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# Administration of Estates Review of Selected 1972 California Legislation

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# Administration of Estates

## Administration of Estates; testamentary gifts to minors

Probate Code §186 *et seq.* (new).

AB 1023 (Johnson); STATS 1972, Ch 439

Support: State Bar of California

Chapter 11, commencing with §186, has been added to Division 1 of the Probate Code to provide a procedure whereby a testator may make bequests of money, securities, life or endowment policies, and annuity contracts to minors and have such bequests held subject to the provisions of the California Uniform Gifts to Minors Act [CAL. CIV. CODE §1154 *et seq.*].

Section 186.1 states that if a testator provides in his will that a bequest shall be paid or delivered to a custodian subject to the California Uniform Gifts to Minors Act, then all of the provisions of that act are applicable to such bequest during the period prior to distribution of the property.

Section 186.2 provides that the bequest shall be paid or delivered to a designated adult or a trust company qualified to do business in this state with the words, "as custodian for (name of minor) under the California Uniform Gifts to Minors Act." However, failure to name a qualified custodian does not invalidate the bequest as a bequest permitted under these provisions; and a variation of the wording of the bequest as set forth in this section will be disregarded if the testator's intent to make a bequest pursuant to these provisions appears from the will as a whole or from the wording of the bequest.

Under Section 186.3, a bequest which does not comply with the provisions of Sections 186, 186.1, and 186.2, or a bequest to a person who becomes an adult prior to the order for distribution, shall be deemed to be a direct bequest to the person named as the minor, unless the will clearly requires otherwise.

Section 186.4 states that a bequest made as provided in this chapter shall be distributed by the executor or administrator of the estate pursuant to an order of distribution by transferring the bequeathed property in the form and manner provided by the California Uniform Gifts to Minors Act.

Sections 186.5 and 186.6 enable the testator, in his will, to provide for successor or alternate custodians, and specify the standard of compensation of the custodian. If a vacancy in the custodianship exists prior to the full distribution of the bequest by the executor or administrator, a successor custodian shall be appointed for any undistributed property as provided by the California Uniform Gifts to Minors Act.

Except as otherwise provided in the will or ordered by a court, Section 186.7 provides that each custodian designated in the will and the person for whom the property is to be held shall be deemed a legatee for the purpose of receiving notices which may be required or permitted to be sent to a legatee in the estate of the testator. However, unless required by the will or ordered by the court a custodian has no duty to participate in the proceedings in the estate on behalf of the minor, and in no event shall have a duty to so participate unless and until he has filed a written notice of acceptance of the office of custodian with the clerk of the court in which the administration of the estate of the testator is pending.

Section 186.8 provides that the court in which administration of the estate of the testator is pending has exclusive jurisdiction over all proceedings and matters concerning undistributed property pursuant to an order of distribution. After distribution of any property is completed, said court shall have no further jurisdiction over the property so distributed, and such property will be subject to the California Uniform Gifts to Minors Act in the same manner as if it had been a gift made during the life of the testator.

Section 186.9 states that this chapter is not to be construed as providing an exclusive method for making bequests to or for the benefit of minors.

### **COMMENT**

The purpose of this legislation is to enable a person to make, through his will, a gift to a minor without becoming involved in guardianship proceedings [STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-1].

Under the California Uniform Gifts to Minors Act, a person may, *during his lifetime*, transfer money, securities, life or endowment policies, or annuity contracts to a minor by designating a custodian for the minor's gift and transferring the property to said custodian [CAL. CIV. CODE §1156].

However, with the exception of small gifts in limited situations (as

provided by California Probate Code §§1430, 1430.5), a person may not *bequeath* such property to a minor without the appointment of a guardian for the minor's estate [CAL. PROB. CODE §1405].

The expenses of guardianship work a hardship in the case of testamentary gifts of small value to minors. Chapter 11 has been added to provide a simplified and inexpensive method for the making of testamentary gifts to minors by permitting such gifts to be made to custodians.

Paralleling the provisions of the Gifts to Minors Act with respect to inter vivos gifts, this chapter appears to provide adequate security for the minor's property and accountability by the custodian, while eliminating unnecessary administration costs inherent in guardianship and trust arrangements.

It should be noted, however, that the provisions in Chapter 11 are expressly nonexclusive, and a testator who desires the more formal arrangements of guardianship or trust may elect such arrangements by the terms of his will.

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**See Generally:**

- 1) 1 WITKIN, *SUMMARY OF CALIFORNIA LAW, Personal Property* §§53-55 (7th ed. 1960).
- 2) Middleditch, *Uniform Gifts to Minors Act*, 103 *TRUSTS AND ESTATES* 983 (1964).
- 3) *STATE BAR OF CALIFORNIA, 1972 CONFERENCE RESOLUTION 7-1.*

### **Administration of Estates; gifts to minors—venue**

Civil Code §1162.5 (new).

AB 1026 (Johnson); *STATS* 1972, Ch 440

Support: State Bar of California

Section 1162.5 has been added to the Civil Code to specify venue for court proceedings where petitions are filed under the California Uniform Gifts to Minors Act [CAL. CIV. CODE §1154 *et seq.*]. Subject to the power of the court to transfer actions and proceedings as provided in the Code of Civil Procedure [CAL. CODE CIV. PROC. Part 2, Title 4 (commencing with §392)], a petition filed under the Gifts to Minors Act shall be heard and proceedings thereon held in the superior court in the proper county, which shall be determined as follows:

(a) If the minor resides in this state, the proper county shall be the county where the minor resides.

(b) If the minor does not reside within this state, the proper county shall be the county where the donor resides, or where the estate

of a deceased or legally incapacitated custodian or successor custodian is being administered, or where a parent of such minor resides.

(c) If neither the minor, donor, nor any parent resides within this state, and no estate of a deceased or legally incapacitated custodian or successor custodian is being administered within this state, any county shall be the proper county.

