservatorship may find that it is in the best interest of the ward or conservatee to maintain both proceedings in the same county. That court determines the appropriate county, and the proceeding in the other county must then be dismissed. (*Prob.C. 2203(c).*)

(4) *Notice and Opportunity for Hearing.* Notice and an opportunity for hearing are jurisdictional requirements in guardianship and conservatorship proceedings. (*Grinbaum v. Superior Court* (1923) 192 C. 528, 540, 221 P. 635; *In re Pozzo* (1930) 104 C.A. 11, 13, 285 P. 330; *Sacks v. Superior Court* (1947) 79 C.A.2d 806, 807, 180 P.2d 922; see 39 Am.Jur.2d (1999 ed.), *Guardian and Ward* §60; 2 Cal. Proc. (4th), *Jurisdiction*, §114 et seq.; on statutory notice requirements, see *supra*, §910 et seq.)

(5) *Continuing Jurisdiction.* Guardianship and conservatorship are continuing proceedings, and once an appointment is made, the court has continuing jurisdiction over the guardian or conservator and over the administration of the affairs of the ward or conservatee. (See *Browne v. Superior Court* (1940) 16 C.2d 593, 597, 107 P.2d 1, 10 Summary (10th), *Parent and Child*, §365; *Conservatorship of McKeown* (1994) 25 C.A.4th 502, 505, 30 C.R.2d 542 [jurisdiction in original conservatorship proceeding continued in proceeding to reestablish conservatorship noticed within 1-year period of original conservatorship even though hearing was held after original period expired]; 2 Cal. Proc. (4th), *Jurisdiction*, §401 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Jurisdiction in Superior Court.* The Elder Abuse and Dependent Adult Civil Protection Act provides special civil remedies against elder abuse. (See Welf.C. 15600 et seq.; 6 *Summary* (10th), *Torts*, §1686 et seq.) The superior court and the probate court have concurrent jurisdiction in an action under the Act if a conservator has been appointed for the plaintiff before the action is commenced. If the probate court determines that the matter should be resolved in a civil action, it must transfer the case to the general civil calendar of the superior court. (Welf.C. 15657.3.) (See *Conservatorship of Kayle* (2005) 134 C.A.4th 1, 7, 35 C.R.3d 671 [probate court erred in dismissing complaint without notice or hearing; proper procedure is to transfer case to superior court].)(4) *Notice and Opportunity for Hearing.* See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §65 et seq.

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §112 et seq.

(5) *Continuing Jurisdiction.*

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §415 et seq.



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b. Venue.

14 Witkin Sum. Cal. Law Wills § 980

[§ 980] Venue.

(1) *Residents*. The proper county in which to commence a proceeding for a California resident is either the county in which the proposed ward or conservatee resides, or another county that is in his or her best interests. (*Prob.C. 2201*; cf. *Unif.Prob.C., §5-403*.) Under the "best interests" provision, a court may determine that venue is proper even though the place of residence is in dispute. (Legislative Com. Comment.) (For comparison of "residence" and "domicile" and special governing rules, see 2 *Cal. Proc. (4th), Jurisdiction*, Supp., §151A et seq.)

(2) *Nonresidents*. The proper county in which to commence a proceeding for a nonresident is the county in which the proposed ward or conservatee is temporarily living, or another county that is in his or her best interests. In a proceeding for guardianship or conservatorship of the estate, any county in which the proposed ward or conservatee has property is also a proper county. (*Prob.C. 2202*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Residents*.

Comparison of "residence" and "domicile":

Cross-Reference: 2 *Cal. Proc. (5th), Jurisdiction*, §127 et seq.



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Witkin Sum. Cal. Law Wills § 981

[§ 981] Change of Venue.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Order and Fees*. On presumption that transfer will be in conservatee's best interests where court has approved change of conservatee's residence, see *Prob.C. 2215(b)*, as amended in 2006.(7) *(New) Notice and Hearing Following Transfer*. When venue is transferred from one county to another, the receiving court notifies the transferring court that it has received the file and takes proper action to ensure that the guardian or conservator complies with accounting and reporting requirements. The transferring court sets a hearing within 2 months to confirm that the notice has been received or to inquire into the status of the matter. (*Prob.C. 2217*, added in 2007.)



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14 Witkin Sum. Cal. Law Wills § 981

[§ 981] Change of Venue.

(1) *Transfer Authorized.* On petition, the court in which a guardianship or conservatorship proceeding is pending may transfer the proceeding to another county. (*Prob.C. 2211.*) The statute applies before as well as after the appointment of the guardian or conservator. (See *Prob.C. 2210.*) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §28:13 et seq.; C.E.B., 1 Conservatorship Practice, §3.14 et seq. C.E.B., Guardianship Practice, §3.14 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward, §152 et seq.)

(2) *Who May Petition.* The petition may be filed by the guardian or conservator, the ward or conservatee, the spouse of the ward or the spouse or domestic partner of the conservatee, a relative or friend, or an interested person. (*Prob.C. 2212*; see *Prob.C. 48* and *1424* ["interested person" defined].)

(3) *Contents of Petition.* The petition must set forth (a) the county to which the proceeding is to be transferred; (b) the names and addresses of the ward or conservatee, the spouse or domestic partner, and relatives within the second degree; (c) a brief description of the character, value, and location of the property of the ward or conservatee; and (d) the reasons for the transfer. (*Prob.C. 2213.*)

(4) *Notice of Hearing.* Notice of the hearing must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (*supra*, §910 et seq.). At least 15 days before the hearing, the notice and a copy of the petition must be mailed to all persons required to be listed in the petition. (*Prob.C. 2214.*)

(5) *Conduct of Hearing.* At the hearing, persons required to be listed in the petition, creditors, or any other interested person may appear to support or oppose the petition and may file written objections. (*Prob.C. 2215(a)*; see *Prob.C. 48* and *1424* ["interested person" defined].)

(6) *Order and Fees.* If the court determines that the requested transfer will be in the best interests of the ward or conservatee, it orders the proceeding transferred. (*Prob.C. 2215(b).*) The clerk then transmits a copy of the transfer order, together with the papers filed in the proceeding, to the clerk of the destination court. The clerk of the transferring court is not entitled to a fee, but the estate pays the expenses incurred in the removal. The clerk of the destination court is entitled to the fees payable on filing the original proceeding. (*Prob.C. 2216.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Transfer Authorized*. See 13 Am.Jur. P.P. Forms (2009 ed.), Guardian and Ward §156 et seq.

(6) *Order and Fees*. On presumption that transfer will be in conservatee's best interests where court has approved change of conservatee's residence, see *Prob.C. 2215(b)*, as amended in 2006.(7) *(New) Notice and Hearing Following Transfer*. When venue is transferred from one county to another, the receiving court notifies the transferring court that it has received the file and takes proper action to ensure that the guardian or conservator complies with accounting and reporting requirements. The transferring court sets a hearing within 2 months to confirm that the notice has been received or to inquire into the status of the matter. (*Prob.C. 2217*, added in 2007.)



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6. Oath and Letters.

14 Witkin Sum. Cal. Law Wills § 982

[§ 982] Oath and Letters.

(1) *Oath*. Before the appointment of a guardian or conservator is effective, the guardian or conservator must take an oath, which is attached to or endorsed on the letters of guardianship or conservatorship. (*Prob.C. 2300*.) In lieu of an oath, *C.C.P. 2015.6* authorizes an unsworn written affirmation.

(2) *Letters*. The appointment, the oath, and any required bond (see *infra*, §983) are evidenced by the clerk issuing letters of guardianship or conservatorship. (*Prob.C. 2310(a)*.) The first page of the order appointing a guardian or conservator must include the following language in capital letters: "Warning: This appointment is not effective until letters have issued." (*Prob.C. 2310(b)*.) Except as otherwise required by the order of appointment, the letters are in substantially the same form as letters of administration. (*Prob.C. 2311*.) (See Judicial Council Form No. GC-250 [Letters of Guardianship], Judicial Council Form No. GC-350 [Letters of Conservatorship]; C.E.B., 1 Conservatorship Practice, §5.95 et seq.; C.E.B., Guardianship Practice, §5.84 et seq.; 8 Am.Jur. Trials, Incompetency and Commitment Proceedings §24.)

(3) *Recordation*. The conservator of an estate must record a certified copy of the letters in each county in which the conservatee owns an interest in real property, including a security interest. The letters must be recorded as soon as practicable after issuance, but not later than 90 days after appointment. A temporary conservator is exempt, but may record letters if he or she deems it appropriate. (*Prob.C. 2313*.)

West's Key Number Digest, Guardian and Ward k.14 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Letters*. The following Judicial Council Forms have been renamed:

Judicial Council Form No. GC-250 [Letters of Guardianship (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-350 [Letters of Conservatorship (Probate--Guardianships and Conservatorships)].



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a. Requirement.

14 Witkin Sum. Cal. Law Wills § 983

[§ 983] Requirement.

(1) *In General.* Except as otherwise provided by statute, every guardian and conservator must give a bond approved by the court before letters are issued. (*Prob.C. 2320(a)*; see *Prob.C. 2300(b)* [before appointment is effective, guardian or conservator must file bond, if required]; cf. *Unif.Prob.C., §§5-410, 5-411.*) The bond is for "the benefit of the ward or conservatee and all persons interested in the guardianship or conservatorship estate," and must be conditioned on the faithful execution of the guardian's or conservator's duties according to law. (*Prob.C. 2320(b).*) (See C.E.B., 1 Conservatorship Practice, §9.1 et seq.; C.E.B., Guardianship Practice, §8.1 et seq.; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §72; 8 *Am.Jur. Trials* 483 [incompetency and commitment proceedings]; 9A *Am.Jur. Legal Forms* 2d (2002 ed.), *Guardian and Ward*, §133:32 et seq.; 13 *Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*, §120 et seq.)

(2) *Governing Law.* The Bond and Undertaking Law (*C.C.P. 995.010* et seq.; see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §9 et seq.) applies except to the extent it is inconsistent with *Prob.C. 2320* et seq. (*Prob.C. 2320(e).*)

(3) *Bonds of Joint Guardians or Conservators.* If joint guardians or conservators are appointed, the court may require separate bonds, a joint bond, or a combination. (*Prob.C. 2326(a).*) Liability on a joint bond is joint and several. (*Prob.C. 2326(b).*)

(4) *Bonds for Several Wards or Conservatees.* In a conservatorship proceeding, the court must order a separate bond for each conservatee, unless their assets are commingled, in which case a combined bond covering all assets may be provided. (*Prob.C. 2327(a).*) In a guardianship proceeding, the court may order separate bonds, a single bond for the benefit of two or more wards, or a combination of these bonds. (*Prob.C. 2327(b).*)

(5) *Separate Bond of Corporate Fiduciary.* Because a corporate fiduciary "cannot assume responsibility for the acts of an individual cofiduciary," an individual cofiduciary required to give a bond must give a separate bond, except to the extent that the court orders the assets to be held solely by the corporate fiduciary. (C.R.C., Rule 7.203.)

West's Key Number Digest, Guardian and Ward k.15

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §67; 13 Am.Jur. P.P. Forms (2009 ed.), *Guardian and Ward* §119 et seq.(2) *Governing Law.*

Bond and Undertaking Law:

Cross-Reference: 6 Cal. Proc. (5th), *Provisional Remedies*, §9 et seq.



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Witkin Sum. Cal. Law Wills § 984

[§ 984] Exceptions and Waiver.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Waiver by Court. Prob.C. 2321(a)* was amended in 2006 to also prohibit a reduction in the amount of the bond without good cause and to require the good cause determination to include a determination that the conservatee will not suffer harm as a result of the waiver or reduction.(5) *Small Estate.* In 2007, *Prob.C. 2628(b)* was relettered *Prob.C. 2628(a)* and amended to increase the net value limit to \$ 15,000 and the monthly income limit to \$ 2,000.



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[§ 984] Exceptions and Waiver.

(1) *Waiver by Court.* Notwithstanding any other provision of law, the court in a conservatorship proceeding may not waive a bond without good cause. For this purpose, good cause is not established by a showing that the conservator filed a bond in another proceeding or a prior proceeding. (*Prob.C. 2321(a).*)

(2) *Waiver by Conservatee.* If a conservatee, having sufficient capacity to do so, waives the filing of a bond, the court may permit the filing of a bond in an amount less than would otherwise be required under *Prob.C. 2320* (supra, §983). (*Prob.C. 2321(b).*)

(3) *Guardian or Conservator of Person.* A guardian or conservator of the person need not file a bond unless required to do so by the court. (*Prob.C. 2322.*)

(4) *Nominated Guardian.* Where a guardian has been nominated under *Prob.C. 1500* or *1501* (supra, §917) and the person making the nomination waives bond, the guardian need not file a bond unless required to do so by the court. (*Prob.C. 2324.*)

(5) *Small Estate.* The court may dispense with the bond if it appears likely that the estate will satisfy the following conditions of *Prob.C. 2628(b)* (authority to dispense with account; see *infra*, §1036) for its duration: (a) It consists of property with a total net value of less than \$ 7,500. (b) The monthly income of the estate, exclusive of public benefit payments, is less than \$ 1,000. (c) All income of the estate, if not retained, is spent for the benefit of the ward or conservatee. (*Prob.C. 2323(a).*) If at any time it appears that the estate does not satisfy these conditions, a bond may be required. (*Prob.C. 2323(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Waiver by Court.* *Prob.C. 2321(a)* was amended in 2006 to also prohibit a reduction in the amount of the bond without good cause and to require the good cause determination to include a determination that the conservatee will not suffer harm as a result of the waiver or reduction. (5) *Small Estate.* In 2007, *Prob.C. 2628(b)* was relettered *Prob.C. 2628(a)* and amended to increase the net value limit to \$ 15,000 and the monthly income limit to \$ 2,000. In 2008, *Prob.C. 2323(b)* was amended to require a bond unless the court determines good cause for a waiver under *Prob.C.*

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Witkin Sum. Cal. Law Wills § 985

[§ 985] Amount of Bond.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

(d) *(New) Costs of enforcement:* Beginning January 1, 2008, the bond must also include a "reasonable amount for the cost of recovery to collect on the bond," including attorneys' fees and costs. (*Prob.C. 2320(c)(4)*, added in 2006; C.R.C., Rule 7.207(a), adopted in 2007; see C.R.C., Rule 7.207(b) [increase in existing bonds to include additional amount].)

The reasonable amount for the cost of recovery is based on the sum of (1) the appraised value of personal property of the estate, (2) the appraised value of real property that may be sold without court approval or confirmation (less encumbrances), (3) the probable annual income from all assets of the estate, and (4) the probable annual gross payments described in *Prob.C. 2320(c)(3)* (text, p. 1094). The reasonable amount is 10% of that sum up to \$ 500,000, plus 12% of that sum from \$ 500,000 to \$ 1 million, plus 2% of that sum over \$ 1 million. (C.R.C., Rule 7.207(c).)

The fees and costs incurred in a successful action against a guardian or conservator for a breach of duty under the Probate Code are a surcharge against the guardian or conservator and, if unpaid, may be recovered from the surety on the bond. (*Prob.C. 2320(c)(4)*, as amended in 2007.)



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[§ 985] Amount of Bond.

(1) *In General.* Except as otherwise provided by statute, unless the court increases or decreases the amount of a bond on a showing of good cause, the amount of a bond given by an admitted surety insurer must be the sum of the following:

(a) The value of the personal property of the estate. (*Prob.C. 2320(c)(1).*)

(b) The probable annual gross income of all of the property of the estate. (*Prob.C. 2320(c)(2).*)

(c) The sum of the probable annual gross payments from the following public entitlements: (1) Welf.C. 11000 et seq. (aid and medical assistance); (2) Welf.C. 16000 et seq. (services for the care of children); (3) Welf.C. 17000 et seq. (county aid and relief to indigents); (4) 42 U.S.C., §401 et seq. (federal old-age, survivors, and disability insurance benefits); (5) 42 U.S.C., §1382 et seq. (supplemental security income for the aged, blind, or disabled); and (6) any other public entitlements of the ward or conservatee. (*Prob.C. 2320(c)(3).*)

If the sureties on the bond are personal sureties, the bond must be for twice the amount required for a bond given by an admitted surety insurer. (*Prob.C. 2320(d)*; see *Prob.C. 2623(a)*, *infra*, §1040 [cost of surety bond as allowable expense].)

(2) *Decrease in Amount.* The amount of the bond may be reduced when money is invested in an account in a financial institution or personal property is deposited in a trust company, subject to withdrawal only on authorization of the court. (*Prob.C. 2328*; on deposits of money or property, see *infra*, §1004.) A comparable provision applies to estate administration. (See *Prob.C. 8483*, *supra*, §449.)

If the guardian or conservator moves for reduction in the amount of the bond, the motion must include an affidavit setting forth the condition of the estate. (*Prob.C. 2329(a).*) Except for a showing of good cause, the amount of the bond may not be reduced below the amount determined pursuant to *Prob.C. 2320*. (*Prob.C. 2329(b).*) However, nothing in *Prob.C. 2329* limits the authority of the court to reduce bond with or without notice pursuant to *Prob.C. 2328*. (*Prob.C. 2329(c).*) (See C.E.B., 1 Conservatorship Practice, §9.8 et seq.; C.E.B., Guardianship Practice, §8.9 et seq.)

(3) *Increase in Amount.* Where the guardian or conservator has knowledge of facts from which he or she knows or should know that the posted bond is less than the required amount, the guardian or conservator or attorney must apply ex parte for an order increasing the bond to the required amount. (*Prob.C. 2320.1.*)

"Immediately upon the occurrence of facts making it necessary or appropriate to increase the amount of the bond," the guardian or conservator of the estate must make an ex parte application for an order increasing the bond. (C.R.C., Rule 7.204(a).) If the guardian or conservator of the estate does not make the application, the attorney for the guardian or conservator must do so "immediately upon becoming aware of the need to increase bond." (C.R.C., Rule 7.204(b).) The application must show the value of the estate's personal property, the probable annual gross income of all the property of the estate, and the sum of the probable annual gross payments of public benefits of the ward or conservatee identified in *Prob.C. 2320(c)(3)*. If the guardian or conservator of the estate has authority to sell estate real property without court confirmation, the application must also show the amount of equity in estate real property. (C.R.C., Rule 7.204(c).)

If an additional bond is required when an account is heard, the order approving the account and related matters, including fees, is not effective and may not be filed until the additional bond is filed. (*Prob.C. 2320.2.*)

(4) *Additional Bond on Real Property Transactions.* On the confirmation of the sale of real property of an estate, or on the authorization of a mortgage or deed of trust with respect to real property of an estate by which money is raised, the guardian or conservator must furnish additional bond required by the court in order to make the sum of the bonds equal to the amount determined pursuant to *Prob.C. 2320*, taking into account the proceeds of the sale, mortgage, or deed of trust. If a bond or additional bond is required under *Prob.C. 2330*, the order confirming the sale or authorizing the secured loan is not effective and may not be filed until the bond is filed. However, the court may make an express finding "stating the reason why the bond should not be increased." (*Prob.C. 2330.*) (See C.E.B., 1 Conservatorship Practice, §9.23 et seq.; C.E.B., Guardianship Practice, §8.24 et seq.)

(5) *Suspension Pending Determination of Sufficiency of Bond.* Where a petition is filed requesting that a guardian or conservator be required to give a bond, or an objection to the sufficiency of the bond is made, and the petition or affidavit alleges "facts showing that the guardian or conservator is failing to use ordinary care and diligence in the management of the estate," the court may suspend the powers of the guardian or conservator until the matter is determined. (*Prob.C. 2334.*)

West's Key Number Digest, Guardian and Ward k.15

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

(d) *(New) Costs of enforcement:* Beginning January 1, 2008, the bond must also include a "reasonable amount for the cost of recovery to collect on the bond," including attorneys' fees and costs. (*Prob.C. 2320(c)(4)*, added in 2006; C.R.C., Rule 7.207(a), adopted in 2007; see C.R.C., Rule 7.207(b) [increase in existing bonds to include additional amount].)

The reasonable amount for the cost of recovery is based on the sum of (1) the appraised value of personal property of the estate, (2) the appraised value of real property that may be sold without court approval or confirmation (less encumbrances), (3) the probable annual income from all assets of the estate, and (4) the probable annual gross payments described in *Prob.C. 2320(c)(3)* (text, p. 1094). The reasonable amount is 10% of that sum up to \$ 500,000, plus 12% of that sum from \$ 500,000 to \$ 1 million, plus 2% of that sum over \$ 1 million. (C.R.C., Rule 7.207(c).)

The fees and costs incurred in a successful action against a guardian or conservator for a breach of duty under the Probate Code are a surcharge against the guardian or conservator and, if unpaid, may be recovered from the surety on the bond. (*Prob.C. 2320(c)(4)*, as amended in 2007.)



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d. Sureties.

14 Witkin Sum. Cal. Law Wills § 986

[§ 986] Sureties.

(1) *Substitution of Surety.* A guardian or conservator who applies for a substitution and release of a surety must file an account with the application. The court may not order a substitution unless the accounting is approved. (*Prob.C. 2335.*)

(2) *Action on Bond.* "In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate." (*Prob.C. 2333(a).*) The action must be brought within 4 years from (a) the discharge or removal of the guardian or conservator, or (b) the date the order surcharging the guardian or conservator becomes final, whichever is later. (*Prob.C. 2333(b).*) (On meaning of "discharge or removal" under former statute, see *Maloney v. Massachusetts Bonding & Ins. Co. (1942) 20 C.2d 1, 4, 123 P.2d 449; Keck v. Sweeney (1936) 16 C.A.2d 521, 522, 61 P.2d 79.*) Notwithstanding *Prob.C. 2103(b)* (fraud, conspiracy, or misrepresentation in obtaining order; see *supra*, §962), an action against the sureties on the bond must be commenced within 6 years after the date the judgment under *Prob.C. 2103(b)* becomes final or the later of the orders under *Prob.C. 2333(b)* becomes final. (*Prob.C. 2333(c).*) (See *Estate of Mason (1990) 224 C.A.3d 634, 638, 274 C.R. 61 [Prob.C. 2333, not C.C.P. 337 (general statute of limitation in action on written contract; see 3 Cal. Proc. (4th), Actions, §474), is applicable to ward's action against guardian's surety]; C.E.B., 1 Conservatorship Practice, §9.31; C.E.B., Guardianship Practice, §8.32.*)

(3) *Bond of Nonprofit Charitable Corporation.* The surety on the bond of a nonprofit charitable corporation must be an admitted surety insurer. (*Prob.C. 2325; on nonprofit charitable corporation as guardian or conservator, see Prob.C. 2104, supra, §966; on cost of bond as allowable expense, see infra, §1040.*)

(4) *Required Notice to Surety.* In specified circumstances, *Prob.C. 1213* requires notice, in the form specified by *Prob.C. 1211* (general probate notice; see *supra*, §386), to be mailed to the surety on a bond at the address shown on the bond. If a petition, motion, or order relates to the guardian or conservator to whom the bond applies, notice must be mailed by the following persons:

- (a) A person who petitions to surcharge.
- (b) A person who files an objection to an account.

(c) A person who petitions to suspend or remove a guardian or conservator. Within 5 days of entry of a suspension or removal order, the petitioner must also notify the surety of the order.

(d) An attorney who moves to withdraw from representing a guardian or conservator.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Action on Bond.*

Statute of limitation in action on written contract:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §508.



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[§ 987] Request for Special Notice.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Modification or Termination of Request. Prob.C. 2701(a)* was amended in 2006 to delete the provision on deemed withdrawal of the request.



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[§ 987] Request for Special Notice.

(1) *Who May Make Request.* A written request for special notice may be filed by the ward (if over 14 years of age) or conservatee, the spouse of the ward or the spouse or domestic partner of the conservatee, a relative or creditor of the ward or conservatee, or any other interested person, in person or by attorney. (*Prob.C. 2700(a)*; see *Prob.C. 48* and *1424* ["interested person" defined].) Special notice to a ward over 14 years of age or a conservatee must be given if requested, whether or not the court has dispensed with notice under *Prob.C. 1460*. (Legislative Com. Comment; see *Prob.C. 1460(d)*, *supra*, §910.)

(2) *Proceedings for Which Request May Be Made.* Special notice may be requested for the following matters:

(a) Petitions filed in the guardianship or conservatorship proceeding. (*Prob.C. 2700(c)(1)*.)

(b) Inventories and appraisals. (*Prob.C. 2700(c)(2)*.)

(c) Accounts. (*Prob.C. 2700(c)(3)*.)

(d) Proceedings for the final termination of the guardianship or conservatorship. (*Prob.C. 2700(c)(4)*.)

Special notice must be given even though the particular provision under which the petition is filed permits an ex parte petition. (See, e.g., *Prob.C. 2463* [authorization to commence partition action]; *infra*, §1007.) But if the action is one that may be taken without court authorization, no notice is required. (Legislative Com. Comment.)

(3) *Procedure.* The request for special notice must be so entitled, and must set forth the name and address to which notices are to be sent. (*Prob.C. 2700(b)*.) Special notice of one or more matters specified in *Prob.C. 2700(c)* may be requested by describing the matter, and special notice of all those matters may be requested by a general reference to the provisions of *Prob.C. 2700(c)*. (*Prob.C. 2700(d)*.) A copy of the request must be personally delivered or mailed to the guardian or conservator, or to the attorney for that person. If delivered, the request is effective when delivered. If mailed, the request is effective when received. (*Prob.C. 2700(e)*.) When the original request is filed, it must be accompanied by a written admission or proof of service. (*Prob.C. 2700(f)*.) A comparable provision applies to decedents' estates. (See *Prob.C. 1250*; *supra*, §395.)

(4) *Judicial Council Form.* The Judicial Council has adopted a form for the request. (See Judicial Council Form No. GC-035 [Request for Special Notice].)

(5) *Modification or Termination of Request.* A request for special notice may be modified or withdrawn, and is deemed withdrawn 3 years from the date it was served under *Prob.C. 2700(e)*. (*Prob.C. 2701(a)*.) A new request for special notice may be served and filed at any time as provided in the case of an initial request. (*Prob.C. 2701(b)*.)

(6) *Manner of Giving Special Notice.* Unless the court dispenses with notice, if special notice has been requested, the person filing the petition, account, or other paper must, within 15 days before the hearing, mail written notice of the filing and the time and place of the hearing, with a copy of the petition, account, or other paper, to those who requested special notice. If no hearing is required, the paper must be mailed within 15 days after the paper is filed. (*Prob.C. 2702*.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Modification or Termination of Request.* *Prob.C. 2701(a)* was amended in 2006 to delete the provision on deemed withdrawal of the request.



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9. Appealable Orders.

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[§ 988] Appealable Orders.

A general statute governs the appealability of orders common to all Probate Code proceedings, including various orders relating to fiduciaries. (See *Prob.C. 1300*, supra, §401; 9 *Cal. Proc. (4th), Appeal*, §172.) (On effect of taking appeal, see *Prob.C. 1310* et seq., supra, §402.) Additional specific statutes apply to particular proceedings. *Prob.C. 1301*, governing conservatorships, guardianships, and other protective proceedings, provides that granting or denying the following orders is appealable:

- (1) Order granting or revoking letters, except temporary letters. (*Prob.C. 1301(a)*.)
- (2) Order granting permission to fix the residence of the ward or conservatee at a place outside California. (*Prob.C. 1301(b)*.)
- (3) Order directing, authorizing, approving, or modifying payments for support, maintenance, or education of the ward or conservatee or a person legally entitled to those payments from a ward or conservatee. (*Prob.C. 1301(c)*.)
- (4) Order granting or denying a petition for payment of surplus income to relatives of a conservatee or a petition for substituted judgment under *Prob.C. 2580* et seq. (*Prob.C. 1301(d)*.)
- (5) Order affecting the legal capacity of a conservatee under *Prob.C. 1870* et seq. (*Prob.C. 1301(e)*.)
- (6) Order adjudicating the merits of a claim under *Prob.C. 2500* et seq. (compromise of claim or modification of obligation). (*Prob.C. 1301(f)*.)
- (7) Order granting or denying a petition under *Prob.C. 3100* et seq. (community property proceedings). (*Prob.C. 1301(g)*.)

West's Key Number Digest, Guardian and Ward k.13(8)

SUPPLEMENT: [This section is current through the latest supplement]
General statute:

Cross-Reference: 9 Cal. Proc. (5th), *Appeal*, §218.



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a. In General.

14 Witkin Sum. Cal. Law Wills § 989

[§ 989] In General.

(1) *Statutory Framework.* *Prob.C.* 2350 et seq. relate to the powers and duties of a guardian or conservator of the person. (See C.E.B., 1 Conservatorship Practice, §13.1 et seq.; C.E.B., Guardianship Practice, §11.1 et seq.; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §97 et seq.) In these statutes, the term "conservator" means conservator of the person, and "guardian" means guardian of the person. (*Prob.C.* 2350.)

(2) *Care, Custody, Control, and Education.* Generally, the guardian or conservator (other than a limited conservator) has "the care, custody, and control of, and has charge of the education of the ward or conservatee." (*Prob.C.* 2351(a).) (See *Kagy v. Napa State Hosp.* (1994) 28 C.A.4th 1, 6, 33 C.R.2d 741, 3 Cal. Proc. (4th), Actions, §284 [public guardian serving as conservator of the person lacked authority to prosecute civil action on behalf of conservatee].) However, the court may limit the powers and duties that the conservator would otherwise have by an order stating either of the following:

(a) "The specific powers that the conservator does not have with respect to the conservatee's person and reserving the powers so specified to the conservatee." (*Prob.C.* 2351(b)(1).)

(b) "The specific powers and duties the conservator has with respect to the conservatee's person and reserving to the conservatee all other rights with respect to the conservatee's person that the conservator otherwise would have." (*Prob.C.* 2351(b)(2).) The Legislative Committee Comment points out that the court has discretion to allow the conservatee to fix his or her own residence or to make decisions concerning education.

The order may be included in the original order of appointment or may be made, modified, or revoked on a subsequent petition, after notice and hearing. (*Prob.C.* 2351(c).)

(3) *Additional Conditions in Order.* With the consent of the guardian or conservator, the court may insert additional conditions in the order of appointment providing for the care, treatment, education, and welfare of the ward or conservatee; these conditions must be included in the letters of guardianship or conservatorship. (*Prob.C.* 2358.) (See *Guardianship of Reynolds* (1943) 60 C.A.2d 669, 679, 141 P.2d 498 [decided under former law].)

(4) *Instructions or Confirmation.* On petition, notice, and hearing, the court may authorize and instruct the guardian or conservator or approve and confirm the acts of the guardian or conservator. (*Prob.C.* 2359; on required notice, see *supra*, §910 et seq.) (See *Estate of Christiansen* (1967) 248 C.A.2d 398, 401, 56 C.R. 505 [decided under former law]; Cal. Civil Practice, 4 Probate and Trust Proceedings, §28:71.)

(5) *Restrictions on Self-Dealing.* Several statutes restrict self-dealing by the guardian or conservator. (For restrictions on employment or referral of entity in which guardian or conservator has financial interest, see *Prob.C.* 2351(d), *supra*, §970; on required disclosure when guardian or conservator petitions for approval of sale, lease, or rental of estate property involving persons with family or affiliate relationship with guardian or conservator, see *Prob.C.* 2359(c), *infra*, §1000.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Framework.* See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §89 et seq.

(2) *Care, Custody, Control, and Education.*

Kagy case:

Cross-Reference: 3 Cal. Proc. (5th), *Actions*, §300.



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Witkin Sum. Cal. Law Wills § 990

[§ 990] Fixing Residence.

SUPPLEMENT: [This section is current through the latest supplement]

The statutes authorizing the guardian or conservator to fix the residence of the ward or conservatee were extensively revised in 2006 and Rules of Court governing notice of a change of residence were adopted in 2007. The following provisions are now applicable:

(1) *In General.* Except where the conservatee retains the right to establish his or her own residence under *Prob.C. 2351*, the guardian or conservator may establish a residence for the ward or conservatee under *Prob.C. 2352*. (*Prob.C. 2352(f).*)

(2) *Residence in State.* The guardian or conservator may establish a residence within California without the permission of the court. The guardian or conservator must select the "least restrictive appropriate residence" that is available and necessary to meet the needs of the ward or conservatee and in the best interests of the ward or conservatee. (*Prob.C. 2352(a)* [ward]; *Prob.C. 2352(b)* [conservatee].) With respect to a conservatee, it is presumed that the personal residence at the time the proceeding is commenced is the least restrictive appropriate residence. At a hearing to determine if removal of the conservatee from the personal residence is appropriate, the presumption may be overcome by a preponderance of the evidence. (*Prob.C. 2352.5(a).*) (On determination of appropriate level of care for conservatee and evaluation of measures necessary to keep conservatee in personal residence, see *Prob.C. 2352.5(b).*)(3) *Residence Out of State.* The guardian or conservator may establish a residence outside California with the prior permission of the court. (*Prob.C. 2352(c).*) The order must require the guardian or conservator to either (a) return the ward or conservatee to California or (b) cause a guardianship, conservatorship, or equivalent proceeding to be commenced in the place of the new residence, once the ward or conservatee has resided there for 4 months (or for a longer or shorter period specified in the order). (*Prob.C. 2352(d).*)

The filing fee for a petition, application, or opposition to an order granting permission to fix the residence of a ward or conservatee at a place outside California is \$ 180. (*Govt.C. 70658(a)(10)*, added in 2007.)

(4) *Notice.* The guardian or conservator must file a notice of change of residence with the court within 30 days of the change. (*Prob.C. 2352(e)(1).*) The guardian or conservator must mail a copy of the notice to all persons entitled to

notice under *Prob.C. 1511(b)* (appointment of guardian; text, §920) or *Prob.C. 1822(b)* (appointment of conservator; text, §939) and must file proof of service. For good cause, the court may waive the mailing requirement. (*Prob.C. 2352(e)(2)*.) If the guardian or conservator proposes to remove the ward or conservatee from his or her personal residence, the guardian or conservator must mail notice of the intent to do so to all persons entitled to notice under *Prob.C. 1511(b)* or *Prob.C. 1822(b)* and must file proof of service. In the absence of an emergency, the notice must be mailed at least 15 days before the proposed removal. If the notice is mailed less than 15 days before the removal, the notice must set forth the basis for the emergency. (*Prob.C. 2352(e)(3)*.)

Additional notice requirements are imposed by C.R.C., Rule 7.1013 (change of ward's residence) and C.R.C., Rule 7.1063 (change of conservatee's residence). The provisions of these rules are substantially similar and require the following:

(a) *Premove Notice*. Unless an emergency requires shorter notice, a guardian or conservator of the person who intends to change the personal residence must mail notice of the intended change at least 15 days before the date of the proposed change and must file the original notice and proof of mailing with the court. With respect to a ward, the notice must be mailed to the ward (if age 12 or older), the attorney of record, the ward's parents, a person who had legal custody of the ward when the first petition for appointment of a guardian was filed, a guardian of the estate, and a person who was nominated as a guardian but was not appointed. (C.R.C., Rule 7.1013(a).) (On what constitutes ward's personal residence for this purpose, see C.R.C., Rule 7.1013(b).) With respect to a conservatee, the notice must be mailed to the conservatee, the attorney of record, the conservatee's spouse or registered domestic partner, and the conservatee's relatives named in the petition for appointment of the probate conservator, including "deemed relatives" under *Prob.C. 1821(b)* if the conservatee does not have a spouse or registered domestic partner and does not have second degree relatives. (C.R.C., Rule 7.1063(a).) (On what constitutes conservatee's personal residence for this purpose and changes of residence that are not considered changes of a personal residence, see C.R.C., Rule 7.1063(b).) Judicial Council Form No. GC-079 must be used for the notice. If an emergency requires a notice period shorter than 15 days, the basis for the emergency must be stated in the notice. (C.R.C., Rules 7.1013(e), 7.1063(e).)

(b) *Postmove Notice*. A guardian or conservator of the person must file notice of a change of residence with the court within 30 days of the date of the change. Unless waived by the court for good cause to prevent harm to the ward or conservatee, the notice must be mailed to designated persons and proof of mailing must be filed with the court with the original notice. With respect to a ward, the notice must be mailed to the attorney of record, the ward's parents, a person who had legal custody of the ward when the first petition for appointment of a guardian was filed, a guardian of the estate, and a person who was nominated as a guardian but was not appointed. (C.R.C., Rule 7.1013(c).) With respect to a conservatee, the notice must be mailed to the conservatee, the attorney of record, the conservatee's spouse or registered domestic partner, and the conservatee's relatives named in the petition for appointment of the probate conservator, including "deemed relatives" under *Prob.C. 1821(b)* if the conservatee does not have a spouse or registered domestic partner and does not have second degree relatives. (C.R.C., Rule 7.1063(c).) Judicial Council Form No. GC-080 must be used for the notice. (C.R.C., Rules 7.1013(e), 7.1063(e).)

(c) *Change of Residence Out of State*. Prior court approval is required before a residence may be established outside California. (C.R.C., Rules 7.1013(f), 7.1063(f).)

(5) *Judicial Council Forms*. The following Judicial Council forms have been added:

Judicial Council Form No. GC-079 [Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward].

Judicial Council Form No. GC-079(MA) [Attachment to Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward].

Judicial Council Form No. GC-080(MA) [Attachment to Post-Move Notice of Change of Residence of Conservatee

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14 Witkin Sum. Cal. Law Wills § 990

[§ 990] Fixing Residence.

(1) *In General.* Except when a conservatee retains the right to fix his or her residence under *Prob.C. 2351* (supra, §989), the guardian or conservator may fix the residence of the ward or conservatee at any place in California or, if prior court permission is obtained, outside California. (*Prob.C. 2352(a)*, (d).) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §28:72 [petition], §28:73 [order]; C.E.B., 1 Conservatorship Practice, §13.10 et seq.; C.E.B., Guardianship Practice, §11.9 et seq.)

(2) *Residence in State.* In fixing the residence within the state, the guardian or conservator must select "the least restrictive appropriate setting which is available and necessary to meet the needs of the ward or conservatee, and which is in the best interests of the ward or conservatee." In determining the appropriate level of care, guardians or conservators may use the statewide nursing home preadmission screening program or a comparable assessment by a community-based case management organization. (*Prob.C. 2352(a)(1)*.)

(3) *Residence Out of State.* If the court authorizes the ward or conservatee to reside out of state, once the ward or conservatee has resided there for 4 months (or for a longer or shorter period specified in the order), the order must require the guardian or conservator either to return the ward or conservatee to California or to cause a guardianship, conservatorship, or equivalent proceeding to be commenced in the new place of residence. (*Prob.C. 2352(b)*.)

(4) *Notice.* Notice of a change of residence must be "promptly" mailed to the court. (*Prob.C. 2352(c)*.)

(5) *Judicial Council Forms.* The Judicial Council has adopted the following mandatory forms for a change of residence in guardianship and conservatorship proceedings:

Judicial Council Form No. GC-080 [Change of Residence Notice].

Judicial Council Form No. GC-085 [Petition to Fix Residence Outside the State of California].

Judicial Council Form No. GC-090 [Order Fixing Residence Outside the State of California].

SUPPLEMENT: [This section is current through the latest supplement]

The statutes authorizing the guardian or conservator to fix the residence of the ward or conservatee were extensively revised in 2006 and 2008. Rules of Court governing notice of a change of residence were adopted in 2007. The following provisions are now applicable:

(1) *In General.* Except where the conservatee retains the right to establish his or her own residence under *Prob.C. 2351*, the guardian or conservator may establish a residence for the ward or conservatee under *Prob.C. 2352*. (*Prob.C. 2352(f).*) As used in *Prob.C. 2352*, "guardian" includes a proposed guardian, "ward" includes a proposed ward, "conservator" includes a proposed conservator, and "conservatee" includes a proposed conservatee. (*Prob.C. 2352(g).*)

(2) *Residence in State.* The guardian or conservator may establish a residence within California without the permission of the court. The guardian or conservator must select the "least restrictive appropriate residence" that is available and necessary to meet the needs of the ward or conservatee and in the best interests of the ward or conservatee. (*Prob.C. 2352(a)* [ward]; *Prob.C. 2352(b)* [conservatee].) With respect to a conservatee, it is presumed that the personal residence at the time the proceeding is commenced is the least restrictive appropriate residence. At a hearing to determine if removal of the conservatee from the personal residence is appropriate, the presumption may be overcome by a preponderance of the evidence. (*Prob.C. 2352.5(a).*) (On determination of appropriate level of care for conservatee and evaluation of measures necessary to keep conservatee in personal residence, see *Prob.C. 2352.5(b).*)(3) *Residence Out of State.* The guardian or conservator may establish a residence outside California with the prior permission of the court. Notice of the hearing on the petition to do so, with a copy of the petition, must be given in the manner required by *Prob.C. 1460(a)* (general notice requirement; text, §910) to all persons entitled to notice under *Prob.C. 1511(b)* (appointment of guardian; text, §920) or *Prob.C. 1822(b)* (appointment of conservator; text, §939). (*Prob.C. 2352(c).*) The order must require the guardian or conservator to either (a) return the ward or conservatee to California or (b) cause a guardianship, conservatorship, or equivalent proceeding to be commenced in the place of the new residence, once the ward or conservatee has resided there for 4 months (or for a longer or shorter period specified in the order). (*Prob.C. 2352(d).*)

The fee for filing a petition, application, or opposition concerning an order granting permission to fix the residence of a ward or conservatee at a place outside California is \$ 350. (*Govt.C. 70658(a)(10)*, added in 2007 and amended in 2008.)

(4) *Notice.* The guardian or conservator must file a notice of change of residence with the court within 30 days of the change. (*Prob.C. 2352(e)(1).*) The guardian or conservator must mail a copy of the notice to all persons entitled to notice under *Prob.C. 1511(b)* or *Prob.C. 1822(b)* and must file proof of service. For good cause, the court may waive the mailing requirement. (*Prob.C. 2352(e)(2).*) If the guardian or conservator proposes to remove the ward or conservatee from his or her personal residence, except as provided by *Prob.C. 2352(c)*, the guardian or conservator must mail notice of the intent to do so to all persons entitled to notice under *Prob.C. 1511(b)* or *Prob.C. 1822(b)* and must file proof of service. In the absence of an emergency, the notice must be mailed at least 15 days before the proposed removal. If the notice is mailed less than 15 days before the removal, the notice must set forth the basis for the emergency. (*Prob.C. 2352(e)(3).*)

Additional notice requirements are imposed by C.R.C., Rule 7.1013 (change of ward's residence) and C.R.C., Rule 7.1063 (change of conservatee's residence). The provisions of these rules are substantially similar and require the following:

(a) *Remove Notice.* Unless an emergency requires shorter notice, a guardian or conservator of the person who intends to change the personal residence must mail notice of the intended change at least 15 days before the date of the proposed change and must file the original notice and proof of mailing with the court. With respect to a ward, the notice must be mailed to the ward (if age 12 or older), the attorney of record, the ward's parents, a person who had legal custody of the ward when the first petition for appointment of a guardian was filed, a guardian of the estate, and a person who was nominated as a guardian but was not appointed. (C.R.C., Rule 7.1013(a).) (On what constitutes ward's personal residence for this purpose, see C.R.C., Rule 7.1013(b).) With respect to a conservatee, the notice must be

mailed to the conservatee, the attorney of record, the conservatee's spouse or registered domestic partner, and the conservatee's relatives named in the petition for appointment of the probate conservator, including "deemed relatives" under *Prob.C. 1821(b)* if the conservatee does not have a spouse or registered domestic partner and does not have second degree relatives. (C.R.C., Rule 7.1063(a).) (On what constitutes conservatee's personal residence for this purpose and changes of residence that are not considered changes of a personal residence, see C.R.C., Rule 7.1063(b).) Judicial Council Form No. GC-079 must be used for the notice. If an emergency requires a notice period shorter than 15 days, the basis for the emergency must be stated in the notice. (C.R.C., Rules 7.1013(e), 7.1063(e).)

