



1-1-1993

Administration of Estates

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

 Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Administration of Estates*, 24 PAC. L. J. 603 (1993).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol24/iss2/13>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Administration of Estates

Administration of Estates; civil proceedings

Civil Code § 56.10 (amended); Probate Code § 2900 (repealed & new); §§ 1470, 1472, 1513, 1890, 2550, 2580, 2620.2, 2640, 2641 (amended).
SB 1455 (Mello); 1992 STAT. Ch. 572

Existing law provides for court appointment of legal counsel for a ward¹ or conservatee² and that the court may fix a reasonable sum³ for compensation and expenses of legal counsel.⁴ Existing law additionally provides for the compensation of guardians⁵ and conservators.⁶ Chapter 572 provides that the court may authorize compensation of legal counsel for services rendered to a conservatee prior to date of appointment by the court.⁷ Chapter 572 provides for similar compensation for guardians and conservators.⁸

Existing law requires a court investigator⁹ to make an investigation and file a recommendation with the court¹⁰ concerning

1. See BLACK'S LAW DICTIONARY 1583 (6th ed. 1991) (defining ward as a person placed by authority of law under the care of a guardian); *In re Jennings*, 368 N.E.2d 864, 868 (Ill. 1977) (defining ward as a person, especially an infant, placed by authority of law under the care of a guardian; a person over whom or over whose property a guardian is appointed).

2. See CAL. PROB. CODE § 29 (West 1991) (defining conservatee).

3. See *id.* § 1472(a)(1) (West 1991) (providing for the payment of a reasonable sum for attorney's fees and expenses).

4. *Id.* §§ 1470, 1472 (West 1991). See generally *Trynin v. D'Esopo*, 49 Cal. 3d 868, 879, 782 P.2d 232, 238, 264 Cal. Rptr. 93, 99 (1989) (stating as a reason for the compensation that if attorneys have no assurance of fair compensation, they will be reluctant to take on probate services).

5. See CAL. PROB. CODE § 2350 (West 1991) (defining guardian as guardian of the person).

6. *Id.* §§ 2640, 2641 (West 1991); see *id.* § 2400 (West 1991) (defining conservator); *id.* § 2623 (West 1991) (authorizing compensation of conservator at time of accounting for reasonable expenses incurred during tenure as conservator).

7. *Id.* § 1472(a)(1) (amended by Chapter 572). See SENATE COMMITTEE ON JUDICIARY, ANALYSIS OF SB 1455, at 5 (May 5, 1992) (stating that Chapter 572 allows the court, within its discretion, to award compensation for advice rendered prior to conservatorship). Chapter 572 is in response to *Young v. Thomas*, 210 Cal. App. 3d 812, 258 Cal. Rptr. 574 (1989), which held that the court was prohibited from setting such compensation because the court's duty was to forestall wasteful practices. *Id.*

8. CAL. PROB. CODE § 2641(b) (amended by Chapter 572).

9. See *id.* § 1419 (West 1991) (defining court investigator); see also *id.* § 1454 (West 1991) (describing the duties and responsibilities of the court investigator).

10. See *id.* § 1418 (West 1991) (defining the court).

every proposed guardianship of a person¹¹ or estate.¹² Chapter 572 specifies that the investigator shall have access to the proposed ward's medical, psychological, school, probation and social services records for purposes of writing the report.¹³

Existing law provides that a court may appoint a conservator for a person if the court finds that the person is unable to give informed consent¹⁴ to medical treatment.¹⁵ Under existing law, only a licensed physician¹⁶ may execute a declaration that the conservatee lacks the capacity to give informed consent.¹⁷ Chapter 572 permits a licensed psychologist¹⁸ to make that determination.¹⁹

Existing law requires a guardian or conservator to obtain court authorization to borrow money,²⁰ secure a loan,²¹ or lease,²²

11. See *id.* § 2350 (West 1991) (defining guardian of a person); see also *id.* § 1510 (West 1991) (describing who may file a petition for appointment); Robert H. Mnookin, *Tribute: In Memory of Jay M. Spears: The Guardianship of Phillip B.: Jay Spears' Achievement*, 40 STAN. L. REV. 841 n.34 (1988) (discussing the difference between a guardian of a person's estate and a guardian of a person).