**COMMENT**

The California Uniform Gifts to Minors Act provides that in certain situations a minor, a donor, his legal representative, the legal representative of the custodian, a guardian of the minor, or an adult member of the minor's family may petition the court for an accounting, for designation of a successor custodian, for removal of a custodian and designation of a successor custodian or, in the alternative, that the custodian be required to give bond for the performance of his duties [CAL. CIV. CODE §§1161, 1162]. However, there was no express provision specifying the proper venue for such proceedings.

The apparent intent in adding Section 1162.5 is to provide an advantage of certainty, and enable the court proceedings to have some logical connection to the custodianship [Interview with Harold Bradford, Legislative Representative of the State Bar of California, Sacramento, California, Aug. 3, 1972]. However, in specifying venue there may be a corresponding loss of flexibility which the lack of such provisions permitted by allowing the proceedings to be filed in whatever county was considered most convenient to the parties concerned [STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-2, Counter Argument].

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**See Generally:**

- 1) 1 WITKIN, SUMMARY OF CALIFORNIA LAW, *Personal Property* §§53-57 (7th ed. 1960).
- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 31.
- 3) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-2.
- 4) Middleditch, *Uniform Gifts to Minors Act*, 103 TRUSTS AND ESTATES 983 (1964).

**Administration of Estates; proof of uncontested wills**

Probate Code §329 (amended).  
SB 630 (Roberti); STATS 1972, Ch 298  
Support: State Bar of California

Section 329 of the Probate Code was amended in 1968 [CAL. PROB. CODE §329, *as amended*, CAL. STATS. 1968, c. 819, at 1582.] to allow admission to probate of an uncontested will valid

on its face, when no subscribing witness could be found: (1) upon proof of the handwriting of the testator and any one of the subscribing witnesses, or (2) receipt in evidence of either a writing *incorporated in the document* bearing the purported signatures of all the subscribing witnesses or an affidavit of a person with personal knowledge of the execution, which recites facts showing the due execution of the will. This section has been amended by Chapter 298 to require that the evidentiary writing be at the *end* of the document offered as the will, rather than incorporated in the will.

### COMMENT

The intent of having such an evidentiary writing *incorporated within the document* was to provide for what is commonly known as an attestation clause or memorandum [*Annual Reports of State Bar Committees*, 43 CAL. S.B.J. 745 (1970)]. However, since the testator's signature must come at the end of the will [CAL. PROB. CODE §50], it could be argued that the required evidentiary writing, if placed after the testator's signature, would not be considered as "incorporated within" the will. Therefore, the wording "incorporated within" was not clear [CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION vol. I, §7.34 (1971)] and led to confusion as to whether a standard attestation clause was sufficient [STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-17].

The apparent legislative intent behind Chapter 298, in specifying that the evidentiary writing be at the *end* of the document, is to clarify that such writing be in the nature of an attestation clause. The attestation that shows the due execution of the will, signed by the subscribing witnesses, should follow the testator's signature [See CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING §4.21 (1965)].

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**See Generally:**

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §233 (Supp. 1969).
- 2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION, vol. I, §7.34 (1971).
- 3) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 233.
- 4) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-17.
- 5) Coil, *A Probate Puzzle*, 45 CAL. S.B.J. 695 (1970).
- 6) Letter from John G. Davies to *California State Bar Journal*, 45 CAL. S.B.J. 345 (1970).

### **Administration of Estates; summary probate procedure**

Probate Code §§630, 645, 646 (amended).

SB 1319 (Lagomarsino); STATS 1972, Ch 555

Support: State Bar of California

Section 630 of the Probate Code has been amended to increase from \$3,000 to \$5,000 the maximum value of an estate, consisting solely of personal property, which may be distributed by means of summary probate procedure.

Chapter 555 also amends Section 645 of the Probate Code, which provides for the summary administration of an estate when the court finds that the net value of the estate over and above all liens, encumbrances, and the value of any homestead interest does not exceed the sum of \$5,000 and that the last illness, funeral, and administration expenses have been paid. Section 645 now allows such an estate to be set aside in favor of the surviving spouse or minor children of the decedent, without further proceedings, regardless of the value of other property which these heirs may receive from the decedent outside his estate (such as by joint tenancy). Previously, Section 645 prevented summary administration of estates if the heirs take other property from the decedent the value of which exceeds the homestead exemption permitted a head of a family under Section 1260 of the Civil Code, *i.e.*, \$20,000.

Section 646 of the Probate Code requires full probate of an estate valued in excess of \$5,000 or when there is no surviving spouse or minor child. As amended, this section no longer requires full probate when a surviving spouse or minor child holds other estate valued in excess of the homestead exemption allowed the head of a family.

#### *COMMENT*

The apparent legislative intent with respect to the amendment of §630, is to conform summary probate procedure to inflationary changes in the economy by permitting disposition of small estates without the time and expense involved in full probate procedures [STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-6].

The objective of Chapter 555, as it amends §§645 and 646, apparently is to expedite the disposition of small and medium sized estates by removing the "outside-probate" property limit. Qualification for summary administration is to be determined not by what the heir already owns, but only by what he will receive via the summary probate procedure. This will avoid situations in which an estate of very small value is needlessly subjected to the time-consuming procedure of full

probate merely because an item of property, such as a family residence worth more than \$20,000, passes to the surviving spouse as a surviving joint tenant.

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**See Generally:**

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §318 (7th ed. 1960).
- 2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1967 CODE LEGISLATION 189-192.
- 3) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-6.
- 4) Marshall, *Probate Speeded Up and Stripped Down*, 46 LOS ANGELES BAR BULL. 387 (1970).

### **Administration of Estates; simultaneous death**

Probate Code §296.41 (amended).