(b) *Postmove Notice*. A guardian or conservator of the person must file notice of a change of residence with the court within 30 days of the date of the change. Unless waived by the court for good cause to prevent harm to the ward or conservatee, the notice must be mailed to designated persons and proof of mailing must be filed with the court with the original notice. With respect to a ward, the notice must be mailed to the attorney of record, the ward's parents, a person who had legal custody of the ward when the first petition for appointment of a guardian was filed, a guardian of the estate, and a person who was nominated as a guardian but was not appointed. (C.R.C., Rule 7.1013(c).) With respect to a conservatee, the notice must be mailed to the conservatee, the attorney of record, the conservatee's spouse or registered domestic partner, and the conservatee's relatives named in the petition for appointment of the probate conservator, including "deemed relatives" under *Prob.C. 1821(b)* if the conservatee does not have a spouse or registered domestic partner and does not have second degree relatives. (C.R.C., Rule 7.1063(c).) Judicial Council Form No. GC-080 must be used for the notice. (C.R.C., Rules 7.1013(e), 7.1063(e).)

(c) *Change of Residence Out of State*. Prior court approval is required before a residence may be established outside California. (C.R.C., Rules 7.1013(f), 7.1063(f).)

(5) *Judicial Council Forms*. The following Judicial Council forms have been added:

Judicial Council Form No. GC-079 [Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward].

Judicial Council Form No. GC-079(MA) [Attachment to Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward].

Judicial Council Form No. GC-080(MA) [Attachment to Post-Move Notice of Change of Residence of Conservatee or Ward].



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c. Medical Treatment.
1. Consent to Treatment of Ward.

14 Witkin Sum. Cal. Law Wills § 991

[§ 991] Consent to Treatment of Ward.

Generally, the guardian has the same right as a parent with legal custody of a child to consent to medical treatment or to require the ward to receive medical treatment. (*Prob.C. 2353(a)*; see *Family C. 6910* [guardian may authorize adult entrusted with care of minor to consent to medical or dental treatment].) However, except in an emergency, surgery may not be performed on a ward 14 years of age or older without either (1) the consent of both the ward and the guardian, or (2) a court order specifically authorizing the treatment. (*Prob.C. 2353(b)*; on court-ordered treatment, see *infra*, §994.) (On constitutional rights of minor over 14 years of age, see *In re Roger S. (1977) 19 C.3d 921, 931, 141 C.R. 298, 569 P.2d 1286, 7 Summary (10th), Constitutional Law*, §653.)

In an emergency, the consent of the guardian alone is sufficient, and no person is liable because the surgery is performed without the ward's consent. (*Prob.C. 2353(c)*.) Immunity from liability does not extend to malpractice. (Legislative Com. Comment.) An emergency case is one in which the guardian makes a good faith determination based upon medical advice that the ward "faces loss of life or serious bodily injury if the surgery is not performed." (*Prob.C. 2353(c)*.)

The guardian's consent is not required where the ward alone may consent under other statutes. (*Prob.C. 2353(d)*; see, e.g., *Family C. 6920 et seq.* [minor may consent to medical treatment]; 1 *Summary (10th), Contracts*, §38 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Consent to Treatment of Conservatee.

14 Witkin Sum. Cal. Law Wills § 992

[§ 992] Consent to Treatment of Conservatee.

(1) *Conservatee Not Adjudicated To Lack Capacity.* If the conservatee has not been adjudicated to lack the capacity to give informed consent for medical treatment, consent may be given by the conservatee alone, the conservatee and conservator jointly, or the conservator alone if the conservatee does not object to the medical treatment. (*Prob.C. 2354(a).*) (On adjudication of capacity, see *supra*, §§956, 957.) The Law Revision Commission Comment makes the following points:

(a) Medical personnel may safely rely on the conservatee's informed consent so long as the conservatee has not been adjudicated to lack capacity to give informed consent.

(b) A conservator who wishes to forestall the treatment must seek an order under *Prob.C. 1880* that the conservatee lacks capacity to give informed consent.

(c) A medical practitioner who is unwilling to rely on the consent of the conservatee may request the joint consent of the conservator. (For remedy if conservator refuses to consent, see *Prob.C. 2357(i)*, *infra*, §994.)

A conservator may require the conservatee to receive medical treatment under a court order specifically authorizing the treatment. (*Prob.C. 2354(b)*); on procedure for obtaining order, see *infra*, §994.)

In an emergency, the consent of the conservator alone is sufficient, and no person is liable because the surgery is performed upon the conservatee without the conservatee's consent. (*Prob.C. 2354(c).*) Immunity from liability does not extend to malpractice. (Legislative Com. Comment.) An emergency case is one in which the medical treatment is required to alleviate *severe* pain, or the conservatee has a medical condition that, "if not immediately diagnosed and treated, will lead to serious disability or death." (*Prob.C. 2354(c).*)

(2) *Conservatee Adjudicated To Lack Capacity.* If the conservatee has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make those decisions "that the conservator in good faith based on medical advice determines to be necessary." The conservator must make decisions according to the

conservatee's health care instructions and "other wishes to the extent known." Otherwise, the conservator makes decisions in the conservatee's best interest, considering the conservatee's "personal values to the extent known." For this purpose, "health care" is defined in *Prob.C. 4615* (supra, §880) and "health care decision" is defined in *Prob.C. 4617* (supra, §880). (*Prob.C. 2355(a)*.) (See *Prob.C. 2355(b)* [treatment by practitioner of religion relying on prayer alone for healing]; *Prob.C. 2357*, infra, §994 [court-ordered treatment].) (On adjudication of capacity, see supra, §§956, 957.)

"The conservator may require the conservatee to receive the health care, whether or not the conservatee objects. In this case, the health care decision of the conservator alone is sufficient and no person is liable because the health care is administered to the conservatee without the conservatee's consent." (*Prob.C. 2355(a)*.) Immunity from liability does not extend to malpractice. (Legislative Com. Comment.)

The Law Revision Commission Comment makes the following points:

(a) The standard of care provided in *Prob.C. 2355(a)* is substantially the same as the standard applicable to other surrogate health care decision-makers under the Health Care Decisions Law (*Prob.C. 4600* et seq.; supra, §878 et seq.), e.g., an agent under a power of attorney for health care (see *Prob.C. 4684*; supra, §886) and a surrogate under a statutory surrogate's health care decision (see *Prob.C. 4714*; supra, §891). Under this standard, the surrogate has both the right and the fiduciary duty to make a decision based on the individual circumstances of the conservatee. The standard for determining the conservatee's wishes and best interest is by a preponderance of the evidence. Proof is not required by clear and convincing evidence.

(b) Use of the same terminology as in the Health Care Decisions Law makes it clear that the scope of health care decisions made by the conservator under *Prob.C. 2355(a)* is the same as provided by the Health Care Decisions Law.

(c) The intent of *Prob.C. 2355(a)* "is to protect and further the patient's interest in making a health care decision in accordance with the patient's expressed desires, where known, and if not, to make a decision in the patient's best interest, taking personal values into account. The necessary determinations are to be made by the conservator, whether private or public, in accordance with the statutory standard. Court control or intervention in this process is neither required by statute, nor desired by the courts."

A higher standard applies to the removal of life support. (See infra, §996.)

West's Key Number Digest, Guardian and Ward k.29

SUPPLEMENT: [This section is current through the latest supplement]



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3. Restrictions on Treatment.

14 Witkin Sum. Cal. Law Wills § 993

[§ 993] Restrictions on Treatment.

Prob.C. 2356 limits the forms of medical treatment that may be authorized for a ward or conservatee. (See C.E.B., 1 Conservatorship Practice, §13.20 et seq.; C.E.B., Guardianship Practice, §11.16 et seq.)

(1) *Treatment in Mental Health Facility*. A ward or conservatee may not be placed in a mental health treatment facility under the Guardianship-Conservatorship Law against his or her will; involuntary civil placement must be obtained pursuant to Welf.C. 5150 et seq. (3 *Cal. Proc.* (4th), *Actions*, §30 et seq.), Welf.C. 5350 et seq. (3 *Cal. Proc.* (4th), *Actions*, §40 et seq.), or Welf.C. 6000 (see 7 *Summary* (10th), *Constitutional Law*, §653). (*Prob.C. 2356(a)*.)

(2) *Experimental Drugs*. Experimental drugs may be used only as provided in *Health & Saf.C. 26668* et seq. (*Prob.C. 2356(b)*.) (See 22 *U.S.F. L. Rev.* 341 [right to refuse antipsychotic drugs].)

(3) *Convulsive Treatment*. Convulsive treatment may be administered only as provided in *Health & Saf.C. 5325* et seq. (*Prob.C. 2356(c)*.) (See *Conservatorship of Fadley* (1984) 159 C.A.3d 440, 445, 205 C.R. 572; *Lillian F. v. Superior Court* (1984) 160 C.A.3d 314, 320, 206 C.R. 603.)

(4) *Sterilization*. No minor may be sterilized under the Guardianship-Conservatorship Law. (*Prob.C. 2356(d)*.) This provision is consistent with *Guardianship of Tulley* (1978) 83 C.A.3d 698, 701, 146 C.R. 266, and *Guardianship of Kemp* (1974) 43 C.A.3d 758, 762, 118 C.R. 64. (Law Rev. Com. Comment.) (For sterilization of adult conservatees, see *infra*, §1059.)

(5) *Health Care Directive*. The provisions of *Prob.C. 2350* et seq. are subject to a valid and effective advance health care directive under the Health Care Decisions Law (*Prob.C. 4600* et seq.; see *supra*, §878 et seq.). (*Prob.C. 2356(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Treatment in Mental Health Facility*.

Involuntary civil placement:

Cross-References: 3 *Cal. Proc.* (5th), *Actions*, §80 et seq., §91 et seq.



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c. Medical Treatment.
4. Court Authorization of Treatment.

14 Witkin Sum. Cal. Law Wills § 994

[§ 994] Court Authorization of Treatment.

(1) *Petition Authorized.* If the ward or conservatee requires medical treatment that is not otherwise authorized, and the ward or conservatee is unable to give informed consent, the guardian or conservator may petition for a court order authorizing treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee. (*Prob.C. 2357(b)*; see *Prob.C. 2357(a)* [procedure applies to temporary guardianships or conservatorships]; *Prob.C. 2357(c)* [specifying content of petition]; *Prob.C. 2357(d)* [appointment of counsel].) (See *Guardianship of Phillip B. (1983) 139 C.A.3d 407, 427, 188 C.R. 781* [surgery may be authorized without separate petition where essential information is timely presented and issues are fully litigated as part of guardianship proceeding]; *Dority v. Superior Court (1983) 145 C.A.3d 273, 280, 193 C.R. 288* [court order for withdrawal of infant's life support system, after finding that infant was brain dead, was proper and appropriate]; C.E.B., Elder Law Resources, §4.58 et seq.; C.E.B., Durable Powers of Attorney, §6.14 et seq.)

(2) *Notice.* Not less than 15 days before the hearing, notice and a copy of the petition must be (a) personally served on the ward (if 12 years of age or older) or the conservatee, and the attorney, and (b) mailed to the spouse or domestic partner of the conservatee and relatives named in the petition at the addresses stated in the petition. (*Prob.C. 2357(e)*.) The court may shorten or waive notice for good cause, taking into account existing medical facts and circumstances and the desirability of giving adequate notice to interested persons. (*Prob.C. 2357(f)*; see *Prob.C. 48 and 1424* ["interested person" defined].)

(3) *Submission on Affidavits.* The matter may be submitted on medical affidavits or declarations if the attorney for the petitioner and the attorney for the ward or conservatee so stipulate and further stipulate that there remains no issue of fact to be determined. (*Prob.C. 2357(g)*.)

(4) *Grounds for Order.* The court may authorize the recommended treatment if it determines the following: (a) The existing or continuing medical condition requires the recommended course of medical treatment. (b) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the ward or conservatee. (c) The ward or conservatee is unable to give informed consent. (*Prob.C. 2357(h)*.)

(5) *Where Guardian or Conservator Fails To Act.* A ward, conservatee, or other interested person who believes there is a need for medical treatment that the guardian or conservator is unwilling to obtain or has failed to obtain may petition for a noticed hearing at which the guardian or conservator may be ordered to obtain or consent to the needed treatment. (*Prob.C. 2357(i)*; see *Prob.C. 48* and *1424* ["interested person" defined].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition Authorized.* See C.E.B., Powers of Attorney and Health Care Directives, §2.23 et seq.



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5. Conservatee With Dementia.

14 Witkin Sum. Cal. Law Wills § 995

[§ 995] Conservatee With Dementia.

Prob.C. 2356.5 authorizes various actions by the conservator where the conservatee has dementia, lacks the capacity to give informed consent, and has a mental function deficit under *Prob.C. 811(a)* (see supra, §9) that *significantly impairs* the conservatee's ability to understand the consequences of the action. (For legislative findings, see *Prob.C. 2356.5(a)*.)

(1) *Placement in Secure Facility*. The conservator may authorize the placement of the conservatee in a secure facility of a type designated in the statute, if the court finds, by clear and convincing evidence, that the conservatee would benefit from a restricted and secure environment and that the proposed placement is the least restrictive placement appropriate to the needs of the conservatee. (*Prob.C. 2356.5(b)*.)

(2) *Administration of Medication*. The conservator may authorize the administration of medication, if the court finds, by clear and convincing evidence, that the conservatee would benefit from appropriate medication. (*Prob.C. 2356.5(c)*.)

(3) *Procedure*. The procedure for authority to act under *Prob.C. 2356.5* is generally governed by *Prob.C. 2357* (supra, §994) except that (a) the conservatee must be represented by an attorney, (b) the conservatee must attend the hearing, unless excused, (c) the petition must be supported by the declaration of a licensed physician or psychologist, and (d) the petition may be filed by any person designated in *Prob.C. 1891* (supra, §957). (*Prob.C. 2356.5(f)*.) (On investigation and report by court investigator, see *Prob.C. 2356.5(g)*; on attorney's petition or report where conservatee objects to treatment or where change in treatment is warranted, see *Prob.C. 2356.5(g)*; on petition to terminate authority, see *Prob.C. 2356.5(h)*.)

The Judicial Council has adopted forms governing the procedure. (See Judicial Council Form No. GC-313 [Attachment Requesting Special Orders Regarding Dementia]; Judicial Council Form No. GC-335 [Capacity Declaration--Conservatorship]; Judicial Council Form No. GC-335A [Dementia Attachment to Capacity Declaration--Conser-vatorship].)

(4) *Scope of Statute.* Nothing in *Prob.C. 2356.5* affects the conservatorship of the estate of a person with dementia (*Prob.C. 2356.5(i)*), laws otherwise applicable to emergency situations (*Prob.C. 2356.5(j)*), or the power of the Probate Court to fix the residence or authorize medical treatment of a conservatee without dementia (*Prob.C. 2356.5(k)*).

(5) *Judicial Council Forms.* The Judicial Council has adopted the following forms for capacity declarations in conservatorship proceedings:

Judicial Council Form No. GC-333 [Ex Parte Application for Order Authorizing Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-334 [Ex Parte Order Re Completion of Capacity Declaration--HIPAA (Probate--Guardianships and Conservatorships)].

Judicial Council Form No. GC-335 [Capacity Declaration--Conservatorship].

Judicial Council Form No. GC-335A [Dementia Attachment to Capacity Declaration--Conservatorship].

SUPPLEMENT: [This section is current through the latest supplement]



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6. Removal of Life Support.

14 Witkin Sum. Cal. Law Wills § 996

[§ 996] Removal of Life Support.

(1) *Conservatee in Persistent Vegetative State.* The constitutional right of an incurable patient to die, i.e., to require the removal of life support equipment over the objections of physicians or others, was established in California by *Bartling v. Superior Court* (1984) 163 C.A.3d 186, 209 C.R. 220, 5 Summary (10th), Torts, §127, and *Bouvia v. Superior Court* (1986) 179 C.A.3d 1127, 225 C.R. 297, 5 Summary (10th), Torts, §127. In *Conservatorship of Drabick* (1988) 200 C.A.3d 185, 245 C.R. 840, the court held that where a person is incompetent, his or her conservator, considering medical advice and the conservatee's best interest, may make that decision.

In *Drabick*, William suffered a head injury in an automobile accident, and for 5 years remained unconscious in a persistent vegetative state. There was no hope for his recovery, but his electroencephalogram was not flat, and he breathed without a respirator. The members of his family, his doctors, and his conservator were in favor of removing the nasogastric feeding tube that kept him alive; and evidence of declarations by the conservatee before his accident indicated that he would prefer death to life maintained by artificial support systems. But the conservator's petition to the superior court for approval of removal of the tube was denied, and the conservator appealed. *Held*, reversed.

(a) *Prob.C. 2355* (supra, §992), stating the conservator's power to give consent to medical treatment, "by necessary implication" gives the conservator the power to "withhold or withdraw consent" under appropriate circumstances. (200 C.A.3d 200.) Courts of other states have given the same interpretation to similar statutes. (200 C.A.3d 201.) And court approval is not required for medical treatment decisions under *Prob.C. 2355*. (200 C.A.3d 202.)

(b) "At present, William's treatment is determined solely as a matter of medical technology; his life is prolonged because it is possible, not because anyone purporting to speak for him has decided that this is the best or the wisest course." (200 C.A.3d 208.) But *Bartling* and *Bouvia* "recognize that medical care decisions must be guided by the individual patient's interests and values." (200 C.A.3d 208.) And, while William's coma precludes his participation, it is still possible for others to make a decision that reflects his interests more closely than a technological decision to do whatever is possible. "Lacking the ability to decide, he has a right to a decision that takes his interests into account." (200 C.A.3d 208.)

(c) The right is meaningless unless someone is permitted to make the decision. "Thus, by permitting the conservator to exercise vicariously William's right to choose, guided by his best interests, we do the only thing within our power to continue to respect him as an individual and to preserve his rights." (200 C.A.3d 209.)

(d) Under *Prob.C. 2355*, the conservator was not required to seek judicial approval before withholding consent to further treatment. "Thus, further proceedings will be necessary only if the conservator chooses to seek approval by pursuing his petition or if another interested person challenges his decision." (200 C.A.3d 216.) If judicial supervision is invoked, the court's role will be limited to determining whether the conservator's decision complies with the statute. (200 C.A.3d 216.)

Prob.C. 2355(a), discussed in *Conservatorship of Drabick*, was substantially revised in 1999 to conform to the Health Care Decisions Law (*Prob.C. 4600 et seq.*). The Law Revision Commission Comment notes that the amended statute is consistent with *Drabick*.

(2) *Objection of Physician*. In *Conservatorship of Morrison* (1988) 206 C.A.3d 304, 253 C.R. 530, the issue was whether the conservator could require physicians, against their personal moral objections, to remove the feeding tube from a conservatee in a persistent vegetative state. The conservator sought an injunction against the hospital and the conservatee's attending physician to require removal, and the trial court denied injunctive relief. *Held*, affirmed.

(a) Under *Drabick*, the conservator may authorize removal of the tube. (206 C.A.3d 308.) *Bartling and Bouvia* establish the right of the patient to require physicians to do so; but no decision so far deals with the right of the conservator to direct a physician to do so. The prevailing viewpoint among medical ethicists is that a physician may refuse on personal moral grounds, but must be willing to transfer the patient to another physician who will follow the conservator's direction. (206 C.A.3d 310.)

(b) "This approach is fair and just, and we shall follow it here. In such cases as this no physician should be forced to act against his or her personal moral beliefs if the patient can be transferred to the care of another physician who will follow the conservator's direction." (206 C.A.3d 311.)

(c) This case does not pose the dilemma created when no physician can be found who will follow the direction. "The issue of whether a court could compel physicians to act contrary to their ethical views is too profound for gratuitous discussion in a dictum. Its resolution must await an appropriate case." (206 C.A.3d 312.)

(d) Judicial intervention in right to die cases "should be minimal." The *Drabick* opinion suggests that courts should intervene only if there is disagreement among the interested parties. "We add that courts should intervene only if there is disagreement among the conservator and other interested parties and they have exhausted all nonjudicial efforts to resolve the dispute. Because of the absence of any attempt to transfer Morrison to another facility and have the nasogastric tube removed by a willing physician, the time for judicial intervention in this case has not yet arrived." (206 C.A.3d 312.)

(3) *Conservatee Incompetent*. *Conservatorship of Wendland* (2001) 26 C.4th 519, 110 C.R.2d 412, 28 P.3d 151, deals with whether a conservator may, under *Prob.C. 2355*, withhold artificial nutrition and hydration from an incompetent but conscious conservatee who is not terminally ill, comatose, or in a persistent vegetative state, and who has not left formal instructions for health care or appointed an agent or surrogate for health care decisions.

Robert was involved in a traffic accident and seriously injured. He remained in a coma for several months but eventually regained consciousness and, with therapy, regained the ability to perform simple tasks such as throwing a ball and performing certain two-step commands. However, he remained unable to verbalize, and he continued to suffer from paralysis, swallowing dysfunction, incontinence, inappropriate social behavior, and other mental and physical dysfunctions. About 2 years after the accident, Rose, Robert's wife, refused to give doctors permission to replace Robert's displaced feeding tube. Although agreeing with this decision, the treating physician inserted a nasogastric feeding tube to keep Robert alive pending input from the hospital's ethics committee. This committee eventually

approved Rose's decision, but Robert's mother and sister obtained a temporary restraining order barring the removal of the feeding tube. After Rose successfully petitioned to become Robert's conservator, she sought permission to withhold life-sustaining treatment. The trial judge, finding that she had not presented clear and convincing evidence to justify this course of action, but also finding that she acted in good faith, ordered that she was to have no authority to withhold nutrition and hydration. The Court of Appeal, reasoning that the good faith finding was all that was required, reversed. *Held*, decision of the Court of Appeal reversed.

(a) *Right to refuse treatment.* A competent person has the right to refuse medical treatment, even treatment necessary to sustain life. (26 C.4th 530, citing *Union Pac. Ry. Co. v. Botsford* (1891) 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734, and *Bartling v. Superior Court*, *supra*.) The right to refuse treatment survives incapacity, in a practical sense, if exercised during competency pursuant to a law giving that act lasting validity. Thus, numerous statutes, in the form either of instructions for health care or the designation of an agent or surrogate for health care decisions, give effect to the decision of a competent person. These laws are a way of respecting personal autonomy by giving effect to competent decisions. In contrast, decisions made by a conservator typically derive their authority from a different basis, i.e., the *parens patriae* power of the state to protect incompetent persons. (26 C.4th 534.)

(b) *Drabick decision.* *Conservatorship of Drabick*, *supra*, dealing with a conservatee in a persistent vegetative state, held that the provision in Prob.C. 2355 giving the conservator exclusive authority to consent to such medical treatment as the conservator in good faith based on medical advice determines to be necessary also gives a conservator the power to withhold or withdraw consent to medical treatment (on the ground that treatment to sustain the life of a permanently unconscious person is not "necessary"). The *Drabick* court added that incompetence did not result in the loss of the fundamental right to die, because the incompetent person could still gain the benefit of this right through its vicarious exercise by a conservator. (26 C.4th 535.) "We do not question the *Drabick* court's conclusion that incompetent persons have a right, based in the California Constitution, to appropriate medical decisions that reflect their *own* interests and values. ... But the right to an appropriate decision by a court-appointed conservator does not necessarily equate with the conservatee's right to refuse treatment, or obviously take precedence over the conservatee's right to life or the state's interest in preserving life." (26 C.4th 537.) Moreover, although no published decision has rejected the *Drabick* court's conclusions, none has applied it to the facts of the present case, i.e., to an incompetent but conscious conservatee. (26 C.4th 537.)

(c) *Probate Code.* As interpreted in *Drabick*, Prob.C. 2355 did not *compel* the conservator, whose judgment was regarded as controlling, to abide by the conservatee's prior informal statements about the conservatee's wishes on becoming incompetent. However, the statute was amended in 1999, and, as pertinent here, the following language was added: "The conservator shall make health care decisions for the conservatee in accordance with the conservatee's ... wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's *best interest*. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator." Contrary to the *Drabick* holding, this language assigns dispositive weight to the conservatee's informally expressed wishes. (26 C.4th 538.)

(d) *Clear and convincing evidence required.* Rose asserted that she offered sufficient evidence of Robert's wishes to satisfy the statutory standard, while the objectors maintained that Rose had not met her burden of proof. Thus, the primary issue is whether Robert's wishes had to be determined by a preponderance of the evidence or by clear and convincing evidence. (26 C.4th 542.) Prob.C. 2355 does not specify any special standard for determining the conservatee's wishes. And, under Ev.C. 115 (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §3), except as otherwise stated, the burden is proof by a preponderance of the evidence. Nevertheless, the objectors contended that it would be unconstitutional to construe the statute to permit a conservator to terminate a conscious conservatee's life based on a finding, supported only by a preponderance of the evidence, that the latter would not want to live. This argument is correct. "We ... construe the statute to minimize the possibility of its unconstitutional application by requiring clear and convincing evidence of a conscious conservatee's wish to refuse life-sustaining treatment when the conservator relies on that asserted wish to justify withholding life-sustaining treatment. This construction does not entail

a deviation from the language of the statute and constitutes only a partial rejection of the Law Revision Commission's understanding that the preponderance of the evidence standard would apply ... to the majority of health care decisions made by conservators not contemplating a conscious conservatee's death." (26 C.4th 543.) The reasons for this conclusion are as follows:

(1) *First*, the *Drabick* court specifically limited its holding allowing a conservator to withhold life-sustaining treatment to situations where the conservatee was in a persistent vegetative state. By limiting its decision in this way, the *Drabick* court avoided the constitutional issue confronted here, namely, the propriety of a decision to withhold artificial nutrition and hydration from a conscious conservatee who, while incompetent, may nevertheless *subjectively* perceive the effects of dehydration and starvation. (26 C.4th 543.)

(2) *Second*, there is no evidence that the Legislature gave any consideration to the fact situation involved here. The prefatory note and comments to the Uniform Health Care Decisions Act are also silent on this point. (26 C.4th 545.)

(3) *Third*, a competent person who appoints an agent or surrogate to make health care decisions will presumably choose a person in whom the designator reposes the highest degree of confidence. In contrast, a conservator appointed for an incompetent conservatee cannot be presumed to have special knowledge concerning the latter's health care wishes. Therefore, "when the legal premise of a conservator's decision to end a conservatee's life by withholding medical care is that the conservatee would refuse such care, to apply a high standard of proof will help to ensure the reliability of the decision." (26 C.4th 546.)

(4) *Fourth*, although the default standard of proof in civil cases is the preponderance of the evidence, the courts have applied the clear and convincing evidence standard when necessary to protect important rights. The decision to withdraw life-sustaining treatment is obviously one of these rights. Moreover, the decision to treat is reversible, while the decision to withdraw is not. Thus, the latter decision must be based on a high evidentiary standard. (26 C.4th 546.)

(e) *Evidence of conservatee's wishes*. The evidence focused on two pre-accident conversations in which Robert allegedly expressed a desire not "to live like a vegetable." However, one of these conversations occurred when Robert was recovering from a night of heavy drinking and the other occurred following the loss of Robert's father-in-law, with whom he was very close. More explicit direction than "I don't want to live like a vegetable" is required to justify a decision to end the life of one who is not in a persistent vegetative state. Moreover, Robert did not describe the precise condition in which he later found himself and refused to answer the question "Do you want to die?" while giving plausible "yes" or "no" answers to a variety of other questions. (26 C.4th 552.)

(f) *Conservatee's best interest*. The best interest standard applies as a fallback standard only when the conservatee's wishes are not known. (26 C.4th 541.) And while the assessment of a conservatee's best interest belongs in the first instance to the conservator, this does not mean that the court must invariably defer to the conservator regardless of the evidence. (26 C.4th 553.) For the reasons already mentioned, the "clear and convincing evidence" standard applies to the determination of a conservatee's best interest. However, it is not necessary here to define the extreme factual predicates that, if proved by clear and convincing evidence, might support a conservator's determination that withdrawing life support would be in the conservatee's best interest. Rose's decision in this regard was based only on her subjective judgment that Robert did not enjoy a satisfactory quality of life and on legally insufficient evidence that he wished to die. Clearly, this did not constitute clear and convincing evidence. (26 C.4th 554.)

(g) *Scope of decision*. The court concluded by reiterating the following caution: "We emphasize ... that the clear and convincing evidence standard does not apply to the vast majority of health care decisions made by conservators under section 2355. Only the decision to withdraw life-sustaining treatment, because of its effect on a conscious conservatee's fundamental rights, justifies imposing that high standard of proof. Therefore, our decision today affects only a narrow class of persons: conscious conservatees who have not left formal directions for health care and whose conservators propose to withhold life-sustaining treatment for the purpose of causing their conservatees' deaths." (26 C.4th 555.) (See 24 Thomas Jefferson L. Rev. 207 [ability of spouse to terminate life support].)

SUPPLEMENT: [This section is current through the latest supplement]



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a. General Provisions.
1. Appointment and Conditions.

14 Witkin Sum. Cal. Law Wills § 997

[§ 997] Appointment and Conditions.

(1) *Statutory Framework.* *Prob.C. 2400* et seq. relate to the powers and duties of a guardian or conservator of the estate. In these statutes, the term "conservator" means conservator of the estate, and "guardian" means guardian of the estate. (*Prob.C. 2400.*) Except where particular procedures are not appropriate for use in the case of a minor (thus limited to conservatorships), the powers and duties of guardians and conservators of the estate are virtually identical. (See 14 Cal. Law Rev. Com. Reports, p. 545.)

(2) *Community Property.* *Prob.C. 2400* et seq. apply to property owned by a husband and wife as community property only to the extent authorized by *Prob.C. 3000* et seq. (infra, §1062). (*Prob.C. 2407.*)

(3) *Authority To Act Independently Is Preserved.* Nothing in *Prob.C. 2400* et seq. limits or restricts any authority granted to a guardian or conservator under *Prob.C. 2590* et seq. (independent exercise of powers; see infra, §1029 et seq.). (*Prob.C. 2408.*)

(4) *Additional Conditions in Order of Appointment.* When a guardian or conservator is appointed, the court may, with the consent of the guardian or conservator, insert in the appointment order "conditions not otherwise obligatory" providing for the care and custody of the property of the ward or conservatee. These conditions must be included in the letters. (*Prob.C. 2402.*)

West's Key Number Digest, Guardian and Ward k.32 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Framework.* For purposes of *Prob.C. 2400* et seq., "estate" means personal property wherever located and real property located in California. (*Prob.C. 2400(b)*, added in 2008.)



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2. Summary Determination of Disputes.

14 Witkin Sum. Cal. Law Wills § 998

[§ 998] Summary Determination of Disputes.

In the event of a dispute relating to the estate between the guardian or conservator and a third person, the guardian or conservator may enter into a written agreement with the third person to do the following:

(1) *Refer to Temporary Judge.* Refer the dispute to a temporary judge designated in the agreement. The agreement must be filed with the clerk, and the court must enter an order referring the matter to the designated person. The temporary judge must "promptly" hear and determine the matter by summary procedure, without pleadings, discovery, or jury trial. The decision of the temporary judge is subject to *C.C.P.* 632 (statement of decision; see 7 *Cal. Proc.* (4th), *Trial*, §399 et seq.). Judgment is entered on the decision and is as valid and effective as if rendered by a judge of the court in an action commenced by ordinary process. (*Prob.C.* 2405(a).) Any member of the State Bar, including a court commissioner or referee, may be appointed as a temporary judge for this purpose. (Law Rev. Com. Comment.)

(2) *Refer to Judge of the Court.* Submit the dispute to a judge of the court, with the judge's written consent, using the same summary procedure. Both the agreement and the judge's consent must be filed with the clerk "within the time for bringing an independent action on the matter in dispute." (*Prob.C.* 2405(b).)

(3) *Submit to Arbitration.* Submit the dispute to arbitration pursuant to *C.C.P.* 1280 et seq. The agreement is not effective until approved by and filed with the court. (*Prob.C.* 2406.)

Nothing in *Prob.C.* 2405 limits the alternative of a reference and trial by a referee, pursuant to *C.C.P.* 638 et seq. (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §58 et seq.). (Law Rev. Com. Comment.)

Similar statutes are applicable to decedents' estates. (See *Prob.C.* 9620, 9621, *supra*, §472.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Refer to Temporary Judge.*

Statement of decision:

Cross-Reference: 7 Cal. Proc. (5th), *Trial*, §390 et seq.

(3) *Submit to Arbitration.*

Trial by referee:

Cross-Reference: 6 Cal. Proc. (5th), *Proceedings Without Trial*, §63 et seq.



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3. Liability for Breach of Fiduciary Duty.

14 Witkin Sum. Cal. Law Wills § 999

[§ 999] Liability for Breach of Fiduciary Duty.

Prob.C. 2401.3 et seq. govern the liability of a guardian or conservator for breach of a fiduciary duty. Comparable provisions apply to personal representatives (see *Prob.C. 9601 et seq.*; *supra*, §525) and trustees (see *Prob.C. 16440*; 13 *Summary* (10th), *Trusts*, §134 *et seq.*).

(1) *Measure of Liability.* A guardian or conservator who breaches a fiduciary duty is chargeable with any of the following that is "appropriate under the circumstances":

(a) "Any loss or depreciation in value of the estate resulting from the breach of duty, with interest." (*Prob.C. 2401.3(a)(1).*)

(b) "Any profit made by the guardian or conservator through the breach of duty, with interest." (*Prob.C. 2401.3(a)(2).*)

(c) "Any profit that would have accrued to the estate if the loss of profit is the result of the breach of duty." (*Prob.C. 2401.3(a)(3).*)

(2) *Interest.* The liability of a guardian or conservator for interest under *Prob.C. 2401.3* is for the greater of (a) the amount that accrues at the legal rate on judgments (see *C.C.P. 685.010*; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §35), or (b) the amount actually received. (*Prob.C. 2401.5(a).*)

(3) *Exercise of Court's Discretion.* If the guardian or conservator has acted "reasonably and in good faith under the circumstances as known to the guardian or conservator" and it is equitable to do so, the court has discretion to excuse the guardian or conservator from liability in whole or in part. (*Prob.C. 2401.3(b), 2401.5(b).*)

(4) *Liability Is Personal.* A surcharge against a guardian or conservator under *Prob.C. 2401.3* or *2401.5* may not be paid by the estate or offset against future fees or wages to be provided by the estate. (*Prob.C. 2401.6.*)

(5) *Restrictions on Self-Dealing.* Statutory restrictions apply to the sale, lease, or rental of estate property involving

persons with a family or affiliate relationship with the guardian or conservator. Losses to the estate resulting from a violation of these restrictions are deemed charges under *Prob.C. 2401.3* or *2401.5*. (See *infra*, §1000.)

(6) *Other Remedies Are Available*. The provisions of *Prob.C. 2401.3* and *2401.5* "do not prevent resort to any other remedy available against the guardian or custodian under the statutory or common law." (*Prob.C. 2401.7*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Interest*.

Legal rate on judgments:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §42.



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Witkin Sum. Cal. Law Wills § 1000

[§ 1000] Restrictions on Self-Dealing.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) Doing Business With Entity in Which Guardian or Conservator Has Financial Interest.* A guardian or conservator of the estate who is not a trust company may not hire or refer business to an entity in which the guardian or conservator has a financial interest without court authorization. Prior to authorization, the interest must be disclosed to the court in writing. For this purpose, "financial interest" means (a) an ownership interest in a sole proprietorship, partnership, or closely held corporation, (b) an ownership interest of greater than one percent in a publicly traded corporation, or (c) being an officer or director of a corporation. (*Prob.C. 2401(c)*, as amended in 2006.) (For restrictions on self-dealing by trust company, see *Prob.C. 2401(d)*, added in 2006.)

(6) *(New) Conflicts of Interest.* In 2007, the Judicial Council adopted uniform standards of conduct for guardians and conservators of the estate. C.R.C., Rule 7.1009 applies to guardians of the estate and C.R.C., Rule 7.1059 applies to conservators of the estate. These rules are substantially similar. They provide as follows:

(a) The guardian or conservator must avoid actual conflicts of interest and, consistent with his or her fiduciary duty, the appearance of conflicts. The guardian or conservator "must avoid any personal, business, or professional interest or relationship that is or reasonably could be perceived as being self-serving or adverse" to the interests of the ward or conservatee. (C.R.C., Rules 7.1009(a), 7.1059(a).)

(b) Except as appropriate for those who are not professional fiduciaries with full disclosure to the court, the guardian or conservator should not personally provide medical or legal services to the ward or conservatee and the conservator should not provide housing services to the conservatee. (C.R.C., Rules 7.1009(a)(1), 7.1059(a)(1).)

(c) The guardian or conservator must be independent from service providers (C.R.C., Rules 7.1009(a)(2), 7.1059(a)(2)) and must neither solicit nor accept incentives from service providers (C.R.C., Rules 7.1009(a)(3), 7.1059(a)(3)). (On exceptions to independence requirement, see C.R.C., Rules 7.1009(a)(2), 7.1059(a)(2).)

(d) The guardian or conservator must not engage family members to provide services for a profit or fee when other

alternatives are "reasonably available." (C.R.C., Rules 7.1009(a)(4), 7.1059(a)(4).) (On requirements where family members do provide services, see C.R.C., Rules 7.1009(a)(4), 7.1059(a)(4).) The guardian's or conservator's employees and family members are not service providers and are not providing services if their compensation is paid by the fiduciary and their services are either included in the petition for allowance of the fiduciary's compensation or are not paid from the estate. (C.R.C., Rules 7.1009(a), 7.1059(a).)



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14 Witkin Sum. Cal. Law Wills § 1000

[§ 1000] Restrictions on Self-Dealing.

(1) *In General.* Statutes restrict the purchase, lease, or rental of real or personal property from the estate of a ward or conservatee where the transaction involves a family or affiliate relationship with the guardian or conservator.

(2) *Definitions.* For this purpose, "family" means relatives within the second degree, the spouse, domestic partner, and the spouse's relatives within the second degree. The term "affiliate" means an entity under the direct, indirect, or common control of the guardian or conservator. (*Prob.C. 2359(c)(2)* [guardian and conservator of person]; *Prob.C. 2403(c)(2)* [guardian and conservator of estate].)

(3) *Required Disclosure.* A guardian or conservator who petitions for approval of a purchase, lease, or rental must disclose a family or affiliate relationship with the purchaser, lessee, renter, or a hired agent. (*Prob.C. 2359(c)(1)* [guardian and conservator of person]; *Prob.C. 2403(c)(1)* [guardian and conservator of estate].)

(4) *Effect of Violation.* A violation of the disclosure requirement results in the rescission of the purchase, lease, or rental. Losses to the estate because the property was sold or leased at less than fair market value are deemed charges against the guardian or conservator under *Prob.C. 2401.3* or *2401.5* (*supra*, §999). The court must assess a civil penalty equal to three times the charges against the guardian or conservator and may assess punitive damages. If the estate does not incur losses as a result of the violation, the court must order a fine up to \$ 5,000 for each violation. These fines and penalties are in addition to any other rights and remedies provided by law. (*Prob.C. 2359(c)(3)* [guardian and conservator of person]; *Prob.C. 2403(c)(3)* [guardian and conservator of estate].)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) Doing Business With Entity in Which Guardian or Conservator Has Financial Interest.* A guardian or conservator of the estate who is not a trust company may not hire or refer business to an entity in which the guardian or conservator has a financial interest without court authorization. Prior to authorization, the interest must be disclosed to the court in writing. For this purpose, "financial interest" means (a) an ownership interest in a sole proprietorship, partnership, or closely held corporation, (b) an ownership interest of greater than one percent in a publicly traded corporation, or (c) being an officer or director of a corporation. (*Prob.C. 2401(c)*, as amended in 2006.) (For restrictions

on self-dealing by trust company, see *Prob.C. 2401(d)*, added in 2006.)

(6) *(New) Conflicts of Interest.* In 2007, the Judicial Council adopted uniform standards of conduct for guardians and conservators of the estate. C.R.C., Rule 7.1009 applies to guardians of the estate and C.R.C., Rule 7.1059 applies to conservators of the estate. These rules are substantially similar. They provide as follows:

(a) The guardian or conservator must avoid actual conflicts of interest and, consistent with his or her fiduciary duty, the appearance of conflicts. The guardian or conservator "must avoid any personal, business, or professional interest or relationship that is or reasonably could be perceived as being self-serving or adverse" to the interests of the ward or conservatee. (C.R.C., Rules 7.1009(a), 7.1059(a).)

(b) Except as appropriate for those who are not professional fiduciaries with full disclosure to the court, the guardian or conservator should not personally provide medical or legal services to the ward or conservatee and the conservator should not provide housing services to the conservatee. (C.R.C., Rules 7.1009(a)(1), 7.1059(a)(1).)

(c) The guardian or conservator must be independent from service providers (C.R.C., Rules 7.1009(a)(2), 7.1059(a)(2)) and must neither solicit nor accept incentives from service providers (C.R.C., Rules 7.1009(a)(3), 7.1059(a)(3)). (On exceptions to independence requirement, see C.R.C., Rules 7.1009(a)(2), 7.1059(a)(2).)

(d) The guardian or conservator must not engage family members to provide services for a profit or fee when other alternatives are "reasonably available." (C.R.C., Rules 7.1009(a)(4), 7.1059(a)(4).) (On requirements where family members do provide services, see C.R.C., Rules 7.1009(a)(4), 7.1059(a)(4).) The guardian's or conservator's employees and family members are not service providers and are not providing services if their compensation is paid by the fiduciary and their services are either included in the petition for allowance of the fiduciary's compensation or are not paid from the estate. (C.R.C., Rules 7.1009(a), 7.1059(a).)



