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Administration of Estates

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Administration of Estates

Administration of Estates; uniform transfers to minors act

Civil Code §§1154, 1155, 1156, 1157, 1158, 1158.5, 1159, 1160, 1161, 1162, 1162.5, 1163, 1164, 1165 (repealed); Probate Code §§6340, 6342, 6343, 6344, 6346 (repealed); §§3900, 3901, 3902, 3903, 3904, 3905, 3906, 3907, 3908, 3909, 3910, 3911, 3912, 3913, 3914, 3915, 3916, 3917, 3918, 3919, 3920, 3920.5, 3921, 3922, 3923, 3924, 3925 (new); §§3303, 3400, 3410, 3412, 3413, 3602, 3611, 6341, 6348, 6349 (amended).

AB 2492 (Sher); 1984 STAT. Ch 243

In 1959 the Legislature enacted the California Uniform Gifts to Minors Act,¹ which regulated gifts of property² to a minor subject to the control of a custodian who manages, invests, and uses the property for the benefit of the minor.³ Many states, including California, substantially revised their versions of the Uniform Gifts to Minors Act.⁴ In response to the resulting nonuniformity of state legal schemes relating to transfers of property to minors, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Transfers to Minors Act.⁵ Chapter 243 enacts the California version of the Uniform Transfers to Minors Act, which expands and clarifies the coverage of the earlier California Gifts to Minors Act.⁶

Transfer of Property

Chapter 243 allows any kind of property, real or personal, tangible or intangible, to be the subject of a transfer to a custodian for the

1. 1959 Cal. Stat. c. 709, §2, at 2684 (enacting CAL. CIV. CODE §§1154-1165); *see also* Unif. Gifts to Minors Act, 8A U.L.A. 1 (1966).

2. 1982 Cal. Stat. c. 591, §1.5, at 2553 (amending CAL. CIV. CODE §1155) (types of property transferable under the California Gifts to Minors Act).

3. *See* 1982 Cal. Stat. c. 591, §3, at 2556 (amending CAL. CIV. CODE §1158) (powers and duties of a custodian under the California Uniform Gifts to Minors Act).

4. *Cf.* California Law Revision Commission, *Recommendation Relating to Uniform Transfers to Minors Act*, 17 CAL. L. REVISION COMM'N REPORTS 601, 609 (1984) [hereinafter cited as *Recommendation*].

5. *See* Unif. Transfers to Minors Act, 8A U.L.A. Supp. 63 (1983).

6. *Recommendation*, *supra* note 4, at 610. Uniformity in this area is important to avoid conflicts of law when laws of more than one state may apply to a transaction or series of transactions. *Id.* at 609.

benefit of a minor.⁷ Each transfer to a custodian may be made for only one minor, and only one person may be the custodian.⁸ Under Chapter 243, the transfer may be made (1) in the form of an outright, lifetime gift;⁹ (2) from a trust, estate, or guardianship;¹⁰ or (3) from a person indebted to the minor.¹¹

A. Lifetime Gift

The California Uniform Gifts to Minors Act authorized the traditional lifetime gift.¹² Chapter 243 recognizes an outright lifetime gift as an allowable method of transfer, and further allows a transfer of property to a custodian for the benefit of a minor to be made by an irrevocable exercise of a power of appointment.¹³ In addition, Chapter 243 abolishes the prior law requirement that the transferor of the property be an adult.¹⁴ Chapter 243 permits a transferor to nominate a custodian for a minor to receive distribution in the future under a will or trust, or as a beneficiary of a power of appointment or of contractual rights.¹⁵

B. Transfers from Wills and Trusts

Existing law permits a testator to devise any type of property to

7. CAL. PROB. CODE §§3904 (transfer of custodial property by irrevocable gift or power of appointments), 3905 (transfer of custodial property from will or trust), 3906 (transfer of custodial property by fiduciary), 3907 (transfer of custodial property by obligor of minor). See also *id.* §3901(f) (custodial property defined as any interest in property). The definition of custodial property has been generalized and expanded to encompass every conceivable legal or equitable interest in property of any kind, including real property and tangible or intangible personal property as well as any income from the custodial property. *Recommendation, supra* note 4, at 645. Cf. 1982 Cal. Stat. c. 591, §1.5 at 2553 (amending CAL. CIV. CODE §1155). Prior law specifically listed the types of property transferable to a custodian although the list included a general category of "... any other type of property under the supervision of the same custodian for the same minor...." *Id.*

8. CAL. PROB. CODE §3910. All custodial property held by the same custodian for the benefit of the same minor constitutes a single custodianship. *Id.*

9. *Id.* §3904.