AB 1137 (Z'Berg); STATS 1972, Ch 444

Support: State Bar of California

Pursuant to the provisions of Section 296.41 of the Probate Code, when it is claimed that any persons have died under circumstances where there is no sufficient evidence that they have died otherwise than simultaneously, the executor or administrator of any one of such persons may file a petition, in the proceeding in which he received his appointment, seeking to have it determined that such persons died under circumstances where there is no sufficient evidence that they died otherwise than simultaneously.

This section has been amended to provide that, in addition to said executor or administrator, any other person interested in the estate (as defined in Probate Code §977) of any person who has died under the above stated circumstances may file a petition provided for in this section in the estate proceeding in which he claims an interest.

#### *COMMENT*

Section 296.41 was amended to clarify that persons other than the executor or administrator may file a petition to determine simultaneous death. Previously, §296.41 appeared to authorize only an executor or administrator to act.

This amendment is significant, for example, when the personal representative is actively disinclined to have the sequence of death determined and, therefore, does not file the petition to seek to determine simultaneous death. Assume that a husband and wife die simultaneously and intestate, and the husband leaves a substantial life insurance policy naming the wife as sole beneficiary with no contingent beneficiaries. A third party sues the husband's estate for damages



arising out of personal injuries. If the personal representative of the wife's estate maintains that the wife survived the husband, and not that they died simultaneously, the proceeds of the insurance policy would be payable to the wife's estate. If the personal representative of the decedents would take through the wife's estate, he would *not* want a determination of simultaneous death, since Probate Code §296.3 provides that the insured is presumed to have survived the beneficiary in a simultaneous death situation (thus, the insurance proceeds would be reachable by the third party in the husband's estate). Section 296.41, as amended, would permit the third party to have a judicial determination of the sequence of death despite the personal representative's disinterest in obtaining such a determination.

The amendment is also significant because frequently an interested heir or legatee might not wish to await the pleasure of a personal representative for having the determination made by the court [STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-14]. As amended, the section appears to solve this problem by specifying a procedure whereby such a person may personally file said petition.

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**See Generally:**

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§57-60 (7th ed. 1960).
- 2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING §11.47 (1965).
- 3) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION, vol. I, §6.32 (1971).
- 4) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-14.

### **Administration of Estates; designation of executor**

Probate Code §403 (repealed); §403 (new).

SB 886 (Deukmejian); STATS 1972, Ch 407

Support: State Bar of California

Section 403 of the Probate Code has been repealed and a new Section 403 added to provide that a testator may, by his will, confer upon one or more persons the power to designate an executor or co-executor or successor executor or co-executor, and may provide that the person or persons so designated may serve without bond. The designation shall be in writing and filed with the court. If there are two or more holders of the power to designate, the designation must be unanimous, unless the will provides otherwise, or unless one of the designators is unable or unwilling to act, in which case the remaining designator or designators may nominate an executor or co-executor or successor executor or co-executor. Except as provided in this sec-

tion, an executor does not have authority to appoint an executor, co-executor, or successor executor or co-executor.

### **COMMENT**

Prior to its repeal, Section 403 of the Probate Code rendered void an attempt to authorize the executor of a will to appoint another person as executor. The newly enacted Section 403 appears to afford greater flexibility in the preparation of wills and the administration of estates, by permitting the testator to designate in his will a person or persons who shall, in turn, designate the executor, co-executor, or successor of either, to administer the estate. This revision appears thereby to conform to the authority of a testator to give to another a general power of appointment over his estate [CAL. PROB. CODE §§409, 423].

As revised, Section 403 will be of considerable benefit to testators who wish their estate administered by a person whose identity may not be known at the time of execution of the will. For example, a testator who wishes his estate administered by a particular officer, such as the president of a college, and who cannot predict who that individual may be at the time of his death, would be able to authorize a person to designate after his death the president of the college as his executor [Interview with Harold Bradford, Legislative Representative of the State Bar of California, Sacramento, California, Aug. 3, 1972]. Implementation of the testator's desires can thus be facilitated.

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**See Generally:**

- 1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING §16.7 (1965).
- 2) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-3.

### **Administration of Estates; validity of foreign wills**

Probate Code §§26, 361, 362 (amended).

SB 978 (Song); STATS 1972, Ch 713

Support: State Bar of California

Section 26 of the Probate Code formerly provided that no will made out of this state was valid as a will in this state unless executed according to the provisions of the California Probate Code, except that a will valid under the laws of a state or country in which the testator is domiciled at the time of his death was valid in this state in-so-far as the same relates to personal property. Chapter 713 amends this section by deleting the provision pertaining to the validity of foreign wills relating to personal property, and adding provisions that

validate a foreign will if said will is: (1) executed according to the laws of the state or country in which it was executed, (2) valid under the laws of the state or country in which the testator was domiciled at the time of his death, or (3) valid under the laws of the state in which the testator was domiciled on the date of execution of the will.

Section 361 of the Probate Code provides that the executor or any person interested in the will may file, together with his petition for letters, a copy of the will and of the order or decree admitting it to probate, or other evidence of its establishment or proof in accordance with the laws of the other state or country, if such copy or other evidence satisfies the requirements of Division 11 of the Evidence Code (commencing with §1530). Chapter 713 amends this section to provide that notice shall be given and, *except as provided in Section 362 infra*, the will shall be subject to the same proceedings as in the case of an original petition for the probate of a will.

Section 362 of the Probate Code formerly provided that if it appeared from the order or decree specified in Section 361, or if it was otherwise proved in cases in which there is no such order or decree, that the will had been admitted to probate in another state or country or established or proved in accordance with the laws thereof, and that it was valid according to the law of the place in which the testator was domiciled at the time of his death, or according to the law of this state, it should be admitted to probate and have the same force and effect as a will first admitted to probate in this state, except as limited by Section 26 of the Probate Code *supra*. Chapter 713 amends this section to require that it be shown that the will was admitted to probate or proved in accordance with the laws of the foreign state "in a proceeding in which all interested parties were given notice and an opportunity for contest, and in which the determination has become final, is not subject to revocation, and is based upon a finding that the decedent was domiciled at his death in that foreign state or country." If the above is established, Chapter 713 provides that no contest shall be permitted either before or after admission to probate and the will shall be admitted and have the same force and effect as a will first admitted to probate in this state. Chapter 713 deletes the provision limiting the force and effect to the requirements of Section 26 *supra*.