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Witkin Sum. Cal. Law Wills § 1001

[§ 1001] Duty To Manage Estate.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Instructions or Confirmation.* The filing fee for a petition, application, or opposition to an order authorizing, instructing, or directing a fiduciary or approving or confirming the acts of a fiduciary is \$ 180. (*Govt.C. 70658(a)(3)*, added in 2007.) The filing fee for a petition, application, or opposition to an order directing, authorizing, approving, or confirming the sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property is \$ 180. (*Govt.C. 70658(a)(1)*, added in 2007.)(5) *(New) Standards for Estate Management.* In 2007, the Judicial Council adopted uniform standards of estate management for guardians and conservators of the estate. C.R.C., Rule 7.1009 applies to guardians of the estate and C.R.C., Rule 7.1059 applies to conservators of the estate. C.R.C., Rule 7.1009(b) adopts for guardians the standards applicable to conservators by reference to C.R.C., Rule 7.1059(b). A conservator must do the following:

- (a) "Provide competent management of the conservatee's property, with the care of a prudent person dealing with someone else's property." (C.R.C., Rule 7.1059(b)(1).)
- (b) "Refrain from unreasonably risky investments." (C.R.C., Rule 7.1059(b)(2).)
- (c) "Refrain from making loans or gifts of estate property, except as authorized by the court after full disclosure." (C.R.C., Rule 7.1059(b)(3).)
- (d) "Manage the estate for the benefit of the conservatee." (C.R.C., Rule 7.1059(b)(4).)
- (e) "Subject to the duty of full disclosure to the court and persons entitled under law to receive it, closely guard against unnecessary or inappropriate disclosure of the conservatee's financial information." (C.R.C., Rule 7.1059(b)(5).)
- (f) "Keep the money and property of the estate separate from the conservator's or any other person's money or property, except as may be permitted under statutes authorizing public guardians or public conservators and certain regulated private fiduciaries to maintain common trust funds or similar common investments." (C.R.C., Rule

7.1059(b)(6).)

(g) "Hold title reflecting the conservatorship in individual securities, mutual funds, securities broker accounts, and accounts with financial institutions." (C.R.C., Rule 7.1059(b)(7).)

(h) "Keep accurate records of all transactions. Professional fiduciaries must maintain prudent accounting systems and procedures designed to protect against embezzlement and other cash-asset mismanagement." (C.R.C., Rule 7.1059(b)(8).)

(i) "Undertake as soon as possible after appointment and qualification to locate and safeguard the conservatee's estate planning documents, including wills, living trusts, powers of attorney for health care and finances, life insurance policies, and pension records." (C.R.C., Rule 7.1059(b)(9).)

(j) "Undertake as soon as possible after appointment and qualification to secure the real and personal property of the estate, insuring it at appropriate levels, and protecting it against damage, destruction, or loss." (C.R.C., Rule 7.1059(b)(10).)

(k) "Make reasonable efforts to preserve property identified in the conservatee's estate planning documents." (C.R.C., Rule 7.1059(b)(11).)

(l) "Communicate as necessary and appropriate with the conservator of the person of the conservatee, if any, and with the trustee of any trust of which the conservatee is a beneficiary." (C.R.C., Rule 7.1059(b)(12).)

(m) "Pursue claims against others on behalf of the estate when it would be in the best interest of the conservatee or the estate to do so. Consider requesting prior court authority to pursue or compromise large or complex claims, particularly those that might require litigation and the assistance of counsel and those that might result in an award of attorneys' fees for the other party against the estate if unsuccessful, and request such approval before entering into a contingent fee agreement with counsel." (C.R.C., Rule 7.1059(b)(13).)

(n) "Defend against actions or claims against the estate when it would be in the best interest of the conservatee or the estate to do so. Consider requesting court approval or instructions concerning the defense or compromise of litigation against the estate." (C.R.C., Rule 7.1059(b)(14).)

(o) "Collect all public and insurance benefits for which the conservatee is eligible." (C.R.C., Rule 7.1059(b)(15).)

(p) "Evaluate the conservatee's ability to manage cash or other assets and take appropriate action, including obtaining prior court approval when necessary or appropriate, to enable the conservatee to do so to the level of his or her ability." (C.R.C., Rule 7.1059(b)(16).)

(q) "When disposing of the conservatee's tangible personal property, inform the conservatee's family members in advance and give them an opportunity to acquire the property, with approval or confirmation of the court." (C.R.C., Rule 7.1059(b)(17).)

(r) "In deciding whether it is in the best interest of the conservatee to dispose of property of the estate, consider the following factors, among others, as appropriate in the circumstances: (A) The likely benefit or improvement of the conservatee's life that disposing of the property would bring; (B) The likelihood that the conservatee would need or benefit from the property in the future; (C) Subject to the factors specified in *Probate Code section 2113*, the previously expressed or current desires of the conservatee concerning the property; (D) The provisions of the conservatee's estate plan concerning the property; (E) The tax consequences of the disposition transaction; (F) The impact of the disposition transaction on the conservatee's entitlement to public benefits; (G) The condition of the entire estate; (H) Alternatives to disposition of the property; (I) The likelihood that the property will deteriorate or be subject to waste if retained in the estate; and (J) The benefit versus the cost or liability of maintaining the property in the estate." (C.R.C., Rule

7.1059(b)(18).)

A guardian of the estate (a) must manage the estate primarily for the ward's long-term benefit if the ward has a parent who can provide sufficient support and (b) must consider requesting court authority to support the ward from the estate if the ward does not have a parent who can provide sufficient support. (C.R.C., Rule 7.1009(b).)



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[§ 1001] Duty To Manage Estate.

(1) *In General.* A guardian or conservator (or a limited conservator to the extent "specifically and expressly provided" in the order of appointment) has the management and control of the estate. (*Prob.C. 2401(a).*) (See 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §107 et seq.; C.E.B., 1 *Conservatorship Practice*, §14.1 et seq.; C.E.B., *Guardianship Practice*, §13.1 et seq.; 13 *Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*, §239 et seq.) (For cases decided under former law, see *De Greayer v. Superior Court* (1897) 117 C. 640, 643, 49 P. 983; *In re Forthmann* (1931) 118 C.A. 332, 339, 5 P.2d 472 [guardian has constructive possession of undistributed interest of ward in father's estate]; *Doran v. Hibernia Savings & Loan Soc.* (1947) 80 C.A.2d 790, 792, 182 P.2d 630, 13 *Summary* (10th), *Personal Property*, §31 [possession of ward's property is like that of trustee, for benefit of ward, and in no sense adverse to ward]; cf. *Vigne v. Superior Court* (1940) 37 C.A.2d 346, 349, 99 P.2d 589 [guardian was not entitled to obtain possession of ward's will from custodian; will is not property of ward].) (On authority to petition for appointment of "practice administrator" for disabled attorney, see *Prob.C. 2401(a).*)

(2) *Standard of Care.* In managing the estate, the guardian or conservator must use ordinary care and diligence, "determined by all the circumstances of the particular estate." (*Prob.C. 2401(a)*; see Legislative Committee Comment [professional guardian or conservator is held to higher standard than nonprofessional].) The standard of ordinary care and diligence determines the extent to which the guardian or conservator should or should not exercise a power otherwise granted by statute. (*Prob.C. 2401(b).*) A similar provision applies to personal representatives. (See *Prob.C. 9600*, supra, §465.) (For restrictions on self-dealing, see supra, §1000.) Whether the exercise of a power is mandatory or discretionary depends on the circumstances in light of the basic duty to use ordinary care and diligence. (See 14 *Cal. Law Rev. Com. Reports*, p. 546.) Thus, a guardian or conservator may be required to secure insurance to cover the risk of loss of property of the estate, but need not purchase an amount in excess of that which would be purchased using ordinary care and diligence in the management and control of the estate. (Legislative Com. Comment.)

(3) *Instructions or Confirmation.* On a petition by the guardian or conservator, the ward or conservatee, a creditor, or any interested person, "the court may authorize and instruct the guardian or conservator, or approve and confirm the acts of the guardian or conservator, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses." (*Prob.C. 2403(a)*; see

Prob.C. 48 and 1424 ["interested person" defined].) Notice of the hearing on the petition must be given as provided by *Prob.C. 1460 et seq.* (supra, §910 et seq.). (*Prob.C. 2403(b)*.) (On required disclosure of family or affiliate relationship for specified transactions, see *Prob.C. 2403(c)*, supra, §1000.)

(4) *Neglect of Duties and Court Order for Payments.* If the guardian or conservator "fails, neglects, or refuses to furnish comfortable and suitable support, maintenance, or education" for the ward or conservatee, or to pay a debt, expense, or charge lawfully due and payable by the ward, conservatee, or estate, the court must order the guardian or conservator to do so from the estate. (*Prob.C. 2404(a)*.) The order is on a petition by the ward or conservatee, a creditor, or any interested person, or on the court's own motion. Notice of the hearing on the petition must be given as provided by *Prob.C. 1460 et seq.* (supra, §910 et seq.). (*Prob.C. 2404(b)*; see *Prob.C. 48 and 1424* ["interested person" defined].)

West's Key Number Digest, Guardian and Ward k.37 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §99 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §245 et seq. (3) *Instructions or Confirmation.* The fee for filing a petition, application, or opposition concerning an order authorizing, instructing, or directing a fiduciary or approving or confirming the acts of a fiduciary is \$ 350. (*Govt.C. 70658(a)(3)*, added in 2007 and amended in 2008.) The fee for filing a petition, application, or opposition concerning an order directing, authorizing, approving, or confirming the sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property is \$ 350. (*Govt.C. 70658(a)(1)*, added in 2007 and amended in 2008.) (5) *(New) Out-of-State Real Property.* A guardian or conservator must use "ordinary care and diligence" to identify and protect out-of-state real property of the ward or conservatee. What constitutes "ordinary care and diligence" is determined by all the facts and circumstances that become known to the guardian or conservator, the value of the property, and the needs of the ward or conservatee. Except as provided by *Prob.C. 1061(a)* (text, §382) and *Prob.C. 1062* (text, §383), the guardian or conservator has no duty to inventory or account for out-of-state real property but must include a schedule of out-of-state real property with the inventory and accounting. (*Prob.C. 2401.1*, added in 2008.) This provision has the effect of overturning the rule in prior case law. (See *Conservatorship of Hume* (2006) 139 *C.A.4th* 393, 399, 42 *C.R.3d* 796 [conservator was required to include conservatee's out-of-state real property in inventory and accounting].)

(6) *(New) Standards for Estate Management.* In 2007, the Judicial Council adopted uniform standards of estate management for guardians and conservators of the estate. C.R.C., Rule 7.1009 applies to guardians of the estate and C.R.C., Rule 7.1059 applies to conservators of the estate. C.R.C., Rule 7.1009(b) adopts for guardians the standards applicable to conservators by reference to C.R.C., Rule 7.1059(b). A conservator must do the following:

(a) "Provide competent management of the conservatee's property, with the care of a prudent person dealing with someone else's property." (C.R.C., Rule 7.1059(b)(1).)

(b) "Refrain from unreasonably risky investments." (C.R.C., Rule 7.1059(b)(2).)

(c) "Refrain from making loans or gifts of estate property, except as authorized by the court after full disclosure." (C.R.C., Rule 7.1059(b)(3).)

(d) "Manage the estate for the benefit of the conservatee." (C.R.C., Rule 7.1059(b)(4).)

(e) "Subject to the duty of full disclosure to the court and persons entitled under law to receive it, closely guard against unnecessary or inappropriate disclosure of the conservatee's financial information." (C.R.C., Rule 7.1059(b)(5).)

(f) "Keep the money and property of the estate separate from the conservator's or any other person's money or property, except as may be permitted under statutes authorizing public guardians or public conservators and certain regulated private fiduciaries to maintain common trust funds or similar common investments." (C.R.C., Rule 7.1059(b)(6).)

(g) "Hold title reflecting the conservatorship in individual securities, mutual funds, securities broker accounts, and accounts with financial institutions." (C.R.C., Rule 7.1059(b)(7).)

(h) "Keep accurate records of all transactions. Professional fiduciaries must maintain prudent accounting systems and procedures designed to protect against embezzlement and other cash-asset mismanagement." (C.R.C., Rule 7.1059(b)(8).)

(i) "Undertake as soon as possible after appointment and qualification to locate and safeguard the conservatee's estate planning documents, including wills, living trusts, powers of attorney for health care and finances, life insurance policies, and pension records." (C.R.C., Rule 7.1059(b)(9).)

(j) "Undertake as soon as possible after appointment and qualification to secure the real and personal property of the estate, insuring it at appropriate levels, and protecting it against damage, destruction, or loss." (C.R.C., Rule 7.1059(b)(10).)

(k) "Make reasonable efforts to preserve property identified in the conservatee's estate planning documents." (C.R.C., Rule 7.1059(b)(11).)

(l) "Communicate as necessary and appropriate with the conservator of the person of the conservatee, if any, and with the trustee of any trust of which the conservatee is a beneficiary." (C.R.C., Rule 7.1059(b)(12).)

(m) "Pursue claims against others on behalf of the estate when it would be in the best interest of the conservatee or the estate to do so. Consider requesting prior court authority to pursue or compromise large or complex claims, particularly those that might require litigation and the assistance of counsel and those that might result in an award of attorneys' fees for the other party against the estate if unsuccessful, and request such approval before entering into a contingent fee agreement with counsel." (C.R.C., Rule 7.1059(b)(13).)

(n) "Defend against actions or claims against the estate when it would be in the best interest of the conservatee or the estate to do so. Consider requesting court approval or instructions concerning the defense or compromise of litigation against the estate." (C.R.C., Rule 7.1059(b)(14).)

(o) "Collect all public and insurance benefits for which the conservatee is eligible." (C.R.C., Rule 7.1059(b)(15).)

(p) "Evaluate the conservatee's ability to manage cash or other assets and take appropriate action, including obtaining prior court approval when necessary or appropriate, to enable the conservatee to do so to the level of his or her ability." (C.R.C., Rule 7.1059(b)(16).)

(q) "When disposing of the conservatee's tangible personal property, inform the conservatee's family members in advance and give them an opportunity to acquire the property, with approval or confirmation of the court." (C.R.C., Rule 7.1059(b)(17).)

(r) "In deciding whether it is in the best interest of the conservatee to dispose of property of the estate, consider the following factors, among others, as appropriate in the circumstances: (A) The likely benefit or improvement of the conservatee's life that disposing of the property would bring; (B) The likelihood that the conservatee would need or benefit from the property in the future; (C) Subject to the factors specified in *Probate Code section 2113*, the previously expressed or current desires of the conservatee concerning the property; (D) The provisions of the conservatee's estate plan concerning the property; (E) The tax consequences of the disposition transaction; (F) The impact of the disposition transaction on the conservatee's entitlement to public benefits; (G) The condition of the entire estate; (H) Alternatives to disposition of the property; (I) The likelihood that the property will deteriorate or be subject to waste if retained in the estate; and (J) The benefit versus the cost or liability of maintaining the property in the estate." (C.R.C., Rule 7.1059(b)(18).)

A guardian of the estate (a) must manage the estate primarily for the ward's long-term benefit if the ward has a parent who can provide sufficient support and (b) must consider requesting court authority to support the ward from the estate if the ward does not have a parent who can provide sufficient support. (C.R.C., Rule 7.1009(b).)



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Witkin Sum. Cal. Law Wills § 1002

[§ 1002] Exercise of Powers Without Court Supervision.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Powers.* *Prob.C. 2451.5*, added in 2007, specifies the following additional powers:

- (a) The power to enter into contracts, to perform outstanding contracts, and to bind the estate. (*Prob.C. 2451.5(a).*)
- (b) The power to purchase tangible personal property. (*Prob.C. 2451.5(b).*)
- (c) The power to employ an attorney to advise and represent the guardian or conservator in all matters, subject to *Prob.C. 2640* et seq. (compensation; see text, §1044 et seq.). (*Prob.C. 2451.5(c).*)
- (d) The power to employ accountants, investment advisers, agents, depositaries, and employees. (*Prob.C. 2451.5(d).*)
- (e) The power to operate a business, farm, or enterprise that is an asset of the estate "at the risk of the estate" for 45 days after the issuance of letters. (*Prob.C. 2451.5(e).*)



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CHAPTER XXI - Wills and Probate

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XVII. GUARDIANSHIP AND CONSERVATORSHIP
E. Provisions Common to Guardianship and Conservatorship.
11. Powers and Duties: Guardian or Conservator of Estate.
b. Estate Management Powers.
2. Exercise of Powers Without Court Supervision.

14 Witkin Sum. Cal. Law Wills § 1002

[§ 1002] Exercise of Powers Without Court Supervision.

(1) *General Authority.* The powers and duties of a guardian or conservator specified in *Prob.C. 2450* et seq. may be exercised or performed without court authorization, instruction, approval, or confirmation, unless a statute specifically provides a proceeding to obtain court authorization or requires authorization with respect to a particular power or duty. (*Prob.C. 2450(a)*.) A similar provision applies to personal representatives. (See *Prob.C. 9610*, supra, §468.) Generally, prior court authorization is not required for routine actions but is required for actions that have a significant impact on the estate. (See 14 Cal. Law Rev. Com. Reports, p. 547.) The guardian or conservator remains under a duty to exercise ordinary care and diligence in the management of the estate. (See *Prob.C. 2401*; supra, §1001.) If in doubt, the guardian or conservator may seek court authorization, instructions, approval, or confirmation for particular transactions pursuant to *Prob.C. 2403* (supra, §1001). (*Prob.C. 2450(a)*.)

The court may limit the authority of the guardian or conservator to exercise particular powers and duties. (*Prob.C. 2450(b)*.) (On authority of court to add to the powers exercisable without court authorization, see *infra*, §1029 et seq.)

(2) *Statutory Powers.* The powers and duties of the guardian or conservator exercisable under *Prob.C. 2450* et seq. without prior court authorization (unless the court otherwise orders) include the following:

(a) Advancing funds for the benefit of the ward or conservatee or the estate, and reimbursing the advances out of income and principal. (*Prob.C. 2466*.)

(b) Caring for the estate of a deceased ward or conservatee pending delivery to the personal representative. (*Prob.C. 2467*.)

(c) Maintaining and repairing the home of the ward or conservatee and dependents. (*Prob.C. 2457*, *infra*, §1008.)

(d) Exercising voting and other rights of a corporate shareholder, member, or property owner. (*Prob.C. 2458*.)

(e) Insuring the property of the estate against loss or damage, and insuring the ward or conservatee, the guardian or conservator, and the estate against liability to third persons. (*Prob.C. 2460*.)

(f) Paying, contesting, or compromising taxes and making tax returns. (*Prob.C. 2461.*)

(g) Disposing of or abandoning valueless property. (*Prob.C. 2465*; on disposition of property with value requiring court authorization, see *supra*, §356 et seq.)

Other parts of the Guardianship-Conservatorship Law also authorize powers exercisable without prior court authorization. The following are illustrative:

(a) Providing for support, maintenance, and education. (*Prob.C. 2420*, *infra*, §1008.)

(b) Paying specified debts and expenses. (*Prob.C. 2430*, *infra*, §1010.)

(c) Paying specified wage claims. (*Prob.C. 2431*, *infra*, §1011.)

(d) Compromising or settling claims and actions and modifying terms of obligations. (*Prob.C. 2500*, *infra*, §1012.)

(e) Selling specified securities. (*Prob.C. 2544*, *infra*, §1016.)

(f) Selling or exchanging specified personal property. (*Prob.C. 2545*, *infra*, §1016.)

(g) Entering into specified leases of real property. (*Prob.C. 2555*, *infra*, §1022.)

(h) Making specified investments. (*Prob.C. 2574*, *infra*, §1019.)

West's Key Number Digest, Guardian and Ward k.37

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statutory Powers.* *Prob.C. 2451.5*, added in 2007, specifies the following additional powers:

(a) The power to enter into contracts, to perform outstanding contracts, and to bind the estate. (*Prob.C. 2451.5(a).*)

(b) The power to purchase tangible personal property. (*Prob.C. 2451.5(b).*)

(c) The power to employ an attorney to advise and represent the guardian or conservator in all matters, subject to *Prob.C. 2640* et seq. (compensation; see text, §1044 et seq.). (*Prob.C. 2451.5(c).*)

(d) The power to employ accountants, investment advisers, agents, depositaries, and employees. (*Prob.C. 2451.5(d).*)

(e) The power to operate a business, farm, or enterprise that is an asset of the estate "at the risk of the estate" for 45 days after the issuance of letters. (*Prob.C. 2451.5(e).*)



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3. Collection of Debts or Benefits.

Witkin Sum. Cal. Law Wills § 1003

[§ 1003] Collection of Debts or Benefits.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Endorsement and Deposit of Checks.* In 2007, *Prob.C. 2628(b)* was relettered *Prob.C. 2628(a)*.



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3. Collection of Debts or Benefits.

14 Witkin Sum. Cal. Law Wills § 1003

[§ 1003] Collection of Debts or Benefits.

(1) *In General.* "The guardian or conservator may collect debts and benefits due to the ward or conservatee and the estate." (*Prob.C. 2451.*) "Benefits" include Social Security, public assistance, and benefits under private plans. (Law Rev. Com. Comment.) The duty under *Prob.C. 2401* (supra, §1001) to use ordinary care and diligence in managing the estate includes a duty to take appropriate action to collect a debt or benefit. But where the potential recovery is less than the cost of taking action that might result in recovery of a debt, *Prob.C. 2451* does not impose a duty to act; and, if in doubt, the guardian or conservator may obtain instructions under *Prob.C. 2403* (supra, §1001). (Law Rev. Com. Comment.) (See C.E.B., 1 Conservatorship Practice, §15.30 et seq.)

(2) *Endorsement and Deposit of Checks.* The guardian or conservator may endorse, cash, or deposit checks, warrants, or drafts payable to the ward or conservatee that constitute property of the estate. (*Prob.C. 2452(a).*) If it appears likely that the estate is a small estate satisfying the conditions of *Prob.C. 2628(b)* (infra, §1036), the court may order that the guardian or conservator be the designated payee for designated public assistance benefits. (*Prob.C. 2452(b).*)

(3) *Acceptance of Deed in Lieu of Foreclosure.* If it is advantageous to the estate to accept a deed to property subject to a mortgage or deed of trust in lieu of foreclosure or a trustee's sale (as shown by clear and convincing evidence), the guardian or conservator may, after a noticed hearing and upon court authorization, accept a deed conveying the property to the ward or conservatee. (*Prob.C. 2464.*) (See C.E.B., 2 Conservatorship Practice, §17.70 et seq.) A comparable provision applies to decedents' estates. (See *Prob.C. 9850(c)*; supra, §509.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Endorsement and Deposit of Checks.* In 2007, *Prob.C. 2628(b)* was relettered *Prob.C. 2628(a)*.



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 4. Deposit of Money or Property.

Witkin Sum. Cal. Law Wills § 1004

[§ 1004] Deposit of Money or Property.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Withdrawal Only on Court Order.* C.R.C., Rules 7.953 and 7.954 were amended in 2006 to refer to a "minor or person with a disability."



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14 Witkin Sum. Cal. Law Wills § 1004

[§ 1004] Deposit of Money or Property.

(1) *When Prior Court Authorization Is Unnecessary.* Unless the court otherwise orders, prior court authorization is not required for deposits in the following circumstances:

(a) The guardian or conservator may deposit money belonging to the estate in an "insured account in a financial institution" in California. (*Prob.C. 2453*; see *Prob.C. 46* ["insured account in a financial institution" defined].) If a trust company serving as guardian or conservator deposits money of the estate in a department of the corporation or association of which it is a part, it is chargeable with interest on the deposit at the rate of interest prevailing among local banks on such deposits. However, where it is to the advantage of the estate, cash reasonably necessary for orderly administration of the estate may be deposited in a non-interest checking account. (*Prob.C. 2453.5*.) A comparable provision applies to decedents' estates. (See *Prob.C. 9705*; *supra*, §480.)

(b) The guardian or conservator may deposit personal property of the estate with a trust company. (*Prob.C. 2454*.) (See *Prob.C. 83* ["trust company" defined].)

(c) A trust company serving as guardian or conservator may deposit estate securities in a securities depository, as provided in *Fin.C. 775*. (*Prob.C. 2455(a)*.) If the securities have been deposited with a trust company under *Prob.C. 2328* (*supra*, §985) or *Prob.C. 2454*, the trust company may deposit the securities in a securities depository, as provided in *Fin.C. 775*. (*Prob.C. 2455(b)*.) The securities depository may hold securities deposited with it in the manner authorized by *Fin.C. 775*. (*Prob.C. 2455(c)*.)

(2) *Withdrawal Only on Court Order.* On application of the guardian or conservator, the court may, with or without notice, order that money or other personal property be deposited pursuant to *Prob.C. 2453* or *2454*, and be "subject to withdrawal only upon authorization of the court." (*Prob.C. 2456(a)*.) Otherwise, the money or personal property may be withdrawn without court order. (*Prob.C. 2453, 2454*.) The guardian or conservator must deliver a copy of the court order to the financial institution at the time the deposit is made. (*Prob.C. 2456(b)*.) A financial institution accepting a deposit pursuant to *Prob.C. 2453* or *2454* is not on notice of the existence of an order that the deposit is subject to withdrawal only with court authorization unless it has actual notice of the order. (*Prob.C. 2456(c)*.)

Where the court orders that funds to be received by a minor or incompetent person must be deposited in a financial institution and may not be distributed without further court order, the order must include a provision that a certified or file endorsed copy of the order must be delivered to the manager of the financial institution, and a receipt from the institution (acknowledging both the receipt of the funds and the order) must be filed with the court. (C.R.C., Rule 7.953(a).) The order may provide for withdrawal of funds without further court order after a specified date on which the minor attains majority. (C.R.C., Rule 7.953(b).) (On disposition of proceeds of claim or judgment for minor or disabled person, see *Prob.C. 3600* et seq., *infra*, §1070 et seq.)

A petition for the withdrawal of funds deposited for a minor or incompetent person must be verified and must include the identity of the depository, the amount previously withdrawn, a statement of the balance, and a justification for the withdrawal. (C.R.C., Rule 7.954(a).) A petition may be considered *ex parte* or set for a hearing. (C.R.C., Rule 7.954(b).)

(3) *Judicial Council Forms.* The Judicial Council has adopted the following mandatory forms:

Judicial Council Form No. MC-355 [Order to Deposit Money into Blocked Account].

Judicial Council Form No. MC-356 [Receipt and Acknowledgement of Order for the Deposit of Money into Blocked Account].

Judicial Council Form No. MC-357 [Petition for Withdrawal of Funds from Blocked Account].

Judicial Council Form No. MC-358 [Order for Withdrawal of Funds from Blocked Account].

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Prior Court Authorization Is Unnecessary.*

(c) *Trust company serving as guardian or conservator:* *Fin.C. 775* was repealed in 2008. Comparable provisions are now in *Fin.C. 1592*. (2) *Withdrawal Only on Court Order.* C.R.C., Rules 7.953 and 7.954 were amended in 2006 to refer to a "minor or person with a disability."



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5. Notification by Institutions.

Witkin Sum. Cal. Law Wills § 1005

[§ 1005] Notification by Institutions.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Financial Institutions.*

(d) *Contents.* Judicial Council Form No. GC-051 has been renamed: Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe-Deposit Box (Probate--Guardianships and Conservatorships).



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14 Witkin Sum. Cal. Law Wills § 1005

[§ 1005] Notification by Institutions.

Prob.C. 2890 et seq. impose reporting requirements on two kinds of institutions holding guardianship or conservatorship assets.

(1) *Financial Institutions.* The following provisions apply to financial institutions:

(a) *Definitions.* A "financial institution" means a bank, trust, savings and loan association, savings bank, industrial bank, or credit union. (*Prob.C. 2892(b).*)

(b) *Reporting Requirements.* When a guardian or conservator of the estate opens an account or a safe deposit box in a financial institution or changes the name on an existing account or safe deposit box, the institution must send a written statement to the court that issued the letters of guardianship or conservatorship. (*Prob.C. 2892(a).*)

(c) *Affidavit Procedure.* The statement must be in the form of an affidavit signed by an officer of the institution. (*Prob.C. 2893(a).*) The affidavit need not be filed in a proceeding more than once for each asset, and all assets held by the institution may be listed in a single affidavit. (*Prob.C. 2893(d).*) (On disclosure of the affidavit under the California Right to Financial Privacy Act, see *Prob.C. 2893(b).*)

(d) *Contents.* The affidavit must include the name and address of the financial institution, the name of the account or box holder, the account or reference number, the date on which the account or box was opened or the ownership was changed, the balance of the account on that date, and, if the institution has been given access to the contents of the safe deposit box, a list of the contents, including, e.g., "currency, coins, jewelry, tableware, insurance policies or certificates, stock certificates, bonds, deeds, and wills." (*Prob.C. 2892(a).*) The Judicial Council has adopted a form for the affidavit. (See Judicial Council Form No. GC-051 [Notice of Opening or Changing A Guardianship or Conservatorship Account or Safe Deposit Box].)

(2) *Other Institutions.* The following provisions apply to other institutions:

(a) *Definitions.* An "institution" means an insurance company, agent, or broker, an investment company or bank, a

securities broker-dealer, an investment advisor, a financial planner or advisor, or any other person who takes, holds, or controls an asset that is subject to a conservatorship or guardianship, except a financial institution under *Prob.C. 2892*. (*Prob.C. 2890(c)*.)

(b) *Reporting Requirements*. When a guardian or conservator of the estate "takes possession or control" of an asset of the ward or conservatee held by an institution, the institution must send a written statement to the court with jurisdiction of the guardianship or conservatorship. (*Prob.C. 2890(a)*.) For this purpose, "taking possession or control" of an asset includes changing title, withdrawing all or part of an asset, or transferring all or part of the asset from the institution. (*Prob.C. 2890(b)*.)

(c) *Affidavit Procedure*. The statement must be in the form of an affidavit signed by an authorized person. (*Prob.C. 2891(a)*.) Where the guardian or conservator takes possession or control of an asset, the affidavit may cover any other assets of the ward or conservatee held by the institution. (*Prob.C. 2891(f)*.) The affidavit need not be filed in a proceeding more than once for each asset, and all assets held by the institution may be listed in a single affidavit. (*Prob.C. 2891(e)*.) The court may not charge a fee for filing the affidavit or related information. (*Prob.C. 2891(d)*.)

(d) *Contents*. The affidavit must include the name and address of the institution, the name of the ward or conservatee and the guardian or conservator, the court case number, any account number, the description of the asset (including, if known, the policy number of a life insurance policy or annuity and the name and reference number of a security listed on a public exchange), and the known or estimated value of the asset on the date letters were issued to the extent value is routinely provided in the statements from the institution to the owner. (*Prob.C. 2890(a)*.) The Judicial Council has adopted a form for the affidavit. (See Judicial Council Form No. GC-050 [Notice of Taking Possession or Control of an Asset of Minor or Conservatee].)

(3) *Personal Information Is Confidential*. If the affidavit or accompanying document contains a Social Security number or other personal information about the ward or conservatee that would not be disclosed in an accounting, an inventory and appraisal, or other nonconfidential pleadings filed in the action, the information is kept confidential and may be disclosed only by court order. (*Prob.C. 2891(b)*, *2893(e)*.)

(4) *Trust-Like Arrangements*. The reporting requirements apply to Totten trust accounts, but not to the other trust-like arrangements (e.g., common trust funds, regulated investment trusts) that are excluded from the definition of "trust" by *Prob.C. 82(b)*. (*Prob.C. 2891(c)*, *2893(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Financial Institutions*.

(d) *Contents*. Judicial Council Form No. GC-051 has been renamed: Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe-Deposit Box (Probate--Guardianships and Conservatorships).

(2) *Other Institutions*. (d) *Contents*. Judicial Council Form No. GC-050 has been renamed: Notice of Taking Possession or Control of an Asset of Minor or Conservatee (Probate--Guardianships and Conservatorships).

(5) *(New) Responsibilities of Guardian and Conservator*. When taking possession or control of an asset held by an institution in the name of a ward or conservatee or opening or changing the name on an account or safe-deposit box in a financial institution, a temporary or general guardian or conservator of the estate must provide the institution with a certified copy of his or her letters (containing the Notice to Institutions and Financial Institutions) and a blank copy of Judicial Council Form No. GC-050 or Judicial Council Form No. GC-051, whichever is appropriate for the transaction. (C.R.C., Rule 7.1011 [guardianship] and C.R.C., Rule 7.1061 [conservatorship], adopted in 2008.)



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6. Life Insurance and Other Benefits.

14 Witkin Sum. Cal. Law Wills § 1006

[§ 1006] Life Insurance and Other Benefits.

A guardian or conservator may obtain, continue, renew, modify, terminate, or otherwise deal freely with medical, hospital, and other health care policies, plans, or benefits and with disability policies, plans, or benefits. (*Prob.C. 2459(a)*.) These policies, plans, and benefits are an alternative method of meeting expenses that may be charged against the estate, and the authority may be exercised without court authorization. (Law Rev. Com. Comment.) A conservator may continue in force life insurance, annuity policies, mutual funds, retirement and employee welfare plans, etc., in which a conservatee or a dependent has or will have an interest. (*Prob.C. 2459(b)*.)

Actions that would affect the expectancies of beneficiaries of insurance policies or other benefit plans, e.g., "the right 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, or to take similar actions," require court authorization under *Prob.C. 2580 et seq.* (*infra*, §1025 et seq.). (*Prob.C. 2459(c)*.) However, without court authorization, the conservator may borrow on the loan value of an insurance policy to pay the current premiums to keep the policy in force, if the conservatee followed that practice prior to the establishment of the conservatorship. (*Prob.C. 2459(d)*.)

With the written consent of a parent or guardian, a minor may contract for a life, disability, or annuity policy for the benefit of a limited class of persons. (*Ins.C. 10112*.) The guardian may give that consent without court authorization, but a court order (obtained after petition, notice, and hearing) is required to use guardianship funds to effect or maintain that contract in force. (*Prob.C. 2459(e)*.)

Prob.C. 2459 does not limit the power of the guardian or conservator of the estate to make investments otherwise authorized under *Prob.C. 1400 et seq.* (*Prob.C. 2459(f)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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7. Representation in Actions and Proceedings.

14 Witkin Sum. Cal. Law Wills § 1007

[§ 1007] Representation in Actions and Proceedings.

A guardian or conservator may, without court authorization, bring or defend actions and proceedings on behalf of the ward or conservatee or the estate, including filing a petition for bankruptcy on behalf of the ward or conservatee, unless another person is appointed for that purpose. (*Prob.C. 2462.*) (See *Alvez v. Toprahanian (1940) 39 C.A.2d 126, 128, 102 P.2d 566* [decided under former law; pleading representative capacity]; *39 Am.Jur.2d (1999 ed.)*, *Guardian and Ward §186* et seq.; *13 Am.Jur. P.P. Forms (1999 ed.)*, *Guardian and Ward, §477* et seq.) A comparable provision applies to decedents' estates. (See *Prob.C. 9820*; *supra*, §513.)

Court authorization is required, however, to commence and prosecute (but not to defend) an action for partition of real or personal property. (*Prob.C. 2463(a), (c).*) When authorized by an order, the guardian or conservator may consent and agree to a partition of the property and to the part to be set off to the estate, and may execute deeds or conveyances to the owners of the remaining parts. (*Prob.C. 2463(b)*; see *infra*, §1013.)

SUPPLEMENT: [This section is current through the latest supplement]

See *39 Am.Jur.2d (2008 ed.)*, *Guardian and Ward §152* et seq.; *13 Am.Jur. P.P. Forms (2009 ed.)*, *Guardian and Ward §494* et seq.



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1. In General.

Witkin Sum. Cal. Law Wills § 1008

[§ 1008] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *(New) Filing Fee.* The filing fee for a petition, application, or opposition to an order directing, authorizing, approving, or modifying payments for the support, maintenance, or education of a ward or conservatee or a person entitled to those payments from a ward or conservatee is \$ 180. (*Govt.C. 70658(a)(11)*, added in 2007.)



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1. In General.

14 Witkin Sum. Cal. Law Wills § 1008

[§ 1008] In General.

(1) *Payment of Estate Income.* The guardian or conservator must apply the income from the estate, "so far as necessary," to the "comfortable and suitable" support, maintenance, and education of the ward or conservatee and of those legally entitled to support, maintenance, or education from the ward or conservatee, "taking into account the value of the estate and the condition of life" of those persons. Similarly, income from the estate must be applied to the "care, treatment, and support" of a ward or conservatee who is a patient in a state hospital. (*Prob.C. 2420(a).*) If the income from the estate is insufficient, the guardian or conservator may sell or encumber property of the estate. (*Prob.C. 2420(b)*; on sale or encumbrance, see *infra*, §1015 et seq.)

While court authorization is not required before making payments for support, maintenance, or education, *Prob.C. 2420* does not dispense with the need to obtain court authorization otherwise required for a particular transaction. (*Prob.C. 2420(d).*) Nor does the statute preclude the guardian or conservator from seeking court authorization, instructions, approval, or confirmation pursuant to *Prob.C. 2403* (*supra*, §1001). (*Prob.C. 2420(e).*) (See *Guardianship of Talbot (1958) 156 C.A.2d 816, 820, 320 P.2d 20* [construing former law]; C.E.B., 1 Conservatorship Practice, §14.18 et seq.; C.E.B., Guardianship Practice, §12.18 et seq.; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §102 et seq.; 13 *Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*, §204 et seq.)

(2) *Reimbursement for Advances.* A guardian or conservator who makes advances for support, maintenance, or education is entitled to credit for payments when the accounts are settled if the payments are supported by proper vouchers or other satisfactory proof. (*Prob.C. 2420(c)*; on settlement of accounts, see *infra*, §1039.)

(3) *Support Notwithstanding Third-Party Obligation.* On petition, notice, and hearing, the court may for good cause order the ward or conservatee to be wholly or partially supported, maintained, or educated out of the estate, "notwithstanding the existence of a third party legally obligated" to provide support, maintenance, or education. The order may be made for a limited period of time; if not limited, the order remains in effect until modified or revoked. (*Prob.C. 2422*; on required notice, see *supra*, §910 et seq.)

(4) *Personal Allowance for Ward or Conservatee.* On petition, notice, and hearing, the court may authorize the

guardian or conservator to pay to the ward or conservatee out of the estate a reasonable allowance for the personal use of the ward or conservatee. The guardian or conservator is not required to account for the allowance other than that it has been paid; the funds are subject to the sole control of the ward or conservatee. (*Prob.C. 2421*; on required notice, see *supra*, §910 et seq.) (See C.E.B., 1 Conservatorship Practice, §14.38 et seq.; C.E.B., Guardianship Practice, §12.36 et seq.; 70 *A.L.R.4th* 499 [validity of inter vivos gift by ward to guardian or conservator].)

(5) *Maintenance of Home*. The guardian or conservator "may maintain in good condition and repair the home or other dwelling" of the ward or conservatee and the "persons legally entitled to such maintenance and repair" from the ward or conservatee. (*Prob.C. 2457*.) This power may be exercised without court authorization (see *Prob.C. 2450*, *supra*, §1002); but improvements must be authorized by the court. (See Law Rev. Com. Comment to *Prob.C. 2457*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Payment of Estate Income*. See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §94 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §208 et seq.(6) *(New) Filing Fee*. The fee for filing a petition, application, or opposition concerning an order directing, authorizing, approving, or modifying payments for the support, maintenance, or education of a ward or conservatee or for a person entitled to those payments from a ward or conservatee is \$ 350. (*Govt.C. 70658(a)(11)*, added in 2007 and amended in 2008.)



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 2. Distribution of Surplus Income.

Witkin Sum. Cal. Law Wills § 1009

[§ 1009] Distribution of Surplus Income.

SUPPLEMENT: [This section is current through the latest supplement]

The filing fee for a petition, application, or opposition to an order granting or denying a request concerning the payment of surplus income to relatives of a conservatee under *Prob.C. 2423* is \$ 180. (*Govt.C. 70658(a)(12)*, added in 2007.)



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14 Witkin Sum. Cal. Law Wills § 1009

[§ 1009] Distribution of Surplus Income.

On petition, notice, and hearing, the court may authorize or direct the conservator to pay and distribute all or part of any surplus income of the estate (not used for the support, maintenance, and education of the conservatee and dependents) to the conservatee's spouse or domestic partner and relatives within the second degree whom the conservatee would, in the judgment of the court, have aided but for the existence of the conservatorship. The court may impose conditions that the conservatee would have imposed if he or she had the capacity to act. (*Prob.C. 2423*; for factors considered in exercising discretion, see *Prob.C. 2423(b)*.) (On substituted judgment, which permits gifts to other persons, and gifts of principal as well as income, see *Prob.C. 2580* et seq., *infra*, §1025 et seq.) (For cases construing former law, see *Guardianship of Hudelson (1941) 18 C.2d 401, 408, 115 P.2d 805* [court could impose condition that payments would constitute advance against inheritance of person aided]; *Estate of Jacobson (1942) 56 C.A.2d 255, 261, 132 P.2d 229* [suggesting that in proper case court might allow credit for payments made without prior order]; *Guardianship of Hall (1947) 31 C.2d 157, 165, 187 P.2d 396*; C.E.B., 1 Conservatorship Practice, §14.58 et seq.; 15 *So. Cal. L. Rev.* 265; 18 *Hastings L. J.* 415 [suggesting broader power to make gifts]; 39 *Am.Jur.2d (1999 ed.)*, *Guardian and Ward* §§102, 118, 119.)

SUPPLEMENT: [This section is current through the latest supplement]

The fee for filing a petition, application, or opposition concerning an order granting or denying a request for the payment of surplus income to relatives of a conservatee under *Prob.C. 2423* is \$ 350. (*Govt.C. 70658(a)(12)*, added in 2007 and amended in 2008.)

See 39 *Am.Jur.2d (2008 ed.)*, *Guardian and Ward* §108 et seq.



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d. Payment of Claims and Expenses.
1. In General.

14 Witkin Sum. Cal. Law Wills § 1010

[§ 1010] In General.

The guardian or conservator must pay the following from the principal and income of the estate:

(1) Debts incurred by the ward or conservatee before creation of the guardianship or conservatorship, giving priority to debts for wage claims under *Prob.C. 2431* (infra, §1011). (*Prob.C. 2430(a)(1).*)

(2) Debts incurred by the ward or conservatee during the guardianship or conservatorship for necessities of life for the ward, conservatee, spouse, and minor children, and basic living expenses for the domestic partner to the extent the debt is reasonable, deducting the amount from any allowance payable to the ward or conservatee. (*Prob.C. 2430(a)(2).*)

(3) Other debts incurred by a conservatee during the conservatorship, but only if they satisfy the requirements of *Prob.C. 1870* et seq. (capacity of conservatee to bind estate; see supra, §953) and do not impair the ability to provide necessities of life to the conservatee, spouse, and minor children and basic living expenses to the domestic partner. (*Prob.C. 2430(a)(3), (b).*)

(4) Reasonable expenses of the guardianship or conservatorship, except that court authorization is required to pay compensation to the guardian, conservator, and attorneys. (*Prob.C. 2430(a)(4).*) (On compensation of guardian, conservator and attorneys, see infra, §1044 et seq.)