12. CAL. PROB. CODE § 1513 (West 1991); see *id.* § 2400 (West 1991) (defining guardian of an estate). See generally William S. Johnstone, *California Conservatorships and Guardianships* §§ 17.1-17.45 (Cal. Continuing Educ. Bar) (1990) (providing forms and procedural guides for court investigations and reports).

13. CAL. PROB. CODE § 1513(e) (amended by Chapter 572). The investigator shall have access to an oral or written summary of the ward's medical or psychological records prepared by the physician, psychologist or psychiatrist. *Id.*; see SENATE COMMITTEE ON JUDICIARY, ANALYSIS OF SB 1455, at 5 (May 5, 1992) (stating that Chapter 572 is necessary because court investigators have been experiencing problems obtaining information without a court order from certain schools, hospitals and psychologists). See generally Audrey S. Garfield, *Elder Abuse and the States' Adult Protective Services Response: Time For a Change in California*, 42 HASTINGS L.J. 859, 878 (1991) (discussing an elder person's right to privacy in light of state guardianship statutes); Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 109 (1984) (examining the family's right to privacy when a child is being investigated for determining guardianship rights).

14. See generally *Cobbs v. Grant*, 8 Cal. 3d 229, 239, 502 P.2d 1, 7, 104 Cal. Rptr. 505, 511 (1972) (discussing informed consent to medical treatment).

15. CAL. PROB. CODE §§ 1801, 1880 (West 1991).

16. See CAL. BUS. & PROF. CODE §§ 2050-2079 (West 1990 & Supp. 1992) (establishing requirements for a physician's license).

17. CAL. PROB. CODE § 1890(c) (West 1991).

18. See CAL. BUS. & PROF. CODE § 2902(a) (West 1990) (defining licensed psychologist).

19. CAL. PROB. CODE § 1890(c) (amended by Chapter 572).

20. See *id.* § 2551 (West 1991) (permitting the borrowing of money for the estate as specified).

21. See *id.* § 2552 (West 1991) (permitting the giving of security for the estate as specified).

22. See *id.* § 2553 (West 1991) (permitting the leasing of estate property as specified).

convey,²³ or exchange²⁴ property of the estate.²⁵ Chapter 572 additionally requires court authorization for a guardian or conservator to lend money from the estate.²⁶

Under existing law a public guardian²⁷ may take possession of a person's property which is subject to loss, injury, waste or misappropriation if the public guardian intends to apply for appointment.²⁸ Chapter 572 additionally authorizes the public guardian to deny access to, or prohibit residency to, anyone living in the home of the proposed ward or decedent who does not have a written rental agreement or other legal right to occupy the home.²⁹

LGC

Administration of Estates; litigation and probate law

Civil Code § 2480.5 (new); §§ 1363, 2225, 2412, 2476, 3294 (amended); Code of Civil Procedure §§ 353, 374, 377, 385, 389.6, 390 (repealed); § 388 (repealed and new); §§ 368.5, 369.5, 375 (new); §§ 355, 367, 369, 376 (amended); Probate Code § 573 (repealed); §§ 258, 10520, 18100.5 (new); §§ 551, 6320, 6321, 6611, 7664, 9103, 9391, 9392, 10501, 13107.5, 13109, 13156, 13204, 13554, 15686, 15804, 16314, 19103, 19104, 19400, 19401, 19402 (amended).
SB 1496 (Lockyer); 1992 STAT. Ch. 178

23. *See id.* § 2554 (West 1991) (permitting the conveying of estate property as specified).

24. *See id.* (permitting the exchange of estate property as specified).

25. *Id.* § 2550 (amended by Chapter 572).

26. *Id.*

27. *See id.* § 2920 (West 1991) (providing for application and appointment of public guardian).

