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Chapter 724: The California Bar Association's 1997 Omnibus Probate Law Amendments

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Code Sections Affected

Code of Civil Procedure § 632 (amended); Probate Code §§ 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1460.1, 16061.5, 16061.6, 16061.7, 16061.8, 21600, 21601, 21610, 21611, 21612, 21620, 21621, 21622, 21623, 21630 (new), 39, 1890, 8226, 21350 (amended), 2312, 2750, 2751, 2752, 3024, 4948, 7240, 7241, 7242, 8406, 17207, 19028 (repealed).
AB 1172 (Kaloogian); 1997 STAT. Ch. 724

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I. INTRODUCTION

Chapter 724, the product of omnibus legislation sponsored by the Estate Planning, Trust and Probate Law Section of the California State Bar,¹ makes various changes to the Probate Code. This legislative note details these changes and breaks them into two groups: changes in substantive law² and changes that are organizational, structural, or meant to clarify certain code sections or statutorily significant terms.³

While the reasons for these changes vary with each separate amendment, one stated purpose for Chapter 724 is to bring the law of trusts, insofar as they are used in the administration of estates, into accord with probate law.⁴ The Bar notes that trusts are increasingly being used in testamentary dispositions.⁵ Accordingly, various portions of Chapter 724 reconcile trust law with probate law where appropriate.⁶

II. CHAPTER 724

A. Changes to Substantive Law

1. Children and Spouses Omitted from Trusts Used as Testamentary Dispositions

Trust law is increasingly being used in lieu of probate law in the administration of estates.⁷ Accordingly, Chapter 724 brings the law of trusts into conformity with probate law in dealing with omitted spouses and children.⁸ Because omitted spouses and children were not covered under prior law dealing with trusts, Chapter 724 fills this gap.⁹

In the probate of a will, prior law required that if a testator failed to provide for his or her spouse, the omitted spouse received a share in the estate consisting of one-half of the community property belonging to the testator, one half of the quasi-

1. Throughout this review, all citations to the Estate Planning, Trust & Probate Law Section of the California State Bar Association will be to "State Bar."

2. See *infra* Part II.A (explaining the provisions of Chapter 724 changing substantive probate law).

3. See *infra* Part II.B (discussing the organizational and structural changes and clarifications to the Probate Code).

4. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1172, at 3 (Apr. 16, 1997).

5. *Id.*

6. See *infra* Part II.A.1 (discussing the changes in law dealing with spouses and children omitted from trusts used as testamentary dispositions); Part II.A.5 (explaining changes in requirements for trustee notification once a trust becomes irrevocable upon the death of the settlor).

7. See discussion *infra* Part II.

8. See *infra* notes 13-31 and accompanying text (discussing the changes to the Probate Code with respect to spouses and children omitted from trusts).

9. See *infra* notes 10-12 and accompanying text (explaining requirements under prior law dealing only with spouses and children omitted from wills).

community property belonging to the testator, and a share of the separate property of the testator equal in value to that which the spouse would have received had the testator died intestate.¹⁰ Prior law also provided that if a testator failed to provide for a child of the testator born or adopted after the execution of a will, the omitted child received a share in the estate equal to that which the child would have received had the testator died intestate.¹¹ In its goal of promoting conformity between trust and probate law, Chapter 724 repeals the chapters of the Probate Code dealing with spouses and children omitted from wills and completely rewrites the provisions to account for spouses or children omitted from *any testamentary disposition*, including trusts.¹²

Under Chapter 724, a surviving spouse is entitled to the same share of community property, quasi-community property and separate property under a revocable trust as such spouse would have received if omitted from a decedent-spouse's will under prior law.¹³ Likewise, just as if a child was omitted from a will, a child omitted from a trust is entitled to that portion of the trust he or she would have received had the trustor died intestate under prior law.¹⁴

Under prior law, satisfaction of the share of a spouse or child omitted from a will required that the share of such spouse or child was first taken from the portion of the testator's estate not disposed of by will.¹⁵ Thereafter, as much as was neces-

10. CAL. PROB. CODE § 6570 (West 1991); *see id.* § 6561(a) (West 1991) (stating that a spouse does not receive a share of the estate if the testator's failure to provide for the spouse in the will was intentional and such intention appears in the will); *id.* § 6561(b) (West 1991) (providing that a spouse may not receive a share of the estate if the testator provided for the spouse by transfer outside the will and the intention that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or by the evidence); *id.* § 6561(c) (West 1991) (declaring that a spouse is not entitled to a share of the estate if the spouse made a valid agreement waiving the share in the testator's estate); *id.* § 6560 (West 1991); *see id.* § 6560(c) (amended by Chapter 724) (prohibiting the surviving spouse from receiving more than one-half the value of the separate property of the estate).