If there is doubt whether a debt should be paid, the guardian or conservator may petition the court for instructions under *Prob.C. 2403* (supra, §1001). (*Prob.C. 2430(c).*) (For cases decided under former law, see *Guardianship of Cornaz* (1937) 8 C.2d 347, 355, 65 P.2d 784 [creditor's claims against estate of incompetent]; *Stevenson v. Superior Court* (1970) 9 C.A.3d 904, 906, 88 C.R. 462 [rejected claim in conservatorship had to be established by action at law; probate court had no authority to adjudicate validity of indebtedness]; see also C.E.B., 1 Conservatorship Practice, §15.1 et seq.; C.E.B., Guardianship Practice, §13.1 et seq.; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §§95, 117; 13 *Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*, §276 et seq.)

West's Key Number Digest, Guardian and Ward k.67

SUPPLEMENT: [This section is current through the latest supplement]

See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §107; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §288 et seq.



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2. Wage Claims.

14 Witkin Sum. Cal. Law Wills § 1011

[§ 1011] Wage Claims.

(1) *Priority and Proration.* The guardian or conservator must promptly pay wage claims, not exceeding \$ 900 to each claimant, for work done or services rendered within 30 days prior to the date the petition for appointment of the guardian or conservator was filed. If there is insufficient money to pay all the claims up to \$ 900, the money available must be distributed among the claimants in proportion to the amount of their respective claims. (*Prob.C. 2431(b).*) After those payments are made, the guardian or conservator must pay any additional wage claims, not exceeding \$ 1,100 to each claimant, for work or services within 90 days prior to the petition for appointment. (*Prob.C. 2431(c).*) The balance of a wage claim not given priority under *Prob.C. 2431* is then payable under *Prob.C. 2430(a)(1)* (*supra*, §1010). (See Legislative Com. Comment.) A comparable provision applies to decedents' estates. (See *Prob.C. 11402*; *supra*, §648.)

(2) *Verification and Payment.* The guardian or conservator may require sworn claims, and may refuse to pay a preferred claim if there is reasonable cause to believe that it is not valid. Undisputed portions of the claim must be paid and sufficient money must be withheld to cover the disputed portion until the claimant has had a reasonable opportunity to establish the validity of the claim by court action. (*Prob.C. 2431(d).*) Subject to this provision, when there is doubt whether a wage claim should be paid, the guardian or conservator may petition the court for instructions under *Prob.C. 2403* (*supra*, §1001). (*Prob.C. 2431(a).*)

(3) *Order To Pay.* If the guardian or conservator neglects or refuses to pay all or a portion of an undisputed claim, the court must order the guardian or conservator to do so on the informal application of a wage claimant or the claimant's assignee or representative. (*Prob.C. 2431(e)*; see *Prob.C. 2404*, *supra*, §1001 [order to pay debt, expense, or charge].)

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SUPPLEMENT: [This section is current through the latest supplement]



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1. Without Court Approval.

Witkin Sum. Cal. Law Wills § 1012

[§ 1012] Without Court Approval.

SUPPLEMENT: [This section is current through the latest supplement]

A guardian or conservator must pursue claims on behalf of the estate when it would be in the best interest of the ward or the conservatee or the estate to do so. The guardian or conservator should consider requesting prior court authority to pursue or compromise large or complex claims, "particularly those that might require litigation and the assistance of counsel and those that might result in an award of attorneys' fees for the other party against the estate if unsuccessful, and request such approval before entering into a contingent fee agreement with counsel." (C.R.C., Rules 7.1009(b), 7.1059(b)(13), adopted in 2007.)



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14 Witkin Sum. Cal. Law Wills § 1012

[§ 1012] Without Court Approval.

If it is to the advantage of the estate, a guardian or conservator may (a) compromise or settle a claim, action, or proceeding, (b) give a covenant not to sue, or (c) extend, renew, or modify an obligation without court approval, except to the extent that the court limits the authority of the guardian or conservator, or court approval is otherwise required by statute. (*Prob.C. 2500(a)*; for matters requiring court approval, see *Prob.C. 2501* et seq., infra, §1013.) But the guardian or conservator is not precluded from seeking court authorization, instructions, approval, or confirmation pursuant to *Prob.C. 2403* (supra, §1001). (*Prob.C. 2500(b)*.) (See 42 *A.L.R.2d* 1319 [validity and enforcement of agreement to compromise will contest or withdraw objection to probate or to induce others to do so].) A similar statute applies to personal representatives. (See *Prob.C. 9830*, supra, §507.)

SUPPLEMENT: [This section is current through the latest supplement]

A guardian or conservator must pursue claims on behalf of the estate when it would be in the best interest of the ward or the conservatee or the estate to do so. The guardian or conservator should consider requesting prior court authority to pursue or compromise large or complex claims, "particularly those that might require litigation and the assistance of counsel and those that might result in an award of attorneys' fees for the other party against the estate if unsuccessful, and request such approval before entering into a contingent fee agreement with counsel." (C.R.C., Rules 7.1009(b), 7.1059(b)(13), adopted in 2007.)



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2. Court Approval Required.

14 Witkin Sum. Cal. Law Wills § 1013

[§ 1013] Court Approval Required.

(1) *Matters Relating to Real Property.* Generally, court approval is required where real property is involved. (*Prob.C. 2501(a).*) However, if it is to the advantage of the estate, approval is not required for the extension, renewal, or modification of (a) a lease in which the rent is not over \$ 5,000 a month and the term is not over 2 years, or (b) regardless of the amount of rental, a lease that is from month to month. (*Prob.C. 2501(b).*) If the lessee is given the right to extend the term of the lease, the right is considered to have been exercised for purposes of the 2-year term limit. (*Prob.C. 2501(c).*) (On authority to lease without court approval, see *Prob.C. 2555*; *infra*, §1022.)

(2) *Amounts Exceeding \$ 25,000.* Court approval is required for the compromise or settlement of a matter requiring the transfer or encumbrance of property, or the creation of an unsecured liability of the estate, or both, in excess of \$ 25,000. (*Prob.C. 2502.*) This provision does not apply to the compromise of tax matters. (*Prob.C. 2461(b)*; see *supra*, §1002.)

(3) *Claims Against Guardian or Conservator.* Court approval is required for (a) the compromise or settlement of a claim by the ward or conservatee against the guardian or conservator, or the attorney for the guardian or conservator, whether or not the claim arises out of the administration of the estate, and (b) an extension, renewal, or modification of a debt or similar obligation of the guardian or conservator, or the attorney for the guardian or conservator, in favor of the ward, conservatee, or estate. (*Prob.C. 2503*; on fiduciary relationship in guardianship and conservatorship proceedings, see *supra*, §961.) A comparable provision applies to decedents' estates. (See *Prob.C. 9834*; *supra*, §506.)

(4) *Claims for Support, Wrongful Death, or Personal Injury.* Court approval is required for the compromise or settlement of claims (a) for the support, maintenance, or education of the ward, the conservatee, or a dependent, (b) for wrongful death of the ward or conservatee, or (c) for physical or nonphysical harm to the person of the ward or conservatee. (*Prob.C. 2504.*)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Sum. Cal. Law Wills § 1014

[§ 1014] Procedure for Court Approval.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition.* *Govt.C. 26827* was amended and renumbered in 2005. The fee for filing a petition to compromise a minor's claim under *Prob.C. 3600* or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(1)*, added in 2005.) The fee for filing a petition, application, or opposition to an order adjudicating the merits of a claim under *Prob.C. 2500* et seq. is \$ 180. (*Govt.C. 70658(a)(14)*, added in 2007.)

(3) *Judicial Council Forms.* In 2006, Judicial Council Form Nos. MC-350 and MC-351 were amended to delete the parenthetical in the title.



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[§ 1014] Procedure for Court Approval.

(1) *Proper Court To Give Approval.* When a claim is the subject of a pending action or proceeding in a California court, any required court approval is obtained from the court in which the matter is pending. (*Prob.C. 2505(a).*) When a claim is the subject of a pending action or proceeding in a federal, sister state, or foreign court, court approval is obtained from either the court in which the matter is pending or the court in which the guardianship or conservatorship proceeding is pending. (*Prob.C. 2505(c).*) When a claim is not the subject of a pending action or proceeding, approval is obtained from the superior court (a) in which the guardianship or conservatorship proceeding is pending; (b) in the county of residence of the ward, conservatee, guardian, or conservator; or (c) in any county where a suit on the claim could be brought. (*Prob.C. 2505(b).*) (See C.E.B., 1 Conservatorship Practice, §15.20 et seq.)

(2) *Petition.* Where court approval is required, the guardian or conservator must file a petition showing the advantage of the compromise, settlement, or modification to the ward or conservatee and to the estate. A noticed hearing is required. (*Prob.C. 2506.*)

A petition for court approval of a compromise or covenant not to sue involving a minor or incompetent must be verified and must contain "a full disclosure of all information that has any bearing upon the reasonableness of the compromise or covenant." (C.R.C., Rule 7.950.) If the petitioner has been assisted by an attorney in preparing the petition, additional information about the attorney and the assistance must be included. (C.R.C., Rule 7.951.) These rules set forth extensive lists of required information. (On attendance of claimant, petitioner, and witnesses at hearing on petition, see C.R.C., Rule 7.952; on compromise of minor's disputed claim by parent, see *Prob.C. 3500*, *infra*, §1069; on disposition of proceeds of claim or judgment for minor or disabled person, see *Prob.C. 3600* et seq., *infra*, §1070 et seq.; on filing fee for petition for compromise of minor's claim, see *Govt.C. 26827*, *supra*, §585.)

(3) *Judicial Council Forms.* The Judicial Council has adopted the following forms:

Judicial Council Form No. MC-350 [Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Adult Person With a Disability (Miscellaneous)].

Judicial Council Form No. MC-351 [Order Approving Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Adult Person With a Disability (Miscellaneous)].

(4) *When Another Statute Is Controlling.* Notwithstanding *Prob.C. 2500* to *2506*, when another statute governs a compromise, settlement, or modification, that statute governs any case to which it applies. (*Prob.C. 2507(a)*; see, e.g., *C.C.P. 372* [compromise of pending action or proceeding].) When another statute provides that a compromise or settlement of an administrative proceeding is not valid unless approved in that proceeding, the approval is governed by that statute and approval in the guardianship or conservatorship proceeding is not required. (*Prob.C. 2507(b)*; see, e.g., *Lab.C. 5001* [compromise of workers' compensation action]; 2 *Summary* (10th), *Workers' Compensation*, §361.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition.* *Govt.C. 26827* was amended and renumbered in 2005. The fee for filing a petition to compromise a minor's claim under *Prob.C. 3600* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(1)*, added in 2005 and amended in 2008.) The fee for filing a petition, application, or opposition concerning an order adjudicating the merits of a claim under *Prob.C. 2500* et seq. is \$ 350. (*Govt.C. 70658(a)(14)*, added in 2007 and amended in 2008.)

(3) *Judicial Council Forms.* In 2006, Judicial Council Form Nos. MC-350 and MC-351 were amended to delete the parenthetical in the title.



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1. In General.

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[§ 1015] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Purposes for Which Sales May Be Made.* On factors guardian or conservator should consider in determining whether to dispose of estate property, see C.R.C., Rules 7.1089(b), 7.1059(b)(18), Supp., supra, §1001.

(3) *Sale of Conservatee's Personal Residence.* *Prob.C. 2540(b)* was amended in 2006 (a) to require the conservator to inform the court why other alternatives, including in-home care services, are not available, and (b) to refer to the conservator's power to sell real property pursuant to *Prob.C. 2590 et seq.*



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1. In General.

14 Witkin Sum. Cal. Law Wills § 1015

[§ 1015] In General.

(1) *Purposes for Which Sales May Be Made.* A guardian or conservator may sell real or personal property of the estate if (a) estate income is insufficient for "comfortable and suitable" support, maintenance, and education of the ward or conservatee (including one who is a patient in a state mental institution) or those legally dependent on the ward or conservatee (see *supra*, §1008); (b) the sale is necessary to pay debts, expenses, and wage claims under *Prob.C.* 2430 (*supra*, §1010) and *Prob.C.* 2431 (*supra*, §1011); or (c) the sale is for the "advantage, benefit, and best interest" of the ward or conservatee alone, the estate, or both the ward or conservatee and those legally dependent on the ward or conservatee. (*Prob.C.* 2541.) A comparable statute applies to decedents' estates. (See *Prob.C.* 10000(a); *supra*, §495.) (See generally C.E.B., 2 Conservatorship Practice, §17.1 et seq.)

(2) *Extent of Court Supervision.* Except for securities, mutual funds, and tangible personal property sold pursuant to *Prob.C.* 2544, 2544.5, and 2545 (see *infra*, §1016), sales of real or personal property of the estate are subject to authorization, confirmation, or direction of the court. (*Prob.C.* 2540(a), 2542(a).) Sales without court supervision are nevertheless protected by the express requirements that the sale be in the "best interest" of the ward, conservatee, or estate, and that each such sale be subject to review by the court on settlement of the accounts of the guardian or conservator (see *infra*, §1038). (See 14 Cal. Law Rev. Com. Reports, p. 554.)

(3) *Sale of Conservatee's Personal Residence.* Unless the conservator is granted the power to sell real property of the estate pursuant to *Prob.C.* 2590 (*infra*, §1029), in seeking authorization to sell a conservatee's present or former personal residence, the conservator must tell the court (a) that the personal residence is proposed to be sold; (b) that the conservator has discussed the sale with the conservatee; (c) whether the conservatee supports or opposes the sale; and (d) the circumstances that necessitate the sale, including whether the conservatee has the ability to live in the residence. The court may require the court investigator to discuss the sale with the conservatee. (*Prob.C.* 2540(b); on appraisal by probate referee, see *Prob.C.* 2943(b).) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §28:135 [petition], §28:136 [order].)

(4) *Limitation on Transactions With Court Officials or Employees.* Generally, court officials and employees who deal with guardianships and conservatorships, and persons related to them by blood or marriage, are prohibited from

engaging in transactions involving property in the guardianship or conservatorship estate. (*Prob.C. 2111.5.*)

West's Key Number Digest, Guardian and Ward k.41 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Purposes for Which Sales May Be Made.* On factors guardian or conservator should consider in determining whether to dispose of estate property, see C.R.C., Rules 7.1089(b), 7.1059(b)(18), Supp., supra, §1001.

(3) *Sale of Conservatee's Personal Residence.* *Prob.C. 2540(b)* was amended in 2006 (a) to require the conservator to inform the court why other alternatives, including in-home care services, are not available, and (b) to refer to the conservator's power to sell real property pursuant to *Prob.C. 2590* et seq.



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f. Sales.

2. Sale Without Court Authorization.

14 Witkin Sum. Cal. Law Wills § 1016

[§ 1016] Sale Without Court Authorization.

(1) *Sale of Securities*. Except as specifically limited by a court order and subject to *Prob.C. 2541* (supra, §1015), a guardian or conservator may sell securities without court authorization, confirmation, or direction in specified circumstances. (See Judicial Council Form No. GC-070 [Ex Parte Petition for Authority to Sell Securities and Order].) One of the following conditions must be satisfied:

(a) The securities are to be sold on an established stock or bond exchange. (*Prob.C. 2544(a)(1).*)

(b) The securities to be sold are securities designated as a national market system security on an interdealer quotation system or subsystem, of the National Association of Securities Dealers, sold through a registered broker during the regular course of business. (*Prob.C. 2544(a)(2).*)

(c) The securities are to be directly redeemed by the issuer. (*Prob.C. 2544(a)(3).*)

(2) *Sale of Mutual Funds*. Except as specifically limited by a court order and subject to *Prob.C. 2541* (supra, §1015), a guardian or conservator may sell mutual funds held without a beneficiary designation without court authorization, confirmation, or direction. (*Prob.C. 2544.5.*)

(3) *Sale or Exchange of Tangible Personal Property*. Subject to *Prob.C. 2541* (supra, §1015), a guardian or conservator may sell or exchange tangible personal property of the estate without court authorization, confirmation, or direction in specified circumstances. (*Prob.C. 2545(a).*) (See Judicial Council Form No. GC-075 [Ex Parte Petition for Approval of Sale of Personal Property and Order]; 39 *Am.Jur.2d* (1999 ed.), *Guardianship and Ward* §159 et seq.; Cal. Civil Practice, 4 Probate and Trust Proceedings, §28:135.) The following conditions apply:

(a) The aggregate of sales or exchanges made during any calendar year may not exceed \$ 5,000. (*Prob.C. 2545(b).*)

(b) A sale or exchange of personal effects or household furnishings may be made only with the consent of the ward, if 14 years of age or over, or with the consent of the conservatee, if consent is within the conservatee's capacity. (*Prob.C. 2545(c).*)

The failure of the guardian or conservator to observe these statutory limitations does not invalidate the title or impose liability on a third person who acts in good faith without actual notice of the failure. (*Prob.C. 2545(d).*)

The Law Revision Commission observes that this authorization permits sale of a motor vehicle and other excess tangible personal property, including furniture and furnishings in commercial use, without requiring the expense of court proceedings to the estate. (Law Rev. Com. Comment; see 14 Cal. Law Rev. Com. Reports, p. 553.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Sale or Exchange of Tangible Personal Property*. See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §136 et seq.



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Witkin Sum. Cal. Law Wills § 1017

[§ 1017] Procedure.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Manner of Sale.* *Prob.C. 2543(b)* was amended in 2006 to refer to sales by personal representatives under *Prob.C. 10300* et seq. (text, §691 et seq.), *Prob.C. 10350* et seq. (text, §704 et seq.), *Prob.C. 10360* et seq. (text, §706 et seq.), and *Prob.C. 10380* et seq. (text, §709).

(a) *Notice provisions:* *Prob.C. 2543(c)* was relettered *Prob.C. 2543(d)* in 2006.(c) *(New) Appraisal for sale of personal residence:* If a conservatee's personal residence is to be sold, a new appraisal is required within 6 months before the confirmation hearing, unless the court finds that reliance on an appraisal conducted not more than 1 year before the confirmation hearing is in the conservatee's best interests. (*Prob.C. 2543(c)*, added in 2006.)

(3) *Confirmation of Sale.* Judicial Council Form No. GC-060 has been renamed: Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships); Judicial Council Form No. GC-065 has been renamed: Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships).



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f. Sales.
3. Procedure.

14 Witkin Sum. Cal. Law Wills § 1017

[§ 1017] Procedure.

(1) *Terms of Sale.* "All sales shall be for cash or for part cash and part deferred payments." In most cases, the terms of sale are subject to the approval of the court. (*Prob.C. 2542(a)*; for exceptions, see *supra*, §1016.) If real property is sold for part deferred payments, the guardian or conservator must obtain from the purchaser a note and a mortgage or deed of trust on the property to secure payment. The mortgage or deed of trust must be subject only to encumbrances existing on the date of sale and such others as the court may approve. (*Prob.C. 2542(b)*.) If real or personal property sold for part deferred payments consists of less than an entire ownership interest, and the owners of the remaining interest join in the sale, the note and the mortgage or deed of trust may be made to the ward or conservatee and the other owners. (*Prob.C. 2542(c)*.)

(2) *Manner of Sale.* As a general rule, sales by guardians and conservators are governed by the provisions of the Probate Code governing sales by personal representatives (excluding the Independent Administration of Estates Act). (*Prob.C. 2543(b)*; see *Prob.C. 1000* et seq.; *supra*, §670 et seq.) (See 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward, §307 et seq.; 9A Am.Jur. Legal Forms 2d (2002 ed.), Guardian and Ward §133:38 et seq.) The following restrictions apply:

(a) The notice provisions of the Guardianship-Conservatorship Law are applicable, and *Prob.C. 1200* and *1201* are inapplicable. (See *Prob.C. 1469*; *supra*, §910.) Special rules apply to posting notice at the courthouse, when required on a petition for the confirmation of a sale, when required or authorized for sales of personal property, or when ordered by the court. (*Prob.C. 2543(c)*.) The clerk of the court must cause the notice of the hearing to be posted in the manner provided in *Prob.C. 1230* (*supra*, §394) if posting is required by *Prob.C. 2543(c)*. (*Prob.C. 1460(c)*.) (See Judicial Council Form No. GC-020(C) [Clerk's Certificate of Posting Notice of Hearing--Guardianship or Conservatorship (Probate--Guardianships and Conservatorships)].)

(b) Sales of securities, mutual funds, and tangible personal property are governed by special rules. (See *Prob.C. 2544*, *2545*, *2544.5*, *supra*, §1016.)

If estate property is required or permitted to be sold, the guardian or conservator may: (a) use discretion as to which

property to sell first, (b) sell the entire interest or a lesser interest, and (c) sell the property either at public auction or private sale. (*Prob.C. 2543(a).*)

(3) *Confirmation of Sale.* On a showing that the guardian or conservator has denied a bona fide prospective purchaser or the purchaser's broker an opportunity to inspect the property, the court may not confirm the sale but must continue the sale to allow inspection, unless good cause to confirm the sale is shown. (C.R.C., Rule 7.451.) The court may not proceed on a petition to confirm the sale of property unless the petitioner's attorney (or the petitioner, if not represented) is present. (C.R.C., Rule 7.452.) (See Judicial Council Form No. GC-060 [Report of Sale and Petition for Order Confirming Sale of Real Property], Judicial Council Form No. GC-065 [Order Confirming Sale of Real Property].)

(4) *Disposition of Proceeds.* The proceeds of the sale must be applied to the purposes for which the sale was made, as far as necessary, and any residue must be managed as the other estate property. (*Prob.C. 2547.*) (See 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §183 et seq.)

(5) *Statute of Limitations on Recovery of Property.* An action to recover property sold by a guardian or conservator must be commenced within 3 years after termination of the guardianship or conservatorship, or 3 years after the removal of any legal disability to sue, whichever is later. (*Prob.C. 2548.*)

West's Key Number Digest, *Guardian and Ward* k.41 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Manner of Sale.* *Prob.C. 2543(b)* was amended in 2006 to refer to sales by personal representatives under *Prob.C. 10300* et seq. (text, §691 et seq.), *Prob.C. 10350* et seq. (text, §704 et seq.), *Prob.C. 10360* et seq. (text, §706 et seq.), and *Prob.C. 10380* et seq. (text, §709).

See 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §317 et seq.

(a) *Notice provisions:* *Prob.C. 2543(c)* was relettered *Prob.C. 2543(d)* in 2006.(c) *(New) Appraisal for sale of personal residence:* If a conservatee's personal residence is to be sold, a new appraisal is required within 6 months before the confirmation hearing, unless the court finds that reliance on an appraisal conducted not more than 1 year before the confirmation hearing is in the conservatee's best interests. (*Prob.C. 2543(c)*, added in 2006.)

(3) *Confirmation of Sale.* Judicial Council Form No. GC-060 has been renamed: Report of Sale and Petition for Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships); Judicial Council Form No. GC-065 has been renamed: Order Confirming Sale of Real Property (Probate--Decedents' Estates and Guardianships and Conservatorships).

(4) *Disposition of Proceeds.* This topic is not covered in 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward*.



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1. Authorization by Court.

14 Witkin Sum. Cal. Law Wills § 1018

[§ 1018] Authorization by Court.

(1) *Investment of Money.* *Prob.C. 2570* provides general authority for the investment of surplus funds of the estate in real or personal property. (Law Rev. Com. Comment.) The court may authorize the guardian or conservator to "invest the proceeds of sales and any other money of the estate" as provided in the order. (*Prob.C. 2570(a)*.) To obtain court authorization, a guardian, conservator, or an interested person may file a petition. (*Prob.C. 2570(b)*); see *Prob.C. 48* and *1424* ["interested person" defined].) (On notice, see *Prob.C. 2570(c)*.) The court may require proof of the "fairness and feasibility" of the transaction. (*Prob.C. 2570(d)*.) If the showing is made, the court may authorize the transaction and prescribe the terms and conditions. (*Prob.C. 2570(e)*.) (For investments permitted without court authorization, see, e.g., *Prob.C. 2453*, supra, §1004 [bank and savings account]; *Prob.C. 2574*, infra, §1019 [certain obligations and securities].) (See generally *39 Am.Jur.2d* (1999 ed.), *Guardian and Ward* §145 et seq.; C.E.B., 1 Conservatorship Practice, §16.1 et seq.; *13 Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*, §296 et seq.)

(2) *Investment in Securities.* The court, in authorizing an investment in government bonds, need not specify any issuer or issue, but may authorize the guardian or conservator to select from among bonds issued by a governmental agency, if the type of issuer is designated in general terms and the order specifies a minimum quality rating as shown in a recognized investment service, minimum interest coupon rate, minimum yield to maturity, and the date of maturity within a 5-year range. (*Prob.C. 2573*.)

(3) *Purchase of Home.* The guardian or conservator may be authorized by the court, acting under *Prob.C. 2570*, to purchase a home for the ward or conservatee or for a dependent if the purchase is for the "advantage, benefit, and best interest" of the ward or conservatee and, when applicable, of the dependent. (*Prob.C. 2571*.)

(4) *Joint Purchase of Other Real Property.* The court may authorize the guardian or conservator to join with another person in the purchase of real property, or an interest in real property, for cash or on credit. (*Prob.C. 2572*.) (On purchase of community property, see *Prob.C. 3020* et seq.; *11 Summary* (10th), *Community Property*, §158 et seq.)

West's Key Number Digest, Guardian and Ward k.53

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Investment of Money*. See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §129 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §307 et seq.



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2. Investments Not Requiring Authorization.

14 Witkin Sum. Cal. Law Wills § 1019

[§ 1019] Investments Not Requiring Authorization.

No court authorization is necessary for the guardian or conservator to invest estate funds in the following:

- (a) Direct obligations of the United States or California that will mature within 5 years. (*Prob.C. 2574(a)(1).*)
- (b) U.S. Treasury bonds redeemable at par value on the death of the holder for payment of federal estate taxes. (*Prob.C. 2574(a)(2).*)
- (c) Stocks, bonds, and other securities listed on and purchased from an established stock or bond exchange in the United States. (*Prob.C. 2574(a)(3).*)
- (d) Securities eligible for the investment of surplus state moneys pursuant to *Govt.C. 16430*. (*Prob.C. 2574(a)(4).*)
- (e) Registered money market mutual funds or investment vehicles authorized for the collective investment of trust funds, with portfolios limited to obligations of the United States maturing within 5 years or repurchase agreements fully collateralized by United States government obligations. (*Prob.C. 2574(a)(5).*)
- (f) Units of common trust funds described in *Fin.C. 1564* and invested primarily in short-term fixed income obligations. (*Prob.C. 2574(a)(6).*)

Investments made by the guardian or conservator under *Prob.C. 2574* must take into consideration the circumstances of the estate, indicated cash needs, and, if readily ascertainable, the date of the prospective termination of the guardianship or conservatorship. (*Prob.C. 2574(b).*)

Prob.C. 2574 does not limit the authority of the guardian or conservator to seek court authorization for any investment, or to make other investments with court authorization. (*Prob.C. 2574(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

14 Witkin Sum. Cal. Law Wills § 1020

[§ 1020] In General.

(1) *When Court Authorization Is Required.* Except as otherwise provided by statute, court authorization is required for a guardian or conservator to lend or borrow money, give security, or lease, convey, or exchange property of the estate. (*Prob.C. 2550.*) The order may be obtained under *Prob.C. 2550* et seq. or some other applicable provision. (Law Rev. Com. Comment; see, e.g., *Prob.C. 2403*, supra, §1001 [authorization and instructions from court]; on sale or exchange of certain tangible personal property without court authorization, see *Prob.C. 2545*, supra, §1016.)

(2) *Execution of Authorized Transactions.* Whenever the court authorizes or directs specified property transactions, the transaction must be carried out by the guardian or conservator of the estate according to the order. (*Prob.C. 2111(b).*) For this purpose, "transaction" means a transfer of personal property, the creation of a security interest or other lien in personal property, the conveyance or lease of real property, or the creation of a mortgage or deed of trust on real property. (*Prob.C. 2111(a).*) A similar provision applies to personal representatives. (See *Prob.C. 7260* et seq., supra, §412.)

(3) *Statement of Authority and Recordation.* A conveyance, lease, or mortgage or deed of trust on real property executed by a guardian or conservator must state that it is made by authority of the court order and give the date of the order; and a certified copy of the order must be recorded in each county in which any portion of the real property is located. (*Prob.C. 2111(c).*)

(4) *Effect of Transaction.* "A transaction carried out by a guardian or conservator in accordance with an order authorizing or directing the transaction has the same effect as if the ward or conservatee had carried out the transaction while having legal capacity to do so." (*Prob.C. 2111(d)*; see Legislative Com. Comment [court's direction to execute quitclaim or grant deed is example].)

(5) *Liability on Instrument.* Unless otherwise provided in the instrument or in the Guardianship-Conservatorship Law, a guardian or conservator is not personally liable on an instrument (including a note, mortgage, deed of trust, or other contract) properly entered into in a fiduciary capacity in the course of the guardianship or conservatorship unless the guardian or conservator fails to reveal his or her representative capacity or identify the guardianship or

conservatorship estate in the instrument. (*Prob.C. 2110.*) This provision is comparable to provisions in the Trust Law (*Prob.C. 18000*; see 13 *Summary* (10th), *Trusts*, §244) and the statutes governing decedents' estates (*Prob.C. 9606*; see *supra*, §523).

(6) *Limitation on Transactions With Court Officials or Employees.* Generally, court officials and employees who deal with guardianships and conservatorships, and persons related to them by blood or marriage, are prohibited from engaging in transactions involving property in the guardianship or conservatorship estate. (*Prob.C. 2111.5.*)

West's Key Number Digest, Guardian and Ward k.44 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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h. Other Property Transactions.
2. Loans and Secured Transactions.

14 Witkin Sum. Cal. Law Wills § 1021

[§ 1021] Loans and Secured Transactions.

(1) *Authority To Borrow.* The court may authorize a guardian or conservator to borrow money on an unsecured note, a note to be secured by a security interest or other lien on estate personal property, or a note to be secured by a mortgage or deed of trust on estate real property. The money must be applied to the purposes specified in the order. (*Prob.C. 2551(a).*) A comparable statute applies to personal representatives. (See *Prob.C. 9800*, supra, §488.) (See *39 Am.Jur.2d* (1999 ed.), *Guardian and Ward* §141 et seq.; C.E.B., 1 Conservatorship Practice, §15.43 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), *Guardian and Ward*, §357 et seq.)

(2) *Procedure.* The petition must state the purpose for which the order is sought, the terms of the transaction, and the need or advantage of the transaction. (*Prob.C. 2551(b).*) After a noticed hearing, the court may authorize the transaction and prescribe terms and conditions. (*Prob.C. 2551(c).*) The note and any mortgage or deed of trust must be signed by the guardian or conservator. (*Prob.C. 2551(d).*) In the event of a foreclosure or sale, if the proceeds are insufficient to make full payment, a deficiency judgment or claim against the ward or conservatee or the estate is not allowed. (*Prob.C. 2551(f).*)

(3) *Authorized Purposes for Loan.* After court authorization is obtained under *Prob.C. 2551*, the guardian or conservator may give a security interest or lien on estate personal property or a mortgage or deed of trust on estate real property (a) to pay, reduce, extend, or renew an existing security interest, lien, mortgage, or deed of trust on estate property, or (b) to improve, use, operate, or preserve property proposed to be mortgaged or subjected to a deed of trust. (*Prob.C. 2552(a).*) If property of the estate consists of less than the entire ownership interest and it appears advantageous to the estate to borrow money with the other owners to refinance, repair, or improve the property, the guardian or conservator, with court authorization, may join with the other property owners in borrowing money and executing a note and a security interest, lien, mortgage, or deed of trust. (*Prob.C. 2552(b).*) The guardian or conservator may also borrow for the purposes set forth in *Prob.C. 2541* (support of ward, conservatee, or dependents and payments of debts; supra, §1015). (*Prob.C. 2551(a).*)

(4) *Effect of Error.* No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the note, security interest, lien, mortgage, or deed of trust. (*Prob.C. 2551(e), 2552(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Authority To Borrow*. See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §126 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §366 et seq.



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3. Leases.

14 Witkin Sum. Cal. Law Wills § 1022

[§ 1022] Leases.

(1) *Petition for Authorization.* Generally, a guardian or conservator may lease estate property only after authorization by a court order. (*Prob.C. 2553(a)*.) To obtain an order, the guardian or conservator or an interested person files a petition containing a general description of the property and stating the term, rental, and general conditions of the lease, and the advantage to the estate. If the lease is for longer than 10 years, the petition must state additional facts showing the need for the longer lease and its advantage to the estate. Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (*supra*, §910 et seq.). (*Prob.C. 2553(b)*); see *Prob.C. 48* and *1424* ["interested person" defined].) (See 39 Am.Jur.2d (1999 ed.), Guardian and Ward §1383 et seq.; C.E.B., 2 Conservatorship Practice, §17.56 et seq.; 6 A.L.R.3d 570 [guardian's power to make lease for minor ward beyond minority or term of guardianship]; 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward, §366 et seq.)

(2) *Hearing and Determination.* If it is satisfied that the lease will be to the advantage of the estate, the court may authorize the guardian or conservator to make the lease "to the person and on the terms stated in the order." However, the court must "entertain and consider any other offer made in good faith at the hearing to lease the same property on more favorable terms" but may not authorize a lease to any person other than the lessee named in the petition unless the offer made at the hearing is acceptable to the guardian or conservator. (*Prob.C. 2553(c)*.)

Jurisdiction of the court to administer the estate of the ward or conservatee vests the court with jurisdiction to make the order for the lease, and conclusively inures to the benefit of the lessee and the lessee's heirs and assigns. No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the lease. (*Prob.C. 2553(d)*.)

(3) *Terms and Conditions of Lease.* An order authorizing execution of a lease must set forth the minimum rental or royalty and the period of the lease, "which shall be for such time as the court may authorize." (*Prob.C. 2554(a)*.) Special terms and conditions may be set with respect to leases involving minerals, oil, gas, other hydrocarbon substances, or geothermal energy. (*Prob.C. 2554(b)*, (d).) (See 3 U.C.L.A. L. Rev. 476, 481 et seq. [oil leases].) If the lease covers additional property owned by other persons or an interest of the ward or conservatee less than the entire ownership interest, the lease may provide for division of rents or royalty on a proportionate basis. (*Prob.C. 2554(c)*.)

(4) *Lease Not Requiring Court Authorization.* A guardian or conservator may lease real property without a court order if the lease is to the advantage of the estate and (a) the rent is not over \$ 5,000 a month and the term is not over 2 years, or (b) regardless of the amount of rent, the lease is from month to month. (*Prob.C. 2555.*)

(5) *Effect of Right To Extend.* For purposes of *Prob.C. 2550* et seq., if the lessee has the right to extend the term of the lease, the length of the term is to be considered as though the right has been exercised. (*Prob.C. 2552.5.*)

West's Key Number Digest, Guardian and Ward k.44

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition for Authorization.* See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §124; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §374 et seq.



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4. Dedication or Conveyance of Real Property Interests.

14 Witkin Sum. Cal. Law Wills § 1023

[§ 1023] Dedication or Conveyance of Real Property Interests.

In specified circumstances, a guardian or conservator may be authorized, by order of the court after a noticed hearing, to dedicate or convey real property with or without consideration. The dedication or conveyance must be "for the advantage, benefit, and best interests of the estate and those interested therein." (*Prob.C. 2556(a)*.) (See C.E.B., 2 Conservatorship Practice, §17.74 et seq.) The guardian or conservator may do the following:

- (a) Dedicate or convey real property to the State of California, a public entity in California, or the United States or any of its agencies or instrumentalities "for any purpose." (*Prob.C. 2556(a)(1)*.)
- (b) Dedicate or convey an easement "to any person for any purpose." (*Prob.C. 2556(a)(2)*.)
- (c) Convey, release, or relinquish access rights to a street, highway, or freeway to the State of California or a public entity in California. (*Prob.C. 2556(a)(3)*.)
- (d) Consent as a lienholder to a dedication, conveyance, release, or relinquishment by the owner of property subject to the lien. (*Prob.C. 2556(a)(4)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Exchange of Property.

14 Witkin Sum. Cal. Law Wills § 1024

[§ 1024] Exchange of Property.

The court may authorize a guardian or conservator to *exchange* any estate property for other property, with or without additional payment or receipt of cash, on the terms and conditions prescribed by the court. The exchange must be to the "advantage, benefit, and best interests" of the ward or conservatee and those entitled to support, maintenance, or education from the ward or conservatee. (*Prob.C. 2557(a)*.) The guardian, conservator, or an interested person must file a petition describing the property, stating the terms and conditions of the exchange, and showing that the exchange is for the advantage, benefit, and best interests of the ward or conservatee. (*Prob.C. 2557(b)*.) (On notice, see *Prob.C. 2557(c)*, (d).) Once authorized, the guardian or conservator may execute the conveyance or transfer necessary to effectuate the exchange. (*Prob.C. 2557(e)*.) No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the exchange. (*Prob.C. 2557(b)*.) (See C.E.B., 2 Conservatorship Practice, §17.80 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward, §345 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
See 13 Am.Jur. P.P. Forms (2009 ed.), Guardian and Ward §356 et seq.



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1. Nature of Doctrine.

Witkin Sum. Cal. Law Wills § 1025

[§ 1025] Nature of Doctrine.

SUPPLEMENT: [This section is current through the latest supplement]

The probate court may, under the substituted judgment doctrine, establish a special needs trust funded by an inheritance. In *Conservatorship of Kane* (2006) 137 C.A.4th 400, 40 C.R.3d 378, a developmentally disabled conservatee was entitled to an inheritance on the death of his mother. His conservator petitioned to establish a special needs trust to preserve the funds for his medical care without jeopardizing his receipt of public benefits. *Held*, the trial court could authorize the trust under *Prob.C. 2580(b)(5)* (text, §1026). Both California and federal law authorize special needs trusts to preserve public benefits available for conservatees. A special needs trust funded by a compromise or judgment in litigation may be established only under *Prob.C. 3600*. It would be inconsistent with federal legislation to allow a special needs trust for litigation beneficiaries but not for inheritance beneficiaries. Thus, because a proper purpose of the substituted judgment doctrine is to avoid taxes and other governmental assessments, authority to establish a special needs trust funded by an inheritance is conferred by *Prob.C. 2580(b)(5)*. (137 C.A.4th 406, 407.)



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[§ 1025] Nature of Doctrine.

Prob.C. 2580 et seq. codify the doctrine of substituted judgment, which permits a court to authorize the transfer of estate property that a conservatee would have transferred had he or she been competent to act. (See *Estate of Christiansen* (1967) 248 C.A.2d 398, 408, 56 C.R. 505; *Conservatorship of Wemyss* (1971) 20 C.A.3d 877, 879, 98 C.R. 85; C.E.B., 2 Conservatorship Practice, §18.1 et seq.; 18 *Hastings L. J.* 415; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §120; 99 *A.L.R.2d* 946 [power to make charitable gifts for estate of incompetent]; 24 *A.L.R.3d* 863 [power to make noncharitable gifts from estate of incompetent]; *Rest.2d, Property (Donative Transfers)* §34.4 [capacity of minor's guardian to make donative transfer].)

The California Law Revision Commission observes that the estate of a conservatee may exceed the amount required to provide for the needs of the conservatee and for the support of those legally entitled to the conservatee's support. In those cases, the estate may be subjected to income, inheritance, or estate taxes that a reasonably prudent person would minimize through estate planning techniques. There may also be relatives, friends, charities, or other objects of bounty that the conservatee supported before the conservatorship was established. (14 Cal. Law Rev. Com. Reports, p. 555.) The substitute judgment statute permits a conservator, with court authorization, to minimize taxes through such estate planning techniques as making gifts of principal or income from the estate, exercising or releasing a conservatee's powers as the donee of a power of appointment, and creating revocable and irrevocable trusts of the property of the estate. The conservator may make other decisions and take other actions consistent with the proper management and control of the estate.

Substituted judgment may be exercised when the purpose is to (a) benefit the conservatee or the estate, (b) minimize current or prospective taxes or expenses of estate administration, or (c) provide gifts to those who would be likely beneficiaries of gifts from the conservatee, including charities, relatives, and friends. (*Prob.C. 2580(a)*.) (For illustrative actions, see *Prob.C. 2580(b)*, *infra*, §1026.) The conservator has no duty to propose any action and there is no liability for failure to do so. (*Prob.C. 2585*.)

SUPPLEMENT: [This section is current through the latest supplement]

The probate court may, under the substituted judgment doctrine, establish a special needs trust funded by an inheritance.

In *Conservatorship of Kane* (2006) 137 C.A.4th 400, 40 C.R.3d 378, a developmentally disabled conservatee was entitled to an inheritance on the death of his mother. His conservator petitioned to establish a special needs trust to preserve the funds for his medical care without jeopardizing his receipt of public benefits. *Held*, the trial court could authorize the trust under *Prob.C. 2580(b)(5)* (text, §1026). Both California and federal law authorize special needs trusts to preserve public benefits available for conservatees. A special needs trust funded by a compromise or judgment in litigation may be established only under *Prob.C. 3600*. It would be inconsistent with federal legislation to allow a special needs trust for litigation beneficiaries but not for inheritance beneficiaries. Thus, because a proper purpose of the substituted judgment doctrine is to avoid taxes and other governmental assessments, authority to establish a special needs trust funded by an inheritance is conferred by *Prob.C. 2580(b)(5)*. (137 C.A.4th 406, 407.)

See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §110.



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Witkin Sum. Cal. Law Wills § 1026

[§ 1026] Petition, Notice, and Hearing.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition To Authorize Proposed Action*. The filing fee for a petition, application, or opposition to an order granting or denying a request concerning substituted judgment under *Prob.C. 2580* (text, §1025 et seq.) is \$ 180. (*Govt.C. 70658(a)(12)*, added in 2007.)



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2. Petition, Notice, and Hearing.

14 Witkin Sum. Cal. Law Wills § 1026

[§ 1026] Petition, Notice, and Hearing.