28. *Id.* § 2900 (enacted by Chapter 572).

29. *Id.*

Under prior law, personal representatives¹ of a decedent could bring a court action on behalf of the decedent or continue an action brought by a plaintiff if the plaintiff died while the action was pending.² Chapter 178 provides that the decedent's successor in interest³ may bring an action on behalf of the decedent if there is no personal representative.⁴

Prior law provided that actions against the decedent commenced after the death of the decedent could be asserted against the decedent's personal representative.⁵ Prior law additionally provided that actions commenced before the death of the decedent could be continued against either the personal representative or successor in

1. See CAL. PROB. CODE § 58 (West 1991) (defining personal representative as an executor, administrator, administrator with the will annexed, special administrator, or successor personal representation).

2. 1990 Cal. Legis. Serv. 140, sec. 1, at 928 (West) (amending Cal. Civ. Proc. Code § 353); 1988 Cal. Legis. Serv. ch. 1199, sec. 5, at 2935 (West) (amending CAL. CIV. PROC. CODE § 385). Prior law required the representatives to bring the action within six months of the death of the decedent, and the time limit for bringing the action is required to have expired before the decedent's death. 1990 Cal. Legis. Serv. ch. 140, sec. 1, at 928 (West) (amending CAL. CIV. PROC. CODE § 353); see *Johnson v. Simonelli*, 231 Cal. App. 3d 105, 110, 282 Cal. Rptr. 205, 208 (1991) (holding that a judgment for legal malpractice rendered after a party died during the action but before the personal representative was made a party was an abuse of discretion); *Kinsler v. Superior Court*, 121 Cal. App. 3d 808, 812, 175 Cal. Rptr. 564, 565 (1981) (holding that the death of the husband during a divorce proceeding did not abate the jurisdiction of the court).

3. See CAL. CIV. PROC. CODE § 377.11 (enacted by Chapter 178) (defining decedent's successor in interest).

4. *Id.* § 377.30 (enacted by Chapter 178). An action of the decedent must be brought either within six months after the person's death or within the time that the limitations period that would have been applicable had the person not died. *Id.* § 366.1(a)-(b) (enacted by Chapter 178). On motion after the death of the decedent, the court must allow a pending action or proceeding to be continued by the personal representative of the decedent. *Id.* § 377.31 (enacted by Chapter 178). If there is no personal representative, the action may be continued by the successor in interest. *Id.* In order to commence or continue an action, the successor in interest must file an affidavit with the court. *Id.* § 377.32 (enacted by Chapter 178). Recovery of any damages is limited to the loss or damage that the decedent sustained before death including penalties, punitive, or exemplary damages. *Id.* § 377.34 (enacted by Chapter 178).

5. 1990 Cal. Stat. ch. 140, sec. 1, at 928 (amending CAL. CIV. PROC. CODE § 353). Prior law mandated that the actions be brought within one year of the death. *Id.*; see *Johnson*, 231 Cal. App. 3d at 110, 282 Cal. Rptr. at 208 (holding that the judgment against the deceased was not valid if rendered before the personal representative was made a party to the action); *Wills v. Williams*, 47 Cal. App. 3d 941, 945, 121 Cal. Rptr. 420, 422 (1975) (holding that the excess of a claim for damages which exceeded the maximum insurance coverage was not automatically waived upon the death of the defendant).

interest.⁶ Chapter 178 provides that actions may be brought against the successor in interest of the defendant even where the action was brought after the death of the decedent.⁷

Under existing law, a person may use a form to provide an agent with the authority to act on that person's behalf.⁸ Chapter 178 provides that if a person refuses to recognize the authority of an agent⁹ with a properly executed form power of attorney,¹⁰ that person may be compelled by the court to honor the authority of the agent and ordered to pay the attorney's fees of the agent.¹¹

Existing law provides that third parties are fully protected in their dealings with trustees¹² when the third party has relied in good faith,¹³ for valuable consideration,¹⁴ and without actual knowledge

6. 1988 Cal. Stat. ch. 1199, sec. 5, at 3878 (amending CAL. CIV. PROC. CODE § 385); see Arthur K. Marshall, *Suits Against Decedents*, CAL. ST. B.J. 588, 590 (1972) (discussing actions pending at the death of the decedent).