11. *Id.* § 6571(a) (West 1991) (stating that a child does not receive a share of the estate if the testator's failure to provide for the child in the will was intentional and such intention appears in the will); *id.* § 6571(b) (West 1991) (declaring that a child is not entitled to a portion of the estate if at the time of execution of the will, the testator had one or more children and devised substantially all the estate to the other parent of the child); *id.* § 6571(c) (West 1991) (providing that a child may not receive a share of the estate if the testator provided for the child by transfer outside the will and the intention that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or by the evidence).

12. *See* 1997 Cal. Stats. Ch. 724, sec. 17, at 3935 (repealing CAL. PROB. CODE §§ 6560-6562 & 6570-6573). *See generally* CAL. PROB. CODE §§ 21600-21630 (added by Chapter 724) (rewriting provisions of the California Probate Code that deal with spouses and children omitted from *any* testamentary disposition).

13. *See* CAL. PROB. CODE § 21610 (added by Chapter 724) (stating that an omitted spouse who married the decedent after the execution of the revocable trust shall receive a share in the estate consisting of one-half of the community property belonging to the decedent, one half of the quasi-community property belonging to the decedent, and a share of the separate property of the decedent equal in value to that which the spouse would have received had the settlor died intestate); *see also id.* § 21610(c) (added by Chapter 724) (prohibiting the surviving spouse from receiving more than one-half the value of the separate property of the estate).

14. *See id.* § 21620 (added by Chapter 724) (declaring that a child omitted from a testamentary disposition is entitled to that portion of the decedent's estate that he or she would have received had the decedent died intestate).

15. *Id.* § 6562(a)(1) (West 1991); *id.* § 6573(a)(1) (West 1991).

sary to satisfy the share of the omitted spouse or child could be taken from all devisees in proportion to the value they could receive under the testator's will.¹⁶ Under Chapter 724, the method for satisfying the share of the omitted spouse or child for *any testamentary disposition* remains the same.¹⁷

Chapter 724 provides for certain situations in which an omitted spouse or child is not entitled to a share of a testamentary disposition.¹⁸ A spouse is not entitled to a share of a testamentary disposition if it is clear that the failure to provide for such spouse was intentional and is made clear by the testamentary instrument.¹⁹ Moreover, a spouse is not entitled to a share of a testamentary disposition if it is clear the decedent provided for such spouse outside of the testamentary disposition, or if such spouse made a valid agreement waiving the right to share in the decedent's estate.²⁰

Under Chapter 724, an omitted child is not entitled to a portion of a testamentary disposition if it is clear the decedent intentionally failed to provide for such child,²¹ or if the decedent provided for the child outside of the testamentary instrument.²² Moreover, an omitted child is not entitled to a share of a disposition if the decedent had one or more children and devised or directed the disposition of substantially all the estate to the other parent of the child.²³ Furthermore, Chapter 724 provides that if, at the time of execution, a decedent failed to provide for a child because the decedent believed the child was dead or was unaware of the child's birth, the omitted child is entitled to a share in the decedent's estate equal to that which the child would have received if the decedent had died without having any testamentary instruments.²⁴

16. *Id.* § 6562(a)(2) (West 1991); *id.* § 6573(a)(2) (West 1991). *But see id.* §§ 6562(b), 6573(b) (West 1991) (declaring that if the obvious intention of the testator in relation to some specific devisee or other provision of the will would be defeated by taking from such devisee's share or from such provision of the will, the specific devisee or provision may be exempted and a different apportionment may be adopted).

17. *See id.* §§ 21612(a), 21623(a) (added by Chapter 724) (providing that the share of an omitted spouse or child is first taken from the portion of the testator's estate not disposed of by will or trust); *id.* §§ 21612(a)(2), 21623(a)(2) (added by Chapter 724) (providing that if taking from the portion of the estate not disposed of by will or trust does not satisfy the share of the omitted spouse or child, so much as may be necessary to satisfy the share of the omitted spouse or child may be taken from all beneficiaries in proportion to the value they may receive); *id.* §§ 21612(b), 21623(b) (added by Chapter 724) (declaring that if the obvious intention of the testator in relation to some specific devisee or other provision of the will would be defeated by taking from the share of such devisee or provision, the specific devisee or provision may be exempted and a different apportionment may be adopted).