(1) *Petition To Authorize Proposed Action.* The conservator or an interested person may file a petition for an order authorizing or requiring the conservator to take a proposed action to benefit the conservatee or the estate, or for estate planning or gift giving purposes. (See *Prob.C. 2580(a)*, supra, §1025.) The following actions are among those that may be proposed:

- (a) Making gifts of principal or income, outright or in trust. (*Prob.C. 2580(b)(1).*)
- (b) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and survivorship rights. (*Prob.C. 2580(b)(2).*)
- (c) Exercising or releasing the conservatee's powers as the donee of a power of appointment. (*Prob.C. 2580(b)(3).*)
- (d) Entering into contracts. (*Prob.C. 2580(b)(4).*)
- (e) Creating revocable or irrevocable trusts, which may extend beyond the conservatee's disability or life. A special needs trust for money paid pursuant to a compromise or judgment for the conservatee may be established only under *Prob.C. 3600* et seq. (infra, §1070 et seq.), not under *Prob.C. 2580* et seq. (*Prob.C. 2580(b)(5).*)
- (f) Transferring to a trust created by the conservator or the conservatee any property unintentionally omitted. (*Prob.C. 2580(b)(6).*)
- (g) Exercising the conservatee's options to purchase or exchange securities or other property. (*Prob.C. 2580(b)(7).*)
- (h) Exercising the conservatee's rights to elect benefit or payment options, terminate, change beneficiaries or ownership, assign rights, borrow, or receive cash value in return for a surrender of rights under: (1) life insurance, (2) annuities, (3) mutual fund and other dividend investment plans, and (4) retirement, profit sharing, and employee welfare plans and benefits. (*Prob.C. 2580(b)(8).*)

(i) Exercising the conservatee's right to elect to take under or against a will. (*Prob.C. 2580(b)(9).*)

(j) Exercising the conservatee's right to disclaim any interest that may be disclaimed under *Prob.C. 260* et seq. (see supra, §329). (*Prob.C. 2580(b)(10).*)

(k) Exercising the conservatee's right to revoke or modify a revocable trust, or to surrender that right, if doing so is not inconsistent with the trust instrument. (*Prob.C. 2580(b)(11).*)

(l) Making an election under *Prob.C. 13502* (surviving spouse's election to have community property administered; see supra, §820) or *Prob.C. 13503* (surviving spouse's election to transfer property to trust; see supra, §820). (*Prob.C. 2580(b)(12).*)

(m) Making a will for the conservatee. (*Prob.C. 2580(b)(13).*)

(2) *Notice of Hearing.* Notice of the hearing on the petition must be given, regardless of age, for the period and in the manner provided by *Prob.C. 1460* et seq. (supra, §910 et seq.) to (a) the persons required to be given notice under *Prob.C. 1460* et seq.; (b) the persons required to be named in a petition for the appointment of a conservator (see supra, §940); (c) testamentary beneficiaries, so far as known to the petitioner, unless the court for good cause dispenses with notice; (d) the persons who would be the conservatee's heirs under the laws of intestate succession, so far as known to the petitioner, unless the court for good cause dispenses with notice; and (e) such other persons as the court may order. (*Prob.C. 2581.*)

(3) *Production of Conservatee's Estate Plan.* The court may compel production of the conservatee's estate plan (including will, trust, power of appointment, contract, transfer, and joint ownership arrangement) for confidential consideration by the court and the attorneys in connection with a petition under *Prob.C. 2580* et seq., notwithstanding the lawyer-client privilege. (*Prob.C. 2586(b).*) Unless otherwise authorized, no person who examines a document produced under *Prob.C. 2586* may disclose its contents to any other person; unauthorized disclosure is a punishable contempt. (*Prob.C. 2586(c).*) The court may order that a document constituting all or part of the conservatee's estate plan be delivered to a designated custodian for safekeeping and may impose appropriate conditions. The court may also authorize the conservator to take any action a depositor may take under *Prob.C. 700* (safekeeping of estate planning documents; see supra, §17 et seq.). (*Prob.C. 2586(d).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition To Authorize Proposed Action.* The fee for filing a petition, application, or opposition concerning an order granting or denying a request for substituted judgment under *Prob.C. 2580* (text, §1025 et seq.) is \$ 350. (*Govt.C. 70658(a)(12)*, added in 2007 and amended in 2008.)



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14 Witkin Sum. Cal. Law Wills § 1027

[§ 1027] Determination and Order.

(1) *Order*. "After hearing, the court, in its discretion, may approve, modify and approve, or disapprove the proposed action and may authorize or direct the conservator to transfer or dispose of assets or take other action as provided in the court's order." (*Prob.C. 2584*.) (See *Conservatorship of McElroy* (2002) 104 C.A.4th 536, 553, 128 C.R.2d 485 [full evidentiary hearing was not required under *Prob.C. 2584* where verified petition made sufficient showing of statutory circumstances to justify granting petition].)

(2) *Required Determinations*. The court may make an order authorizing or requiring the proposed action only if it determines both of the following:

(a) The conservatee is not opposed to the proposed action or, if opposed, lacks the legal capacity to perform the proposed action. (*Prob.C. 2582(a)*.)

(b) The proposed action will not have an adverse effect on the estate or the estate remaining will be adequate to provide for the needs of the conservatee and those supported by the conservatee, taking into account their age, physical condition, standard of living, and other relevant circumstances. (*Prob.C. 2582(b)*.)

(3) *Circumstances Considered*. *Prob.C. 2583* contains a nonexclusive listing of relevant circumstances the court must consider when authorizing or requiring an action to be taken. They relate primarily to the probable donative intent of the conservatee and gift giving and estate planning considerations, including the "likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so." (*Prob.C. 2583(k)*.)

(4) *Requirements Where Trust Is Funded by Court Order*. An order that creates or approves funding a trust must provide that the trust is subject to the continuing jurisdiction of the court under *Prob.C. 15000* et seq. and may provide that the trust is subject to court supervision under *Prob.C. 1400* et seq. (C.R.C., Rule 7.903 [specifying provisions required in trust instrument].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Order*. On application of doctrine of collateral estoppel to substituted judgment order, see *Murphy v. Murphy* (2008) 164 C.A.4th 376, 398, 78 C.R.3d 784, 7 Cal. Proc. (5th), *Judgment*, Supp., §429.



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14 Witkin Sum. Cal. Law Wills § 1028

[§ 1028] Role of Trial Judge.

In *Conservatorship of Hart* (1991) 228 C.A.3d 1244, 279 C.R. 249, the court examined the role of the trial judge in determining a petition for substituted judgment. The conservator of an elderly woman with Alzheimer's disease petitioned under *Prob.C. 2580* et seq. for authority to make substantial gifts to the conservatee's children and grandchildren from the conservatee's estate of approximately \$ 13 million. Among the proposed gifts were gifts of \$ 600,000 intended to use the conservatee's full unified gift and estate tax credit. Over the objection of one of the children, the judge granted the petition. *Held*, reversed and remanded for more fully informed consideration in the trial court.

(a) *Protection of conservatee's interest.* Throughout substituted judgment proceedings, the interests of the conservatee must be protected. "Where amounts are large and the stakes otherwise especially high, it may be prudent for the superior court to appoint a guardian ad litem, empowered to retain independent counsel, to protect the conservatee's personal interest." (228 C.A.3d 1253.)

(b) *Adequacy of information before trial court.* While the superior court has broad latitude in substituting its judgment for that of the conservatee, it must be given complete information about all relevant circumstances. "The conservator, and any petitioner other than the conservator, must bear the burden of informing the court fully and fairly. And in any case the superior court must on its own motion take all steps necessary to satisfy itself, as the conservatee's decisionmaking surrogate, that it has been fully and fairly informed." (228 C.A.3d 1254.)

(c) *Consideration of new evidence.* The power of reviewing courts to take new evidence has been used "sparingly." (228 C.A.3d 1257; see 9 Cal. Proc. (4th), Appeal, §793.) Here, the conservatee's gift tax return, filed while the appeal was pending, shows that, contrary to the conservator's representations, substantial taxable gifts were made in prior years and that the conservatee would exhaust the unified credit with taxable gifts of \$ 145,500, rather than \$ 600,000. As a consequence, the proposed gifts would result in a current tax liability of \$ 242,000. (228 C.A.3d 1257, 1258.) This "readily obtainable and obviously relevant information concerning enormous previous gifts" cannot be disregarded and may be considered on appeal to prevent a "serious breakdown in the administration of justice." (228 C.A.3d 1259.) Because the superior court was not given full information and because the omission was significant to its decision, the court's order is "fatally flawed." (228 C.A.3d 1261.)

(d) *Burden on remand.* "[A] substituted-judgment petitioner's proposal should not be authorized simply because no one has come up with a better idea. Even if wholly unopposed, the petition should be granted only if the court is satisfied, by a competent showing of all relevant circumstances, that in the last analysis the proposed action is what a reasonably prudent person in the conservatee's position would have done. If this criterion is not met, the court need not authorize any action." (228 C.A.3d 1264.)

(e) *Relevant circumstances to be considered.* Under *Prob.C. 2583* (supra, §1027), the court must take all relevant circumstances into consideration. However, every circumstance enumerated in the statute may not be present in every case, and every circumstance need not be consistent with the proposed action. (228 C.A.3d 1265.) Here, tax and estate planning considerations are of particular importance, especially the impact of the generation-skipping transfer tax, which was not addressed by the conservator. (228 C.A.3d 1269.)

(f) *Effect of remand on completed gifts.* The trial judge authorized the conservator to make the proposed gifts before resolution of the appeal. But the determination on appeal that the substituted judgment order should be reversed creates a practical dilemma: "To resolve the dilemma we shall reverse the orders and remand for further proceedings with directions that the gifts shall not be rescinded, or restitution required, unless and until the superior court, on the basis of the further proceedings, shall determine that the gifts should not have been made. In necessary effect the superior court will be called upon to evaluate the gifts retrospectively ... and for this purpose it may take into account any new information developed since the 1989 hearings, but it shall nevertheless apply the provisions and standards of the substituted-judgment statute." (228 C.A.3d 1270, 1271.)

SUPPLEMENT: [This section is current through the latest supplement]
Power of reviewing court to take new evidence:

Cross-Reference: 9 Cal. Proc. (5th), Appeal, §313.



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1. Purpose and Effect of Authorization.

Witkin Sum. Cal. Law Wills § 1029

[§ 1029] Purpose and Effect of Authorization.

SUPPLEMENT: [This section is current through the latest supplement]

The portion of *Prob.C. 2590* discussed in the text is now *Prob.C. 2590(a)*. Under *Prob.C. 2590(b)*, added in 2007, a guardian or conservator does not have a power specified in *Prob.C. 2591* without court authorization under *Prob.C. 2590* et seq. or an express provision of the Probate Code.



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14 Witkin Sum. Cal. Law Wills § 1029

[§ 1029] Purpose and Effect of Authorization.

The court may authorize a guardian or conservator to exercise one or more of the powers listed in *Prob.C. 2591* (infra, §1030) without the need to petition in each instance, whenever it would be "to the advantage, benefit, and best interest of the estate to do so." (*Prob.C. 2590.*) Time and expense are saved in managing the estate, while adequate safeguards are preserved through the requirement for accounting. (See Law Rev. Com. Comment to *Prob.C. 2590.*)

The guardian or conservator may exercise the granted powers without notice, hearing, or court authorization, instructions, approval, or confirmation "in the same manner as the ward or conservatee could do if possessed of legal capacity," subject to any requirements, conditions, or limitations in the order. (*Prob.C. 2590.*) Thus, if the sale of real property is authorized, it is not necessary for the guardian or conservator to comply with *Prob.C. 2540* et seq. (supra, §1015), because the ward or conservatee would not be required to do so if competent; but the guardian or conservator remains subject to the general duty of *Prob.C. 2401* (supra, §1001) to use ordinary care and diligence in the management of the estate. (Law Rev. Com. Comment to *Prob.C. 2590.*) (On appraisal by probate referee where conservator seeks authority to sell real or personal property valued in excess of \$ 10,000, see *Prob.C. 2943(b).*)

Even though the court authorizes the independent exercise of powers, the guardian or conservator may submit any transaction or matter to the court in the same manner as if the powers had not been granted. (*Prob.C. 2595(a)*; see *Prob.C. 2403*, supra, §1001 [court authorization, instructions, approval, or confirmation].)

Where authority exists under any other provision of law to do an act or enter into a transaction listed in *Prob.C. 2591* (infra, §1030), the guardian or conservator may proceed under the other provision without obtaining authority to exercise powers independently under *Prob.C. 2590* et seq. (*Prob.C. 2595(b).*) (See C.E.B., 1 Conservatorship Practice, §14.45 et seq.; on powers that may be exercised without court supervision, see supra, §1002; on authority of guardian nominated by will to exercise powers provided in will, without notice, hearing, authorization, instructions, approval, or confirmation, see *Prob.C. 2108*, supra, §965.)

SUPPLEMENT: [This section is current through the latest supplement]

The portion of *Prob.C. 2590* discussed in the text is now *Prob.C. 2590(a)*. Under *Prob.C. 2590(b)*, added in 2007, a

guardian or conservator does not have a power specified in *Prob.C. 2591* without court authorization under *Prob.C. 2590* et seq. or an express provision of the Probate Code.



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[§ 1030] Powers That May Be Granted.

SUPPLEMENT: [This section is current through the latest supplement]

A number of the provisions of *Prob.C. 2591* quoted in the text have been amended. The statute now refers to the following powers:

(a) The power to operate a business, farm, or enterprise constituting an asset of the estate for longer than 45 days. (*Prob.C. 2591(a).*)

(b) The power to grant and take options. (*Prob.C. 2591(b).*)

(c) The power to sell, at public or private sale, real or personal property of the estate, other than the personal residence of a conservatee, without confirmation of the court of the sale. (*Prob.C. 2591(c)(1).*) The power to sell, at public or private sale, the personal residence of the conservatee without confirmation of the court of the sale, subject to the requirements of *Prob.C. 2352.5* (presumption concerning personal residence; Supp., supra, §990), *Prob.C. 2541* (purpose of sale; text, §1015), and *Prob.C. 2591.5*. (*Prob.C. 2591(c)(2).*) The authority to sell property includes the authority to contract for the sale and fulfill the terms and conditions of the contract, including conveyance of the property. (*Prob.C. 2591(c)(3).*) *Prob.C. 2591.5*, added in 2006, imposes detailed requirements for the sale of a conservatee's personal residence concerning the terms of the sale, the timing of the appraisal, and notice.

(d) The power to create easements and servitudes. (*Prob.C. 2591(d).*)

(e) The power to borrow money. (*Prob.C. 2591(e).*)

(f) The power to give security for the repayment of a loan. (*Prob.C. 2591(f).*)

(g) The power to purchase real or personal property. (*Prob.C. 2591(g).*)

(h) The power to alter, improve, raze, replace, and rebuild property of the estate. (*Prob.C. 2591(h).*)

(i) The power to lease property of the estate, or extend, renew, or modify a lease of real property, for which the monthly rental or the lease term exceeds the maximum specified in *Prob.C. 2501* and *2555* for any purpose and for any period. (*Prob.C. 2591(i).*)

(j) The power to lend money on adequate security. (*Prob.C. 2591(j).*)

(k) The power to exchange property of the estate. (*Prob.C. 2591(k).*)

(l) The power to sell property of the estate on credit if any unpaid portion of the selling price is adequately secured. (*Prob.C. 2591(l).*)

(m) The power to commence and maintain an action for partition. (*Prob.C. 2591(m).*)

(n) The power to exercise stock rights and stock options. (*Prob.C. 2591(n).*)

(o) The power to participate in a reorganization, consolidation, merger, dissolution, liquidation, or other modification or adjustment affecting estate property or a voting trust. (*Prob.C. 2591(o).*)

(p) The power to pay, collect, compromise, or adjust claims, debts, or demands on the guardianship or conservatorship described in *Prob.C. 2501(a)* (real property; text, §1013), *Prob.C. 2502* (amounts exceeding \$ 25,000; text, §1013), or *Prob.C. 2504* (support, wrongful death, and personal injury; text, §1013), or to arbitrate a dispute described in *Prob.C. 2406* (text, §998). (*Prob.C. 2591(p).*)



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14 Witkin Sum. Cal. Law Wills § 1030

[§ 1030] Powers That May Be Granted.

The court may authorize the independent exercise of the following powers set forth in *Prob.C. 2591*:

- (1) "The power to contract for the guardianship or conservatorship and to perform outstanding contracts and thereby bind the estate."
- (2) "The power to operate at the risk of the estate a business, farm, or enterprise constituting an asset of the estate."
- (3) "The power to grant and take options."
- (4) "The power to sell at public or private sale real or personal property of the estate."
- (5) "The power to create by grant or otherwise easements and servitudes."
- (6) "The power to borrow money and give security for the repayment thereof."
- (7) "The power to purchase real or personal property."
- (8) "The power to alter, improve, and repair or raze, replace, and rebuild property of the estate."
- (9) "The power to let or lease property of the estate for any purpose (including exploration for and removal of gas, oil, and other minerals and natural resources) and for any period, including a term commencing at a future time."
- (10) "The power to lend money on adequate security."
- (11) "The power to exchange property of the estate."
- (12) "The power to sell property of the estate on credit if any unpaid portion of the selling price is adequately secured."

(13) "The power to commence and maintain an action for partition."

(14) "The power to exercise stock rights and stock options."

(15) "The power to participate in and become subject to and to consent to the provisions of a voting trust and of a reorganization, consolidation, merger, dissolution, liquidation, or other modification or adjustment affecting estate property."

(16) "The power to pay, collect, compromise, arbitrate, or otherwise adjust claims, debts, or demands upon the guardianship or conservatorship."

(17) "The power to employ attorneys, accountants, investment counsel, agents, depositaries, and employees and to pay the expense."

SUPPLEMENT: [This section is current through the latest supplement]

A number of the provisions of *Prob.C. 2591* quoted in the text have been amended. The statute now refers to the following powers:

(a) The power to operate a business, farm, or enterprise constituting an asset of the estate for longer than 45 days. (*Prob.C. 2591(a).*)

(b) The power to grant and take options. (*Prob.C. 2591(b).*)

(c) The power to sell, at public or private sale, real or personal property of the estate, other than the personal residence of a conservatee, without confirmation of the court of the sale. (*Prob.C. 2591(c)(1).*) The power to sell, at public or private sale, the personal residence of the conservatee without confirmation of the court of the sale, subject to the requirements of *Prob.C. 2352.5* (presumption concerning personal residence; Supp., supra, §990), *Prob.C. 2541* (purpose of sale; text, §1015), and *Prob.C. 2591.5*. (*Prob.C. 2591(c)(2).*) The authority to sell property includes the authority to contract for the sale and fulfill the terms and conditions of the contract, including conveyance of the property. (*Prob.C. 2591(c)(3).*) *Prob.C. 2591.5*, added in 2006, imposes detailed requirements for the sale of a conservatee's personal residence concerning the terms of the sale, the timing of the appraisal, and notice.

(d) The power to create easements and servitudes. (*Prob.C. 2591(d).*)

(e) The power to borrow money. (*Prob.C. 2591(e).*)

(f) The power to give security for the repayment of a loan. (*Prob.C. 2591(f).*)

(g) The power to purchase real or personal property. (*Prob.C. 2591(g).*)

(h) The power to alter, improve, raze, replace, and rebuild property of the estate. (*Prob.C. 2591(h).*)

(i) The power to lease property of the estate, or extend, renew, or modify a lease of real property, for which the monthly rental or the lease term exceeds the maximum specified in *Prob.C. 2501* and *2555* for any purpose and for any period. (*Prob.C. 2591(i).*)

(j) The power to lend money on adequate security. (*Prob.C. 2591(j).*)

(k) The power to exchange property of the estate. (*Prob.C. 2591(k).*)

(l) The power to sell property of the estate on credit if any unpaid portion of the selling price is adequately secured. (*Prob.C. 2591(l).*)

(m) The power to commence and maintain an action for partition. (*Prob.C. 2591(m).*)

(n) The power to exercise stock rights and stock options. (*Prob.C. 2591(n).*)

(o) The power to participate in a reorganization, consolidation, merger, dissolution, liquidation, or other modification or adjustment affecting estate property or a voting trust. (*Prob.C. 2591(o).*)

(p) The power to pay, collect, compromise, or adjust claims, debts, or demands on the guardianship or conservatorship described in *Prob.C. 2501(a)* (real property; text, §1013), *Prob.C. 2502* (amounts exceeding \$ 25,000; text, §1013), or *Prob.C. 2504* (support, wrongful death, and personal injury; text, §1013), or to arbitrate a dispute described in *Prob.C. 2406* (text, §998). (*Prob.C. 2591(p).*)



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3. Procedure.

14 Witkin Sum. Cal. Law Wills § 1031

[§ 1031] Procedure.

(1) *Petition and Notice of Hearing.* A guardian or conservator may apply for an order to exercise powers independently. (*Prob.C. 2592(a)*.) If the application is made in the petition for appointment, notice of the hearing on the petition must state that the petition includes the application and identify the powers to be exercised independently. (*Prob.C. 2592(b)*.) If the application is made in a petition filed after the petition for appointment, notice of hearing must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (*supra*, §910 et seq.). (*Prob.C. 2592(c)*.) (See C.E.B., 1 Conservatorship Practice, §14.49 et seq.)

(2) *Withdrawal or Limitation of Powers.* On its own motion or on the petition of an interested person, the court may withdraw "any or all of the powers" that have been granted independently or impose restrictions, conditions, or limitations on the exercise of those powers by the guardian or conservator "when it appears to be for the best interests of the ward or conservatee or the estate." (*Prob.C. 2593(a)*; see *Prob.C. 48* and *1424* ["interested person" defined].) Notice of hearing on the petition must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (*supra*, §910 et seq.). (*Prob.C. 2593(b)*.) (See C.E.B., 1 Conservatorship Practice, §14.53 et seq.)

(3) *Letters Must State Powers and Restrictions.* When authority to exercise powers independently is granted, the letters of guardianship or conservatorship must state the power or powers so granted, and any restrictions, conditions, or limitations, and must refer to *Prob.C. 2590* et seq. (*Prob.C. 2594(a)*; see *Prob.C. 2594(b)* [new letters must be issued when powers are granted by subsequent order].) If powers are withdrawn, or if restrictions, conditions, or limitations are imposed by a subsequent order, new letters must be issued accordingly. (*Prob.C. 2594(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 1032

[§ 1032] General Provisions.

(1) *Definitions.* *Prob.C. 2600* et seq. set forth rules relating to estate inventory, appraisal, and accounting. For this purpose, unless the context otherwise requires, "conservator" means the conservator of the estate, or a limited conservator of the estate to the extent that the powers and duties of the limited conservator are specifically and expressly provided by the order of appointment; and "guardian" means the guardian of the estate. (*Prob.C. 2600.*)

(2) *Wages or Salary of Ward or Conservatee.* Unless otherwise ordered by the court, if the ward or conservatee is employed, wages and salary are to be paid to the ward or conservatee and are subject to his or her control to the same extent as if the guardianship or conservatorship did not exist. The wages and salary are not a part of the estate and the guardian or conservator is not accountable for them. (*Prob.C. 2601(a).*) However, an employer is bound by any court order "only after notice of the order has been received by the employer." (*Prob.C. 2601(b).*)

West's Key Number Digest, Guardian and Ward k.13(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Definitions.* For purposes of *Prob.C. 2600* et seq., "estate" means personal property wherever located and real property located in California. (*Prob.C. 2600(b)*, added in 2008.) (On requirements with respect to out-of-state real property, see *Prob.C. 2401.1*, Supp., supra, §1001.)



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[§ 1033] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Filing Requirement.* The guardian must mail a copy of the inventory and appraisal and a notice of how to file an objection to the attorney of record for the ward. The conservator must mail a copy of these documents to the conservatee and to the attorney of record for the conservatee. Unless the court determines that mailing will result in harm to the conservatee, copies must also be mailed to the conservatee's spouse or registered domestic partner and relatives of the first degree (or the next closest relative if there are no relatives of the first degree). (*Prob.C. 2610(a)*, as amended in 2006.)

See *Conservatorship of Hume (2006) 139 C.A.4th 393, 399, 42 C.R.3d 796* [conservator is required to include conservatee's out-of-state real property in inventory].

(3) *Judicial Council Forms.* The following Judicial Council forms have been added:

Judicial Council Form No. GC-042 [Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property].

Judicial Council Form No. GC-042(MA) [Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property].

Judicial Council Form No. GC-045 [Objections to Inventory and Appraisal of Conservator or Guardian].



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14 Witkin Sum. Cal. Law Wills § 1033

[§ 1033] In General.

(1) *Filing Requirement.* The guardian or conservator must file an inventory and appraisal, made as of the date of appointment. Filing is required within 90 days after appointment or within such further time as the court may allow (on an ex parte petition). (*Prob.C. 2610(a).*) The inventory property is appraised in the same manner as in a decedent's estate. (See supra, §601 et seq.) The guardian or conservator may appraise the assets that a personal representative could appraise under *Prob.C. 8901.* (*Prob.C. 2610(c).*) (For inventory and appraisal when conservatorship is initiated pursuant to Welf.C. 5000 et seq. (Lanterman-Petris-Short Act), see *Prob.C. 2610(d).*) (See C.E.B., 1 Conservatorship Practice, §10.1 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward, §383 et seq.)

(2) *Oath.* The guardian or conservator must take and subscribe to an oath, endorsed on or annexed to the inventory, stating that the inventory is a "true statement of all of the estate of the ward or conservatee of which the guardian or conservator has possession or knowledge." (*Prob.C. 2610(b).*)

(3) *Judicial Council Forms.* The Judicial Council has approved forms for the inventory and appraisal. (See Judicial Council Form No. GC-040 [Inventory and Appraisal], Judicial Council Form No. GC-041 [Inventory and Appraisal Attachment].)

(4) *Copies.* If a timely request is made, the court clerk mails a copy of the inventory and appraisal to the county assessor. (*Prob.C. 2612.*) If the ward or conservatee has been a patient in a state mental hospital during the guardianship or conservatorship, the guardian or conservator must mail a copy to the director of the appropriate department not later than 15 days after the inventory is filed. (*Prob.C. 2611*; but see *Prob.C. 1461(c)* [waiver of notice when ward or conservatee is not indebted to state].)

(5) *Supplemental Inventory and Appraisal.* When property is discovered or received after the inventory, a supplemental inventory and appraisal must be filed, with the property appraised at the date of discovery or receipt. (*Prob.C. 2613.*)

(6) *Liability for Failure To File.* If an inventory is not timely filed, the guardian or conservator is liable for damages

directly resulting in an injury to the estate or to an interested person from the failure. Damages awarded are a personal liability of the guardian or conservator and a liability on any bond. (*Prob.C. 2615.*) In addition, a guardian or conservator who fails to file the inventory without good cause after a court order to do so may be removed from office. (*Prob.C. 2614.5.*)

(7) *Sufficiency of Bond.* Every inventory and appraisal must contain one of these statements: (a) "Bond is waived." (b) "Bond has been filed in the amount of \$ (specify amount) and is insufficient." (c) "Bond has been filed in the amount of \$ (specify amount) and is sufficient." (C.R.C., Rule 7.501(a).) If the bond is insufficient, the fiduciary or the attorney for the fiduciary must make an ex parte application under C.R.C., Rule 7.204 (supra, §449) for an order increasing the amount of the bond. (C.R.C., Rule 7.501(b).) The statement must be signed by the attorney of record for the fiduciary, or by the fiduciary (if not represented). (C.R.C., Rule 7.501(c).)

West's Key Number Digest, Guardian and Ward k.13(2)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Filing Requirement.* The guardian must mail a copy of the inventory and appraisal and a notice of how to file an objection to the attorney of record for the ward. The conservator must mail a copy of these documents to the conservatee and to the attorney of record for the conservatee. Unless the court determines that mailing will result in harm to the conservatee, copies must also be mailed to the conservatee's spouse or registered domestic partner and relatives of the first degree (or the next closest relative if there are no relatives of the first degree). (*Prob.C. 2610(a)*, as amended in 2006.)

See 13 Am.Jur. P.P. Forms (2009 ed.), Guardian and Ward §390 et seq.

(3) *Judicial Council Forms.* The following Judicial Council forms have been added:

Judicial Council Form No. GC-042 [Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property].

Judicial Council Form No. GC-042(MA) [Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property].

Judicial Council Form No. GC-045 [Objections to Inventory and Appraisal of Conservator or Guardian].



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[§ 1034] Objections and Independent Appraisal.

SUPPLEMENT: [This section is current through the latest supplement]

See *Conservatorship of Hume (2006) 140 C.A.4th 1385, 1389, 44 C.R.3d 906* [person objecting to appraisal has burden of proof on correct valuation].

The following Judicial Council forms have been added:

Judicial Council Form No. GC-042 [Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property].

Judicial Council Form No. GC-042(MA) [Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property].

Judicial Council Form No. GC-045 [Objections to Inventory and Appraisal of Conservator or Guardian].



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14 Witkin Sum. Cal. Law Wills § 1034

[§ 1034] Objections and Independent Appraisal.

Prob.C. 2614 provides for objections to the valuation of an appraisal, and authorizes the court to order an independent appraisal:

(a) Objections must be filed within 30 days after the inventory and appraisal is filed, and must be heard not less than 15 days thereafter. (*Prob.C. 2614(a).*)

(b) Notice of the hearing, with a copy of the objections, must be given as provided in *Prob.C. 1460* et seq. (see *supra*, §910 et seq.). If the appraisal was made by the probate referee, notice and a copy of the objections must be mailed to the probate referee at least 15 days before the hearing. (*Prob.C. 2614(b).*)

(c) The court determines the objection and may fix the true value of any asset to which objection has been filed. Costs of an independent appraisal are assessed (1) against the estate, or (2) against the objecting party, if the objecting party is not the guardian or conservator and the objection is rejected by the court. (*Prob.C. 2614(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

See *Conservatorship of Hume (2006) 140 C.A.4th 1385, 1389, 44 C.R.3d 906* [person objecting to appraisal has burden of proof on correct valuation].

The following Judicial Council forms have been added:

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3. Examination on Property Wrongfully Withheld.

14 Witkin Sum. Cal. Law Wills § 1035

[§ 1035] Examination on Property Wrongfully Withheld.

(1) *Petition.* The guardian or conservator, the ward or conservatee, or a creditor or other interested person, including "persons having only an expectancy or prospective interest in the estate," may file a petition concerning assets of the estate. (*Prob.C. 2616(a)*; see *Prob.C. 48* and *1424* ["interested person" defined].)

(2) *Allegations.* The petition may allege that (a) a person has wrongfully taken, concealed, or disposed of property of the ward or conservatee, (b) a person has knowledge or possession of a deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the ward or conservatee to property, or an instrument in writing belonging to the ward or conservatee, (c) a person asserts a claim against the ward or conservatee or the estate, or (d) the estate asserts a claim against the person. (*Prob.C. 2616(b)*.) (See *Conservatorship of Du Nah (1980) 106 C.A.3d 517, 522, 165 C.R. 170* [decided under former statute; conservatee's will was not an "instrument in writing" that conservator was entitled to have delivered to him by law firm that retained it at conservatee's request]; C.E.B., 1 Conservatorship Practice, §10.19 et seq.)

(3) *Citation.* The court may order the person to appear and be examined under oath. (*Prob.C. 2616(b)*.)

(4) *Interrogatories.* The court may order the person to answer interrogatories. (*Prob.C. 2616(b)*.) The interrogatories and answers must be in writing and must be filed with the court. Answers must be signed under penalty of perjury. (*Prob.C. 2617*.)

(5) *Production of Property or Documents.* The cited person may be required to produce documents or other personal property specified in the citation. (*Prob.C. 2616(c)*.)

(6) *Contempt.* Disobedience of a citation issued under *Prob.C. 2616* is punishable as a contempt of court. (*Prob.C. 2616(d)*.)

(7) *Examination of Witnesses.* Witnesses may be produced and examined on either side; if the allegations appear to be true, the court may order the cited person to disclose his or her knowledge of the facts, and if the allegations appear

to be false, the court may, in its discretion, charge the person's necessary expenses (including attorneys' fees) against the petitioner or the estate. (*Prob.C. 2618.*)

(8) *Accounting by Person in Control of Property.* The court may issue a citation to persons who possess or control estate property, requiring them to appear and make a sworn account of the property and their actions with respect to it. (*Prob.C. 2619.*)

West's Key Number Digest, Guardian and Ward k.13(2)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Periodic Account.
1. In General.

Witkin Sum. Cal. Law Wills § 1036

[§ 1036] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement.* The court may order an account more frequently than required by the statute but not less frequently. (*Prob.C. 2620(a)*, as amended in 2006.) (On requirements for simplified and standard accountings, see Supp., *infra*, §1036A.)

See *Conservatorship of Hume* (2006) 139 C.A.4th 393, 399, 42 C.R.3d 796 [conservator is required to include conservatee's out-of-state real property in accounting].

(2) *Statements for Accounts in Financial and Other Institutions.* *Prob.C. 2620(c)* was amended and subdivided in 2006. The portion of the statute identifying financial institutions is now *Prob.C. 2620(c)(1)*. The portion of the statute providing an exemption for the public guardian is now *Prob.C. 2620(c)(6)*. The portion of the statute regarding financial statements is now *Prob.C. 2620(c)(2)* and applies to "all account statements." Where the guardian or conservator is a private professional, original account statements for all periods covered by the accounting must be filed, unless the court, by local rule, provides that the court will retain documents lodged under *Prob.C. 2620(c)* until the final determination of the account. (*Prob.C. 2620(c)(3)*, added in 2006.)

(2a) *(New) Other Supporting Documents.* If the accounting involves the sale of real property, the original closing escrow statement showing charges and credits must be filed. (*Prob.C. 2620(c)(4)*, added in 2006.) If the ward or conservatee is in a residential care facility or a long-term care facility, original bill statements must be filed. (*Prob.C. 2620(c)(5)*, added in 2006.)

(3) *Confidential Information.* *Prob.C. 2620(d)*, discussed in the text, was relettered *Prob.C. 2620(c)(7)* in 2006. It was expanded to also cover any document lodged with the court and to authorize the guardian or conservator to redact a Social Security number from any lodged document.

(4) *No Account Required for Small Estate.* *Prob.C. 2628* was revised in 2007. *Prob.C. 2628(a)* was repealed and *Prob.C. 2628(b)*, (c), and (d), were relettered *Prob.C. 2628(a)*, (b), and (c), respectively. *Prob.C. 2628(a)* was amended

to increase the net value limit to \$ 15,000 and the monthly income limit to \$ 2,000.(5) *(New) Court Review.* Any accounting is subject to "random or discretionary, full or partial" review by the court. The review may consider any information necessary to determine the accuracy of the accounting. In the event of a material error, the court must make an express finding about the severity of the error and about any other appropriate action. Appropriate action may include (a) immediate suspension of the guardian or conservator without further notice or proceedings and appointment of a temporary guardian or conservator, or (b) removal of the guardian or conservator under *Prob.C. 2650* (text, §1048) and appointment of a temporary guardian or conservator. (*Prob.C. 2620(d)*, added in 2006.) On reasonable notice, the guardian or conservator must make books, records, and receipts available for inspection and copying by any person designated by the court to verify the accuracy of the accounting. (*Prob.C. 2620(e)*, added in 2006.)



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1. In General.

14 Witkin Sum. Cal. Law Wills § 1036

[§ 1036] In General.

(1) *Requirement.* A comprehensive statute governs all accounts filed with the court under the Probate Code. (See *Prob.C. 1060* et seq., supra, §381 et seq.) One year after the time of appointment and not less frequently than biennially thereafter, unless otherwise ordered, the guardian or conservator must present the accounting of assets to the court for settlement and allowance in the manner provided in *Prob.C. 1060* et seq. (*Prob.C. 2620(a)*.) (See *Conservatorship of Munson* (1978) 87 C.A.3d 515, 518, 519, 152 C.R. 12 [former statutes applied only to guardianships and conservatorships of the estate, or of the person and estate; court had no authority to impose duty on guardian or conservator of the person only]; 39 Am.Jur.2d (1999 ed.), *Guardian and Ward* §200 et seq.; C.E.B., 2 Conservatorship Practice, §19.1 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), *Guardian and Ward*, §383 et seq.)

(2) *Statements for Accounts in Financial and Other Institutions.* Original statements for accounts in financial and other institutions in which money or assets of the estate are held or deposited, showing the balance at the close of the accounting period, must be submitted with each court accounting. With the first court accounting of the guardianship or conservatorship, the guardian or conservator must provide the statement for the account balance "immediately preceding" the date of appointment and the statements for the account through the closing date of the first court accounting. In specified circumstances, the public guardian is exempt from this requirement. This requirement applies to institutions defined in *Prob.C. 2890* and financial institutions defined in *Prob.C. 2892* (supra, §1005). (*Prob.C. 2620(c)*.)

(3) *Confidential Information.* If a document filed under *Prob.C. 2620* contains a Social Security number or other personal information about the ward or conservatee that "would not ordinarily be disclosed in a court accounting, an inventory and appraisal, or other nonconfidential pleadings filed in the action," it is filed with a separate affidavit describing the character of the document in proper form for filing and captioned "Confidential Financial Statement" in capital letters. The document is confidential and may be disclosed only by court order. (*Prob.C. 2620(d)*.)

(4) *No Account Required for Small Estate.* The court may order that no account need be presented if the following conditions are satisfied: (a) The estate consists of property, exclusive of the residence of the ward or conservatee, of a total net value of less than \$ 7,500; (b) the monthly income of the estate, exclusive of public benefit payments, is less

than \$ 1,000; (c) all income of the estate, if not retained, was spent for the benefit of the ward or conservatee. (*Prob.C. 2628(b)*; see *Prob.C. 2628(a)* ["public benefit payments" defined]; *Prob.C. 2323(a)*, supra, §984 [no bond required in small estates].) For any accounting period during which the conditions specified in *Prob.C. 2628(b)* are not satisfied, the guardian or conservator must present the account as otherwise provided by *Prob.C. 2620 et seq.* (*Prob.C. 2628(d)*.) Notwithstanding the order, the ward or conservatee or an interested person may petition for an order requiring the guardian or conservator to present an account as otherwise required by *Prob.C. 2620 et seq.* The order may be made ex parte or after a noticed hearing and may be made on the court's own motion. (*Prob.C. 2628(c)*; see *Prob.C. 48* and *1424* ["interested person" defined].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Requirement.* The court may order an account more frequently than required by the statute but not less frequently. (*Prob.C. 2620(a)*, as amended in 2006.) (On requirements for simplified and standard accountings, see Supp., infra, §1036A.)

See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §164 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §390 et seq.

(2) *Statements for Accounts in Financial and Other Institutions.* *Prob.C. 2620(c)* was amended and subdivided in 2006. The portion of the statute identifying financial institutions is now *Prob.C. 2620(c)(1)*. The portion of the statute providing an exemption for the public guardian is now *Prob.C. 2620(c)(6)*. The portion of the statute regarding financial statements is now *Prob.C. 2620(c)(2)* and applies to "all account statements." The statements must show the account balance at the beginning of the accounting period and the account balance as of the closing date of the accounting period. (*Prob.C. 2620(c)(2)*, as amended in 2008.) Where the guardian or conservator is a private professional, original account statements for all periods covered by the accounting must be filed. (*Prob.C. 2620(c)(3)*, added in 2006 and amended in 2008.)

The court, by local rule, may provide that the court will retain documents lodged under *Prob.C. 2620(c)* until the final determination of the account, at which time the supporting documents will be returned to the guardian or conservator or delivered to any successor appointed by the court. (*Prob.C. 2620(c)(8)*, added in 2008.)

(2a) *(New) Other Supporting Documents.* If the accounting involves the sale of real property, the original closing escrow statement showing charges and credits must be filed. (*Prob.C. 2620(c)(4)*, added in 2006.) If the ward or conservatee is in a residential care facility or a long-term care facility, original bill statements must be filed. (*Prob.C. 2620(c)(5)*, added in 2006.)

(3) *Confidential Information.* *Prob.C. 2620(d)*, discussed in the text, was relettered *Prob.C. 2620(c)(7)* in 2006. It was expanded to also cover any document lodged with the court and to authorize the guardian or conservator to redact a Social Security number from any lodged document.

(4) *No Account Required for Small Estate.* *Prob.C. 2628* was revised in 2007. *Prob.C. 2628(a)* was repealed and *Prob.C. 2628(b)*, (c), and (d), were relettered *Prob.C. 2628(a)*, (b), and (c), respectively. *Prob.C. 2628(a)* was amended to increase the net value limit to \$ 15,000 and the monthly income limit to \$ 2,000.(5) *(New) Court Review.* Any accounting is subject to "random or discretionary, full or partial" review by the court. The review may consider any information necessary to determine the accuracy of the accounting. In the event of a material error, the court must make an express finding about the severity of the error and about any other appropriate action. Appropriate action may include (a) immediate suspension of the guardian or conservator without further notice or proceedings and appointment of a temporary guardian or conservator, or (b) removal of the guardian or conservator under *Prob.C. 2650* (text, §1048) and appointment of a temporary guardian or conservator. (*Prob.C. 2620(d)*, added in 2006.) On reasonable notice, the guardian or conservator must make books, records, and receipts available for inspection and copying by any person designated by the court to verify the accuracy of the accounting. (*Prob.C. 2620(e)*, added in 2006.)



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1a. (New) Simplified and Standard Accountings.

14 Witkin Sum. Cal. Law Wills § 1036A

[§ 1036A] (New) Simplified and Standard Accountings.

C.R.C., Rule 7.575, adopted in 2007, sets forth the requirements for simplified and standard accountings.

(1) *Definitions.* "A standard accounting lists receipts and disbursements in subject-matter categories, with each receipt and disbursement category subtotaled. A simplified accounting lists receipts and disbursements chronologically, by receipt or payment date, without subject-matter categories." (C.R.C., Rule 7.575(a).)

(2) *Use of Standard Accounting.* Standard accounting format may be used for any accounting under *Prob.C. 2620* and must be used if any of the following conditions exist:

(a) The estate contains income real property. (C.R.C., Rule 7.575(b)(1).)

(b) The estate contains an interest in a trade or business. (C.R.C., Rule 7.575(b)(2).)

(c) The appraised value of the estate is \$ 500,000 or more (excluding the value of the personal residence). (C.R.C., Rule 7.575(b)(3).)

(d) The schedules of receipts or disbursements prepared in a simplified accounting exceed five pages. (C.R.C., Rule 7.575(b)(4).)

(e) The court directs that a standard accounting be filed. (C.R.C., Rule 7.575(b)(5).)

(3) *Use of Simplified Accounting.* Simplified accounting format may be used in all other cases. If standard accounting format is required only because a schedule is longer than five pages under C.R.C., Rule 7.575(b)(4), standard accounting format must be used for that schedule and simplified accounting format may be use for the remainder of the accounting. (C.R.C., Rule 7.575(c).)

(4) *Information Required in All Accountings.* Those filing accounts must provide all information required by *Prob.C. 1060-1063* in the accounting schedules or the summary of account and must provide all information required

by *Prob.C. 1064* in the petition for approval of the account or the report accompanying the account. (C.R.C., Rule 7.575(f).)

(5) *Use of Judicial Council Forms.* Judicial Council forms for accountings are either mandatory or optional. (C.R.C., Rule 7.575(e)(1).) Standard forms are designated as GC-400 and simplified forms are designated as GC-405. A form's intended use is indicated by the suffix in the form number. (C.R.C., Rule 7.575(d).) An optional form that is used for both standard and simplified accountings (designated as GC-400/GC-405) may be used for standard accountings but must be used for simplified accountings. (C.R.C., Rule 7.575(e)(1).)

(6) *Use of Other Forms.* A standard accounting that is not on an optional Judicial Council form must state receipts and disbursements in the same subject matter categories used in the Judicial Council form, provide the same information about assets, property, transactions, receipts, disbursements, and other matters required by the Judicial Council form, and must use the same general layout as the Judicial Council form. (C.R.C., Rule 7.575(e)(2).)