#### *COMMENT*

The provisions of Chapter 713 were proposed by the Ad Hoc Committee on the Uniform Probate Code, appointed by the Board of

Governors of the State Bar [*An Interim Report, California and the Uniform Probate Code*, 46 CAL. S.B.J. 290 (1971)], to establish uniformity among the states in procedures for the administration of estates, to promote the concept of unitary administration of wills, and to eliminate the possibility of second will contests of foreign wills in this state [*Report to the Board of Governors Regarding Ancillary Administration, Ad Hoc Committee on the Uniform Probate Code*, June 5, 1971].

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**See Generally:**

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §67 (7th ed. 1960), (Supp. 1969).
- 2) *An Interim Report, California and the Uniform Probate Code*, 46 CAL. S.B.J. 290 (1971).
- 3) *Report to the Board of Governors Regarding Ancillary Administration, Ad Hoc Committee on the Uniform Probate Code*, June 5, 1971.

### **Administration of Estates; conservators**

Welfare and Institutions Code §§5350, 5352.1, 5353, 5365 (amended); §§5352.4, 5358.1, 5358.5, 6300.2 (new).  
AB 1872 (Lanterman); STATS 1972, Ch 574

*Makes various changes with regard to conservatorships for gravely disabled persons pursuant to Chapter 3 of the Lanterman-Petris-Short Act.*

Section 5350 of the Welfare and Institutions Code provides for the appointment of a conservator of the estate and/or of a person who is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism. This section has been amended to reduce from ten days to five, the period of time a conservatee has following the hearing on the conservatorship petition to demand a court or jury trial on the issue of his disability. The maximum continuance of the trial date which may be granted pursuant to this section has been reduced from thirty to fifteen days. (The court or jury trial is normally required to commence within 10 days of the date of demand.) This section has also been amended to provide that if the proposed conservatee demands a court or jury trial before the date of the hearing on the conservatorship petition, such demand shall constitute a waiver of the hearing.

Section 5365 requires that a hearing be held on all such petitions within 30 days of the date of the petition. Section 5365 also provides that the court must appoint the public defender or other attorney for the conservatee. This section has been amended to require the appointment within five days of the filing of the petition.

Section 5352.1 provides for establishment of a *temporary* conservatorship. This section has been amended to provide that when the proposed conservatee demands a court or jury trial, the court may extend the temporary conservatorship beyond the thirty day maximum until the date of the disposition of the case. However, no such extension shall exceed six months.

Section 5352.4 has been added to provide that the conservatorship shall continue in the event of an appeal, unless execution of judgment is stayed by the appellate court.

The addition of §5358.1 provides that neither a conservator, temporary conservator, or a public guardian appointed pursuant to this chapter, nor a peace officer acting pursuant to §5385.5 shall be held civilly or criminally liable for the actions of a conservatee. Section 5358.5 has been added to provide that when a conservatee is placed into a facility pursuant to this chapter, and leaves the facility without the permission of the conservator or the person in charge of the facility, the conservator may take the conservatee into custody and return him to the facility, or request a police officer to detain and return such person to the facility. Whenever possible, persons charged with apprehension of persons pursuant to this section shall dress in plain clothes and shall travel in unmarked vehicles.

Section 6300.2 has been added to the Welfare and Institutions Code to provide that any person admitted to a state hospital as a mentally disordered sex offender shall have full patient rights specified in article 7 (commencing with §5325). Formerly, patient rights were granted to such persons pursuant to §6328, which provides that the superintendent of a state hospital or person in charge of a county psychiatric facility may extend to any person confined therein pursuant to this article such of the privileges granted to other patients of the hospital or facility as are not incompatible with his detention or unreasonably conducive to his escape from custody.

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**See Generally:**

- 1) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONSERVATORSHIPS §5.6 (1968).
- 2) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 293 (1971).

**Administration of Estates; P.O.W.-M.I.A. Family Relief Act of 1972**

Civil Code §§2355, 2356 (amended); Probate Code Chapter 3 (commencing with Section 295), §§1751.5, 1755.5, 1776 *et seq.* (new); §§1751, 1754 (amended).

AB 1978 (Karabian); STATS 1972, Ch 988  
(Effective August 16, 1972)  
AB 1408 (Foran); STATS 1972, Ch 632  
(Effective August 9, 1972)

*Extends conservatorship law to "absentees" and specifies procedures for filing petitions and setting hearings as applicable to conservatorship proceedings; provides for the termination of agency in relations involving "absentees"; prescribes procedure for disposition of personal property of the absentee up to \$5,000.*

Section 1751 of the Probate Code has been amended to provide that a conservator of the person and/or property of a person who is an absentee, as defined in §1751.5 *infra*, may be appointed by the superior court upon sufficient evidence of the need therefor.

Section 1751.5 has been added to the Probate Code to define an absentee as either:

- (a) A member of a uniform service covered by United States Code, Title 37, Chapter 10, who is determined by the secretary concerned [37 U.S.C. §101] or his delegate to be in missing status.
- (b) An employee of the United States government or an agency thereof covered by United States Code, Title 5, Chapter 55, Subchapter VII, who is determined by the head of the department or agency concerned, or his delegate, to be in missing status.