18. *See infra* notes 19-24 (discussing situations where an omitted spouse or child is not entitled to a share of the testamentary disposition).

19. CAL. PROB. CODE § 21611(a) (added by Chapter 724).

20. *Id.* § 21611(b), (c) (added by Chapter 724).

21. *Id.* § 21621(a) (added by Chapter 724).

22. *Id.* § 21621(c) (added by Chapter 724).

23. *Id.* § 21621(b) (added by Chapter 724).

24. *Id.* § 21622 (added by Chapter 724).

According to the Bar, the goal of this change is to bring trust law in concordance with probate law when dealing with omitted spouses or children.²⁵ Prior to the enactment of Chapter 724, statutory provisions dealing with omitted spouses or children did not provide for the omission from a trust as it did for wills.²⁶ The Bar notes that public policy favors the interpretation that people take care of those they leave behind.²⁷ To the extent a person chooses not to provide for a child or spouse they will have to make this explicit in their trust instrument.²⁸ Doubt as to the intention of the trustor with respect to a certain child or spouse will therefore be removed.²⁹ There will be no uncertainties as to whom the trustor intended to provide for and whether the omission of a certain child or spouse was accidental.³⁰ As the Bar states, this change promotes "clarity of documentation" in the law of trusts.³¹

2. Limitation of Donative Transfers to Caregivers

Existing Law prohibits donative transfers to certain proscribed persons.³² Chapter 724 includes among these prohibited persons care custodians of dependent adults.³³ According to the Bar, the purpose of this section is "to prevent the growing 'cottage industry' of 'practical nurses' from successfully taking advantage of dementing elders."³⁴ Chapter 724 imposes the same burden on "practical nurses" existing for fiduciaries with respect to proving the absence of undue influence.³⁵

3. Proponents of Other Wills

Existing law permits the admission of a will to probate notwithstanding the prior admission to probate of another will or the prior distribution of property in a proceeding.³⁶ However, the will may not affect property previously distributed.³⁷

25. State Bar, *Legislative Proposal 9-14-96* (copy on file with the *McGeorge Law Review*); State Bar, *Legislative Proposal 9-15-96* (copy on file with the *McGeorge Law Review*).

26. State Bar, *Legislative Proposal 9-14-96* (copy on file with the *McGeorge Law Review*); State Bar, *Legislative Proposal 9-15-96* (copy on file with the *McGeorge Law Review*).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. See generally CAL. PROB. CODE § 21350 (West Supp. 1997) (discussing prohibited transfers).

33. *Id.* § 21350(a)(6) (added by Chapter 724); see *id.* § 21350(c) (added by Chapter 724) (stating that "dependent adult" and "care custodian" have meanings previously defined in the Probate Code). See generally CAL. WELF. & INST. CODE § 15610.17 (West Supp. 1997) (setting forth the numerous definitions of who constitutes a "care custodian"); *id.* § 15610.23 (West Supp. 1997) (listing the numerous factors that qualify a person as a "dependent adult").

34. State Bar, *Legislative Proposal 96-13* (copy on file with the *McGeorge Law Review*).

35. *Id.*

36. CAL. PROB. CODE § 8226(b) (West 1991).

37. *Id.*

Once admitted, the court has the power to determine how any provision of the will affects property not yet distributed and how any provision of the will affects another provision of the will.³⁸

Chapter 724 requires that if a proponent of a will has received notice of a petition for probate or a petition for letters of administration for a general personal representative, the proponent of the will may petition for probate of the will only within the later of two specified time periods.³⁹ These time periods are limited to either 120 days after issuance of the order admitting the first will to probate⁴⁰ or 30 days after the proponent of the will first obtains knowledge of the will.⁴¹

According to the Bar, these changes will require a proponent of another will to petition for admission of that will within the same time period allowed for a petition to revoke the probate of a will admitted to probate.⁴² Under existing law, any interested person may petition the court to revoke the probate of a will 120 days after the will is admitted to probate.⁴³ Furthermore, if the proponent of the subsequent will acquires knowledge of the first will after the expiration of the 120 day period, he or she would have 30 days from the time of acquiring knowledge of the first will.⁴⁴ Existing law already requires a custodian of a will to deliver the will to the clerk of the superior court in the county of the estate of the decedent and mail a copy of the will to the person named as its executor within 30 days after having knowledge of the death of the testator.⁴⁵ Thus, Chapter 724 brings the time requirements for proponents of other wills into conformity for the time requirements for the normal probate of wills.