(7) *List of Forms.* The Judicial Council has approved the following forms for the accounts of conservators and guardians:

Standard accounts:

Judicial Council Form No. GC-400(A)(1) [Schedule A, Receipts, Dividends--Standard Account].

Judicial Council Form No. GC-400(A)(2) [Schedule A, Receipts, Interest--Standard Account].

Judicial Council Form No. GC-400(A)(3) [Schedule A, Receipts, Pensions, Annuities, and Other Regular Periodic Payments--Standard Account].

Judicial Council Form No. GC-400(A)(4) [Schedule A, Receipts, Rent--Standard Account].

Judicial Council Form No. GC-400(A)(5) [Schedule A, Receipts, Social Security, Veterans' Benefits, Other Public Benefits--Standard Account].

Judicial Council Form No. GC-400(A)(6) [Schedule A, Receipts, Other Receipts--Standard Account].

Judicial Council Form No. GC-400(A)(C) [Schedule A and C, Receipts and Disbursements Worksheet--Standard Account].

Judicial Council Form No. GC-400(AP) [Additional Property Received During Period of Account--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(B) [Schedule B, Gains on Sales--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(C)(1) [Schedule C, Disbursements, Conservatee's Caregiver Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(2) [Schedule C, Disbursements, Conservatee's Residential or Long-Term Care Facility Living Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(3) [Schedule C, Disbursements, Ward's Education Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(4) [Schedule C, Disbursements, Fiduciary and Attorney Fees--Standard Account].

Judicial Council Form No. GC-400(C)(5) [Schedule C, Disbursements, General Administration Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(6) [Schedule C, Disbursements, Investment Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(7) [Schedule C, Disbursements, Living Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(8) [Schedule C, Disbursements, Medical Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(9) [Schedule C, Disbursements, Property Sale Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(10) [Schedule C, Disbursements, Rental Property Expenses--Standard Account].

Judicial Council Form No. GC-400(C)(11) [Schedule C, Disbursements, Other Expenses--Standard Account].

Judicial Council Form No. GC-400(D) [Schedule D, Losses on Sales--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(DIST) [Distributions to Conservatee or Ward--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(E)(1) [Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(E)(2) [Non-Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(F) [Schedule F, Changes in Form of Assets--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(G) [Schedule G, Liabilities at End of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(NI) [Net Income From a Trade or Business--Standard Account].

Judicial Council Form No. GC-400(NL) [Net Loss From a Trade or Business--Standard Account].

Judicial Council Form No. GC-400(OCH) [Other Charges--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(OCR) [Other Credits--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(PH)(1) [Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(PH)(2) [Non-Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-400(SUM) [Summary of Account--Standard and Simplified Accounts].

Simplified accounts:

Judicial Council Form No. GC-405(A) [Schedule A, Receipts--Simplified Account].

Judicial Council Form No. GC-405(AP) [Additional Property Received During Period of Account--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(B) [Schedule B, Gains on Sales--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(C) [Schedule C, Disbursements--Simplified Account].

Judicial Council Form No. GC-405(D) [Schedule D, Losses on Sales--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(DIST) [Distributions to Conservatee or Ward--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(E)(1) [Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(E)(2) [Non-Cash Assets on Hand at End of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(F) [Schedule F, Changes in Form of Assets--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(G) [Schedule G, Liabilities at End of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(OCH) [Other Charges--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(OCR) [Other Credits--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(PH)(1) [Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(PH)(2) [Non-Cash Assets on Hand at Beginning of Account Period--Standard and Simplified Accounts].

Judicial Council Form No. GC-405(SUM) [Summary of Account--Standard and Simplified Accounts].

SUPPLEMENT: [This section is current through the latest supplement]



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2. Hearing and Objections.

14 Witkin Sum. Cal. Law Wills § 1037

[§ 1037] Hearing and Objections.

(1) *Notice of Hearing.* Notice of the hearing on the petition must be given as provided in *Prob.C. 1460* et seq. (supra, §910 et seq.). (*Prob.C. 2621.*) (See C.E.B., 2 Conservatorship Practice, §19.63 et seq.)

(2) *Written Objections.* Interested persons may file written objections, stating the items to which objection is made and the basis for the objection. (*Prob.C. 2622*; see *Prob.C. 48* and *1424* ["interested person" defined].) (See C.E.B., 2 Conservatorship Practice, §19.68 et seq.)

(3) *Objection or Opposition in Bad Faith.* If the court determines that objections are "without reasonable cause and in bad faith," the court may order the objector to pay the compensation of the conservator or guardian and other expenses of litigation, including attorneys' fees, incurred in defending the account. The objector is personally liable to the estate for the amount ordered. (*Prob.C. 2622.5(a).*)

If the court determines that the opposition to objections is "without reasonable cause and in bad faith," the court may award the objector the expenses of litigation, including attorneys' fees, incurred in contesting the account. The amount awarded is a charge against the compensation of the guardian or conservator, who is liable personally and on any bond for any amount that remains unsatisfied. (*Prob.C. 2622.5(b).*)

Comparable provisions apply to decedents' estates (see *Prob.C. 11003*, supra, §717) and to trusts (see *Prob.C. 17211*, 13 Summary (10th), Trusts, §234).

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 1038

[§ 1038] Review of Transactions.

A sale or purchase of property or other transaction not previously authorized, approved, or confirmed by the court is subject to court review on the next succeeding accounting. (*Prob.C. 2625.*) Transactions that have been previously authorized, approved, or confirmed need not be reviewed again. (See *Prob.C. 2103*, supra, §962 [effect of court authorization, approval, or confirmation].) But those transactions that did not require court authorization and those that required it but were made without court authorization are subject to review under *Prob.C. 2625* at the time of the accounting. If court authorization was required but not obtained, the guardian or conservator may be required to give the same justification for the transaction that would have been required had advance authorization been sought. (Law Rev. Com. Comment.)

Upon the accounting and review, the guardian or conservator may be held liable for any violation of duties in connection with the sale, purchase, or other transaction. But the validity of the transaction is not affected by the review. (*Prob.C. 2625.*)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Sum. Cal. Law Wills § 1039

[§ 1039] Settlement and Discharge.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Ward Reaches Majority.* See Judicial Council Form No. GC-395 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)].



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[§ 1039] Settlement and Discharge.

(1) *When Ward Reaches Majority.* After a ward has reached majority, the ward may settle accounts with the guardian and give a release, which is valid if obtained fairly and without undue influence. (*Prob.C. 2627(a)*; C.R.C., Rule 7.1007.) The court may require the personal appearance of the ward at the hearing on the final report or account. (C.R.C., Rule 7.1007.) "Except as otherwise provided by this code, a guardian is not entitled to a discharge until one year after the ward has attained majority." (*Prob.C. 2627(b)*; C.R.C., Rule 7.1007.) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §26:29 [waiver of account and release of guardian].) (On termination of guardianship, see *supra*, §930.)

(2) *Termination of Proceeding If Estate Is Exhausted.* If it appears that the estate has been entirely exhausted through approved expenditures or disbursements, the court, on settlement of the account, must order the proceeding terminated and the guardian or conservator forthwith discharged "unless the court determines that there is reason to continue the proceeding." (*Prob.C. 2626.*) One reason for continuing the proceeding is if it appears that the estate will be replenished by receiving new assets from some source. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Ward Reaches Majority.* See Judicial Council Form No. GC-395 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)].



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[§ 1040] Compensation and Expenses.

SUPPLEMENT: [This section is current through the latest supplement]

Prob.C. 2623 was renumbered in 2006. *Prob.C. 2623(a)-(e)* are now *Prob.C. 2623(a)(1)-(a)(5)*. *Prob.C. 2623(b)*, added in 2006, provides that the guardian or conservator may not be compensated from the estate for costs or fees incurred in unsuccessfully opposing a petition, request, or action by or on behalf of the ward or conservatee unless the court determines that the opposition was in good faith based on the best interests of the ward or conservatee.



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[§ 1040] Compensation and Expenses.

The guardian or conservator is allowed all of the following:

(1) Reasonable expenses incurred in exercising the powers and performing the duties of the guardian or conservator (including, but not limited to, the cost of any surety bond, reasonable attorneys' fees, and compensation for services rendered by the guardian or conservator of the person that the court determines is just and reasonable). (*Prob.C. 2623(a).*)

(2) Compensation for services that the court determines is just and reasonable. (*Prob.C. 2623(b).*) (On compensation, see *infra*, §1044 et seq.)

(3) All reasonable disbursements made before the appointment. (*Prob.C. 2623(c).*)

(4) In the case of termination other than by the death of the ward or conservatee, all reasonable disbursements made after the termination of the guardianship or conservatorship but prior to discharge. (*Prob.C. 2623(d).*)

(5) In the case of termination by the death of the ward or conservatee, all reasonable expenses incurred prior to discharge for the custody and conservation of the estate and its delivery to the personal representative of the estate of the deceased ward or conservatee or in making other disposition of the estate as provided for by law. (*Prob.C. 2623(e).*)

The Law Revision Commission Comment to *Prob.C. 2623* notes that expenses incurred in the performance of the duties of the guardian or conservator include amounts paid for support, maintenance, or education of the ward or conservatee and of legal dependents. (See *Prob.C. 2420*, *supra*, §1008; *Prob.C. 2430* et seq., *supra*, §1010 [payment of debts].) (On compensation for nonprofit corporation and its attorney, see *Prob.C. 2104*, *supra*, §966.)

SUPPLEMENT: [This section is current through the latest supplement]

Prob.C. 2623 was renumbered in 2006. *Prob.C. 2623(a)-(e)* are now *Prob.C. 2623(a)(1)-(a)(5)*. *Prob.C. 2623(b)*, added in 2006, provides that the guardian or conservator may not be compensated from the estate for costs or fees incurred in

unsuccessfully opposing a petition, request, or action by or on behalf of the ward or conservatee unless the court determines that the opposition was in good faith based on the best interests of the ward or conservatee.



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Witkin Sum. Cal. Law Wills § 1041

[§ 1041] Failure To File Account.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice. Prob.C. 2620.2(a)* was amended in 2006. The statute now uses the term "accounting" rather than "account." The time for the hearing has been shortened. The accounting must now be set for hearing within 30 days of the date of the notice (45 days where the guardian or conservator is a public agency). However, for good cause, the court may grant an additional 30 days.

(2) *Contempt. Prob.C. 2620.2(b)* was amended in 2006. The statute now refers to failure to file the accounting within the time specified in *Prob.C. 2620.2(a)*.

(3) *Sanctions. Prob.C. 2620.2(c)* was expanded in 2006 to cover failure to file supporting documentation.(c) *Prob.C. 2620.2(c)(3)* was amended in 2006 to eliminate the provision authorizing compensation from the estate.

(e) *Prob.C. 2620.2(c)(5)* was omitted in 2006.

(f) *Prob.C. 2620.2(c)(6)* was renumbered *Prob.C. 2620.2(c)(5)* in 2006 and amended to (1) reduce the maximum additional time to 30 days, (2) refer to action described in *Prob.C. 2620.2(c)(1)-(c)(3)*, and (3) limit the application of the provision to guardians and conservators who are exempt from the licensing requirements of *B. & P.C. 6500* et seq. (Supp., supra, §970A).



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[§ 1041] Failure To File Account.

(1) *Notice*. If a guardian or conservator has failed to file a required account, the court must require that written notice be given to the guardian or conservator and the attorney of record directing the guardian or conservator to file an account and set the account for hearing within 60 days of the notice (120 days if the guardian or conservator is a public agency). (*Prob.C. 2620.2(a).*)

(2) *Contempt*. Failure to file the account within the time specified in the notice or any additional time allowed by the court, or within 45 days of actual receipt of the notice, whichever is later, constitutes contempt. (*Prob.C. 2620.2(b).*)

(3) *Sanctions*. If a guardian or conservator fails to file an account and set the account for hearing as required by *Prob.C. 2620*, the court must do one or more of the following:

(a) Remove the guardian or conservator under *Prob.C. 2650* et seq. (see *infra*, §1048 et seq.). (*Prob.C. 2620.2(c)(1).*)

(b) Issue and serve a citation requiring the guardian or conservator to show cause why he or she should not be punished by contempt. A guardian or conservator who "purposely evades personal service" of the citation must be removed from office. (*Prob.C. 2620.2(c)(2).*)

(c) Suspend the powers of the guardian or conservator and appoint a temporary guardian or conservator to take possession of the assets, investigate the actions of the guardian or conservator, and petition for surcharge if doing so is in the best interests of the ward or conservatee. The compensation of the temporary guardian or conservator and his or her attorney is a surcharge against the guardian or conservator and, if unpaid, is a breach of a condition on the bond. However, the court for good cause may find that these persons should be compensated from the estate. (*Prob.C. 2620.2(c)(3).*) (On temporary guardian or conservator, see *supra*, §975 et seq.)

(d) Appoint an attorney for the ward or conservatee to investigate the actions of the guardian or conservator, petition for surcharge if appropriate, recommend whether the guardian or conservator should be removed, and

recommend whether money or property should be deposited subject to withdrawal only by court order. The compensation of the attorney is a surcharge against the guardian or conservator and, if unpaid, is a breach of a condition on the bond. However, the court for good cause may find that these persons should be compensated under *Prob.C. 1470* (supra, §908). (*Prob.C. 2620.2(c)(4)*.)

(e) Order that money or property be deposited subject to withdrawal only by court order. (*Prob.C. 2620.2(c)(5)*.)

(f) Grant an additional time up to 60 days to file the account if there is good cause to do so and the estate is adequately bonded. If the account has not been filed within the extended time, the court must take action as described in *Prob.C. 2620.2(c)(1)-(c)(5)*. (*Prob.C. 2620.2(c)(6)*.)

The court may take another appropriate action for failure to file a proper accounting in a timely manner. (*Prob.C. 2620.2(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice.* *Prob.C. 2620.2(a)* was amended in 2006. The statute now uses the term "accounting" rather than "account." The time for the hearing has been shortened. The accounting must now be set for hearing within 30 days of the date of the notice (45 days where the guardian or conservator is a public agency). However, for good cause, the court may grant an additional 30 days.

(2) *Contempt.* *Prob.C. 2620.2(b)* was amended in 2006. The statute now refers to failure to file the accounting within the time specified in *Prob.C. 2620.2(a)*.

(3) *Sanctions.* *Prob.C. 2620.2(c)* was expanded in 2006 to cover failure to file supporting documentation.(c) *Prob.C. 2620.2(c)(3)* was amended in 2006 to eliminate the provision authorizing compensation from the estate.

(e) *Prob.C. 2620.2(c)(5)* was omitted in 2006.

(f) *Prob.C. 2620.2(c)(6)* was renumbered *Prob.C. 2620.2(c)(5)* in 2006 and amended to (1) reduce the maximum additional time to 30 days, (2) refer to action described in *Prob.C. 2620.2(c)(1)-(c)(3)*, and (3) limit the application of the provision to guardians and conservators who are exempt from the licensing requirements of *B. & P.C. 6500* et seq. (Supp., supra, §970A).



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[§ 1042] Accounts on Termination of Relationship.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Death of Ward or Conservatee.* See Judicial Council Form No. GC-395 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)].



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[§ 1042] Accounts on Termination of Relationship.

(1) *Continuing Jurisdiction of Court.* Termination of the relationship of guardian and ward or conservator and conservatee for any reason does not deprive the court of jurisdiction to settle accounts or for any other purpose "incident to the enforcement of the judgments and orders of the court upon such accounts or upon the termination of the relationship." (*Prob.C. 2630*; see *Conservatorship of Starr (1989) 215 C.A.3d 1390, 1394, 264 C.R. 80* [court retained jurisdiction, under *Prob.C. 2630*, to set aside deed executed by conservator before conservatee's death]; on preparation and service of final account of guardian, see *supra*, §930; on preparation and service of final account of conservator, see *supra*, §952.)

(2) *Death of Ward or Conservatee.* If the ward or conservatee dies, the guardian or conservator may contract for and pay (a) a reasonable sum for the expenses of the last illness and the disposition of the remains, (b) unpaid court-approved attorneys' fees, and (c) the unpaid expenses of the guardianship or conservatorship accruing before or after death. Payment may be made "to the extent reasonable" from any personal property of the ward or conservatee under the control of the guardian or conservator. (*Prob.C. 2631(a).*) After the payment of expenses, the guardian or conservator may transfer any remaining property under *Prob.C. 13000* et seq. (summary administration; see *supra*, §792 et seq.). (*Prob.C. 2631(d).*)

If the total market value of the decedent's estate remaining after the payment of the expenses is less than the amount determined under *Prob.C. 13100* (\$ 100,000; see *supra*, §797), the guardian or conservator may without notice petition the court for an order permitting the guardian or conservator to liquidate the decedent's estate. The petition may be made even though a will of the decedent exists, if the will does not appoint an executor or if the named executor refuses to act. If the order is granted, the guardian or conservator may (a) sell personal property of the decedent, (b) withdraw money of the decedent in accounts in financial institutions, and (c) collect debts, claims, and insurance proceeds owed to the decedent or the decedent's estate; a person having possession or control must pay or deliver the money or property to the guardian or conservator. (*Prob.C. 2631(b).*)

The final court accounting of a guardian or conservator following the death of the ward or conservatee must include a court accounting for the period up to the date of death and a separate accounting for the period after the date of death. (*Prob.C. 2620(b).*)

(3) *Death or Unavailability of Guardian or Conservator.* *Prob.C.* 2632 provides as follows:

(a) If the guardian or conservator dies or becomes incapacitated and a legal representative (including a personal representative or a conservator of the estate) is appointed for the guardian or conservator, the legal representative must file an account within 60 days after the appointment. (*Prob.C.* 2632(a), (b).)

(b) If the guardian or conservator dies or becomes incapacitated and no legal representative is appointed, or if the guardian or conservator absconds, the court may compel the guardian's or conservator's attorney to file the account. (*Prob.C.* 2632(c).)

(c) The legal representative or attorney must exercise reasonable diligence in preparing the account, which may be verified on information and belief. The court must settle the account as in other cases, and allow reasonable compensation to the legal representative or attorney (including compensation for services rendered by the attorney's paralegal). The compensation allowed is a charge against the estate that was being administered by the deceased, incapacitated, or absconding guardian or conservator. (*Prob.C.* 2632(d).)

A comparable provision applies to decedents' estates. (See *Prob.C.* 10953; *supra*, §711.)

(4) *Termination Before Inventory Is Filed.* If the guardianship or conservatorship terminates before the inventory has been filed, the court, in its discretion, may dispense with an inventory and appraisal and order the guardian or conservator to file an account covering only those assets of which the guardian or conservator has possession or control. (*Prob.C.* 2633.) Thus, if a conservatee dies a few days after the appointment of a conservator, the court may permit an accounting of assets actually marshalled; this avoids the need to inventory estate assets where the conservator has not yet taken possession or control, and also avoids unnecessary fees for the conservator or additional delays in turning matters over to the executor or administrator for the deceased conservatee. (See Legislative Com. Comment.) (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §26:30 [account and report of guardian], §26:31 [order settling account and report].)

(5) *Effect of Settlement.* An order settling a final account is res judicata, unless obtained by fraud or conspiracy or by misrepresentation of a material fact. (*Prob.C.* 2103, *supra*, §962; see *Adams v. Martin* (1935) 3 C.2d 246, 248, 44 P.2d 572 [construing former law; final account of guardian is heard on notice, and its settlement has same conclusive effect as settlement of final account of executor or administrator]; 39 *Am.Jur.2d* (1999 ed.), *Guardian and Ward* §211.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Death of Ward or Conservatee.* See Judicial Council Form No. GC-395 [Ex Parte Petition for Final Discharge and Order (Probate--Decedents' Estates and Conservatorships and Guardianships)]. (5) *Effect of Settlement.* See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §175.



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a. Former Law.

14 Witkin Sum. Cal. Law Wills § 1043

[§ 1043] Former Law.

(1) *In General.* Former Prob.C. 1556 allowed a guardian "reasonable expenses" incurred in the execution of the guardianship, "just and reasonable" compensation for services, and "reasonable disbursements" made after the legal termination of the guardianship in specified circumstances. (See also former Prob.C. 1556.5 [cost of surety bond]; former Prob.C. 1502 [advances to ward for support, maintenance, or education]; *Mitchell v. Bagot* (1941) 48 C.A.2d 281, 289, 119 P.2d 758 [advances for care and maintenance]; *Guardianship of Ewing* (1941) 42 C.A.2d 629, 630, 109 P.2d 748 [sums advanced for personal needs of ward]; *Estate of Schluter* (1930) 209 C. 286, 289, 286 P. 1008 [advances for care and maintenance]; *Guardianship of Giambastiani* (1934) 1 C.A.2d 639, 645, 37 P.2d 142 [guardian, after formal appointment, could be reimbursed for proper expenditures while acting as de facto guardian]; *Guardianship of Jacobson* (1947) 30 C.2d 312, 319, 182 P.2d 537 ["de facto guardian" was entitled to expenses, including attorneys' fees]; but cf. *Estate of Price* (1934) 136 C.A. 257, 259, 28 P.2d 717 [nonresident guardian was not entitled to reimbursement for transportation and incidental expense prior to commencing proceedings for appointment]; *Guardianship of Hall* (1947) 31 C.2d 157, 166, 187 P.2d 396 [necessity of showing by guardian of propriety of expenses]; *Guardianship of Slakmon* (1978) 83 C.A.3d 224, 236, 147 C.R. 777.)

(2) *Unsuccessful Petition for Appointment.* Under former Prob.C. 1556, a successful petitioner for appointment of a guardian was allowed expenses and fees. An unsuccessful petitioner was ordinarily not entitled to reimbursement or compensation; failure to prevail indicated that a caretaker was not needed, and the petitioner was in the same position as any other volunteer whose services proved to be unnecessary. But an exception was recognized where, despite failure to obtain appointment of a guardian, the petitioner performed a valuable service for the incompetent. (*Estate of Moore* (1968) 258 C.A.2d 458, 460, 65 C.R. 831.)

In the *Moore* case, Dr. M was the personal friend and physician of Mrs. Moore, an elderly lady who had suffered a stroke. He petitioned for appointment as guardian of her person, and appointment of a bank as guardian of her estate. Mr. and Mrs. R then petitioned for appointment as conservators, representing that they were acting in harmony with the wishes of Mrs. Moore. On a consolidated hearing of the two petitions, the lower court appointed Mr. R conservator of the person and the bank conservator of her estate. Dr. M's attorney then moved for an order allowing fees for services rendered by Dr. M, the attorney, a firm of English solicitors (Mrs. Moore's nearest relative was a grandniece in England) and an expert medical witness. *Held*, order allowing fees affirmed.

(a) Dr. M's petition was three-fourths successful: A caretaker was appointed for the person and the property, and the bank was named caretaker. The only thing not done was appointment of Dr. M as caretaker of the person. This was understandable. The person who first suggests the need for a caretaker often attracts wrath and suspicion of the incompetent. (258 C.A.2d 461.)

(b) Sound policy suggests that one who in good faith initiates proceedings in which another is appointed may be awarded costs and counsel fees. The petitioner performs a service in notifying the court of the incompetent's condition, and if compensation is not available responsible parties might be discouraged from acting. (258 C.A.2d 462.)

(3) *Unsuccessful Opposition to Ward's Restoration.* In *Guardianship of Cookingham* (1955) 45 C.2d 367, 289 P.2d 16, the court considered whether unsuccessful opposition to a petition for restoration to capacity constituted "reasonable expenses" under former Prob.C. 1556. An elderly incompetent, committed to a state hospital, was given temporary leave, and, by a guardian ad litem, petitioned for restoration. Appellant, his daughter and guardian of his person and estate, contested the petition and engaged an attorney and psychiatrist without prior court authorization. The order of restoration was made and the ward's experts were paid by court order, but, in settling the account of appellant, the court refused to allow the fees of the psychiatrist and attorneys. *Held*, she was entitled to reimbursement. "There is no compelling reason for requiring a guardian personally to bear the cost of an unsuccessful opposition to his ward's application for restoration, conducted in good faith, merely because he failed to obtain prior authorization. Indeed, it may be extremely difficult for the guardian to determine the position he should take without professional advice at the commencement of the proceeding. If it is conducted in good faith, the guardian should be allowed the reasonable expenses incurred in the opposition. If not in good faith, the expense, of course, should not be allowed. But there is ample opportunity to determine that question when the guardian's account is presented for approval." (45 C.2d 373.)

SUPPLEMENT: [This section is current through the latest supplement]



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[§ 1044] Procedure.

SUPPLEMENT: [This section is current through the latest supplement]

(1a) *(New) Factors in Determining Compensation.* C.R.C., Rule 7.756, adopted in 2007, lists factors the court may consider, among others, in determining the compensation of a conservator or guardian from the estate:

- (a) The size and nature of the estate.
- (b) The benefit to the ward or conservatee or to the estate of the services.
- (c) The necessity of the services.
- (d) The anticipated future needs and income of the ward or conservatee.
- (e) The time spent in performing the services.
- (f) Whether the services were routine or required "more than ordinary skill or judgment."
- (g) Any "unusual skill, expertise, or experience" brought to the performance of the services.
- (h) The estimate of the value of the services.

(i) The customary compensation in the "community where the court is located for the management of conservatorships or guardianships of similar size and complexity." (4a) *(New) Filing Fee.* The filing fee for a petition, application, or opposition to an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of an attorney is \$ 180. (*Govt.C. 70658(a)(4)*, added in 2007.) The filing fee for a petition, application, or opposition to an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of a fiduciary is \$ 180. (*Govt.C. 70658(a)(5)*, added in 2007.) (See *Govt.C. 70658(c)(1)* [fees do not apply to guardianship of the person only].)

(7) *Court Order Required Before Payment.* Attorneys' fees may not be paid from the estate of a ward or

conservatee without a prior court order, and the estate is not obligated to pay fees established by contract until approved by the court. However, the court may award fees under *Prob.C. 2640* et seq. even if a contractual obligation is unenforceable under *Prob.C. 2647*. (*Prob.C. 2647*, added in 2007.)



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14 Witkin Sum. Cal. Law Wills § 1044

[§ 1044] Procedure.

(1) *In General.* *Prob.C. 2640* et seq. authorize court-ordered compensation for guardians, conservators, and their attorneys. Compensation is limited to the amount the court determines is "just and reasonable" to the guardian or conservator or "reasonable" to the attorney for services "rendered to that time." (*Prob.C. 2640, 2641, 2642.*) (See generally *39 Am.Jur.2d (1999 ed.)*, *Guardian and Ward* §222 et seq.; C.E.B., 2 Conservatorship Practice, §20.1 et seq.; C.E.B., Guardianship Practice, §15.1 et seq.; *13 Am.Jur. P.P. Forms (1999 ed.)*, *Guardian and Ward*, §444 et seq.)

(2) *Governing Rules.* C.R.C., Rule 7.750 et seq. apply to compensation payable from the estate of a ward or conservatee or property recovered or collected for a ward or conservatee. (C.R.C., Rule 7.750.) All petitions for compensation of a guardian, conservator, or attorney must comply with the requirements of C.R.C., Rule 7.702 (supra, §540) concerning petitions for extraordinary compensation in decedents' estates "to the extent applicable to guardianships and conservatorships, except that the best interest of the ward or conservatee is to be considered instead of the interest of the beneficiaries of the estate." (C.R.C., Rule 7.751(b).)

(3) *Who May Petition.* A petition for compensation may be filed by a guardian or conservator of the estate (*Prob.C. 2640(a)*), a guardian or conservator of the person (*Prob.C. 2641(a)*), or the attorney for a guardian or conservator (*Prob.C. 2642(a)*). The guardian or conservator of the estate may petition for compensation of himself or herself, the guardian or conservator of the person, or the attorney. (*Prob.C. 2640(a).*) A guardian or conservator of the person (*Prob.C. 2641(a)*) and the attorney (*Prob.C. 26420(a)*) may also petition for their own compensation.

(4) *Time for Petition.* The petition for compensation may be filed after the inventory and appraisal have been filed and 90 days have elapsed since the issuance of letters (or any other period the court orders for good cause). (*Prob.C. 2640(a), 2641(a), 2642(a).*)

(5) *Notice of Hearing.* Notice of the hearing on the petition is given as provided in *Prob.C. 1460* et seq. (supra, §910 et seq.). (*Prob.C. 2640(b).*)

(6) *Order for Accounting Before Allowance of Compensation.* The court may order a guardian or conservator to file an accounting before or at the time a petition for allowance of compensation is filed or heard. (C.R.C., Rule 7.752.)

(7) *Court Order Required Before Payment.* A guardian or conservator may not pay or receive and the attorney may not receive any payment from the estate for services in advance of a court order authorizing payment. In addition to removing the guardian or conservator and imposing other authorized sanctions against the guardian or conservator or the attorney, the court may surcharge the guardian or conservator for an unauthorized payment as provided in C.R.C., Rule 7.700(b) (supra, §541). (C.R.C., Rule 7.755(a).)

(8) *Charge Against Estate.* Allowable compensation is charged to the estate. (*Prob.C.* 2640, 2641, 2642.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §182 et seq.; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §461 et seq.

(1a) *(New) Factors in Determining Compensation.* C.R.C., Rule 7.756, adopted in 2007, lists factors the court may consider, among others, in determining the compensation of a conservator or guardian from the estate:

- (a) The size and nature of the estate.
- (b) The benefit to the ward or conservatee or to the estate of the services.
- (c) The necessity of the services.
- (d) The anticipated future needs and income of the ward or conservatee.
- (e) The time spent in performing the services.
- (f) Whether the services were routine or required "more than ordinary skill or judgment."
- (g) Any "unusual skill, expertise, or experience" brought to the performance of the services.
- (h) The estimate of the value of the services.

(i) The customary compensation in the "community where the court is located for the management of conservatorships or guardianships of similar size and complexity." (4a) *(New) Filing Fee.* The fee for filing a petition, application, or opposition concerning an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of an attorney is \$ 350. (*Govt.C.* 70658(a)(4), added in 2007 and amended in 2008.) The fee for filing a petition, application, or opposition concerning an order fixing, authorizing, allowing, or directing the payment of the compensation or expenses of a fiduciary is \$ 350. (*Govt.C.* 70658(a)(5), added in 2007 and amended in 2008.) (See *Govt.C.* 70658(c)(1) [fees do not apply to guardianship of the person only].)

(7) *Court Order Required Before Payment.* Attorneys' fees may not be paid from the estate of a ward or conservatee without a prior court order, and the estate is not obligated to pay fees established by contract until approved by the court. However, the court may award fees under *Prob.C.* 2640 et seq. even if a contractual obligation is unenforceable under *Prob.C.* 2647. (*Prob.C.* 2647, added in 2007.)



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[§ 1045] Scope of Authorized Compensation.

SUPPLEMENT: [This section is current through the latest supplement]

(6) *(New) No Compensation for Opposition in Bad Faith.* A guardian or conservator may not be compensated from the estate for costs or fees incurred in unsuccessfully opposing a petition, request, or action by or on behalf of the ward or conservatee unless the court determines that the opposition was in good faith based on the best interests of the ward or conservatee. (*Prob.C. 2640(d)*, added in 2006; *Prob.C. 2641(c)*, added in 2006.)



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[§ 1045] Scope of Authorized Compensation.

(1) *Compensation for Services Before Appointment.* Compensation may include compensation for services rendered before the date of appointment. (*Prob.C. 2640(c).*) The petition must show "facts demonstrating the necessity for preappointment services." (*C.R.C., Rule 7.751(a).*)

(2) *Compensation Where Petitioner Is Not Appointed.* In specified circumstances, the court may award compensation to a person who petitions for appointment as a conservator but is not appointed, and to that person's attorney. (*Prob.C. 2640.1.*) (For case law under former statute, see *supra*, §1043.)

(3) *Compensation Related to Instructions.* Compensation for services of the guardian or conservator and the attorney in connection with obtaining instructions is discretionary with the court, particularly where instructions are sought concerning either a transaction not requiring court authorization (see *Prob.C. 2450*, *supra*, §1002), or a transaction covered by a previous order granting authority for independent exercise of powers (see *Prob.C. 2595*, *supra*, §1029). However, the court should allow compensation unless it determines that petitioning for instructions was not reasonably necessary under the circumstances. (Legislative Com. Comment to *Prob.C. 2640.*) (For case law under former statute, see *supra*, §1043.)

(4) *Compensation in Opposing Removal.* In *Conservatorship of Lefkowitz* (1996) 50 C.A.4th 1310, 58 C.R.2d 299, the son of a conservatee successfully sought removal of a private professional conservator, and the conservator requested compensation and attorneys' fees for opposing the removal petition. *Held*, the conservator was not entitled to removal compensation and fees. A conservator is a fiduciary, and the requirements for compensation of a trustee, subjective good faith and objective reasonableness, are applicable. (50 C.A.4th 1314.) Thus, a conservator is entitled to compensation and fees in opposing removal only if opposition is motivated by a good faith belief that opposition is in the best interests of the conservatee and that belief is objectively reasonable. Here, the conservator was motivated by self-interest in the impact of removal on her career as a professional conservator, and lacked a good faith belief that removal would harm the conservatee. (50 C.A.4th 1316.) (For case law under former statute, see *supra*, §1043.)

(5) *Compensation From Other Sources.* In proceedings under *Prob.C. 2640 et seq.*, the court may only determine fees that are payable from the estate of the ward or conservatee. It may not limit fees payable from other sources. (

Prob.C. 2646.)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *(New) No Compensation for Opposition in Bad Faith.* A guardian or conservator may not be compensated from the estate for costs or fees incurred in unsuccessfully opposing a petition, request, or action by or on behalf of the ward or conservatee unless the court determines that the opposition was in good faith based on the best interests of the ward or conservatee. (*Prob.C. 2640(d)*, added in 2006; *Prob.C. 2641(c)*, added in 2006.)



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d. Compensation of Attorney.

14 Witkin Sum. Cal. Law Wills § 1046

[§ 1046] Compensation of Attorney.

(1) *In General.* Several decisions under the former statutes deal with compensation of the attorney for a guardian or conservator. (See *Guardianship of Boxley* (1953) 115 C.A.2d 483, 486, 252 P.2d 348 [statutes authorized fees for services rendered to guardian; incompetent ward could not himself engage attorneys to petition for removal of guardian, and estate was not liable for attorneys' services to ward]; *Reinstein, Land & Katz v. Clune* (1973) 30 C.A.3d 321, 324, 105 C.R. 454 [statute allowing direct application by attorney and order running directly to him relieved guardian of personal liability for attorneys' fees, in absence of contrary agreement]; *Conservatorship of Berry* (1989) 210 C.A.3d 706, 724, 726, 258 C.R. 655 [public defender was entitled to attorneys' fees for representing conservatees, but amount of awards lacked appropriate evidentiary basis].) (See 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward, §444 et seq.; 57 A.L.R.3d 550 [attorneys' compensation in guardianship matters]; on fee for rendering an account for dead, incapacitated, or absconding guardian or conservator under *Prob.C.* 2632, see *supra*, §1042.)

(2) *Paralegal Services.* A petition for compensation of the attorney may include a claim for legal services rendered by a paralegal working under the direction and supervision of the attorney; and, if it does, the petition must set forth the hours spent and services performed by the paralegal. (*Prob.C.* 2640(c), 2642(b).) A request for compensation for those services must satisfy the requirements of C.R.C., Rule 7.703(e) (*supra*, §534). (C.R.C., Rule 7.754.)

(3) *Contingent Fee Agreement.* A guardian or conservator of the estate may make a contingent fee agreement with an attorney for services in representing the ward, the conservatee, or the estate in connection with matters that are customarily the subject of contingent fee contracts. The contract must be "to the advantage, benefit, and best interest" of the ward, the conservatee, or the estate, and is valid only if authorized or approved by a court order. The order is made after a noticed hearing by either the court in which the guardianship or conservatorship proceeding is pending, or the court in which any litigation is pending. (*Prob.C.* 2644.) (On contingent fee agreements generally, see 1 *Cal. Proc.* (4th), *Attorneys*, §202 et seq.) The agreement must satisfy the requirements of C.R.C., Rule 7.703(d)(1) (*supra*, §534) and the court must either authorize the guardian or conservator to enter into the contract or must approve the agreement under *Prob.C.* 2644. (C.R.C., Rule 7.753.)

(4) *Restrictions on Double Compensation.* The rule against double compensation of an executor, administrator, or testamentary trustee who serves as his or her own attorney (see *supra*, §533) applies in guardianship and

conservatorship proceedings. *Conservatorship of Gray* (1970) 12 C.A.3d 513, 521, 90 C.R. 776, recognized both the rule and an exception: where the conservatee's attorney was made conservator at the request of the conservatee and the petition sought authority to act as both conservator and attorney. The petition was granted with authorization "to employ himself as an attorney at law and associate counsel if he deems it necessary." *Held*, under these circumstances, a single fee, to include the reasonable value of his services as attorney, was proper, and the Probate Court erred in denying it. (12 C.A.3d 521.)

Prob.C. 2645 restricts the compensation of an attorney (and others with a family or business relationship with the attorney) serving as a guardian or conservator. However, the statute does not apply if the guardian or conservator is related by blood or marriage to the ward or conservatee or is a cohabitant. (*Prob.C. 2645(c)*.)

Absent a court order, neither an attorney who is a guardian or conservator (*Prob.C. 2645(a)*) nor designated persons (*Prob.C. 2645(b)*) may receive compensation for legal services performed for the guardian or conservator. The prohibition applies to the guardian's or conservator's parents, children, siblings, and spouse, and a law partnership or corporation in which the guardian or conservator is a partner, shareholder, or employee. (*Prob.C. 2645(b)*.)

Compensation otherwise prohibited under *Prob.C. 2645(a)* and (b) may be specifically approved in the court's discretion if the court finds that it is to the "advantage, benefit, and best interests" of the ward or conservatee. (*Prob.C. 2645(a), (b)*.) (See *Conservatorship of Bryant* (1996) 45 C.A.4th 117, 123, 52 C.R.2d 755 [conservator's husband was not entitled to attorneys' fee in absence of showing that "his representation, as opposed to representation otherwise available, benefited the conservatorship estate"].) The relationships of all persons to receive compensation must be fully disclosed. (*Prob.C. 2645(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See 13 Am.Jur. P.P. Forms (2009 ed.), Guardian and Ward §461 et seq.

(3) *Contingent Fee Agreement*.

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §176 et seq.



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14 Witkin Sum. Cal. Law Wills § 1047

[§ 1047] Order Authorizing Periodic Payments.

(1) *In General.* The court may authorize periodic payments on account to a guardian, conservator, or attorney for a guardian or conservator for services rendered. (*Prob.C. 2643(a).*) In fixing the amount of the periodic payments, the court must take into account the services to be rendered on a periodic basis and the reasonable value of the services. The guardian or conservator may make the payments only if the services described are actually rendered. (*Prob.C. 2643(c).*) Payments to the attorney require "a showing of an ongoing need for legal services." (C.R.C., Rule 7.755(b).)

(2) *Petition and Notice.* Advance authority for periodic payments must be requested by a petition describing the services to be rendered and the reasons why periodic payments are needed. (*Prob.C. 2643(c).*) Notice of the hearing on the petition is given as provided in *Prob.C. 1460* et seq. (*supra*, §910 et seq.). (*Prob.C. 2643(b).*)

(3) *Review During Accounting.* Payments "on account" are subject to review by the court at the next regular accounting. (*Prob.C. 2643(c).*) The actual compensation is determined at the time the court reviews the account. (Law Rev. Com. Comment.) If the court determines that the amount paid on account was either excessive or inadequate in view of the services actually rendered, it must make an appropriate order. (*Prob.C. 2643(c)*; on review of accounts, see *supra*, §1038.) (See *Guardianship of Slakmon* (1978) 83 C.A.3d 224, 236, 147 C.R. 777 [former law; although attorney's fee awards were in favor of guardian, trial judge properly ordered attorney, rather than guardian, to reimburse estate for excessive fees where attorney became party to proceedings by filing nunc pro tunc petition, in his own behalf, for an order confirming fees].)

(4) *Circumstances Justifying Order.* The Law Revision Commission states: "An order under Section 2643 may be particularly useful in the case of a large estate where there may be tax advantages arising from making periodic payments of compensation. Where the guardian or conservator of the person is compensated and devotes substantial time to the care of the ward or conservatee, periodic payments may be needed. Periodic payments also avoid problems that may exist when payment is delayed: The payments provide funds on a current basis to cover out-of-pocket expenses in connection with providing services, avoid the need to determine questions that turn on the value of the loss of use of money caused by delay in payment, and tend to protect against variations in the value of money which may be significant in an inflationary period. Where services are rendered on a periodic basis, Section 2643 provides a means of avoiding frequent accountings or petitions for compensation merely to permit payment of compensation to the guardian

or conservator or attorney."

SUPPLEMENT: [This section is current through the latest supplement]



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14 Witkin Sum. Cal. Law Wills § 1048

[§ 1048] Causes for Removal.

The grounds for removal of a guardian or conservator are set forth by statute. (See 39 *Am.Jur.2d* (1999 *ed.*), *Guardian and Ward* §86 et seq.; C.E.B., 2 *Conservatorship Practice*, §21.8 et seq.; C.E.B., *Guardianship Practice*, §16.9 et seq.; on termination of guardianship, see *Prob.C. 1601*, supra, §930; on termination of conservatorship, see *Prob.C. 1860*, supra, §951.) A guardian or conservator may be removed for any of the following causes:

- (1) Failure to use ordinary care and diligence in the management of the estate. (*Prob.C. 2650(a)*.) (See supra, §1001.)
- (2) Failure to file an inventory or to render an account within the time allowed by law or court order. (*Prob.C. 2650(b)*.) (See supra, §1033 et seq.)
- (3) Continued failure to perform duties or incapacity to perform duties suitably. (*Prob.C. 2650(c)*.)
- (4) Conviction of a felony, whether before or after appointment. (*Prob.C. 2650(d)*.)
- (5) Gross immorality. (*Prob.C. 2650(e)*.)
- (6) Having an interest so adverse to the faithful performance of duties that there is an unreasonable risk that the guardian or conservator will fail to perform duties faithfully. (*Prob.C. 2650(f)*.)
- (7) In the case of a guardian or conservator of the person, acting in violation of *Prob.C. 2356* (limitations on involuntary mental commitments, administration of experimental drugs or convulsive treatments, and sterilization; see supra, §993). (*Prob.C. 2650(g)*.)
- (8) In the case of a guardian or conservator of the estate, insolvency or bankruptcy of the guardian or conservator. (*Prob.C. 2650(h)*.)
- (9) Best interests of the ward or conservatee. This catch-all provision gives the court discretion to remove in any other case; but, in considering the best interests of a ward, if the guardian was nominated under *Prob.C. 1500* or *1501*

(supra, §917), the court must take that fact into consideration. (*Prob.C.* 2650(i).)

(10) Contempt for disobeying a court order. (*Prob.C.* 2655(a).)