7. CAL. CIV. PROC. CODE § 377.40 (enacted by Chapter 178). Actions against the successor in interest may only be brought where another statute provides direct liability of the successors. *Id.* On motion, existing claims against the decedent may be continued against the personal representative or successor in interest where there is an express statutory provision making successors in interest personally liable. *Id.* § 377.41 (enacted by Chapter 178). All damages are recoverable that could be recovered had the decedent lived, except punitive or exemplary damages. *Id.* § 377.42 (enacted by Chapter 178).

8. CAL. CIV. CODE § 2475 (West Supp. 1992). The statutory form power of attorney is legally sufficient if: (1) The wording of the form substantially complies with § 2475; (2) the form is properly completed; and (3) the signature of the principal is acknowledged. *Id.* § 2476(a)-(c) (amended by Chapter 178).

9. See *id.* § 2295 (West 1985) (defining agent).

10. See *id.* 2410(c) (West Supp. 1992) (defining power of attorney as the written power of attorney which designates an attorney in fact for a natural person).

11. *Id.* § 2480.5(a)-(b) (enacted by Chapter 178). A third person may not be compelled to honor the power of the attorney if the principal could not have compelled the third person to act in the same circumstances. *Id.* § 2480.5(a) (enacted by Chapter 178). A third person's refusal to recognize a power of attorney is unreasonable if it is based solely on the fact that it is not on a form prescribed by that third person. *Id.* § 2480.5(d) (enacted by Chapter 178).

12. See CAL. PROB. CODE § 84 (West 1991) (defining trustee).

13. See CAL. COM. CODE § 1201 (West Supp. 1992) (defining good faith); Efron v. Kamanovitz, 249 Cal. App. 2d 187, 192, 57 Cal. Rptr. 248, 256 (1967) (defining good faith as a state of mind denoting honesty of purpose, freedom from intention to defraud, and being faithful to one's duty or obligation).

14. See CAL. CIV. CODE § 1605 (West 1982) (defining good consideration as a benefit conferred or agreed to be conferred or prejudice suffered or agreed to be suffered by a promisee as an inducement to the promisor when the promisor is not already legally entitled to the consideration); Horton v. Kyburz, 53 Cal. 2d 59, 62, 346 P.2d 399, 403 (1959) (holding that good consideration is the same as valuable consideration); *In re Bray's Estate*, 230 Cal. App. 2d 136, 140, 40 Cal. Rptr. 750, 753 (1964) (providing that consideration must be an act or return promise bargained for in

that the trustee is exceeding its power even if the trustee has exceeded its power.¹⁵ Chapter 178 provides that where a trustee voluntarily signs an affidavit indicating that the trustee has the power sought to be exercised, third persons who refuse to accept the exercise of the power stated may be liable for attorney's fees in a proceeding to confirm the powers of the trustee.¹⁶

Under existing law the Independent Administration of Estates Act¹⁷ provides that personal representatives may make specified preliminary distributions without court approval.¹⁸ Chapter 178 expands the scope of the distributions to include certain personal property with an aggregate value of \$50,000, cash not to exceed \$10,000, and income received during the administration of the estate.¹⁹

Prior law required the court upon a motion of an interested party, to consolidate a wrongful death action with an action surviving the

exchange for a promise).

15. CAL. PROB. CODE § 18100(b) (West 1991). A third person is not required to inquire whether the trustee is exceeding its power and may assume that such power exists. *Id.* § 18100(a) (West 1991); *Hillweg v. Boyer*, 89 Cal. App. 314, 321, 264 P. 556, 559 (1928) (holding that a bona fide purchaser without notice is not liable to the owner for breach of trust); *Huntoon v. Southern Trust and Commerce Bank*, 107 Cal. App. 121, 130, 290 P. 86, 88 (1930) (stating that knowledge of trust may be imputed to a grantee in a deed from trustee where facts would put a prudent man on inquiry).