According to the Bar, though existing law prevented the admission of a subsequent will from affecting previously distributed property, it did not prevent the proponent of another will from withholding disclosure of that instrument past the period when devisees and creditors acted in reliance on the earlier-admitted will.⁴⁶ These changes are therefore necessary to prevent a proponent of another will from petitioning for the subsequent will once administration of the estate is well in progress.⁴⁷

38. *Id.*

39. *Id.* § 8226(c) (amended by Chapter 724).

40. *Id.* § 8226(c)(1) (amended by Chapter 724).

41. *Id.* § 8226(c)(2) (amended by Chapter 724).

42. State Bar, *Legislative Proposal 96-26* (copy on file with the *McGeorge Law Review*).

43. *Id.*

44. *Id.* § 8270(a) (West 1991).

45. State Bar, *Legislative Proposal 96-26* (copy on file with the *McGeorge Law Review*).

46. *Id.*

47. *Id.*

4. Removal of Ground for Objection to the Appointment of Referee

Under existing law, parties may have any or all issues in a proceeding, whether of fact or law, tried by a referee.⁴⁸ A referee may also be used to ascertain a fact necessary to enable the court to determine an action or proceeding.⁴⁹ Under prior law, a party to a proceeding could object to the appointment of a referee if such referee did not reside within the county in which the proceeding was brought.⁵⁰ Chapter 724 removes this ground for objection.⁵¹

The purpose for this change is to remove what is perceived as an unnecessary barrier in probate proceedings.⁵² Residency in a particular county has no rational relationship to the ability of a referee to deliver a fair and unbiased opinion.⁵³ Moreover, since many attorneys often practice in a number of counties, they should not be prohibited from serving as a referee solely by virtue of the location of their office.⁵⁴

5. Trustee Notification

Existing law provides that a trustee has a duty to keep the beneficiaries of a trust reasonably informed of the trust and its administration.⁵⁵ Under existing law, a trustee must also, on request by a beneficiary, provide such beneficiary with a report of information about various aspects of the administration or character of the trust.⁵⁶

Chapter 724 requires that when a trust becomes irrevocable because of the death of one or more of the settlors of a trust, the trustee must, on request, provide a true

48. CAL. CIV. PROC. CODE § 638(1) (West Supp. 1997); *see id.* § 638 (West Supp. 1997) (stating that a reference may be ordered upon the agreement of the parties or upon the motion of a party to a written contract which provides for reference); *id.* § 639 (West Supp. 1997) (setting forth situations in which a court may order reference when the parties do not consent to reference).

49. *Id.* § 638(2) (West Supp. 1997).

50. *See id.* § 641(1) (West Supp. 1997) (providing that a party may object to the appointment of a person as referee for a want of any of the qualifications prescribed by statute that render a person competent to serve as a juror); *id.* § 203(4) (West Supp. 1997) (requiring a person to be a resident of the jurisdiction where they are summoned to serve as a juror).

51. *See id.* § 641(1) (amended by Chapter 724) (stating that the requirement of residence within a particular county in the State of California is not a ground upon which a party may object to the appointment of any person as referee). *But see id.* § 640 (West 1976) (explaining that where the court must appoint a referee, such referee must be appointed from the county in which the action or proceeding is triable).

52. *See infra* notes 53-54 and accompanying text (discussing the reasons for removing these requirements).

53. State Bar, *Legislative Proposal 96-16* (copy on file with the *McGeorge Law Review*).

54. *Id.*

55. CAL. PROB. CODE § 16060 (West 1991).

56. *Id.* § 16061 (West 1991); *see id.* (providing that the trustee shall provide the beneficiary with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiaries interest, including the terms of the trust that describe or affect the beneficiaries interest).

and complete copy of the terms of the trust to each beneficiary of the trust and each heir of the deceased settlor.⁵⁷

Chapter 724 further requires a trustee to give notice to prescribed persons⁵⁸ when either a revocable trust or any portion thereof becomes irrevocable or when there is a change of trustees of an irrevocable trust.⁵⁹ Notice must be given in accord with established statutory requirements⁶⁰ within 30 days of the occurrence of the event requiring notification, 30 days after the trustee first gains knowledge of a person requiring notification, or 30 days after the date the new trustee commences to serve as trustee if there was previously a vacancy in the office of trustee.⁶¹ The notice must contain certain specified information, including the identity of the trustee, the address where the trust is administered, and a warning that the recipient must bring an action contesting the trust within a specified time.⁶²