Section 1754 of the Probate Code delineates procedures for the filing of a verified petition alleging that the appointment of a conservator is required. Section 1754 has been amended to provide that if the proposed conservatee is an absentee, notice of the proceedings and of the time and place of the hearing on the petition are to be mailed not only to the spouse and relatives within the 2nd degree, but also to the secretary or head of the department concerned, at least 15 days before such hearing date. Section 1754 further provides that if the petition is filed by a person other than the proposed conservatee, a citation to the proposed conservatee must be issued setting forth the time and place of the hearing. Section 1754 has been amended to state that no such citation shall be required if the proposed conservatee is an absentee.

Section 1754 has additionally been amended to require that a certificate complying with §1283 of the Evidence Code be produced at the hearing, showing the determination of the secretary of the military department or the head of the department or agency concerned, or his delegate, that the absentee is in missing status.

Section 1754.5 has been added to provide that the notice required in

§1754 must include the last known military rank and the social security account number and be accompanied by a complete copy of the petition. Delivery of the petition must be by a method which would be sufficient for service of a summons in a civil action. The spouse of the absentee shall not be appointed conservator unless the spouse alleges in the verified petition, and the court finds, that the spouse has not commenced any action or proceeding for judicial or legal separation, divorce, annulment, or adjudication of nullity or dissolution of their marriage.

Section 1755.5 has been added to provide that a petition to terminate the conservatorship may be filed by any party eligible under §1754 to oppose or be made a party to the conservatorship. If such petition alleges, and the court finds, that the absentee has returned to the jurisdiction of the department or agency concerned, or is deceased, the court shall order the conservatorship terminated. An official report or record of such military department or civil department or agency that the absentee has returned or is deceased shall be received as evidence of such fact. Termination of such a conservatorship does not preclude institution of new proceedings for appointment of a conservator for the person and/or estate of the former absentee, for any other appropriate cause specified in §1751.

Section 2355 of the Civil Code has been amended to provide that in the case of a power of attorney, the agency between principal and attorney in fact may be terminated by divorce, dissolution, amendment, or adjudication of the nullity of marriage, or the judicial or legal separation of principal and attorney in fact, or commencement of an action by the attorney in fact for such relief, if the attorney in fact was the spouse of the principal and the principal has become an absentee as defined in §1751.5 of the Probate Code, unless the power of attorney expressly provides otherwise in writing.

Section 2356 of the Civil Code, concerning the termination of an agency by revocation, or the death or incapacity of the principal, has been amended to provide that if the principal is an absentee, the agent and parties concerned shall be deemed to be without actual knowledge of any such revocation, death or incapacity until receipt, by the parties, of notice from the secretary of the department or head of the agency concerned of the termination of such missing status by a finding of death of the absentee.

Chapter 2.5, commencing with §1776, concerning personal property of absentees, has been added to the Probate Code. Section 1777

provides that if the court finds that it will be in the best interests of the absentee, the court may set aside to the family of an absentee, personal property of the absentee situated in California in which the absentee's interest therein does not exceed \$5,000, for the purpose of managing, controlling, encumbering, selling, conveying, or otherwise engaging in any transaction with respect to such property.

Section 1778 requires a verified petition showing that the provisions of Chapter 2.5 are applicable and specifies the contents of the petition in detail.

Section 1779 provides that the court shall set the petition for hearing and that the petitioner shall notify the family of the absentee of the nature, time, and place of the hearing, and send a copy of the petition to such members of the family. Such notice shall also be sent to the secretary concerned or the department head or agency at least 15 days before the hearing. Whenever notice to any officer or agency of this state or of the United States would be required upon petition for appointment of a guardian for an alleged incompetent, such persons must also be notified under this chapter.

Section 1780 provides that if the court finds the allegations of the petition are true and correct, the court may set aside such personal property, situated in California, in which the absentee's interest does not exceed \$5,000. No bond shall be required of any person to whom property of the absentee has been set aside under this chapter.

Section 1781 provides that if the court finds that the value of all the absentee's property, wherever situated, exceeds \$5,000 or that the absentee owns or has any interest in real property, wherever situated, such finding shall not deprive the court of jurisdiction to set aside personal property of the absentee situated in California in which the absentee's interest therein does not exceed \$5,000.

Section 1782 specifies that a lien or interest on any property the absentee holds in joint tenancy shall be included in determining the value of the estate that may be set aside, provided that the joint tenancy interest can only be set aside to that member of the family who is a joint tenant with the absentee.

Section 1783 provides that within 6 months after the absentee has returned to the controllable jurisdiction of the military department or agency concerned, or within 6 months after the determination of death of the absentee, the former absentee or the personal representative of the deceased absentee may, by motion in the same proceeding, require the persons to whom the property was set aside to account for the property



and proceeds, if any. However, this section does not in any manner derogate the finality and conclusiveness of any order, judgment, or decree previously entered in the proceeding.

Chapter 3 (commencing with Section 295) has been added to the Probate Code by Chapter 632 to prescribe a summary procedure for the disposition of an absentee's personal property up to a value of \$5,000.

Section 295.1 provides that if an absentee owns no real property situated in California, and the aggregate value of all the personal property of the absentee situated in California is \$5,000 or less, excluding money owed the absentee by the United States, the family of the absentee may collect, receive, dispose of or engage in any transaction relating to such personal property, if necessary to provide for shelter, food, health care, education, transportation or the maintenance of a reasonable and adequate standard of living for the family of the absentee, *without any judicial proceeding*. Section 295 defines "family of the absentee" as an eligible spouse, or if no eligible spouse, the child or children of an absentee, equally, or if no child or children of an absentee, the parent or parents of an absentee, equally, provided such persons are dependents of the absentee as defined in §401 of Title 37 of the United States Code.

Section 295.1 also establishes a procedure whereby a family can execute an affidavit and have any evidences of interest, indebtedness or right attributable to such items transferred to them. Section 295.2 provides that such procedure shall constitute sufficient acquittance for any payment of money or delivery of property made pursuant to the provisions of Chapter 3 and shall fully discharge such person, representative, corporation, officer or body from any further liability with reference thereto.