16. CAL. PROB. CODE § 18100.5(c) (enacted by Chapter 178). The affidavit must state that the trustee has the power to act, the name of the trust, and that the trust is in effect. *Id.* § 18100.5(a) (enacted by Chapter 178). When a third person relies in good faith on an affidavit, the third person is not required to inquire whether the trustee has the power it is exercising and the third person will be fully protected just as if the trustee had the full power for the actions. *Id.* § 18100.5(b)(1)-(2) (enacted by Chapter 178). A third person's failure to demand an affidavit does not affect the protection provided under § 18100. *Id.* § 18100.5(d) (enacted by Chapter 178).

17. See *id.* §§ 10400-10406 (West 1991) (enacting the general provisions of the Independent Administration of Estates Act).

18. *Id.* § 10502 (West 1991). The personal representative may take numerous actions as long as notice of the proposed action is provided. *Id.* § 10510 (West 1991). The personal representative may: (1) sell or exchange real property; (2) sell or incorporate a business; (3) abandon tangible personal property; (4) borrow or encumber property; (5) grant options to purchase real property of the estate; (6) transfer real property upon exercise of the option; or (7) convey real or personal property. *Id.* §§ 10511-10517 (West 1991).

19. *Id.* § 10520(a)-(c) (enacted by Chapter 178). A personal representative may make certain preliminary distributions if the time for filing claims has expired and distributions may be made without loss to the creditors or injury to the estate or any interested person. *Id.* Personal property which may be distributed include household furniture, motor vehicles, clothing, jewelry, and other tangible articles of a personal nature. *Id.* § 10520(b) (enacted by Chapter 178).

death of the decedent brought out of the same wrongful act.²⁰ Chapter 178 provides that the court possesses discretion to consolidate the actions.²¹

Under existing law, a person who feloniously and intentionally kills a person is barred from receiving any property interest or life insurance benefits of the decedent.²² Chapter 178 additionally provides that such a person is barred from bringing an action for wrongful death of the decedent or recovering any part of such an action brought by the decedent's personal representative.²³

Existing law permits certain instruments²⁴ to provide for the designation of a beneficiary,²⁵ payee, or owner that is a trustee to be in the will of the person leaving the property.²⁶ Chapter 178 permits

20. 1983 Cal. Stat. ch. 842, sec. 12, at 277 (amending CAL. CIV. PROC. CODE § 377). Under prior law, a wrongful death action was one which was brought when the death of a person was caused by the wrongful act or neglect of another. *Id.* The heirs or personal representatives of the decedent could maintain an action against the wrongdoer or their personal representative. *Id.*; see Michael Fish, *Justifying the Denial of Wrongful Death Action to Cohabitants*, 20 SAN DIEGO L. REV. 417, 423 (1983) (discussing the California Supreme Court's refusal to recognize a cohabitant as an interested party for the purposes of a wrongful death action).

21. CAL. CIV. PROC. CODE § 377.62(a) (enacted by Chapter 178). A wrongful death is a death caused by the neglect or wrongful act of another. *Id.* § 377.60 (enacted by Chapter 178). The action may be brought by the decedent's surviving spouse, children, or issue of the deceased children. *Id.* § 377.60(a) (enacted by Chapter 178). Otherwise, persons entitled to the property of the decedent under intestate succession may bring the action. *Id.*

22. CAL. PROB. CODE §§ 250(a), 252 (West 1991 & Supp. 1992). Such a person may not receive any interest or benefit under the will of the decedent including any general or special power of appointment. *Id.* The estate of the decedent passes as if the killer pre-deceased the decedent. *Id.* § 250(b)(1) (West Supp. 1992); see *In re Estate of Kramme*, 20 Cal. 3d 567, 573, 573 P.2d 1369, 1372, 143 Cal. Rptr. 542, 545 (1978) (holding that an intentional act which unintentionally kills the decedent will not bar the inheritance); *In Re Estate of McGowan*, 35 Cal. App. 3d 611, 618, 111 Cal. Rptr. 39, 44 (1973) (holding that persons need not be convicted in causing the death of the decedent or even be charged for causing the death, and that the court may make the determination based on a preponderance of the evidence). See generally Nelson H. Wild, *Felonious Heir in California*, 49 CAL. ST. B.J. 528 (1974) (discussing *In Re Estate of McGowan*).