Chapter 724 provides that unless a trustee makes a good faith effort to comply with these new notice provisions, failure to serve notice renders such trustee liable for all damages, including attorneys' fees, caused by such failure.⁶³ Chapter 724 further states that any waiver by a settlor of the requirements for trustee notification is contrary to public policy and void.⁶⁴ Moreover, under Chapter 724, any person who receives notification under the new law must bring an action to contest the trust not more than 120 days from the date the notification by trustee is served on him

57. *Id.* § 16061.5(b) (added by Chapter 724); *see id.* § 16061.7(b)(4) (added by Chapter 724) (stating that a trustee need not provide a copy of the terms of the trust to any beneficiary or heir who is not known to the trustee or is known to the trustee but whom the trustee cannot locate through reasonable diligence); *id.* § 16061.5(b) (added by Chapter 724) (requiring a trustee to rely on any final judicial determination of heirship for the purposes of the new section); *id.* (declaring that the trustee shall have discretion to make a good faith determination by a reasonable means of the heirs of a deceased settlor in the absence of any final judicial determination of heirship).

58. *See id.* § 16061.7(b)(1) (added by Chapter 724) (requiring notice to be given to each beneficiary of the trust, subject to prescribed statutory limitations); *id.* § 16061.7(b)(2) (added by Chapter 724) (providing for notice to each heir of a deceased settlor of whom the trustee has knowledge if the event giving rise to the requirement for notification is the death of the settlor); *id.* § 16061.7(b)(3) (added by Chapter 724) (stating that notice must be given to the attorney general if the trust is a charitable trust subject to the supervision of the Attorney General).

59. *Id.* § 16061.7(a)(1)-(2) (added by Chapter 724).

60. *See id.* § 16061.7(c) (added by Chapter 724); *see generally* §§ 1200-1265 (West 1991 & Supp. 1997) (setting forth the requirements for notice under the Probate Code).

61. *Id.* § 16061.7(d) (added by Chapter 724).

62. *Id.* § 16061.7(e)(2), (3), (6) (added by Chapter 724); *see infra* note 65 and accompanying text (discussing the requirement that a trustee bring an action within a specified period of time after receiving notice). *See also id.* § 16061.7(e)(1) (added by Chapter 724) (requiring the identity of the settlor(s) of the trust and the date of execution of the trust instrument); *id.* § 16061.7(e)(4) (added by Chapter 724) (providing for notice of any additional information which may be required by the terms of the trust instrument); *id.* § 16061.7(e)(5) (added by Chapter 724) (stating that notification must be given of that which the recipient is entitled, upon reasonable request to the trustee, to receive from the trustee a true and complete copy of the terms of the trust).

63. *Id.* § 16061.7(f) (added by Chapter 724); *see id.* (requiring a trustee to rely on any final judicial determination of heirship for the purposes of the new section); *see also id.* (declaring that the trustee shall have discretion to make a good faith determination by a reasonable means of the heirs of a deceased settlor in the absence of any final judicial determination of heirship).

64. *Id.* § 16061.7(g) (added by Chapter 724).

or her, or 60 days from which a copy of the terms of the trust is mailed to him or her in response to his or her request during that 120-day period, whichever is later.⁶⁵

These changes were sponsored because of a perception that prompt notification of the heirs of a deceased settlor will reduce the chances of a trustee concealing trust assets or the existence of a trust.⁶⁶ Because of a widely-held misperception that trusts are confidential, beneficiaries and heirs are often kept in the dark due to lack of notice.⁶⁷ According to the Bar, the experience of practitioners is that failure to notify beneficiaries of the existence or terms of a trust leads to conflict between trustees and beneficiaries.⁶⁸ Therefore, Chapter 724 provides a clear statutory requirement that beneficiaries and heirs be notified of the existence of a trust, and the name and address of the trustee will reduce the chances for future conflict.⁶⁹

6. *Elimination of Mailed Notice of Hearing to Children Under 12*

Existing law requires a petitioner to give notice to appropriate persons for proceedings pertaining to guardianships or conservatorships.⁷⁰ Chapter 724 exempts these requirements for a child under 12 in two conditions.⁷¹ First, notice is not required if notice was already properly given to a parent, guardian, or other person having legal custody of the minor, with whom the minor resides.⁷² Second, no notice is required when the petition is brought by the minor's parent, guardian, or other person having legal custody of the minor, with whom the minor resides.⁷³

65. *Id.* § 16061.8 (added by Chapter 724); *see id.* § 16061.7(e)(6) (added by Chapter 724) (providing that a warning accompanying the notice must state: "You may not bring an action to contest the trust more than 120 days from the date of this notification by the trustee is served upon you or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to your request during that 120-day period, whichever is later").