Section 295.3 provides the time in which an absentee shall commence any action against any person who executes an affidavit and receives property pursuant to Chapter 3. Such action must be brought either (a) 90 days after the absentee returns to the continental United States after the termination of the condition which caused his classification as an absentee; or (b) two years after the termination of the condition which caused his classification as an absentee, whichever is earlier.

#### *COMMENT*

With reference to the conflict in Southeast Asia, there are more prisoners of war and/or persons missing in action who are from California,

or whose families reside in California, than in any other state [A.B. 1978, CAL. STATS. 1972, c. 988, §9]. This "missing" status causes hardship on the families of such persons because of difficulty in selling property, withdrawing funds, cashing checks, transferring securities, and consummating transactions [See CAL. PROB. CODE §280 *et seq.*]. A similar type of legislation, extending conservatorship to absentees, has already been adopted in Florida [ch. 71-103, (1971) Fla. Reg. Sess. 245].

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**See Generally:**

- 1) CAL. PROB. CODE §280 *et seq.*
- 2) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§179-183 (7th ed. 1960).
- 3) Jalet, *Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons and Absentees*, 54 IOWA L.J. 177 (1968).

### **Administration of Estates; conservatorships**

Welfare and Institutions Code §5352 (amended).  
AB 1851 (Lanterman); STATS 1972, Ch 692

The Lanterman-Petris-Short Act [CAL. WELF. & INST. CODE §5000 *et seq.*] was enacted to end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons and persons impaired by chronic alcoholism; to provide prompt evaluation and treatment of such persons; and to provide individualized treatment, supervision, and placement services by a conservatorship program for gravely disabled persons [CAL. WELF. & INST. CODE §5001]. Prior to amendment, Section 5352 provided that when the professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment determines that *a person in his care* is gravely disabled as a result of mental disorder or impairment by chronic alcoholism, and is unwilling to accept, or incapable of accepting, treatment voluntarily, he may recommend conservatorship to the officer providing conservatorship investigation of the county of residence of the disabled person prior to his admission as a patient in such facility.

Section 5352 has been amended to provide that such a professional person may also recommend conservatorship for a person *without the person being an inpatient in such facility* if the professional person or another professional person designated by him has examined and evaluated the person and determined that: (1) he is gravely disabled; and (2) future examination on an inpatient basis is not necessary for a determination that the person is gravely disabled. Those portions of Section 5352 dealing with petitioning to establish conservatorship, and

county officers acting as temporary conservators, are not affected by Chapter 692.

### COMMENT

Section 5352 will now allow the appointment of a conservator for a gravely disabled person without prior hospitalization for evaluation. This is important in that it will avoid: (1) the unnecessary and potentially harmful dislocation of such a person in cases where the severity of the disability is apparent; and (2) the large cost involved in removing a person to a specified facility for treatment, observation and evaluation [Interview with Dr. James Barter, Deputy Director of Mental Health of Sacramento County, Sacramento, California, July 19, 1972].

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See Generally:

- 1) 2 WITKIN, CALIFORNIA PROCEDURE, *Actions* §§24-35 (1971).
- 2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA CONSERVATORSHIPS (1968).
- 3) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 420 (1972).
- 4) Comment, *California's New Mental Commitment Legislation: Is It Legally Sufficient?*, 6 CAL. WEST. L. REV. 146 (1969).

### Administration of Estates; family allowance

Probate Code §§680, 682, 684 (amended).

AB 1048 (Warren); STATS 1972, Ch 569

Support: State Bar of California

Prior to amendment, Section 680 of the Probate Code provided that the surviving spouse, minor children, and only those adult children who had been declared incompetent by court order were entitled to a family allowance out of the probate estate. As amended, Section 680 provides a family allowance to adult children who are physically or mentally incapacitated from earning a living and who were actually dependent upon the decedent for support. It is, therefore, no longer necessary to obtain a court order declaring incompetency in order for an adult child to receive the family allowance.

Section 682, which excludes persons from such allowance if they have reasonable maintenance derived from other sources, and Section 684, relating to stays of such payments, have been correspondingly amended to include persons within the provisions of Section 680.

### COMMENT

The purpose of the family allowance provided in Section 680 is to "maintain the security of the family during the period of affliction and loss following death . . ." [*In re Wiedemann's Estate*, 228 Cal. App.

2d 362, 373, 39 Cal. Rptr. 496, 502 (1964)]. Since the right to such allowance is entirely statutory, the courts are not empowered to authorize allowances to persons other than those designated in the Probate Code. Thus, prior to the amendment of Section 680, an adult child suffering from muscular dystrophy, cerebral palsy, or other disabling disease could not receive the family allowance, unless he had been declared incompetent by court order pursuant to Section 1460 of the Probate Code.

“There appears to be no reason why such a disabled adult child should not be treated in the same manner as a widow, widower, minor child, or an adult child who has been declared incompetent by an order of court, and should therefore be entitled to a family allowance” [STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-8]. Also, such incapacity can now be determined by the Probate Court, rather than entailing the time and expense of a separate court proceeding.

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**See Generally:**

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§309-311 (7th ed. 1960).
- 2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DECEDENT ESTATE ADMINISTRATION VOL. I §§11.5, 11.6 (1971).
- 3) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 7-8.

### **Administration of Estates; conflict of interest**

Government Code §§27443 (amended); 27443.5 (new); Penal Code §800 (amended).