23. CAL. PROB. CODE § 258 (enacted by Chapter 178).

24. See *id.* § 6320(b) (amended by Chapter 178) (defining instruments). The term instruments includes: (1) insurance, annuity, or endowment contracts; (2) pension, retirement benefit, death benefit, stock bonus, profit-sharing, or employees' saving plans or contracts; and (3) self-employed retirement plans, individual annuities or accounts under the Internal Revenue Code. *Id.* § 6320(a)(1)(3) (amended by Chapter 178).

25. See *id.* § 262 (West 1991) (defining beneficiary).

26. *Id.* § 6321 (amended by Chapter 178). The designation may occur before or after the execution of the designator's will, and is not required to comply with the formalities for execution of a will. *Id.*

additional written instruments to provide for such a designation of a beneficiary.²⁷

DCHIV/MLM

Administration of Estates; minors and incompetents--special needs trusts

Probate Code §§ 3604, 3605 (new); § 3602 (amended).
AB 3328 (Horcher); 1992 STAT. Ch. 355

Under existing law, when a court grants judgment or approves settlement on a civil claim providing for the payment of money or other property to a minor¹ or incompetent² adult, the balance remaining after all expenses, fees, and costs are paid must be delivered to the guardian or conservator of the estate.³ Existing law also provides that a guardian, conservator, or any interested person⁴

27. *Id.* § 6320(b)(4)-(5) (amended by Chapter 178). Chapter 178 permits the designation of beneficiaries for multi-party accounts, such as a joint account, a pay on death account, and a Totten trust. *Id.* Chapter 178 also permits designation of a beneficiary in instruments described in § 5000. *Id.*

1. *See* CAL. PROB. CODE § 3901(k) (West 1990) (defining a minor as an individual who has not attained the age of eighteen or has not reached the age at which custodial property may be distributed).

2. *See id.* § 3603 (West 1990) (defining incompetent person as a person for whom a conservator may be appointed).

3. *Id.* § 3602 (amended by Chapter 355); *id.* §§ 3600-3601 (West 1990); *see* CAL. CIV. PROC. CODE § 372 (West Supp. 1992) (requiring that a guardian, conservator, or guardian ad litem, appear on behalf of a minor or incompetent adult who is a party to litigation); *see also id.* § 373 (West Supp. 1992) (specifying the procedure for appointing a guardian ad litem). The guardian, conservator, or guardian ad litem, is empowered to agree to a judgment or to compromise and settle claims for the minor or incompetent adult. *Id.* § 372 (West Supp. 1992); *see* CAL. PROB. CODE § 3500(a) (West 1990) (permitting the parents of a minor not under guardianship to compromise and settle claims for the child); *cf.* TEX. PROB. CODE ANN. § 234(5) (West 1980) (empowering the court to authorize a personal representative to compromise and settle claims on behalf of the person). The remaining balance must be delivered to the guardian or conservator of the estate if one exists. CAL. PROB. CODE § 3602(b) (amended by Chapter 355); *see id.* § 2400 (West 1990) (defining guardian and conservator of the estate); *id.* § 2401 (West 1990) (requiring guardians and conservators to exercise ordinary care and diligence in managing and controlling an estate); *see also id.* § 2401.3 (West 1990) (specifying that a guardian or conservator is liable for breach of a fiduciary duty).