66. State Bar, *Legislative Proposal 96-19* (copy on file with the *McGeorge Law Review*).

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* CAL. PROB. CODE § 1460(b)(1)-(4) (West Supp. 1997) (requiring a petitioner to give notice to the guardian or conservator, ward or conservatee, the spouse of the ward or conservatee, and any person who has requested special notice of the matter); *id.* § 1460(b)(5)-(6) (West Supp. 1997) (to persons statutorily described pertaining to a petition to terminate a guardianship or conservatorship); *see generally id.* § 1461 (West 1991) (requiring notice to be given to the Director of Mental Health or the Director of Developmental Services under appropriate circumstances); *id.* § 1461.4 (West 1991) (providing for notice to the regional center for the developmentally disabled under appropriate circumstances); *id.* § 1461.5 (West 1991) (allowing for notice to the Veterans Administration under appropriate circumstances); *id.* § 1461.7 (West 1991) (requiring notice where a conservator of an estate has been appointed for a missing person and a petition is filed in the conservatorship proceeding under certain sections of the Probate Code); *id.* § 1460(a) (West 1991) (stating that notice of the time and place of the hearing must be given 15 days before the hearing unless otherwise required); *id.* § 1467 (West 1991) (declaring that service by mail under guardianship or conservatorship proceedings is complete the date a written acknowledgment of the receipt is executed).

71. *See infra* notes 72-73 (explaining these two conditions).

72. CAL. PROB. CODE § 1460.1 (amended by Chapter 724).

73. *Id.*

This change was sponsored by the Bar because of a perception that the requirement was often violated based “on a common sense analysis that the proposed recipient has no legal interest and notice is already being given to the child’s parent.”⁷⁴ The purpose of the requirement is to “invite comment and involvement from persons who might have an interest in the welfare of the subject of the proceedings.”⁷⁵ Children under 12 usually have little to offer in such situations.⁷⁶ Although a court can waive notice to children under 12, such waiver wastes judicial resources and attorney time.⁷⁷ Therefore, by not requiring notice to children under 12, Chapter 724 helps avoid unnecessary expense and delay in some probate proceedings.⁷⁸

B. Clarifications and Code Reorganization

1. Declaration of Medical Practitioner in Conservatorships

Under existing law, a court may determine that a conservatee lacks the capacity⁷⁹ to give informed consent for medical treatment.⁸⁰ When the court makes a determination, it may grant a conservator⁸¹ the power to give consent for medical treatment to be performed on the conservatee.⁸² Existing law allows the concurrent filing of a petition to gain both the appointment of a conservatorship and an order granting the power to give medical consent for a conservatee.⁸³

Prior law required that any request to gain the power to give medical consent for a conservatee be supported by a declaration that the conservatee lacks capacity to give informed consent for medical treatment by a licensed physician or psychologist within the scope of his or her licensure.⁸⁴ The statutory language requiring

74. State Bar, *Legislative Proposal 95-22* (copy on file with the *McGeorge Law Review*).

75. *Id.*

76. *Id.*

77. See CAL. PROB. CODE § 1460(e) (West Supp. 1997) (allowing a court with good cause to dispense with the notice requirements); see also State Bar, *Legislative Proposal 95-22* (copy on file with the *McGeorge Law Review*) (stating that the provisions requiring notice to children under 12 can cause unnecessary delay and waste resources).

78. *Id.*

79. See BLACK’S LAW DICTIONARY 760 (6th ed. 1990) (defining “incapacitated person” as “any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person”).

80. CAL. PROB. CODE § 1880 (West 1991).

81. See BLACK’S LAW DICTIONARY 306 (6th ed. 1990) (defining “conservator” as “a guardian; a protector; preserver. Appointed by court to manage affairs of incompetent or to liquidate business. Person appointed by court to manage estate of one who is unable to manage property and business affairs effectively”).

82. CAL. PROB. CODE § 1880 (West 1991).

83. *Id.* § 1890(a) (West Supp 1997).