(11) Paying or receiving from the estate compensation for services in advance of a court order authorizing payment. (C.R.C., Rule 7.755(a), supra, §1044.)

Decisions under the former removal statutes remain instructive:

(a) Waste or mismanagement of the estate, or abuse of trust. (See *Guardianship of Russell* (1943) 21 C.2d 767, 769, 135 P.2d 369; *Guardianship of Leach* (1947) 30 C.2d 297, 309, 182 P.2d 529; *Estate of Howard* (1955) 133 C.A.2d 535, 540, 284 P.2d 966.)

(b) Failure to file an inventory or render a timely account, or continued failure to perform duties. (See *Guardianship of Whittaker* (1937) 19 C.A.2d 373, 374, 65 P.2d 373 [failure to file inventory or account]; *Guardianship of Howard* (1933) 218 C. 607, 610, 24 P.2d 486 [failure to perform duties].)

(c) Adverse interest. (See *Hornaday v. Hornaday* (1949) 95 C.A.2d 384, 389, 213 P.2d 91; *Guardianship of Howard*, supra, 218 C. 610; *Guardianship of Raymond C.* (1977) 72 C.A.3d 417, 420, 140 C.R. 133.)

(d) Guardianship no longer necessary. (See *Keck v. Sweeney* (1936) 16 C.A.2d 521, 524, 61 P.2d 79 [incompetent; restoration to capacity]; *Guardianship of Case* (1943) 57 C.A.2d 844, 848, 135 P.2d 681 [child's mother died while father was in army, and grandmother was appointed guardian; on father's retirement, he was entitled to restoration of custody]; *Guardianship of White* (1948) 84 C.A.2d 624, 627, 191 P.2d 466 [guardianship of grandmother was terminated, as no longer necessary, on petition of mother]; *Guardianship of Romine* (1949) 91 C.A.2d 389, 392, 205 P.2d 733 [minor; parent seeking custody]; *Guardianship of Guidry* (1961) 196 C.A.2d 426, 433, 16 C.R. 579 [while child was under guardianship, its parents relinquished it to county bureau of adoptions, which then was entitled to custody]; *Guardianship of M.S.W.* (1982) 136 C.A.3d 708, 711, 186 C.R. 430.)

West's Key Number Digest, Guardian and Ward k.25

SUPPLEMENT: [This section is current through the latest supplement]
See 39 *Am.Jur.2d* (2008 ed.), *Guardian and Ward* §80 et seq.



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Witkin Sum. Cal. Law Wills § 1049

[§ 1049] Procedure for Removal.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition*. The filing fee for a petition, application, or opposition to an order surcharging or removing a fiduciary is \$ 180. (*Govt.C. 70658(a)(6)*, added in 2007.)(8) (*New*) *Costs, Expenses, and Fees*. If the court removes a guardian or conservator for cause under *Prob.C. 2650(a)-(g)* (text, §1048) or *Prob.C. 2655* (text, §1048), (a) the court must award the petitioner the costs of the petition and other costs and expenses of litigation, including attorneys' fees, unless the court determines that the guardian or conservator acted in good faith based on the best interests of the ward or conservatee, and (b) the guardian or conservator may not charge his or her costs of litigation to the estate and is personally liable for those costs and expenses. (*Prob.C. 2653(c)*, added in 2006.)



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14 Witkin Sum. Cal. Law Wills § 1049

[§ 1049] Procedure for Removal.

(1) *Petition.* A petition for removal of a guardian or conservator, stating facts showing cause for removal, may be filed by the ward or conservatee, the spouse of the ward, the spouse or domestic partner of the conservatee, a relative or friend of the ward or conservatee, or an interested person. (*Prob.C. 2651*; see *Prob.C. 48* and *1424* ["interested person" defined]; C.E.B., 2 Conservatorship Practice, §21.12 et seq.; C.E.B., Guardianship Practice, §16.10 et seq.; 13 Am.Jur. P.P. Forms (1999 ed.), Guardian and Ward, §163 et seq.)

(2) *Notice of Hearing.* Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (*supra*, §910 et seq.). (*Prob.C. 2652*; see *39 Am.Jur.2d* (1999 ed.), *Guardian and Ward* §90.)

(3) *Hearing, Determination, and Order.* Any interested person may appear at the hearing and support or oppose the petition. If the court determines that cause for removal exists, it may remove the guardian or conservator, revoke the letters, and enter judgment accordingly. In the case of a guardianship or conservatorship of the estate, it may order the guardian or conservator to file an accounting and to surrender the estate to the person legally entitled to it. (*Prob.C. 2653.*)

(4) *Suspension of Powers or Surrender of Estate.* Whenever it appears that the ward, conservatee, or the estate may suffer loss or injury pending notice or hearing, the court may do either or both of the following: (a) suspend the powers of the guardian or conservator pending notice and hearing to the extent that it deems necessary; (b) compel the guardian or conservator to surrender the estate to a custodian designated by the court. (*Prob.C. 2654.*)

(5) *Contempt.* A guardian or conservator may be removed for contempt. (*Prob.C. 2655(a)*, *supra*, §1048.) Notwithstanding any provision of *Prob.C. 2650* et seq., removal for contempt may be by a court order reciting the facts, without further showing or notice. (*Prob.C. 2655(b).*)

(6) *Appointment of Adult To Make Educational Decisions.* When a guardian or conservator is removed or resigns and a successor is not immediately appointed or when the power to make educational decisions for the ward or conservatee is suspended or limited, the court must appoint a responsible adult, without a conflict of interest, to make educational decisions in the interim. (*Prob.C. 2662.*)

(7) *Burden of Proof*. Decisions under the former statutes address the burden of proof required for removal. The burden of showing a change of circumstances justifying removal is on the moving party. (See *Guardianship of Sherman* (1940) 42 C.A.2d 251, 253, 108 P.2d 717 [ward suspicious of guardian, friendly relations difficult; order of removal reversed]; *Estate of Atkins* (1932) 121 C.A. 251, 255, 8 P.2d 1052; *Guardianship of Brock* (1957) 154 C.A.2d 431, 433, 316 P.2d 3.) The original finding of fitness made on appointment places the guardian in much the same preferred position as a parent. (*Guardianship of Sturges* (1939) 30 C.A.2d 477, 490, 86 P.2d 905.) Hence, a parent seeking to displace a guardian had the burden of showing his or her own fitness and therefore the lack of necessity for guardianship. (*Guardianship of Furr* (1959) 167 C.A.2d 604, 605, 334 P.2d 936 [denial of father's petition was affirmed on showing of criminal convictions and no substantial contributions to child's support]; *Guardianship of Davis* (1967) 253 C.A.2d 754, 762, 61 C.R. 297 [following *Furr*].)

West's Key Number Digest, Guardian and Ward k.25

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition*. The fee for filing a petition, application, or opposition concerning an order surcharging or removing a fiduciary is \$ 350. (*Govt.C. 70658(a)(6)*, added in 2007 and amended in 2008.)

See 13 Am.Jur. P.P. Forms (2009 ed.), Guardian and Ward §166 et seq.

(2) *Notice of Hearing*. See 39 Am.Jur.2d (2008 ed.), *Guardian and Ward* §182 et seq.(8) (*New*) *Costs, Expenses, and Fees*. If the court removes a guardian or conservator for cause under *Prob.C. 2650(a)-(g)* (text, §1048) or *Prob.C. 2655* (text, §1048), (a) the court must award the petitioner the costs of the petition and other costs and expenses of litigation, including attorneys' fees, unless the court determines that the guardian or conservator acted in good faith based on the best interests of the ward or conservatee, and (b) the guardian or conservator may not charge his or her costs of litigation to the estate and is personally liable for those costs and expenses. (*Prob.C. 2653(c)*, added in 2006.)



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Witkin Sum. Cal. Law Wills § 1050

[§ 1050] Resignation.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition and Nature of Hearing.* The filing fee for a petition, application, or opposition to an order allowing a fiduciary to resign is \$ 180. (*Govt.C. 70658(a)(8)*, added in 2007.) (See *Govt.C. 70658(c)(1)* [fee does not apply to guardianship of the person only].)



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14 Witkin Sum. Cal. Law Wills § 1050

[§ 1050] Resignation.

(1) *Petition and Nature of Hearing.* A guardian or conservator may at any time file with the court a petition tendering his or her resignation. Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (supra, §910 et seq.). (*Prob.C. 2660.*) (See *39 Am.Jur.2d* (1999 ed.), *Guardian and Ward* §85; 13 *Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*, §156 et seq.)

(2) *Determination and Order.* Following a noticed hearing, the court must allow the resignation "when it appears proper" to take effect "at such time as the court shall fix." (*Prob.C. 2660.*) "It may be desirable, for example, for the resignation to become effective immediately and for the court to appoint a successor even though the accounts of the resigning guardian or conservator have not yet been settled." (14 *Cal. Law Rev. Com. Reports*, p. 568.)

The court may "make any order as may be necessary to deal with the guardianship or conservatorship during the period prior to the appointment of a new guardian or conservator and the settlement of the accounts of the resigning guardian or conservator." (*Prob.C. 2660*; on appointment to fill vacancy, see *Prob.C. 2670* et seq., infra, §§1051, 1052; on appointment of temporary guardian or conservator, see supra, §975; on continuing jurisdiction of court to settle accounts, see supra, §1042.)

West's Key Number Digest, *Guardian and Ward* k.23

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition and Nature of Hearing.* The fee for filing a petition, application, or opposition concerning an order allowing a fiduciary to resign is \$ 350. (*Govt.C. 70658(a)(8)*, added in 2007 and amended in 2008.) (See *Govt.C. 70658(c)(1)* [fee does not apply to guardianship of the person only].)

See *39 Am.Jur.2d* (2008 ed.), *Guardian and Ward* §79; 13 *Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §160 et seq.



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14 Witkin Sum. Cal. Law Wills § 1051

[§ 1051] Appointment of Successor Guardian.

"When for any reason a vacancy occurs in the office of guardian, the court may appoint a successor guardian, after notice and hearing as in the case of an original appointment of a guardian." (*Prob.C.* 2670; see *39 Am.Jur.2d* (1999 ed.), *Guardian and Ward* §92; C.E.B., *Guardianship Practice*, §16.22 et seq.; *13 Am.Jur. P.P. Forms* (1999 ed.), *Guardian and Ward*, §162.) (On appointment of substitute for guardian under *Fiduciaries' Wartime Substitution Law*, see *supra*, §460.)

SUPPLEMENT: [This section is current through the latest supplement]

See *39 Am.Jur.2d* (2008 ed.), *Guardian and Ward* §85; *13 Am.Jur. P.P. Forms* (2009 ed.), *Guardian and Ward* §165.



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14 Witkin Sum. Cal. Law Wills § 1052

[§ 1052] Appointment of Successor Conservator.

(1) *In General.* "When for any reason a vacancy occurs in the office of conservator, the court may appoint a successor conservator in the manner provided in" *Prob.C. 2680 et seq.* (*Prob.C. 2680*; see *13 Pacific L. J. 531*; C.E.B., 2 Conservatorship Practice, §21.23 et seq.) (On appointment of substitute for conservator under Fiduciaries' Wartime Substitution Law, see *supra*, §460.)

(2) *Who May Petition.* A petition for appointment of a successor conservator may be filed by the conservatee, the conservatee's spouse or domestic partner, a relative or friend of the conservatee, an interested state or local entity, agency, officer, or employee, or any other interested person. (*Prob.C. 2681*; see *Prob.C. 48* and *1424* ["interested person" defined].)

(3) *Contents of Petition.* The contents of the petition are specified in *Prob.C. 2682*. If the conservatee is an "absentee" (see *Prob.C. 1403*, *supra*, §948), the petition must contain additional matters required by *Prob.C. 1841* (*supra*, §948). (*Prob.C. 2689(a)*.)

(4) *Notice of Hearing.* Notice of the time and place of the hearing must be given at least 15 days before the hearing and must be accompanied by a copy of the petition. (*Prob.C. 2683(a)*.) The notice must be mailed to the persons designated in *Prob.C. 1460* (*supra*, §910) and to relatives named in the petition. (*Prob.C. 2683(b)*.) Notice by mail must also be given to the Director of Mental Health or the Director of Developmental Services (if required by *Prob.C. 1461*), and to the Veterans Administration (if required by *Prob.C. 1461.5*). (*Prob.C. 2683(c), (d)*.) If the conservatee is an "absentee," additional notice must be given as provided by *Prob.C. 1842* (*supra*, §948). (*Prob.C. 2689(b)*.)

(5) *Interview and Report by Court Investigator.* Unless the petition states that the conservatee will be present at the hearing, the court investigator must interview the conservatee, explain the nature of the proceeding and the conservatee's right to counsel, right to object to the proposed successor, and right to nominate another. The investigator must determine the conservatee's wishes on these matters, and make a full written report to the court at least 5 days before the hearing, with a copy mailed to the attorneys for the petitioner and conservatee, and to "such other persons as the court orders." (*Prob.C. 2684*.) No interview and report is required if the conservatee is an "absentee." (*Prob.C. 2689(c)*.) These provisions are comparable to *Prob.C. 1825 et seq.* (*supra*, §941).

(6) *Information Provided to Conservatee Present at Hearing.* If the conservatee is present, the court must provide the same information that the investigator would give in the interview, and determine the conservatee's opinion on who the successor should be. (*Prob.C. 2685.*)

(7) *Continuance Where Conservatee Is Not Present.* If the petition states that the conservatee will be present but he or she fails to appear, the court must continue the hearing and direct the court investigator to perform the duties set forth in *Prob.C. 2684.* (*Prob.C. 2686.*)

(8) *Support or Opposition.* The conservatee, the spouse or domestic partner of the conservatee, a relative or friend of the conservatee, or any other interested person may appear to support or oppose the petition. (*Prob.C. 2687.*)

(9) *Preference in Appointment.* The order of preference for an initial appointment under *Prob.C. 1810* et seq. (*supra*, §936) applies in appointment of a successor. (*Prob.C. 2688(a).*)

(10) *Content of Order.* The order appointing the successor conservator must contain, among other things, the names, addresses, and telephone numbers of the successor conservator, the conservatee's attorney, and the court investigator. (*Prob.C. 2688(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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Witkin Sum. Cal. Law Wills § 1053

[§ 1053] Transfer of Property Out of State.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition for Transfer*. The filing fee for a petition, application, or opposition to an order transferring or authorizing the transfer of estate property to a fiduciary in another jurisdiction is \$ 180. (*Govt.C. 70658(a)(7)*, added in 2007.)



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14 Witkin Sum. Cal. Law Wills § 1053

[§ 1053] Transfer of Property Out of State.

(1) *In General.* *Prob.C. 2800* et seq. authorize the court to order transfer of some or all of the personal property of the guardianship or conservatorship estate to a foreign guardian or conservator where the ward or conservatee resides out of state at the time the petition to transfer is filed. (*Prob.C. 2801.*) A "foreign guardian or conservator" means a guardian, conservator, committee, or comparable fiduciary in another jurisdiction. (*Prob.C. 2800.*) If the estate includes California realty, it may be necessary to continue the California proceeding. (See Law Rev. Com. Comments to *Prob.C. 2801* and *2808.*) (See C.E.B., 1 Conservatorship Practice, §3.22 et seq.; C.E.B., Guardianship Practice, §3.22 et seq.) (On transfer of property out of state where guardianship or conservatorship of estate is not pending in California, see *Prob.C. 3800* et seq., *infra*, §1077.)

(2) *Petition for Transfer.* A petition to transfer assets out of state may be filed by (a) the guardian or conservator of the estate; (b) the ward or conservatee; or (c) a foreign guardian or conservator. (*Prob.C. 2802.*) (On contents of petition, see *Prob.C. 2803.*)

(3) *Notice of Hearing.* The petitioner must mail notice of the hearing and a copy of the petition at least 30 days before the hearing to each person required to be listed in the petition. (*Prob.C. 2804.*)

(4) *Appearance and Objections.* Persons who may appear and file written objections include (a) any person required to be listed in the petition; (b) any creditor of the ward, conservatee, or estate; (c) the spouse of the ward and the spouse or domestic partner of the conservatee, (d) any relative or friend of the ward or conservatee; and (e) any other interested person. (*Prob.C. 2805*; see *Prob.C. 48* and *1424* ["interested person" defined].)

(5) *Determinations and Order.* The court may grant the petition and order transfer of some or all of the personal property if it determines all of the following: (a) "The transfer will promote the best interests of the ward or conservatee and the estate." (b) "The substantial rights of creditors or claimants in this state will not be materially impaired by the transfer." (c) "The foreign guardian or conservator is qualified, willing, and able to administer the property to be transferred." (*Prob.C. 2806.*) "Important elements in determining whether the transfer will promote the best interests of the ward or conservatee and the estate are whether the transfer will facilitate the economical and convenient administration of the estate and whether the guardianship or conservatorship estate will be administered by a competent fiduciary in the other jurisdiction." (Law Rev. Com. Comment.)

(6) *Manner of Transfer*. "If a transfer is ordered, the court may direct the manner of transfer and impose such terms and conditions as may be just." (*Prob.C. 2807*.)

(7) *Termination of Guardianship or Conservatorship*. If all of the estate's property is ordered transferred, the court, on settlement of the final account, must order the guardianship or conservatorship of the estate terminated upon the filing of a receipt for the property executed by the foreign guardian or conservator. (*Prob.C. 2808(a)*.) Unless notice is waived, a copy of the final account and of the petition for discharge, together with a notice of hearing, must be mailed at least 30 days prior to the hearing to all persons required to be listed in the petition for transfer, including the foreign guardian or conservator. (*Prob.C. 2808(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Petition for Transfer*. The fee for filing a petition, application, or opposition concerning an order transferring or authorizing the transfer of estate property to a fiduciary in another jurisdiction is \$ 350. (*Govt.C. 70658(a)(7)*), added in 2007 and amended in 2008.)



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1. In General.

14 Witkin Sum. Cal. Law Wills § 1054

[§ 1054] In General.

(1) *Nature and Purpose of Statute.* The 1980 Legislature concluded that some developmental disabilities do not call for an unlimited guardianship or conservatorship, and established a new type of limited conservatorship. (See *12 Pacific L. J.* 261; Cal. Civil Practice, 4 Probate and Trust Proceedings, §29:1 et seq.; C.E.B., 2 Conservatorship Practice, §23.1 et seq.) The following provisions apply:

(a) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. The conservatorship may be used "only as necessary to promote and protect the well-being of the individual." It must be designed to encourage the development of maximum self-reliance and independence of the individual, and must be ordered "only to the extent necessitated by the individual's proven mental and adaptive limitations." (*Prob.C. 1801(d).*)

(b) The conservatee is not presumed to be incompetent and retains all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. (*Prob.C. 1801(d).*)

(c) "Except as otherwise provided in the order of the court appointing a limited conservator, the appointment does not limit the legal capacity of the limited conservatee to enter into transactions or types of transactions." (*Prob.C. 1872(b).*)

(2) *Developmental Disability.* A "developmental disability" is a disability that "originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap" for that individual. The term includes "mental retardation, cerebral palsy, epilepsy, and autism," and "handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals," but does not include "other handicapping conditions that are solely physical in nature." (*Prob.C. 1420.*)

(3) *Other Protective Proceedings.* The Director of Developmental Services may be appointed the guardian or conservator of a developmentally disabled person who is either eligible for the services of a regional center or is a patient in a state hospital who was admitted or committed from a county served by a regional center. (*Health & Saf.C. 416.*) The procedure is, with certain exceptions, substantially similar to that prescribed for general guardianships and

conservatorships. (See *Health & Saf.C. 416.1* et seq.; *Guardianship of Smith* (1980) 100 C.A.3d 882, 889, 161 C.R. 335.) Appointment of the Director of the Department of Health as the guardian of a disabled person who resides in a state institution does not create a disqualifying conflict of interest between the director and the ward. (*Guardianship of Raymond C.* (1977) 72 C.A.3d 417, 420, 140 C.R. 133.) (See Welf.C. 4500 et seq. [services for the developmentally disabled]; Welf.C. 6500 et seq. [judicial commitment of mentally retarded persons]; Welf.C. 5350 et seq. [conservatorship for gravely disabled persons]; 3 *Cal. Proc.* (4th), *Actions*, §§41 et seq., 46 et seq.)

West's Key Number Digest, Guardian and Ward k.13(8)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Other Protective Proceedings*.

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §§92 et seq., 97 et seq.



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2. Procedure.

14 Witkin Sum. Cal. Law Wills § 1055

[§ 1055] Procedure.

(1) *Petition and Notice.* In the case of an allegedly developmentally disabled adult, the petition for appointment of a limited conservator must set forth the nature and degree of the alleged disability, the specific duties and powers requested, and the limitations of civil and legal rights requested, and must state whether or not the proposed limited conservatee is or is alleged to be developmentally disabled. (*Prob.C. 1821(h)*.) If the proposed conservatee is developmentally disabled, notice of the hearing and a copy of the petition must be mailed to the regional center that is required to prepare an assessment under *Prob.C. 1827.5*. (*Prob.C. 1822(e)*; see C.E.B., 2 Conservatorship Practice, §23.45 et seq.; Cal. Civil Practice, 4 Probate and Trust Proceedings, §29:34.)

(2) *Assessment of Proposed Limited Conservatee.* Within 30 days after the petition is filed, the proposed limited conservatee, with his or her consent, "shall be assessed at a regional center" as provided in Welf.C. 4620 et seq. The regional center must submit a written report of its findings and recommendations to the court. (*Prob.C. 1827.5(a)*.)

At least 5 days before the hearing, the regional center must mail a copy of the report to (a) the proposed limited conservatee, (b) the proposed conservatee's attorney, (c) if the petitioner is not the proposed conservatee, the attorney for the petitioner or the petitioner if not represented, and (d) such other persons as the court orders. (*Prob.C. 1827.5(d)*; see 16 Cal. Law Rev. Com. Reports, p. 199 et seq.) (On confidentiality of report, see *Prob.C. 1827.5(e)*.)

(3) *Appointment of Counsel.* In a proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to do so, the court must "immediately appoint" the public defender or private counsel to represent the proposed limited conservatee. If able to do so, the proposed limited conservatee must pay the cost. These provisions apply "irrespective of any medical or psychological inability to attend the hearing on the part of the proposed limited conservatee," as allowed in *Prob.C. 1825*. (*Prob.C. 1471(c)*.)

(4) *Appearance and Opposition.* The allegedly developmentally disabled adult has the right to appear at the hearing and oppose the petition; he or she may oppose the petition in part, by objecting to any or all of the requested duties or powers of the limited conservator. (*Prob.C. 1823(b)(5)*.)

(5) *Inquiry and Evaluation by Court.* The court must do each of the following:

(a) "Inquire into the nature and extent of the general intellectual functioning of the individual alleged to be developmentally disabled." (*Prob.C. 1828.5(a)(1).*)

(b) "Evaluate the extent of the impairment of his or her adaptive behavior." (*Prob.C. 1828.5(a)(2).*)

(c) "Ascertain his or her capacity to care for himself or herself and his or her property." (*Prob.C. 1828.5(a)(3).*)

(d) "Inquire into the qualifications, abilities, and capabilities of the person seeking appointment as limited conservator." (*Prob.C. 1828.5(a)(4).*)

(e) If a report by the regional center has not been filed because the proposed limited conservatee withheld his or her consent to assessment, the court must determine the reason for withholding consent. (*Prob.C. 1828.5(a)(5).*)

(6) *Dismissal of Petition.* "If the court finds that the proposed limited conservatee possesses the capacity to care for himself or herself and to manage his or her property as a reasonably prudent person, the court shall dismiss the petition for appointment of a limited conservator." (*Prob.C. 1828.5(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition and Notice.* In 2008, *Prob.C. 1821(h)* was relettered *Prob.C. 1821(j)*.



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3. Order Appointing Limited Conservator.

Witkin Sum. Cal. Law Wills § 1056

[§ 1056] Order Appointing Limited Conservator.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Notice of Rights of Conservatee.* A form providing information about the rights of the conservatee must be attached to the order. Within 30 days after issuance of the order, the conservator must mail the order and the form to the conservatee and to the relatives specified in *Prob.C. 1821(b)* (text, §938). (*Prob.C. 1830(c)*, added in 2006.)



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[§ 1056] Order Appointing Limited Conservator.

(1) *Basis and Nature of Order.* The following provisions govern the nature of the order:

(a) "If the court finds that the proposed limited conservatee lacks the capacity to perform some, but not all, of the tasks necessary to provide properly for his or her own personal needs for physical health, food, clothing, or shelter, or to manage his or her own financial resources, the court shall appoint a limited conservator for the person or the estate or the person and the estate." (*Prob.C. 1828.5(c).*)

(b) "If the court finds that the proposed limited conservatee lacks the capacity to perform all of the tasks necessary to provide properly for his or her own personal needs for physical health, food, clothing, or shelter, or to manage his or her own financial resources, the court shall appoint either a conservator or a limited conservator for the person or the estate, or the person and the estate." (*Prob.C. 1828.5(d).*)

(c) "The court shall define the powers and duties of the limited conservator so as to permit the developmentally disabled adult to care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so." (*Prob.C. 1828.5(e).*)

(2) *Contents of Order.* Under *Prob.C. 1830(b)*, the order must specify the following:

(a) The findings set forth in *Prob.C. 1828.5*.

(b) The powers granted to and duties imposed on the limited conservator (which may not exceed those of an ordinary conservator).

(c) The properties that the limited conservator is entitled to possess and manage (with a description sufficient for identification).

(d) The debts, rentals, wages, or other claims due to the limited conservatee that the limited conservator is entitled to collect or sue for and thereafter to possess and manage.

(e) The contractual or other obligations that the limited conservator may incur on behalf of the limited conservatee.

(f) The claims against the limited conservatee that the limited conservator may pay, compromise, or defend, if necessary.

(g) Any other powers, limitations, or duties relating to the care of the limited conservatee or the management of the property by the limited conservator that the court must specifically and expressly grant.

(3) *Information Provided to Proposed Limited Conservatee.* Prior to the appointment of a limited conservator, "the court shall inform the proposed limited conservatee of the nature and purpose of the limited conservatorship proceeding, that the appointment of a limited conservator for his or her person or estate or person and estate will result in the transfer of certain rights set forth in the petition and the effect of such transfer, the identity of the person who has been nominated as his or her limited conservator, that he or she has a right to oppose such proceeding, and that he or she has a right to have the matter tried by jury. After communicating such information to the person and prior to the appointment of a limited conservator, the court shall consult the person to determine his or her opinion concerning the appointment." (*Prob.C. 1828.5(f).*) In addition, the allegedly developmentally disabled adult must be informed by the court of "each limitation" requested in the order. (*Prob.C. 1828(b)(3).*)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Notice of Rights of Conservatee.* A form providing information about the rights of the conservatee must be attached to the order. Within 30 days after issuance of the order, the conservator must mail the order and the form to the conservatee and to the relatives specified in *Prob.C. 1821(b)* (text, §938). (*Prob.C. 1830(c)*, added in 2006.)



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a. Statutory Specification.

Witkin Sum. Cal. Law Wills § 1057

[§ 1057] Statutory Specification.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Specific Powers.*

(c) *Prob.C. 2351.5(b)(3)* was amended in 2005 to read as follows: "To consent or withhold consent to the marriage of, or the entrance into a registered domestic partnership by, the limited conservatee."



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a. Statutory Specification.

14 Witkin Sum. Cal. Law Wills § 1057

[§ 1057] Statutory Specification.

(1) *Specific Powers.* A limited conservator has the following powers and controls over the limited conservatee only if they are specifically requested in the petition for appointment and granted by the court in the order of appointment:

- (a) "To fix the residence or specific dwelling of the limited conservatee." (*Prob.C. 2351.5(b)(1).*)
- (b) "Access to the confidential records and papers of the limited conservatee." (*Prob.C. 2351.5(b)(2).*)
- (c) "To consent or withhold consent to the marriage of the limited conservatee." (*Prob.C. 2351.5(b)(3).*)
- (d) "The right of the limited conservatee to contract." (*Prob.C. 2351.5(b)(4).*)
- (e) "The power of the limited conservatee to give or withhold medical consent." (*Prob.C. 2351.5(b)(5).*)
- (f) "The limited conservatee's right to control his own social and sexual contacts and relationships." (*Prob.C. 2351.5(b)(6).*)
- (g) "Decisions concerning the education of the limited conservatee." (*Prob.C. 2351.5(b)(7).*)

(2) *General Powers.* Subject to *Prob.C. 2351.5(b)*, the following provisions apply:

- (a) "The limited conservator has the care, custody, and control of the limited conservatee." (*Prob.C. 2351.5(a)(1).*)
- (b) "The limited conservator shall secure for the limited conservatee such habilitation or treatment, training, education, medical and psychological services, and social and vocational opportunity as appropriate and as will assist the limited conservatee in the development of maximum self-reliance and independence." (*Prob.C. 2351.5(a)(2).*)

West's Key Number Digest, Guardian and Ward k.3

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Specific Powers.*

(c) *Prob.C. 2351.5(b)(3)* was amended in 2005 to read as follows: "To consent or withhold consent to the marriage of, or the entrance into a registered domestic partnership by, the limited conservatee."



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b. Modification of Powers.

14 Witkin Sum. Cal. Law Wills § 1058

[§ 1058] Modification of Powers.

Powers specifically granted to a limited conservator may be modified, in the court's discretion, by the addition or elimination of a power. (See Cal. Civil Practice, 4 Probate and Trust Proceedings, §29:35 [petition], §29:36 [order].) The following provisions apply:

(1) The limited conservator, the conservatee, or a relative or friend of the limited conservatee may file a petition in the superior court of the county in which the proceedings are pending to have a limited conservatorship modified by having any specific power added or eliminated. (*Prob.C. 2351.5(c).*)

(2) Notice of the hearing must be given for the period and in the manner provided in *Prob.C. 1460* et seq. (*supra*, §910 et seq.). (*Prob.C. 2351.5(c).*)

(3) The limited conservator or any relative or friend of the limited conservatee may appear in opposition. (*Prob.C. 2351.5(d).*)

(4) "The court shall hear and determine the matter according to the laws and procedures relating to the trial of civil actions, including trial by jury if demanded." (*Prob.C. 2351.5(d).*)

(5) If any powers are granted or eliminated, new letters of limited conservatorship must be issued reflecting the change. (*Prob.C. 2351.5(d).*)

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

Witkin Sum. Cal. Law Wills § 1059

[§ 1059] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Statutory Framework.*(i) *Appeal.* C.R.C., Rule 39.1 was renumbered C.R.C., Rule 8.482 in 2006.



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14 Witkin Sum. Cal. Law Wills § 1059

[§ 1059] In General.

(1) *Case Law Development. Guardianship of Kemp* (1974) 43 C.A.3d 758, 760, 118 C.R. 64, held that, in the absence of specific statutory authority, an order that a guardian consent to the involuntary sterilization of his adult incompetent ward was beyond the jurisdiction of the probate court. (See *Guardianship of Tulley* (1978) 83 C.A.3d 698, 701, 702, 146 C.R. 266 [overwhelming majority of courts hold that power can only be derived from specific legislative authorization; *Kemp* followed]; 74 A.L.R.3d 1210 [jurisdiction of court to permit sterilization in absence of statute].)

Conservatorship of Valerie N. (1985) 40 C.3d 143, 219 C.R. 387, 707 P.2d 760, 7 Summary (10th), *Constitutional Law*, §570, held that *Prob.C. 2356(d)* as it then read (prohibiting sterilization of a ward or conservatee) impermissibly deprived developmentally disabled persons of privacy and liberty interests protected by both the federal and state Constitutions. The court pointed out that the existing statutory scheme denied incompetent women the procreative choice that is recognized as a fundamental, constitutionally protected right of all other adult women. (40 C.3d 161.)

(2) *Enactment of Statutory Procedure.* In response to the *Valerie N.* decision, the 1986 Legislature enacted *Prob.C. 1950* et seq., creating a procedure for a limited conservator to consent to the sterilization of an adult who, because of developmental disabilities, is unable to give informed consent to his or her own sterilization. (See C.E.B., 2 Conservatorship Practice, §22.38 et seq.; Cal. Civil Practice, 4 Probate and Trust Proceedings, §29:20 et seq.; 18 *Pacific L. J.* 682.) The statutory prohibition against sterilization in *Prob.C. 2356(d)* now applies only to minors.

(3) *Declaration of Legislative Intent.* *Prob.C. 1950* states the legislative intent as follows:

"The Legislature recognizes that the right to exercise choice over matters of procreation is fundamental and may not be denied to an individual on the basis of disability. This chapter is enacted for the benefit of those persons with developmental disabilities who, despite those disabilities, are capable of engaging in sexual activity yet who, because of those disabilities, are unable to give the informed, voluntary consent necessary to their fully exercising the right to procreative choice, which includes the right to choose sterilization."

"However, the Legislature further recognizes that the power to sterilize is subject to abuse and, historically, has

been abused. It is the intent of the Legislature that no individual shall be sterilized solely by reason of a developmental disability and that no individual who knowingly opposes sterilization be sterilized involuntarily. It is further the intent of the Legislature that this chapter shall be applied in accord with the overall intent of Division 4.5 (commencing with *Section 4500*) of the *Welfare and Institutions Code* that persons with developmental disabilities be provided with those services needed to enable them to live more normal, independent, and productive lives, including assistance and training that might obviate the need for sterilization."

(4) *Statutory Framework*. The detailed sterilization statute covers the following topics:

(a) *Definitions*. (*Prob.C. 1951(b)*.)

(b) *Scope of proceeding*. (*Prob.C. 1951(a), 1961, 1968, 1969*.)

(c) *Liability and immunity*. (*Prob.C. 1967*.)

(d) *Petition and notice*. (*Prob.C. 1952, 1953*.)

(e) *Appointment of counsel and facilitator*. (*Prob.C. 1954, 1954.5*.)

(f) *Investigation and report*. (*Prob.C. 1955*.)

(g) *Hearing and findings*. (*Prob.C. 1956 et seq.*)

(h) *Order*. (*Prob.C. 1960, 1962, 1963, 1964*.)

(i) *Appeal*. (*Prob.C. 1962, 1965*; see C.R.C., Rule 39.1.)

(j) *New petition after denial*. (*Prob.C. 1966*.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Statutory Framework*. (i) *Appeal*. C.R.C., Rule 39.1 was renumbered C.R.C., Rule 8.482 in 2006.



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c. Sterilization of Conservatee.
2. Hearing.

14 Witkin Sum. Cal. Law Wills § 1060

[§ 1060] Hearing.

(1) *Presence of Conservatee.* Under *Prob.C. 1956*, the proposed conservatee must be present at the hearing "except for reason of medical inability." In *Conservatorship of Angela D.* (1999) 70 C.A.4th 1410, 83 C.R.2d 411, the proposed conservatee missed the hearing because she was sick with the flu. *Held*, the conservatee technically met the statutory requirement of "medical inability" to attend. Here, in addition, there was no possibility that the conservatee's presence would have had any impact on the decision. Under these circumstances, it was not error for the hearing to be held in the conservatee's absence, or any error was harmless beyond a reasonable doubt. However, "[o]rdinarily the hearing should not proceed in the absence of the conservatee except in the most extreme of circumstances." (70 C.A.4th 1426.)

(2) *Required Findings.* *Prob.C. 1958* sets forth in detail findings that are required for a sterilization order. *Prob.C. 1958(c)* requires a finding that "[t]he individual is capable of engaging in, and is likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy." However, in determining whether to authorize sterilization, the court may not consider "that, due to the nature or severity of his or her disability, a person for whom an authorization to consent to sterilization is sought may be vulnerable to sexual conduct by others that would be deemed unlawful." (*Prob.C. 1959*.)

The interaction of these two provisions was at issue in *Conservatorship of Angela D.*, *supra*. A man and woman were appointed conservators of their developmentally disabled 19-year-old daughter. They had been told that if the conservatee became pregnant, seizures probably would result in her death and the death of the fetus, and that she could not use any form of birth control because of reactions to the medications she was taking to control her seizures and diabetes. They petitioned, pursuant to *Prob.C. 1950 et seq.*, for an order authorizing them to give medical consent to her sterilization. The order was granted, and an appeal was filed on behalf of the conservatee. *Held*, affirmed.

(a) *Elements not contested on appeal.* The following uncontested elements for granting the petition were established beyond a reasonable doubt:

(1) That the conservatee is incapable of giving consent. Two doctors testified that they believed the conservatee was incapable of giving consent, her father indicated that her vocabulary was deteriorating, and there was no evidence

that she was capable of giving consent. (70 C.A.4th 1418.)

(2) That the conservatee is fertile and capable of procreation. A doctor and the conservatee's father testified that they had no evidence indicating whether she was, or was not, fertile. This evidence was sufficient to establish fertility without subjecting the conservatee to fertility tests. If she was not fertile, sterilization would produce no loss of a constitutional right, and if she was fertile, it would be appropriate to proceed with review of the petition. (70 C.A.4th 1419.)

(3) That the conservatee is permanently incapable of caring for a child or that pregnancy or childbirth would pose such a risk that sterilization would be deemed necessary for a nondisabled woman. Both requirements were satisfied by evidence from the conservatee's doctors and parents, a psychological report, and the report from the appropriate regional center agreeing that she would have no understanding of pregnancy and would be unable to care for a child, and by testimony from medical experts that the consequences of a pregnancy, to both the conservatee and her unborn fetus, would be devastating and perhaps fatal. (70 C.A.4th 1419.)

(4) That less invasive contraceptive methods, including supervision, but not isolation and segregation, are unworkable. There was medical evidence that birth control pills would have a worsening effect on the conservatee's epilepsy and diabetes and that barrier methods of birth control would require her cooperation, which was unavailable. Although the conservators would never be able to establish that supervision would be unworkable (because if constant supervision were available, there would be no need for sterilization), the burden imposed on the conservators would be intolerable, especially because isolation and segregation were not options. The Legislature cannot make proof of the unattainable a condition of access to a constitutional right. Moreover, the evidence indicated that supervision would be inconsistent with the conservatee's plans to enter a less sheltered, community program. (70 C.A.4th 1420.)

(5) That the proposed method of sterilization be the least invasive procedure available. One doctor testified that the proposed tubal ligation was the appropriate and least invasive procedure. A second doctor testified that it was an effective and safe procedure for the conservatee, and that there was no better alternative. (70 C.A.4th 1421.)

(6) That the current state of scientific knowledge does not suggest either the availability of a reversible sterilization procedure or other less drastic contraceptive method, or a soon-to-be-discovered advance in the treatment of the individual's disability. There was no evidence that another, preferable method of sterilization was about to become available or that there was likely to be an advance in the treatment of the conservatee's disabilities. (70 C.A.4th 1421.)

(7) That the conservatee has not made a knowing objection to the sterilization. (70 C.A.4th 1421.)

(b) *Contested element: whether conservatee is capable of engaging in sexual activity and is likely to do so.*

(1) *Prob.C. 1958(c)* requires that a conservatee be likely to engage in sexual activity. Here, it was uncontested that the conservatee was sexually mature, and although no evidence suggested that she was now sexually active, a psychological report stated that because the conservatee was quite passive, she was very likely to participate sexually if asked, especially due to her low level of intelligence and high degree of emotional compliance. Appellate counsel agreed that the conservatee was likely to participate in sexual activity, but argued that there was no evidence suggesting that she would be placed in a situation where this participation would be likely. However, the report of the regional center noted that the conservatee would soon be entering a less sheltered environment where she would be interacting with male peers. (70 C.A.4th 1421.)

(2) In determining whether a conservatee is likely to engage in sexual activity, the trial court is directed by *Prob.C. 1959* not to consider whether the conservatee is vulnerable to "unlawful sexual activity," defined by P.C. 261 to include sex with a developmentally disabled person unable to give consent. Thus, because the conservatee was unable to give consent, the trial court, in determining whether the conservatee was likely to engage in sexual activity, was compelled to consider conduct that *Prob.C. 1959* directed it not to consider. Obviously, a court will be unable to comply with both statutes. "A provision in the chapter that makes it logically impossible for a conservator to make the necessary showing

under the chapter is inconsistent with that intent. To the extent the provision thwarts the purpose of the chapter ... , it cannot stand." (70 C.A.4th 1423.) This holding is limited to the present case. *Prob.C. 1959* is also inconsistent with *Conservatorship of Valerie N. (1985) 40 C.3d 143, 219 C.R. 387, 707 P.2d 760, supra, §1059*, in that it allows a normal person with epilepsy or diabetes to consent to sterilization, but denies that same right to the developmentally disabled. (70 C.A.4th 1423.)

(3) Although the evidence that the conservatee was likely to engage in sexual activity was slim, the statute does not require an absolute degree of certainty, but merely a prediction. Evidence that the passive and compliant conservatee was "highly likely" to participate in sexual conduct and that she would soon be entering a less supervised program where she would be encountering males was sufficient to establish a very real possibility that the conservatee was likely to participate in sexual activity. (70 C.A.4th 1425.)

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5. Termination of Limited Conservatorship.

14 Witkin Sum. Cal. Law Wills § 1061

[§ 1061] Termination of Limited Conservatorship.

(1) *Termination by Operation of Law.* A limited conservatorship is terminated by (a) the death of the limited conservator, (b) the death of the limited conservatee, or (c) an order appointing a conservator for a former limited conservatee. (*Prob.C. 1860.5(a).*)

(2) *Termination by Court Order.* The court may make an order stating that the limited conservatorship is no longer necessary and terminating it. (*Prob.C. 1860.5(a)(4).*) The following procedural rules apply:

(a) The limited conservator, the limited conservatee, or a relative or friend of the limited conservatee may petition to have the limited conservatorship terminated. (*Prob.C. 1860.5(b).*)

(b) The petition must state the facts showing that the limited conservatorship is no longer required. (*Prob.C. 1860.5(c).*)

(c) The petition must be set for hearing and notice given to the persons in the same manner as provided for a petition for the appointment of a limited conservator. (*Prob.C. 1860.5(d).*)

(d) If the limited conservator is not the petitioner or has not joined in the petition, he or she must be served with a notice of the hearing and a copy of the petition at least 5 days before the hearing. Service must be made in the manner provided in *C.C.P. 415.10* (personal delivery) or *C.C.P. 415.30* (service by mail) or in another manner authorized by the court. If the limited conservator cannot, with reasonable diligence, be served with notice, the court may dispense with notice. (*Prob.C. 1860.5(d).*)

(e) The limited conservator or a relative or friend of the limited conservatee may appear and oppose the petition. (*Prob.C. 1860.5(e).*)

(f) The court must hear and determine the matter according to the laws and procedures relating to the trial of civil actions, including trial by jury if demanded. (*Prob.C. 1860.5(e).*)

(g) If it is determined that the limited conservatorship is no longer required, the limited conservatorship must cease.

(Prob.C. 1860.5(e).)