4. *See* CAL. PROB. CODE § 48 (West 1990) (defining interested person).

may petition the court to have all or part of the remaining balance deposited⁵ in a financial institution⁶ or transferred to a custodian⁷ for the benefit of the minor or incompetent person.⁸

Under Chapter 355, a court granting judgment or approving settlement on a civil claim providing for the payment of money or other property to a disabled⁹ minor or incompetent adult, may order the remaining balance paid into a special needs trust¹⁰ for the individual's benefit.¹¹ Chapter 355 further provides that the statute of limitations for claims by a public entity¹² against the beneficiary¹³ of a special needs trust is tolled until the trust is

5. See *id.* § 2456 (West 1990) (defining deposits that require court authorization prior to withdrawal).

6. See *id.* § 3901(h) (West 1990) (defining financial institution).

7. See *id.* § 3901(g) (West 1990) (defining custodian).

8. *Id.* § 3602(b), (c)(1) (amended by Chapter 355); *cf.* TEX. PROB. CODE ANN. § 389(A) (West 1980) (providing that a guardian may petition the court for authorization to invest money in a trust for the future benefit of the ward). All or a portion of the remaining balance may be transferred to a custodian for the benefit of a minor under the California Uniform Transfers to Minors Act. CAL. PROB. CODE § 3602(c)(2) (amended by Chapter 355); see *id.* § 3909 (West Supp. 1992) (providing for the creation and control of custodial property under the California Uniform Transfers to Minors Act).

9. See WELF. & INST. CODE § 4512(a) (West 1990) (defining developmental disability).

10. The term special needs trust is not defined by California statute, for definitions that may be helpful, see, CAL. PROB. CODE § 82 (West 1990) (defining trust); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Trusts* §§ 9, 165, 166 (1990) (defining the elements of a trust and the characteristics of spendthrift trusts).

11. CAL. PROB. CODE § 3602(d) (amended by Chapter 355); *id.* § 3604(b) (enacted by Chapter 355); see SENATE COMM. ON JUDICIARY, COMM. ANALYSIS OF AB 3328 at 3 (June 9, 1992) (stating that special needs not typically provided for by social security or Medi-Cal include dental care, wheelchairs, vehicle modification, and individual training programs). A special needs trust may be established and continued only if the court finds that the money paid into the trust does not exceed the amount reasonably necessary to meet the disabled person's special needs, and that those needs will not be met without the trust. CAL. PROB. CODE § 3604(b) (enacted by Chapter 355).

12. See CAL. GOV'T CODE § 811.2 (West 1990) (defining public entity).

13. See CAL. PROB. CODE § 24 (West 1990) (defining beneficiary).

terminated or the beneficiary dies, at which time the trust is subject to claims by the public entity.¹⁴

TKT

Administration of Estates; nonprobate transfers of community property on death

Civil Code § 5110.740 (amended); Probate Code §§ 5002, 5003, 5010, 5011, 5012, 5013, 5014, 5015, 5020, 5021, 5022, 5023, 5030, 5031, 5032 (new); § 141 (amended).
AB 1719 (Horcher); 1992 STAT. Ch. 51

Existing law provides various methods for transferring property upon death other than by probate.¹ Existing law prohibits the transfer of community property² through a nonprobate transfer on death

14. *Id.* § 3605(b) (enacted by Chapter 355); *see id.* § 15306(b) (West 1990) (limiting a public entity's ability to attach a disabled beneficiary's interest in a trust established specifically to meet the disabled person's future needs); *cf.* ILL. ANN. STAT. ch. 17, para. 1685.1 (Smith-Hurd 1992) (providing that discretionary trusts established for disabled persons are not liable to public entities for reimbursement of financial aid or resources). However, if the trust causes the disabled person to become ineligible for need-based public social services, the beneficiary is liable for reimbursement of the public support. CAL. PROB. CODE § 15306(b) (West 1990). *See generally* Julianne Sartain, Comment, *Probate Code Section 15306: Discretionary Trusts as a Financial Solution for the Disabled*, 37 UCLA L. REV. 595, 608-612 (1990) (discussing the statutory limitations on state attachment of trust funds established for the disabled).