84. See *id.* § 1890(c) (West Supp 1997) (stating that “any request for a court order under Section 1880, whether made as part of the original petition for appointment of a conservator or subsequent thereto, shall be supported by a declaration, filed at or before the hearing on the request, executed by a licensed physician, or a

this inclusion of such a declaration has been read too literally according to the Bar.⁸⁵ Some courts have construed the language to mean that the petition itself must be accompanied by a declaration from a medical practitioner.⁸⁶ Such a court-imposed requirement causes unnecessary delays in the ability of a conservator to get the proper medical help which is often urgently needed by the conservatee.⁸⁷

Chapter 724 resolves this problem by cleaning up the language of the provision to allow for a petition to be filed without a declaration by a medical practitioner.⁸⁸ However, the court must still have the declaration before granting the conservator the power to give medical consent for the conservatee.⁸⁹ Chapter 724 simply permits this declaration to be obtained in a more expeditious manner in securing medical attention for the conservatee.⁹⁰

2. Expanded Definition of Fiduciary

Current law defines "fiduciary" as a "personal representative, trustee, guardian, conservator or other legal representative."⁹¹ Chapter 724 includes in this definition attorneys in fact, under power of attorney, and custodians under the California Uniform Transfer to Minors Act.⁹² Furthermore, Chapter 724 inserts the words "subject to this code" after "other legal representative."⁹³ According to the Bar, the

licensed psychologist within the scope of his or her licensure, and stating the proposed conservatee or the conservatee, as the case may be, lacks the capacity to give an informed consent for any form of medical treatment and the reasons therefor").

85. State Bar, *Legislative Proposal 95-17* (copy on file with the *McGeorge Law Review*); see *supra* note 84 (quoting the actual statutory language).

86. State Bar, *Legislative Proposal 95-17* (copy on file with the *McGeorge Law Review*).

87. See *id.* (explaining that under the current system a petitioner is forced to first file the petition for appointment as conservator, next attend a hearing where an order is issued that the proposed conservatee be examined, then obtain a declaration from a medical practitioner, and finally wait for the minimum 15 day notice period for the petition to be heard).

88. See CAL. PROB. CODE § 1890(c) (amended by Chapter 724). Provides that: no court order under § 1880, whether issued as part of an order granting the original petition for appointment of a conservator or issued subsequent thereto, may be granted unless supported by a declaration, filed at or before the hearing on the request, executed by a licensed physician, or a licensed psychologist within the scope of his or her licensure, and stating that the proposed conservatee or the conservatee, as the case may be, lacks the capacity to give an informed consent for any form of medical treatment and the reasons therefor.

Id. (emphasis added).

89. See *id.* (stating specifically that "no court order under Section 1880 . . . may be granted unless supported by a declaration . . . by a licensed physician, or a licensed psychologist"); see also State Bar, *Legislative Proposal 95-17* (copy on file with the *McGeorge Law Review*) (explaining that even though not required when filing, a court may still not grant a conservator the power to give medical consent for a conservatee without the appropriate medical declaration).

90. See *supra* note 87 (describing the time delays under the interpretation of the old statutory language).

91. CAL. PROB. CODE § 39 (West 1991).

92. *Id.* (amended by Chapter 724); see generally *id.* §§ 3900-3925 (West 1991) (setting forth the California Uniform Transfers to Minors Act).

93. CAL. PROB. CODE § 39 (West 1991).

prior definition of "other legal representative" was too broad because it was not confined to the Probate Code.⁹⁴ Therefore, the inclusion of "subject to this code" distinguishes its meaning under the Probate Code from those involving other fiduciary relationships in other portions of the California Code.⁹⁵

3. Right to an Evidentiary Hearing

Prior law explicitly guaranteed the right to an evidentiary hearing in a contested manner by statute.⁹⁶ However, the section containing this requirement was repealed and later replaced with various provisions in the probate code.⁹⁷ Accordingly, the right to a contested hearing in factual disputes in matters arising under the Probate Code was called into question.⁹⁸

Chapter 724 clarifies that the repeal of this former section did not affect the right to an evidentiary hearing in a contested matter under the Probate Code.⁹⁹ Specifically, it does this by providing that all issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.¹⁰⁰ Under the Code of Civil Procedure, any party in a civil action is entitled to a hearing.¹⁰¹

94. State Bar, *Legislative Proposal 96-26* (copy on file with the *McGeorge Law Review*).

95. *Id.*

96. See 1931 Cal. Stat. Ch. 281, sec. 1230, at 668 (repealed by 1987 Cal. Stat. ch. 923, sec. 59). Setting forth former Probate Code § 1230 which provided that:

all issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and frame the issues to be tried. If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions. Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions.