AB 1057 (Beverly); STATS 1972, Ch 1046

Section 27443 of the Government Code, as amended, provides that every person holding the office of public administrator, public guardian, or public conservator and any deputy or agent of such officer is guilty of a crime if he: (a) purchases, directly or indirectly, the property of or claim against any estate administered by those named above; or (b) acts upon any transaction or expenditure connected with the estate such officials administer when he has a financial interest in the matter or, with knowledge of such interest, is associated in business with anyone who has such interest. Section 27443 is limited to officials acting in their official capacities and is not applicable to any act specifically authorized by court order. Prior to this amendment this section applied only to public administrators, their agents and employees, and a violation was a misdemeanor, rather than a felony. Section 27443, as amended, further provides that an offender shall forfeit his office and

may be imprisoned in the state prison for not more than 5 years. Prior to this amendment the offender could only be punished by imprisonment in the county jail for not more than one year and/or a fine.

Section 27443.5 provides that employees of the public administrator, public guardian, or public conservator are subject to the provisions of §27443, but only with respect to the administration of estates by their employing officer.

Section 800 of the Penal Code, dealing with the statute of limitations for felonies, has been amended by Chapter 1046 to provide that the statute of limitations for violations of §§72 (fraudulent claims), 118 (perjury), 118a (perjury via false affidavit) of the Penal Code, or §§1090 (conflict of interest by public officer), or 27443 (discussed above) of the Government Code shall be three years from time of *discovery* of the crime. Previously, under §800, prosecutions of the above mentioned felonies were subject to a three-year statute of limitations from the time of *commission* of the crime.

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**See Generally:**

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §190 (7th ed. 1960); §191 (Supp. 1969).
- 2) 2 WITKIN, CALIFORNIA CRIMES, *Crimes Against Government Authority* §873 (1963), (Supp. 1969).

### **Administration of Estates; probate title disputes**

Probate Code §§851.5, 852, 853, 1240 (amended).

AB 1812 (Moorhead); STATS 1972, Ch 641

Support: State Bar of California

Section 851.5 of the Probate Code has been amended to provide that if a person dies in possession of, or holding title to, real or personal property which, or some interest in which, is claimed to belong to another, or *dies having a claim to real or personal property, title to or possession of which is held by another*, the executor, administrator, or *any claimant* may file with the clerk of the court a verified petition setting forth the facts upon which the claim is predicated. The principal impact of the above amendment is to allow the probate court to determine controversies concerning title to property where the party asserting an interest is claiming adversely to the estate and is not in privity with it [See Estate of Hart, 51 Cal. 2d 819, 832, 337 P.2d 73 (1959); Estate of Dabney, 37 Cal. 2d 672, 676, 234 P.2d 962 (1951)].

The petitioner (executor, administrator, or any claimant) shall publish notice of the hearing pursuant to §6063 of the Government Code

in a newspaper in that county, or if no newspaper, post notice in 3 of the most public places in the county at least 10 days before the hearing. The petitioner shall have a copy of the petition and notice of the hearing mailed to the executor or administrator, all known heirs, legatees, and devisees, and (in accordance with §410.10 of Part 2 of the Code of Civil Procedure within 10 days) to any other person who may have an interest in the property. Any interested person may request, and the court shall grant, a continuance for a reasonable time to file a response. Also, any person claiming title to or an interest in property which is the subject matter of the petition may object to the filing in the probate court if it is not the proper court under any other provision of law for the trial of such civil action and, if established, the court shall not grant the petition. If any civil action is pending on the subject matter of such petition, the court shall abate the petition until the action is concluded.

Section 852 has been amended to enable the court, if it is satisfied that a conveyance, transfer, or other order should be made, to make an order either directing the executor or administrator to execute that order to the party entitled, or to grant appropriate relief. If such order relates to real property, it must be recorded with the county recorder.

Section 853 has been amended to conform with the previous changes in regard to the evidence of authority of the order, possession of the property, and the execution of the conveyance or transfer by the executor or administrator or other person according to directions of the order.

Section 1240 has been amended to provide that an appeal from an order adjudicating the merits of any claim under §§851.5, 852 or 853 may be made.

#### *COMMENT*

Prior to this chapter, probate courts generally could not pass upon assertions of title to property by those persons who were not in privity with the estate and were claiming adversely to it [*See Estate of Hart, Estate of Dabney, supra*]. A number of exceptions to this general rule were pronounced in *Estate of Baglione* [65 Cal. 2d 192, 417 P.2d 683, 53 Cal. Rptr. 139 (1966)]; these exceptions arise when the controversy has sufficient connection with a pending proceeding to be properly litigated and fall into three general categories: those arising out of the relationship between the parties; those arising out of the na-

ture of the claim; and those arising out of the nature of the claim plus the claimant's relationship to the estate. Two specific exceptions were stated under "the relationship between the parties:" claims to assets from the estate asserted by an executor or administrator in his individual capacity, and determinations as to whether an assignment of the interest of an heir, legatee or devisee to a third party is valid. Two specific exceptions were stated under "the nature of the claim to the property:" the claim of a surviving wife to her share of the community property, and the adjudication of disputes between claimants to property conceded to have been acquired in the course of the probate proceedings. Under "the nature of the claim plus the claimant's relationship to the estate," only one specific exception was given: the determination of all additional related claims against those in privity with the estate relating to a piece of property in which the claimant asserts claims as a legatee, devisee or heir.

The court in *Baglione* went on to state that the rationale for these exceptions is the conservation of time, energy and money of all concerned. The court also stated that to deny a superior court sitting in probate the power to determine the whole controversy between parties before it is pointless. Yet, the judicial exceptions recognized in *Baglione* are not complete and it has become increasingly difficult to determine the precise limits of the jurisdiction of the probate court. For example, it was held in *Estate of Kurt* [84 Cal. App. 681, 189 P.2d 528 (1948)] that although a surviving wife is entitled to litigate her claim to alleged community property in the probate estate because she obtains her title through the estate, a surviving husband ordinarily cannot litigate the same question in the same forum because his interest vests at death without administration. To a limited extent, *Estate of Kurt* was disapproved in *Wood v. Security First National Bank* [46 Cal. 2d 697, 299 P.2d 657 (1956)], yet the confusion remains.