(h) If the petition alleges, and it is determined, that the limited conservatee is able to properly care for himself or herself and for his or her property, the court must make that finding and enter judgment accordingly. *(Prob.C. 1860.5(e).)*

(i) The limited conservator may, at the hearing or thereafter on further notice and hearing, be discharged and the bond exonerated upon the settlement and approval of the final account by the court. *(Prob.C. 1860.5(e).)*

(j) The court investigator must make a recommendation regarding the continuation or termination of the limited conservatorship. *(Prob.C. 1851(c).)*

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G. Other Protective Proceedings.
1. Community Property.

14 Witkin Sum. Cal. Law Wills § 1062

[§ 1062] Community Property.

Prob.C. 3000 et seq., relating to the management and disposition of community property where one spouse lacks legal capacity, are consistent with the Family Code statutes that give each spouse the right to manage and control community property, subject to joinder or consent by the other spouse at the time of certain dispositions. (See 11 *Summary* (10th), *Community Property*, §158 et seq.) Thus, if one spouse is competent and the other is not, the spouse with legal capacity, whether husband or wife, has management and control of the community property including the exclusive power to dispose of the property, subject to joinder or consent by the conservator. (*Prob.C. 3051* et seq.) The statutes provide for court authorization of transactions involving community property where one spouse is incompetent and has no conservator of the estate. (*Prob.C. 3100* et seq.; see 14 Cal. Law Rev. Com. Reports, pp. 515, 573 et seq.; 11 *Pacific L. J.* 284; Cal. Civil Practice, 4 Probate and Trust Proceedings, §31:1 et seq.; C.E.B., 1 Conservatorship Practice, §2.2 et seq.; on requirements where trust is funded by court order, see C.R.C., Rule 7.903; for complete coverage, see 11 *Summary* (10th), *Community Property*, §161 et seq.)

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G. Other Protective Proceedings.
2. Health Care Decisions for Adult.
a. In General.

14 Witkin Sum. Cal. Law Wills § 1063

[§ 1063] In General.

(1) *Nature and Purpose of Statute.* *Prob.C. 3200* et seq., entitled *Capacity Determinations and Health Care Decisions for Adult Without Conservator*, provide a method of solving the problems that arise when an incompetent adult is unable to give informed consent to nonemergency medical treatment (see 5 *Summary* (10th), *Torts*, §389 et seq.), but does not need an ongoing conservatorship. The court, after a noticed hearing, may authorize treatment. (See Law Rev. Com. Comment to *Prob.C. 3201*; Cal. Civil Practice, 4 Probate and Trust Proceedings, §31:55 et seq.; C.E.B., 1 Conservatorship Practice, §2.29 et seq.; C.E.B., Elder Law Resources, §4.66 et seq.; 41 *Hastings L. J.* 1029 ["Broadening Anachronistic Notions of 'Family' in Proxy Decisionmaking for Unmarried Adults"]; for procedure, see *infra*, §1064; on Due Process in Competence Determinations Act, see *supra*, §8 et seq.)

(2) *Scope of Statute.* The statute is "supplemental and alternative to other procedures or methods for obtaining consent to health care or making health care decisions." (*Prob.C. 3210(a)*.) It does not abrogate the existing rule that informed consent is not required in emergencies. (*Prob.C. 3210(b)*.)

The statute is subject to a valid advance health care directive under the Health Care Decisions Law (*Prob.C. 4600* et seq.; see *supra*, §878 et seq.). (*Prob.C. 3211(e)*.) In addition, nothing in the statute "supersedes the right that any person may have under existing law to make health care decisions on behalf of a patient, or affects the decision-making process of a health care institution." (*Prob.C. 3210(c)*.) Nor does the statute supersede or impair the right of an individual to choose treatment by spiritual means in lieu of medical treatment. (*Prob.C. 3212*.)

(3) *Unauthorized Treatment.* *Prob.C. 3200* et seq. do not authorize placement of the patient in a mental health treatment facility, the use of experimental drugs, convulsive treatment, or sterilization. (*Prob.C. 3211*.)

(4) *Definitions.* *Prob.C. 3200* defines the following terms:

(a) *Health care* refers to "care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition." (*Prob.C. 3200(a)*.)

(b) *Health care decision* means a decision regarding a patient's health care including the "selection and discharge of

health care providers and institutions," the "approval or disapproval of diagnostic tests, surgical procedures, programs of medication," and "directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation." (*Prob.C. 3200(b).*)

(c) *Health care institution* means an institution, facility, or agency licensed, certified, authorized, or permitted to provide health care in the ordinary course of business. (*Prob.C. 3200(c).*)

(d) *Patient* means an adult without a conservator of the person "for whom a health care decision needs to be made." (*Prob.C. 3200(d).*)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Other Protective Proceedings.
2. Health Care Decisions for Adult.
b. Petition, Notice, and Hearing.

Witkin Sum. Cal. Law Wills § 1064

[§ 1064] Petition, Notice, and Hearing.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Who May File Petition.*

(New) Filing fee: The fee for filing a petition concerning a capacity determination and health care decision for an adult without a conservator under *Prob.C. 3200* or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(6)*, added in 2005.)



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b. Petition, Notice, and Hearing.

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[§ 1064] Petition, Notice, and Hearing.

(1) *Kinds of Petitions.* *Prob.C. 3201* authorizes two kinds of petitions, which may be joined in a single proceeding. (*Prob.C. 3201(c).*) The petitions are:

(a) A petition to determine that a patient has the capacity to make a health care decision concerning an existing or continuing condition. (*Prob.C. 3201(a).*)

(b) A petition to determine that a patient lacks the capacity to make a health care decision concerning specified treatment for an existing or continuing condition, and for an order authorizing a designated person to make a health care decision on behalf of the patient. (*Prob.C. 3201(b).*)

(2) *Who May File Petition.* The petition may be filed by (a) the patient, (b) the patient's spouse, (c) a relative, friend, or interested person, including an agent under a power of attorney for health care, (d) the patient's physician, (e) a health care institution in which the patient is located, or (f) the public guardian or designated county official of the county in which the patient resides, is located, or is temporarily living. (*Prob.C. 3203.*)

(3) *Contents of Petition.* Under *Prob.C. 3204*, the petition must set forth or state in an attached declaration the following information known at the time the petition is filed:

- (a) The condition that requires treatment.
- (b) The recommended health care that is considered medically appropriate.
- (c) The threat to the patient's condition if the recommended care is delayed or denied.
- (d) The predictable or probable outcome of the recommended care.
- (e) Medically available alternatives.
- (f) Efforts made to obtain the patient's consent.

(g) If the petition is filed by an institution, the name of the person to be designated to give consent.

(h) The deficits in the patient's mental functions (listed in *Prob.C. 811(a)*, supra, §9) that are impaired and identification of a link between the deficits and the patient's inability to "respond knowingly and intelligently" to questions about the recommended health care or inability to participate in decisions about the recommended health care "by means of a rational thought process."

(i) The names and addresses, as far as they are known to the petitioner, of the persons specified in *Prob.C. 1821(b)* (relatives of proposed conservatee; see supra, §938).

(4) *Venue*. The petition may be filed in the superior court of the county of the patient's residence, the county in which the patient is temporarily living, or "[s]uch other county as may be in the best interests of the patient." (*Prob.C. 3202*.)

(5) *Counsel*. If the patient has not retained an attorney and does not plan to do so, the court must appoint the public defender or private counsel to consult with and represent the patient. (*Prob.C. 3205*.)

(6) *Notice of Hearing*. *Prob.C. 3206* governs notice of the hearing:

(a) Notice of the time and place of the hearing and a copy of the petition must be personally served on the patient, the patient's attorney, and any agent under the patient's power of attorney for health care, not less than 15 days before the hearing. (*Prob.C. 3206(a)*.)

(b) Notice of the time and place of the hearing and a copy of the petition must be mailed to the patient's spouse and the relatives named in the petition not less than 15 days before the hearing. (*Prob.C. 3206(b)*.)

(c) For good cause, the court may shorten or waive notice of the hearing. In determining the period of notice to be required, the court must consider both the existence of medical facts and circumstances and the desirability, when conditions permit, of giving adequate notice to all interested persons. (*Prob.C. 3206(c)*.)

(7) *Submission on Medical Affidavits by Stipulation*. The matter may be submitted on medical affidavits or declarations if the attorneys for the petitioner and patient so stipulate and further stipulate that no issue of fact remains to be determined. (*Prob.C. 3207*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Who May File Petition*.

(New) *Filing fee*: The fee for filing a petition concerning a capacity determination and health care decision for an adult without a conservator under *Prob.C. 3200* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(6)*, added in 2005 and amended in 2008.)



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14 Witkin Sum. Cal. Law Wills § 1065

[§ 1065] Order.

(1) Order Where Patient Lacks Capacity.

(a) The court may authorize the recommended health care and designate a person to give consent on behalf of the patient, if (1) the existing or continuing condition of the patient's health requires the recommended care, (2) there is a probability that the condition, if untreated, "will become life-endangering or result in a serious threat to the physical or mental health of the patient," and (3) the patient is unable to consent to the recommended care. (*Prob.C. 3208(a).*)

(b) The court may authorize "withholding or withdrawing artificial nutrition and hydration and all other forms of health care" and designate a person to give or withhold consent on behalf of the patient if (1) the recommended care is in the patient's best interest, taking into account the patient's personal values to the extent known, and (2) the patient is unable to consent to the recommended care. (*Prob.C. 3208(c).*)

(c) "In determining whether the patient's mental functioning is so severely impaired that the patient lacks the capacity to make any health care decision, the court may take into consideration the frequency, severity, and duration of periods of impairment." (*Prob.C. 3208(b).*)

The Law Revision Commission Comment notes that the authority of the court to authorize health care decisions is subject to the same standards applicable to other surrogate health care decisionmakers under the Health Care Decisions Law, e.g., an agent under a power of attorney for health care (see *Prob.C. 4684*; supra, §886) and a surrogate under a statutory surrogate's health care decision (see *Prob.C. 4714*; supra, §891).

(2) Order Where Patient Has Capacity.

(a) If the patient has capacity to give consent to the recommended health care, the court must so find in its order. (*Prob.C. 3208.5(a).*)

(b) If the patient has capacity to consent to the recommended care, the court must, on request, determine whether the patient has accepted or refused the recommended care, and whether the patient's consent is an informed consent. (*Prob.C. 3208.5(b).*)

(c) If the patient has capacity to consent to the recommended care but refuses consent, the court may not authorize the recommended care or designate a person to give consent to the recommended care. (*Prob.C. 3208.5(c).*)

(d) An order authorizing the recommended care and designating a person to give consent must be revoked if the court determines that the patient has recovered the capacity to consent to the recommended care. Until revoked or modified, the order is an effective authorization for the recommended care. (*Prob.C. 3208.5(c).*)

(3) *Continuing Jurisdiction.* The court has continuing jurisdiction to revoke or modify its order, on a petition filed, noticed, and heard in the same manner as an original petition. (*Prob.C. 3209.*)

SUPPLEMENT: [This section is current through the latest supplement]



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a. In General.

14 Witkin Sum. Cal. Law Wills § 1066

[§ 1066] In General.

The Probate Code contains a number of protective provisions for minors, including the following:

(1) *Administration of Small Estate.* Under *Prob.C. 3400* et seq., a minor's estate not exceeding \$ 5,000 may be administered without a guardian. Assets are paid or delivered directly to a parent to hold in trust until the minor reaches majority. (See *infra*, §1067.)

(2) *Money Belonging to Minor.* *Prob.C. 3410* et seq. authorize a petition and court order for the disposition of money where a minor has a guardian of the estate and the sole asset of the guardianship estate is money, or where a minor has no guardian of the estate and there is money belonging to the minor. (See *infra*, §1068.)

(3) *Compromise of Disputed Claim.* Under *Prob.C. 3500*, a parent may compromise a minor's disputed claim. (See *infra*, §1069.)

(4) *Proceeds of Compromise or Judgment.* *Prob.C. 3600* et seq. provide for the disposition of the proceeds of a compromise or judgment belonging to a minor or disabled person. (See *infra*, §1070 et seq.)

(5) *Duty To Account.* A parent who receives money or property belonging to a minor must account for the property when the minor reaches majority. (*Prob.C. 3300.*)

(6) *Uniform Transfers to Minors Act.* *Prob.C. 3900* et seq., the Uniform Transfers to Minors Act, provides a method for making a transfer to a minor and for administering the property transferred. The essential feature of the Act is its provision for a "custodian" with a kind of power in trust, giving the equivalent of a guardian or trustee without the inconvenience or expense of either. (For detailed treatment, see 13 *Summary* (10th), *Personal Property*, §140 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Small Estate.

14 Witkin Sum. Cal. Law Wills § 1067

[§ 1067] Small Estate.

(1) *In General.* A small estate of a minor may be administered without a guardian pursuant to *Prob.C. 3400* et seq. The statute applies where the total estate of the minor does not exceed \$ 5,000. For this purpose, "total estate" includes both the minor's property and the property of the minor's guardianship estate. (*Prob.C. 3400(a)*.) Custodial property held under the Uniform Transfers to Minors Act (see 13 *Summary* (10th), *Personal Property*, §140 et seq.) and property subject to a court order under *Prob.C. 3602(c)* or *3610* et seq. (infra, §1070) is excluded. (*Prob.C. 3400(b)*.)

(2) *Where There Is No Guardianship of Estate.* If the minor does not have a guardian of the estate, money or property belonging to the minor may be paid or delivered to a parent entitled to custody, to be held in trust until the minor reaches majority. (*Prob.C. 3401(a)*.)

(3) *Where There Is Guardianship of Estate.* If the minor has a guardian of the estate, money and property belonging to the guardianship estate may be paid or delivered to a parent entitled to custody, to be held in trust until the minor reaches majority. (*Prob.C. 3401(b)*.)

(4) *Written Receipt.* The parent must give a verified written assurance that the total estate, including the money or property paid or delivered, does not exceed \$ 5,000. (*Prob.C. 3401(c)(2)*.) (See *Prob.C. 3402* [written receipt of parent giving assurance is acquittance of person making payment or delivering property].)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Money Belonging to Minor.

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[§ 1068] Money Belonging to Minor.

(1) *In General.* Money belonging to a minor may be administered under *Prob.C. 3410* et seq. The statute applies where a minor has a guardian of the estate and the sole asset of the guardianship estate is money (*Prob.C. 3412*), or where a minor has no guardian of the estate and there is money belonging to the minor (*Prob.C. 3413*). For this purpose, custodial property held under the Uniform Transfers to Minors Act (see 13 *Summary* (10th), *Personal Property*, §140 et seq.) and property subject to a court order under *Prob.C. 3602(c)* or *3610* et seq. (see *infra*, §1070) is excluded. (*Prob.C. 3410*.) (See C.E.B., Guardianship Practice, §2.40 et seq.)

(2) *Petition for Deposit or Payment.* A parent entitled to custody of the minor, the guardian of the minor's estate, or the person holding the money may file a petition in the superior court of (a) the county where the minor resides if the minor has no guardian of the estate, or (b) the county having jurisdiction of the guardianship estate, requesting a court order for disposition of the money. (*Prob.C. 3411*.)

(3) *Order.* The court may order that a guardian be appointed or that an existing guardianship be terminated, and, in its discretion, must order one or more of the following:

(a) That the money be deposited in an insured account in a financial institution or in a single-premium deferred annuity, subject to withdrawal only on authorization of the court. (*Prob.C. 3412(a)*, *3413(a)*.)

(b) That all or part of the money be transferred to a custodian under the Uniform Transfers to Minors Act. (*Prob.C. 3412(b)*, *3413(b)*.)

(c) That money not exceeding \$ 20,000 be held on any conditions the court in its discretion determines to be in the best interests of the minor. (*Prob.C. 3412(c)*, *3413(c)*.)

(d) That money not exceeding \$ 5,000 be paid to a parent, without bond, pursuant to *Prob.C. 3400* et seq. (*supra*, §1067). (*Prob.C. 3412(d)*, *3413(d)*.)

(e) That the remaining balance be deposited with the county treasurer under specified conditions. (*Prob.C. 3412(e)*, *3413(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Parent's Compromise of Minor's Claim.

Witkin Sum. Cal. Law Wills § 1069

[§ 1069] Parent's Compromise of Minor's Claim.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition for Compromise*. In 2006, Judicial Council Form No. MC-350 was amended to delete the parenthetical in the title.



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[§ 1069] Parent's Compromise of Minor's Claim.

Prob.C. 3500 applies where a minor has a disputed claim for damages, money, or other property, and does not have a guardian of the estate. (*Prob.C. 3500(a)*.) (On compromise of disputed claim by guardian, see *Prob.C. 2500* et seq., supra, §1012 et seq.)

(1) *Petition for Compromise*. Either parent (if the parents are not living apart), or the parent having custody (if they are), has the right to compromise a minor's claim, or execute a covenant not to sue or to enforce judgment, unless the claim is against the parent. (*Prob.C. 3500(a)*.) The compromise or covenant is valid only after court approval on a petition filed in the superior court of (a) the county where the minor resides, or (b) any county where an action on the claim could be brought. (*Prob.C. 3500(b)*.)

The petition must be verified and must contain a full disclosure of information that has a bearing on the reasonableness of the compromise. (C.R.C., Rule 7.950 [containing nonexclusive list of information required to be included].) The interest of an attorney in a petition to compromise a claim must be disclosed in the petition. (C.R.C., Rule 7.951 [specifying information that must be disclosed].) (See Judicial Council Form No. MC-350 [Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Adult Person With a Disability (Miscellaneous)].)

(2) *Hearing*. The minor and the person compromising the claim on the minor's behalf must attend the hearing unless the court dispenses with their appearance for good cause. The court may require the attendance and testimony of witnesses, including an attending or examining physician. (C.R.C., Rule 7.952.)

(3) *Order for Payment or Delivery*. Money or other property must be paid or delivered on the terms and conditions specified in *Prob.C. 3600* et seq. (infra, §1070 et seq.). (*Prob.C. 3500(c)*.)

(4) *Release or Covenant by Parent*. After the money or other property is paid or delivered, the parent may execute a full release and satisfaction or a covenant not to sue or enforce judgment. If the court orders that all or part of the money be deposited or invested, the release and satisfaction or the covenant is not effective until the money has been deposited or invested. (*Prob.C. 3500(d)*.)

(5) *Distinction: No Compromise of Paternity Suit.* The statute refers to a "claim for damages, money or other property," and a child's right to support, once paternity is established, may constitute such a claim. But the compromise of a paternity claim by the minor's mother does not come within the statute, and such a compromise is not a bar to the minor's action. (*Ernest P. v. Superior Court (1980) 111 C.A.3d 234, 237, 238, 168 C.R. 438* [decided under former statute].)

West's Key Number Digest, Parent and Child k.5(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Petition for Compromise.* In 2006, Judicial Council Form No. MC-350 was amended to delete the parenthetical in the title.



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1. In General.

Witkin Sum. Cal. Law Wills § 1070

[§ 1070] In General.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Procedure.*

(New) Filing fee: The fee for filing a petition to compromise a minor's claim under *Prob.C. 3600* or an objection or other paper in opposition to the petition is \$ 320. (*Govt.C. 70655(c)(1)*, added in 2005.)



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1. In General.

14 Witkin Sum. Cal. Law Wills § 1070

[§ 1070] In General.

(1) *Scope of Procedure.* *Prob.C. 3600* et seq. apply where a court (a) approves the compromise of a minor's disputed claim, or approves the compromise of an action in which a minor or disabled person is a party, or enters a judgment for a minor or disabled person, and (b) money or property is to be paid or delivered for the benefit of the minor or disabled person. (*Prob.C. 3600.*) For this purpose, a disabled person includes a person for whom a conservator may be appointed. (*Prob.C. 3603(a).*) The express consent of a disabled person is required if that person has the capacity to consent within the meaning of *Prob.C. 812* (supra, §8) and does not have a conservator of the estate with authority to do so. (*Prob.C. 3613.*) (See C.E.B., Guardianship Practice, §2.45 et seq.)

(2) *Payment of Expenses, Costs, and Fees.* The court approving the compromise or entering the judgment must make a further order directing that "reasonable expenses" (including medical expenses), costs, and attorneys' fees, as approved by the court, be paid from the money or other property to be paid or delivered. (*Prob.C. 3601(a).*) This order may be directed to a parent of the minor, a guardian ad litem, the guardian of the estate of the minor, the conservator of the estate of the disabled person, or the payor of money to be paid pursuant to the compromise or judgment. (*Prob.C. 3601(b).*)

(3) *Medical Expenses.* In *Goldberg v. Superior Court* (1994) 23 C.A.4th 1378, 28 C.R.2d 613, a personal injury action brought on behalf of three minors, the court, relying on the testimony of an orthopedic surgeon, determined the reasonable expenses to be paid to a chiropractor who was not a party to the proceeding from a compromise under *Prob.C. 3601*. The payment represented a substantial reduction in the fee of the chiropractor, who had contracted with the parents for a lien on any recovery and for payment of the bill regardless of the outcome of litigation. *Held*, the court had authority under *Prob.C. 3601* to decide reasonable medical expenses to be paid from a minor's settlement, but not to adjudicate other claims relating to the same services, under contract or otherwise.

(a) *Prob.C. 3601(b)*, which allows the court to direct its order of payment to a parent, guardian, or payor, does not exclude payment to individuals who are not parties and who provide services under a contract that is not being litigated. The plain language of the statute permits the court to make an order allowing "reasonable expenses," and medical expenses are expressly included; thus, the court was empowered to determine reasonable expenses to be paid from the

settlement to a non-party doctor. (23 C.A.4th 1382.)

(b) The court is not required to either approve all expenses requested or refuse the compromise. It may determine what expenses are reasonable and how much it will allow. The breadth of the statutory language and absence of restrictions on the approval process give the court broad latitude to reduce all fees across the board or only selected fees. (23 C.A.4th 1382.) Moreover, this broad discretion is consistent with the court's special role in protecting the best interests of minors. (23 C.A.4th 1383.)

(c) The court is not prohibited from determining the right to liens on accounts receivable under contracts not being litigated. The court makes similar determinations on contracts not directly before it in civil actions, and in setting reasonable attorney or expert witness fees to be paid by the opposing party. Because health care providers routinely impose liens on any future recovery the patient may obtain, if the court could not dispose of medical liens, it would not be able to determine that the minor was protected by a net settlement sufficient to provide for the minor's injuries. If the court does not have power over all claims against the settlement, judicial approval of the compromise will be meaningless. (23 C.A.4th 1383.)

(d) *Prob.C. 3601* is exclusively concerned with allowing reasonable expenses to be paid from a minor's settlement. It does not permit the court to decide the reasonable value of a practitioner's services in the context of any claim the practitioner may have against a person other than the minor, under contract or otherwise. (23 C.A.4th 1383.)

In *Tapia v. Pohlmann* (1998) 68 C.A.4th 1126, 81 C.R.2d 1, California Children's Services Program paid the medical bills of a minor who was hit by a car and sought reimbursement in a lawsuit brought by the minor's father against the driver of the car. After the driver's insurer agreed to settle for its \$ 25,000 policy limit, the county agreed with the father's counsel to reduce its lien amount to \$ 18,568. The original lien was \$ 47,985.67, reduced from \$ 71,076.49 originally billed by the health care providers. The trial court, on its own motion, reduced the payment on the county's lien to \$ 10,000. *Held*, the trial court erred in declining to order payment from the compromise settlement of the \$ 18,568 sought by the county.

(a) A specific statute controls a general statute when the two come into conflict. (68 C.A.4th 1133.) Thus, the general language of *Prob.C. 3601*, permitting reimbursement of such reasonable medical expenses as the court approves and allows, must give way to the requirement of *Govt.C. 23004.1* that the county be reimbursed for its actual costs. More particularly, the same requirement applies under *Health & Saf.C. 123982* to treatment services furnished under the *Children's Services Program*. (68 C.A.4th 1133.)

(b) Even if *Prob.C. 3601* had applied, reduction of the county's lien here would have been an abuse of discretion. Undisputed evidence showed that the county incurred medical expenses on the minor's behalf in an amount far exceeding the \$ 18,568 requested by the county. Minor's father, through his counsel, acknowledged the county's entitlement to this amount. (68 C.A.4th 1134.)

(c) *Goldberg* is distinguishable. Because it was undisputed that the minor had recovered fully, there was little or no concern that the settlement proceeds remaining after reimbursement of the county would be insufficient to provide for the minor's injuries. (68 C.A.4th 1134.)

(4) *Attorneys' Fees*. In approving and allowing attorneys' fees to be paid from the money or property, the court must use a reasonable fee standard. Fees under a lawful contingency fee agreement may be allowed if the amount is reasonable under all the facts and circumstances. (C.R.C., Rule 7.955.)

In *Curtis v. Estate of Fagan* (2000) 82 C.A.4th 270, 98 C.R.2d 84, the trial court, in approving the compromise of a minor's wrongful death claim, granted the request of the minor's former attorney for quantum meruit attorneys' fees pursuant to *Prob.C. 3601(a)*. The present attorney appealed, contending that the court lacked jurisdiction to award these fees. *Held*, award of the fees was proper. The extent of the trial court's jurisdiction to consider an attorney's claim for fees in an action turns in part on the type of action involved. If the action concerns the compromise of a minor's claim,

the language in *Prob.C. 3601(a)* is clear: the trial court is empowered to make an "order authorizing and directing that such reasonable ... attorney fees, as the court shall approve and allow therein" be paid out of the settlement proceeds. When presented with claims by more than one attorney in the action, each contending that he or she provided services at the direction of the minor's guardian, the trial court must decide the validity of each claim. In doing so, it may consider the evidence presented and determine a reasonable amount to be paid to each attorney. The attorneys are not required to file an independent action against the minor's guardian in order to obtain that determination. (82 C.A.4th 277, 279.) (See *Padilla v. McClellan* (2001) 93 C.A.4th 1100, 1103, 113 C.R.2d 680 [distinguishing *Goldberg*; trial court had jurisdiction under *Prob.C. 3601(a)* to divide attorneys' fees between current and former counsel as part of compromise of minor's claim; fee allocation based on time and results as revealed in full day evidentiary hearing was within proper exercise of court's discretion].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Procedure.*

(New) *Filing fee:* The fee for filing a petition to compromise a minor's claim under *Prob.C. 3600* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(1)*, added in 2005 and amended in 2008.)



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[§ 1071] Disposition of Proceeds.

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Continuing Jurisdiction Over Minor's Money or Property*. In 2006, Judicial Council Form No. MC-351 was amended to delete the parenthetical in the title.



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[§ 1071] Disposition of Proceeds.

(1) *Disposition of Balance Where There Is Guardianship or Conservatorship.* *Prob.C. 3602* governs the disposition of the balance of a compromise or judgment after the payment of expenses, costs, and fees where there is a guardianship or conservatorship of the estate:

(a) Generally, the balance remaining is paid or delivered to the guardian or conservator of the estate. The court may order that all or part of the money be deposited or invested as provided in *Prob.C. 2456* (*supra*, §1004). (*Prob.C. 3602(b).*)

(b) On an *ex parte* petition of the guardian or conservator or on a petition of any person interested in the estate, the court may, for good cause shown, order one or more of the following:

(1) That all or part of the balance not become a part of the estate but be deposited in an insured account or in a single-premium deferred annuity, subject to withdrawal only on court authorization. (*Prob.C. 3602(c)(1).*)

(2) That all or part of the balance not become a part of the estate but be transferred to a custodian for the benefit of the minor under the Uniform Transfers to Minors Act. (*Prob.C. 3602(c)(2).*)

(3) That all or part of the balance not become a part of the estate but be transferred to the trustee of a trust revocable by the minor on attaining the age of 18. (*Prob.C. 3602(c)(3).*)

If the petition is by a person other than the guardian or conservator, notice of hearing must be given as provided in *Prob.C. 1460 et seq.* (*supra*, §910 *et seq.*). (*Prob.C. 3602(e).*)

(c) On a petition of the guardian or conservator or any person interested in the estate, the court may order that all or part of the balance not become a part of the estate but be paid to a special needs trust under *Prob.C. 3604* (*infra*, §1072). (*Prob.C. 3602(d).*) (On notice to Director of Health Services, Director of Mental Health, and Director of Developmental Services, see *Prob.C. 3602(f).*)

(2) *Disposition of Balance Where There Is No Guardianship or Conservatorship.* Where there is no guardianship or conservatorship of the estate, the balance remaining after the payment of expenses, costs, and fees is paid, delivered, deposited, or invested under *Prob.C. 3611*. (*Prob.C. 3602(a), 3610*.) The court may, on the application of a minor or disabled person, make the following orders:

(a) That a guardian or conservator of the estate be appointed, and that the balance be paid or delivered to that person. (*Prob.C. 3611(a)*.)

(b) That money be deposited in an insured account or in a single-premium deferred annuity, subject to withdrawal only on court authorization, and that other property be held on conditions the court determines to be in the best interest of the minor or disabled person. (*Prob.C. 3611(b)*.)

(c) That money be paid to a special needs trust under *Prob.C. 3604* (infra, §1072). A hearing following notice to the Director of Health Services, the Director of Mental Health, and the Director of Developmental Services is required. (*Prob.C. 3611(c)*.)

(d) If the balance is not over \$ 20,000 in value, that all or part of it be held on conditions the court determines to be in the best interest of the minor or disabled person. (*Prob.C. 3611(d)*.)

(e) If the balance is not over \$ 5,000 in value and is to be paid or delivered for the benefit of a minor, that all or part of it be paid or delivered to a parent, without bond, under *Prob.C. 3400* et seq. (supra, §§1067, 1068). (*Prob.C. 3611(e)*.)

(f) If the balance is to be paid or delivered for the benefit of a minor, that all or part of it be transferred to a custodian for the benefit of the minor under the Uniform Transfers to Minors Act. (*Prob.C. 3611(f)*.)

(g) That the balance be transferred to the trustee of a trust revocable by the minor on attaining the age of 18. (*Prob.C. 3611(g)*.)

(h) That the balance be deposited with the county treasurer under specified conditions. (*Prob.C. 3611(h)*.)

(i) That the balance be paid or delivered to the person with the disability. (*Prob.C. 3611(i)*.)

In *Christensen v. Superior Court* (1987) 193 C.A.3d 139, 239 C.R. 143, C's children sustained minor injuries in an automobile accident, and C and the driver of the other vehicle agreed to settle the children's claims. C petitioned for approval of the compromises, and asked the judge to excuse her from the local court policy requiring deposit of a minor's funds in federally insured accounts without fixed maturity dates. She requested authorization to deposit the funds in 2-year CD accounts paying interest higher than the rate then available for a demand savings account. After approving the compromises, the judge ordered C to deposit the funds in accounts without fixed maturity dates, to remain there until the children reached the age of majority. *Held*, reversed.

(a) It is "inappropriate" for the superior court to follow a predetermined program for the disposition of compromise funds, instead of deciding the issue on a case by case basis. The court should select from among the statutory alternatives in *Prob.C. 3611* the one best suited to the individual case. "Rigid application of the local policy, without evaluating the particular circumstances, prevailing economic conditions, or alternative means of safeguarding does not serve the best interest of the minor." (193 C.A.3d 144.)

(b) On remand, the court should consider all dispositions permitted by *Prob.C. 3611*, including the provision that the funds be held by the parent as guardian; and if it decides that deposit of the funds is appropriate, it should consider C's proposed alternatives for protecting the deposited funds. (193 C.A.3d 144.)

(3) *Continuing Jurisdiction Over Minor's Money or Property.* The court making an order under *Prob.C. 3611*,

except to the extent that it orders otherwise, has continuing jurisdiction of money and other property paid, delivered, deposited, or invested until the minor reaches 18 years of age, or, where the minor is disabled, until terminated by the court. (*Prob.C. 3612.*)

Where the court orders that funds to be received by the minor be deposited in a financial institution and not disbursed without further order of the court, the order must require that a certified or filed endorsed copy of the order be delivered to a manager at the institution, and that a receipt from the institution be promptly filed with the court, acknowledging receipt of the funds and the order. (C.R.C., Rule 7.953(a).)

If the order approving the compromise of a minor's claims contains a finding that the minor will attain the age of majority on a specified date, the order for deposit may require that the depository permit the withdrawal of funds by the minor after that date without further court order. (C.R.C., Rule 7.953(b).) (See Judicial Council Form No. MC-351 [Order Approving Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Adult Person With a Disability (Miscellaneous)].)

A petition for the withdrawal of funds must be verified and must include (a) the identity of the depository; (b) amounts previously withdrawn; (c) a statement of the balance on deposit at the time of the petition; and (d) the justification for the withdrawal. (C.R.C., Rule 7.954(a).) The petition may be considered ex parte or set for hearing. (C.R.C., Rule 7.954(b).) (See Judicial Council Form No. MC-355 et seq. [forms for deposit of minor's money in blocked account and withdrawal on court order].)

(4) *Requirements Where Trust Is Funded by Court Order.* An order that creates or approves funding a trust must provide that the trust is subject to the continuing jurisdiction of the court under *Prob.C. 15000* et seq. and may provide that the trust is subject to court supervision under *Prob.C. 1400* et seq. (C.R.C., Rule 7.903 [specifying provisions required in trust instrument].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Continuing Jurisdiction Over Minor's Money or Property.* In 2006, Judicial Council Form No. MC-351 was amended to delete the parenthetical in the title.



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e. Proceeds of Compromise or Judgment.

3. Special Needs Trust.

Witkin Sum. Cal. Law Wills § 1072

[§ 1072] Special Needs Trust.

SUPPLEMENT: [This section is current through the latest supplement]

Reimbursement rights of public agencies: See *Shewry v. Arnold* (2004) 125 C.A.4th 186, 197, 22 C.R.3d 488 [under Welf.C. 14009.5(b) and 42 U.S.C., §1396p(b), Department of Health Services could not enforce claim for reimbursement of Medi-Cal expenses from remaining assets of decedent's special needs trust, where assets were distributed as part of decedent's estate to decedent's adult child who was permanently and totally disabled].



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14 Witkin Sum. Cal. Law Wills § 1072

[§ 1072] Special Needs Trust.

Prob.C. 3604 provides for the establishment of a special needs trust for a minor or a disabled person. A special needs trust is a form of discretionary spendthrift trust designed to preserve public assistance benefits for a disabled beneficiary. (22 Cal. Law Rev. Com. Reports, p. 989; see 24 *Pacific L. J.* 610.) The trust may be established where the court determines all of the following:

(1) The minor or disabled person has a disability that substantially impairs the ability to provide for his or her own care or custody and constitutes a substantial handicap. (*Prob.C. 3604(b)(1).*)

(2) The minor or disabled person is likely to have special needs that will not be met without the trust. (*Prob.C. 3604(b)(2).*)

(3) The amount to be paid to the trust does not exceed what is reasonably necessary to meet the special needs of the minor or disabled person. (*Prob.C. 3604(b)(3).*)

If a court orders payment to a special needs trust under *Prob.C. 3602* or *Prob.C. 3611* (supra, §1071), the terms of the trust must be reviewed and approved by the court. The trust is subject to the court's continuing jurisdiction, and the court may determine the extent of its supervision of the trust. (*Prob.C. 3604(a).*) An order that creates or approves funding a trust must provide that the trust is subject to the continuing jurisdiction of the court under *Prob.C. 15000* et seq. and may provide that the trust is subject to court supervision under *Prob.C. 1400* et seq. (C.R.C., Rule 7.903 [specifying provisions required in trust instrument].)

The court's order must also include a provision requiring satisfaction of liens in favor of the state Departments of Health Services, Mental Health, and Developmental Services, or a county. (*Prob.C. 3604(d).*) Except for these liens, the reimbursement rights of public agencies are deferred until the trust is terminated. (On notice provisions and claim procedure following termination of trust, see *Prob.C. 3605.*) A department or county may, however, petition the court for an order terminating the trust if it has a claim against the trust property, and either (a) the requirements of *Prob.C. 3604(b)* have not been satisfied, or (b) the trustee refuses without good cause to make payments from the trust for the

special needs of the beneficiary. (*Prob.C. 3604(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

Reimbursement rights of public agencies: See *Shewry v. Arnold* (2004) 125 C.A.4th 186, 197, 22 C.R.3d 488 [under Welf.C. 14009.5(b) and 42 U.S.C., §1396p(b), Department of Health Services could not enforce claim for reimbursement of Medi-Cal expenses from remaining assets of decedent's special needs trust, where assets were distributed as part of decedent's estate to decedent's adult child who was permanently and totally disabled].



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14 Witkin Sum. Cal. Law Wills § 1073

[§ 1073] In General.

(1) *Nature and Scope of Statute.* *Prob.C. 3700* et seq. deal with the property of absent federal personnel. (See 16 Cal. Law Rev. Com. Reports, pp. 105, 124; 15 *Pacific L. J.* 462; C.E.B., 1 Conservatorship Practice, §2.44 et seq.) On petition, the court may set aside to the family of an absentee personal property situated in California, for the purpose of managing, controlling, encumbering, selling, or conveying, "or otherwise engaging in any transaction." The order is made on a determination that to do so will be in the best interest of the absentee in providing care for his or her family. (*Prob.C. 3701.*)

The maximum amount that may be set aside is \$ 20,000. (*Prob.C. 3701.*) California property within that limit may be set aside despite the fact that the absentee's total property, wherever situated, exceeds \$ 20,000. (*Prob.C. 3706.*) A joint tenancy interest may be set aside only to a member of the absentee's family who is a joint tenant with the absentee. (*Prob.C. 3707.*)

(2) *Definitions.* "Absentee" has the meaning set forth in *Prob.C. 1403* (see *supra*, §948): federal personnel determined to be in missing status, as defined by federal law. (*Prob.C. 3700(a).*)

"Family of an absentee" means: (a) A spouse who has not commenced an action for separation, dissolution, annulment, or nullity; or (b) if there is no spouse, a child or children; or (c) if there is no child, the parent or parents, provided that the person is a dependent of the absentee under federal law. "Family" includes the guardian of the estate or the conservator of the estate of any of the foregoing persons. (*Prob.C. 3700(c), (d).*)

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b. Court Proceeding To Set Aside Property.

14 Witkin Sum. Cal. Law Wills § 1074

[§ 1074] Court Proceeding To Set Aside Property.

(1) *Petition.* A petition may be filed by a person in whose favor the property may be set aside or by the holder of a general power of attorney issued by the absentee. (*Prob.C. 3702.*) (On effect of absentee's power of attorney, see *infra*, §1076.) The petition must contain information regarding the absentee's identity, family, and property. (*Prob.C. 3703(a).*)

A certificate of missing status must be attached. (*Prob.C. 3703(b).*) The certificate is an official written report complying with *Ev.C. 1283* (see *1 Cal. Evidence (4th), Hearsay, §253*) and showing that the absentee is in missing status. (*Prob.C. 3700(b).*)

(2) *Notice, Hearing, and Determination.* At least 15 days' notice of a hearing on the petition must be given by mail, delivery, and publication. (*Prob.C. 3704.*) At the hearing, the petition may be supported or opposed by state or federal officers or agents or by relatives or friends of the absentee. (*Prob.C. 3705(a).*) A certificate of missing status must be received as evidence that the absentee is missing and the court may not make a determination to the contrary. (*Prob.C. 3703(b).*) If the court determines that the allegations of the petition are true, it may order the property set aside. (*Prob.C. 3705(b).*)

(3) *Accounting After Return or Death of Absentee.* Within 6 months after the absentee has returned or his or her death has been officially determined, the absentee or the personal representative of a deceased absentee may, by motion, require the person to whom the property was set aside to account for the property and the proceeds, if any. (*Prob.C. 3708.*)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Management and Disposition Without Court Proceeding.

14 Witkin Sum. Cal. Law Wills § 1075

[§ 1075] Management and Disposition Without Court Proceeding.

(1) *Authority of Family To Manage Property.* An absentee's family may engage in any transaction relating to the absentee's personal property in California without any judicial proceeding if (a) the absentee owns no real property in California, (b) the value of all the absentee's personal property in California is \$ 5,000 or less, and (c) the family needs to dispose of the property for their support and maintenance. (*Prob.C. 3710.*)

(2) *Transfer of Evidence of Absentee's Interest.* Where the conditions of *Prob.C. 3710* are satisfied, the family may cause any evidence of the absentee's interest in the property to be transferred by furnishing the custodian of the property with a certificate of missing status and an affidavit under oath stating that the value of all property received pursuant to *Prob.C. 3710* does not exceed \$ 5,000. (*Prob.C. 3711(a).*) The receipt of the certificate and affidavit discharges the recipient "without the necessity of inquiring into the truth of any of the facts stated in the affidavit." (*Prob.C. 3711(b).*)

(3) *Action by Absentee.* An absentee may commence an action against a person who executes an affidavit and receives property within the earlier of (a) 90 days after the absentee returns to the United States after termination of the condition that caused classification as an absentee, or (b) 2 years after termination of the condition. (*Prob.C. 3712.*)

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- d. Absentee's Power of Attorney.

14 Witkin Sum. Cal. Law Wills § 1076

[§ 1076] Absentee's Power of Attorney.

(1) *Expiration of Power.* If an absentee's power of attorney expires during the period of absentee status, the power "continues in full force and effect" until 30 days after absentee status is terminated. One who acts in reliance on the power and a certificate of missing status is not liable for that reliance. (*Prob.C. 3720.*)

(2) *Absentee's Death, Incapacity, or Revocation.* For purposes of *Prob.C. 4300* et seq., governing relations with third persons under a power of attorney (see *supra*, §862 et seq.), if the principal is a missing absentee, the attorney-in-fact or a third person is deemed to be without actual knowledge of (a) the principal's death or incapacity while the absentee is missing, until he or she receives notice of death from the relevant department or agency, or (b) revocation by the principal during that period. (*Prob.C. 3721.*)

(3) *Dissolution, Annulment, or Separation.* If an absentee has executed a power of attorney naming his or her spouse as the attorney-in-fact, the authority of the attorney-in-fact is revoked if (a) the spouse commences a proceeding for dissolution, annulment, or legal separation, or (b) legal separation is ordered. (*Prob.C. 3722.*)

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14 Witkin Sum. Cal. Law Wills § 1077

[§ 1077] Property of Nonresident.

If a nonresident has a qualified conservator, guardian, or comparable fiduciary in the state of residence and a proceeding for guardianship or conservatorship is not pending or contemplated in California, the nonresident fiduciary may petition to have property in California removed to the place of residence. (*Prob.C. 3800(a)*.) (On venue, see *Prob.C. 3800(b)*; on notice, see *Prob.C. 3801*; on certification by nonresident fiduciary, see *Prob.C. 3802*; on order for removal, see *Prob.C. 3803*; on transfer of property out of state where guardianship or conservatorship of estate is pending in California, see *Prob.C. 2800 et seq.*, *supra*, §1053.)

SUPPLEMENT: [This section is current through the latest supplement]



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6. Law Practice Administrator.

14 Witkin Sum. Cal. Law Wills § 1078

[§ 1078] Law Practice Administrator.

A law practice administrator may be appointed to take control of the files and assets of the law practice of a disabled or deceased attorney. (See *Prob.C. 2468, 9764.*)

SUPPLEMENT: [This section is current through the latest supplement]