Id.

97. See CAL PROB. CODE § 1000 (West 1991 & Supp. 1997) (stating that, except to the extent the Probate code provides applicable rules, the rules of practice of civil actions constitute the rules of practice under the Probate Code); *id.* § 1000 (West 1991) (providing that the petitioner or other party affirming is the plaintiff and the party objecting is the defendant); *id.* § 1048 (West 1991) (allowing for the entering or signing of orders); *id.* § 1049 (West 1991 & Supp. 1997) (providing for the enforcement of an order pursuant to the California Code of Civil Procedure); *id.* § 1452 (West 1991) (eliminating right to jury trial under division of Probate Code dealing with protective proceedings); *id.* § 7200 (West 1991) (providing that, unless otherwise expressly allowed in the Probate Code, there is no right to trial by jury for proceedings concerning the administration of a decedent's estate); *id.* § 17006 (West 1991) (stating that there is no right to trial by jury in proceedings concerning the internal affairs of trusts).

98. State Bar, *Legislative Proposal 95-63* (copy on file with the *McGeorge Law Review*).

99. See *id.* (stating that the purpose of Chapter 724 is to clarify that the right to an evidentiary hearing in a contested matter of fact is guaranteed under the Probate Code).

100. CAL. PROB. CODE § 1000 (amended by Chapter 724).

101. CAL. CIV. PROC. CODE § 594 (West 1976 & Supp. 1991).

4. Consolidation of Appeal Provisions

Scattered throughout the Probate Code are several appeals provisions.¹⁰² According to the Bar, many of these provisions are “repetitive, inconsistent or incomplete.”¹⁰³ Chapter 724 consolidates these appeal provisions into one chapter to make them uniform.¹⁰⁴

III. CONCLUSION

As stated previously, one of the main purposes for Chapter 724 is to bring the law of trusts, insofar as they are used as testamentary dispositions, in conformity with the law of probate.¹⁰⁵ Hopefully, this goal will be fulfilled with little additional clarifications or legislative changes required in the future.

102. See generally CAL. PROB. CODE §§ 2750-2752 (West 1991 & Supp. 1997) (setting forth appeals procedures under division of Probate Code pertaining to protective orders); *id.* § 3024 (West 1991) (providing for appeals under part of division governing protective proceedings relating to management or disposition of community property where a spouse lacks legal capacity); *id.* § 4948 (West Supp. 1997) (granting power to appeal under sections of Probate Code dealing with power of attorney and durable power of attorney for health care); *id.* §§ 7240-7242 (West 1991 & Supp. 1997) (governing appeals under division of probate code pertaining to administration of estates); *id.* § 17207 (West 1991) (providing for appeals under proceedings concerning trusts).

103. State Bar, *Legislative Proposal 96-18* (copy on file with the *McGeorge Law Review*).

104. See CAL. PROB. CODE § 1300 (added by Chapter 724) (setting forth the conditions in which appeals may be taken under all proceedings under the Probate Code); *id.* § 1301 (added by Chapter 724) (providing for appeals with respect to guardianships, conservatorships and other protective orders); *id.* § 1302 (added by Chapter 724) (stating when an appeal may be taken with respect to proceedings concerning a power of attorney); *id.* § 1303 (added by Chapter 724) (granting the power to appeal with respect to proceedings concerning a decedent's estate); *id.* § 1304 (added by Chapter 724) (stating the conditions for appeal with respect to a trust); see also *id.* § 1310(a) (added by Chapter 724) (declaring that except as otherwise provided, an appeal pursuant to §§ 1300-1304 stays the operation of a judgment or order); *id.* § 1310(b)-(d) (added by Chapter 724) (stating exceptions to provision that an appeal stays a judgment or order); see also 1997 Cal. Legis. Serv. ch. 724, sec. 15, at 3935 (West) (repealing CAL. PROB. CODE §§ 2750-2752); *id.* (repealing CAL. PROB. CODE § 3024); *id.* (repealing CAL. PROB. CODE § 4948); *id.* (repealing CAL. PROB. CODE §§ 7240-7242); *id.* at 3938 (repealing CAL. PROB. CODE § 17207).

105. See *supra* notes 4-6 and accompanying text (discussing the fact that trusts are being used in the administration of estates).