Thus, the apparent intent of Chapter 641 is to do away with artificial concepts of privity and confusing determinations of "connection with the estate" by providing that the probate court may hear any claim involving property in which the decedent may have an interest. Opponents to Chapter 641 may argue that this expansion will have the effect of prolonging probate and inflating attorney's fees out of the estate [STATE BAR OF CALIFORNIA, 1967 CONFERENCE RESOLUTION 65].

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**See Generally:**

- 1) *Estate of Baglione*, 65 Cal. 2d 192, 417 P.2d 683, 53 Cal. Rptr. 139 (1966).

**Administration of Estates; disclaimer of interests**

Probate Code §190 *et seq.* (new); Revenue and Taxation Code §§13409, 15209 (repealed); §§13409, 15209 (new).  
SB 1233 (Coombs); STATS 1972, Ch 990  
(Effective August 16, 1972)

Chapter 990 adds §§190-190.10 to the Probate Code to authorize persons entitled to intestate interests in a decedent's estate, persons entitled to interests under a decedent's will, and persons entitled to certain other interests to disclaim and renounce such interest. Section 190 defines "beneficiary," "interest," "disclaimer," and "disclaimant." For purposes of Chapter 990, a "beneficiary" means and includes any person entitled, but for his disclaimer, to take an interest: (a) by intestate succession; (b) by devise; (c) by legacy or bequest; (d) by succession to a disclaimed interest; (e) by virtue of an election to take against a will; (f) as beneficiary of a testamentary trust; (g) pursuant to the exercise or nonexercise of a power of appointment; (h) as donee of any power of appointment; or (i) as beneficiary of an inter vivos gift, whether outright or in trust.

The disclaimer shall: (a) identify the decedent or donor; (b) describe the property or part thereof or interest therein disclaimed; (c) declare the disclaimer and extent thereof; and (d) be signed by the disclaimant (§190.1). A disclaimer on behalf of an infant, incompetent, conservatee or decedent shall be made by the guardian of the estate of the incompetent, guardian of the estate of the infant, the conservator of the estate of the conservatee, or the personal representative of the decedent (§190.2).

Section 190.3 specifies that a disclaimer, to be effective, shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest, and this section establishes conclusive presumptions as to what is a reasonable time [§190.3(a)] and as to what is *not* a reasonable time [§190.3(c)] with regard to interests created by wills, intestate succession, inter vivos trusts or other cases. Section 190.3(b) states that if the disclaimer is not filed within the times conclusively presumed to be reasonable as set forth in subsection (a), the disclaimant shall have the burden to establish that the disclaimer was filed within a reasonable time after he acquired knowledge of the interest.

Chapter 990 adds §190.4 to establish a filing procedure for disclaimers of the interests mentioned above.

Section 190.5 provides that a disclaimer, when effective, shall be



binding upon the beneficiary and all persons claiming by, through or under him. A person who could file a disclaimer under Chapter 990 may instead file a written waiver of a right to disclaim and such waiver, when filed, shall be similarly binding. Unless otherwise provided in the instrument creating the interest disclaimed, the interest or future interest disclaimed shall descend, go, or be distributed or continued to be held as if the beneficiary disclaiming had predeceased the person creating the interest (§190.6). In every case, the disclaimer shall relate back for all purposes to the date of the creation of the interest.

A disclaimer may not be made after the beneficiary has accepted the interest to be disclaimed (§190.7). Section 190.7 further provides that an acceptance does not preclude a beneficiary from thereafter disclaiming all or part of any interest to which he became entitled because another person disclaimed an interest and of which interest the beneficiary or person able to disclaim on his behalf had no knowledge. If a disclaimer has not previously been filed, a beneficiary will be deemed to have accepted an interest if he, or someone acting on his behalf, makes a voluntary assignment or transfer of the interest (or contract to assign or transfer), executes a written waiver of the right to disclaim the interest, or sells or otherwise disposes of the interest pursuant to judicial process.

The right to disclaim shall exist irrespective of any limitation imposed on the interest of a beneficiary in the nature of an expressed or implied spendthrift provision or other similar restriction (§190.8). Any interest created prior to the effective date of Chapter 990 which has not been accepted, may be disclaimed after the effective date of this chapter, provided however, that no interest which has arisen prior to the effective date of Chapter 990 in any person other than the beneficiary, shall be destroyed or diminished by any action of the disclaimant taken pursuant to Chapter 990 (§190.9).

Chapter 990 has also repealed and added §§13409 and 15209 to the Revenue and Taxation Code to provide that inheritance tax shall apply to disclaimed interests only upon transfer to the ultimate recipient (§13409), and to provide that a disclaimer shall *not* be deemed to constitute a gift by the person disclaiming for purposes of the gift tax (§15209).

#### *COMMENT*

Under prior law, a devisee or legatee could renounce or disclaim,

and the renunciation related back so that no estate vested in him [Estate of Nash, 256 Cal. App. 2d 560, 64 Cal. Rptr. 298 (1967); Estate of Meyer, 107 Cal. App. 2d 799, 810, 238 P.2d 597 (1951)]. An "heir" could also renounce his expectant share but the effect was different; the estate vested in the heir *eo instanti* upon death of the ancestor, and no act of his was required to perfect title [4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §56(b) (7th ed. 1960)]. He could not, by any act, cause the estate to remain in the ancestor, for the latter was incapable of holding it after his death. The heir could not, by a renunciation or disclaimer, prevent the passage of title to himself [4 Witkin §56(b), *supra*].

Chapter 990 appears to be consistent with prior case law concerning disclaimers, except as it concerns the effect of a disclaimer by an intestate heir. Chapter 990, in §190.6, states that the interest disclaimed shall be distributed as if the heir had predeceased the ancestor, and, therefore, no estate would immediately vest in the heir upon the death of the ancestor.

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**See Generally:**

- 1) 4 WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §56(b) (7th ed. 1960).