1. CAL. PROB. CODE § 5000 (West 1982). The Code authorizes the nonprobate transfer of property upon death through an insurance policy, contract of employment, bond, mortgage, promissory note, certified or uncertified 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. *Id.* § 5000(a) (West 1982). Provisions contained within these instruments may include: (1) A provision that money controlled by the decedent be transferred to designated persons or persons named in a will; (2) a provision that money due will cease to be payable under the instrument; and (3) a provision that any property controlled under the instrument should pass to designated person. *Id.* § 5000(b)(1)-(3) (West 1982). Multi-party accounts, including totten trusts, pay on death accounts, community property, and joint tenancy, which provided that the surviving parties receive the funds also are excepted from the probate requirement. *See id.* §§ 5100-5407 (West 1982).

2. *See* CAL. CIV. CODE. § 687 (West 1982) (defining community property).

(NTOD)³ by a married person without the consent of his or her spouse.⁴ Chapter 51 provides that certain NTOD may be made by a married person without the written consent⁵ of his or her spouse.⁶ Under existing law, if a spouse dies before an NTOD, the heirs⁷ of that spouse may revoke the consent of the deceased spouse.⁸ Chapter 51 provides that the death of either spouse prior to a revocation makes the consent irrevocable.⁹

STL/MLM

3. CAL. PROB. CODE § 5000 (West 1982) (defining nonprobate transfers).

4. CAL. CIV. CODE § 5125(b) (West Supp. 1992). A spouse is not precluded from making a unilateral election with regard to money received from work retirement benefits, such that more money was received during that spouse's lifetime and less after his or her death. *Willis v. Board of Admin., Public Employees' Retirement Sys.*, 181 Cal. App. 3d 779, 782, 226 Cal. Rptr. 567, 568 (1986). A spouse who consented to forming a joint bank account with his or her children did not waive her right to require consent to gifts made from that account by his or her spouse to their children. *In re Marriage of Beth and Roy Stephenson*, 162 Cal. App. 3d 1057, 1071, 209 Cal. Rptr. 383, 392 (1985). Written consent for transactions made by one spouse affecting a business owned as community property is not required where that spouse is in charge of the primary management and control of that business. CAL. CIV. CODE § 5125(d) (West Supp. 1992). In the case of a spouse in control of a business, only a written notice of a sale or encumbrance of the property is necessary. *Id.* The court may, upon the motion of a spouse, dispense with the requirement of consent if the proposed transaction is in the best interest of the community, and consent is being arbitrarily withheld or cannot be obtained. *Id.* § 5125.1(e)(1)-(2) (West Supp. 1992).

5. See CAL. PROB. CODE § 5010 (enacted by Chapter 51) (defining written consent).

6. *Id.* § 5003 (enacted by Chapter 51). In order for a spouse to make an NTOD of property without consent, it must be held under an instrument specified in § 5000. *Id.* § 5003(a) (enacted by Chapter 51). Notice of an NTOD by a spouse is unnecessary unless made after either the holder of the property has been served a contrary court order or the holder has been served a written notice that a person is claiming an adverse interest. *Id.* § 5003(b)(1)-(2) (enacted by Chapter 51).

7. See *id.* § 44 (West 1982) (defining heir).

8. CAL. CIV. CODE § 5125.1 (West Supp. 1992). If the consenting non-donor spouse predeceases the donor, the spouse's heirs may claim that spouse's share of the proceeds. *Estate of MacDonald v. MacDonald*, 51 Cal. 3d 262, 266, 794 P.2d 911, 914, 272 Cal. Rptr. 153, 156 (1990).

9. CAL. PROB. CODE § 5030(c) (enacted by Chapter 51). The consent of the spouse is revocable throughout marriage. *Id.* § 5030(a) (enacted by Chapter 51). Upon termination of the marriage by dissolution or legal separation, consent is revocable. *Id.* § 5030(b) (enacted by Chapter 51). A married person may revoke consent during marriage by a writing including a will which is served upon the donor spouse before his or her death. *Id.* § 5031(a) (enacted by Chapter 51).