10. *Id.* §§3905, 3906. For California purposes, the term "conservator" means the guardian of the estate of the minor. *Recommendation, supra* note 4, at 644.

11. *Id.* §3907.

12. 1982 Cal. Stat. c. 591, §2, at 2555 (amending CAL. CIV. CODE §1156).

13. CAL. PROB. CODE §3904; see *Official Comments to AB 2492*, CAL. L. REVISION COMM'N, at 7 [hereinafter cited as *Official Comments*].

14. Compare CAL. PROB. CODE §3904 with 1982 Cal. Stat. c. 591, §2, at 2555 (amending CAL. CIV. CODE §1156). An emancipated minor is permitted to make a will, gift, or other transfer. CAL. CIV. CODE §63. Elimination of the requirement that the transferor be an adult makes clear that an emancipated minor can make a transfer to a custodian for the benefit of the minor or another minor and is consistent with section 63 of the Civil Code. *Recommendation, supra* note 4, at 613, n. 30.

15. CAL. PROB. CODE §3903. Examples of typical contract rights transferred in this manner are life or endowment insurance policies, annuity contracts, pay-on-death accounts, benefit plans, or similar future payment rights. *Recommendation, supra* note 4, at 611.

a custodian to be held for the benefit of a minor.¹⁶ Under prior law, however, no express provisions existed concerning transfers to custodians as authorized in a trust instrument.¹⁷ Chapter 243 expands existing law by allowing a personal representative or trustee to make a transfer to a custodian as authorized by a will, and also expressly permits transfers to custodians as authorized in a trust instrument.¹⁸ Additionally, Chapter 243 permits a personal representative or a trustee to transfer property to a custodian in the absence of a will, or under a will or trust that does not expressly authorize the transfer, provided the transfer is not expressly prohibited by, nor inconsistent with, the terms of any governing instrument.¹⁹

C. Limit on Amount Transferred

Prior law allowed transfers to a custodian from a trust or estate, without prior court approval, only when the money or other property was transferred to the minor's parent and the total estate of the minor did not exceed \$5,000.²⁰ Chapter 243 allows the transfer to be made to any adult or trust company²¹ and increases the amount that may be transferred without prior court approval to \$10,000.²² Under prior law, if the property to be transferred was other than money, and had a value in excess of \$5,000, the establishment of a guardianship for the benefit of the minor was required.²³ Prior law additionally restricted the option of a court to allow a transfer of money to a custodianship to transfers of amounts under \$20,000.²⁴ Chapter 243 provides a court the option of ordering the transfer of any type of property from an estate or trust to a custodianship for the benefit

16. CAL. PROB. CODE §§3903, 3905 (incorporating 1983 Cal. Stat. c. 842, §55 at 807 (enacting CAL. PROB. CODE §6340)).

17. *Recommendation*, *supra* note 4, at 613. Under existing law, however, the court has authority to terminate a trust and to order trust assets distributed to the beneficiaries in a manner that conforms as nearly as possible to the intention of the testator or trustor when the value of the trust principal becomes so low that continuance of the trust with the resulting administrative costs would defeat or substantially impair the accomplishment of the purpose of the trust. CAL. CIV. CODE §2279.1; CAL. PROB. CODE §1120.6.

18. *Compare* CAL. PROB. CODE §3905(a) with 1983 Cal. Stat. c. 842, §55, at 804 (enacting CAL. PROB. CODE §6340).

19. *Id.* §3906.

20. 1979 Cal. Stat. c. 726, §3, at 2335 (enacting CAL. PROB. CODE §3412).

21. CAL. PROB. CODE §3901(q) (definition of trust company).

22. *Id.* §3906.

23. *See* 1979 Cal. Stat. c. 726, §3, at 2335 (enacting CAL. PROB. CODE §3412); *Recommendation*, *supra* note 4, at 615.

24. 1979 Cal. Stat. c. 726 §3, at 2335 (enacting CAL. PROB. CODE §3412).

of a minor without limiting the amount that may be transferred.²⁵

D. Transfer by Obligor

Under prior law, a person who held the property of or owed a liquidated debt to a minor not having a guardian to be held in trust for the minor was allowed to transfer property only to a parent of the minor and only if the value of the property did not exceed \$5,000.²⁶ Under Chapter 243, when no custodian has been nominated, and the value of the property to be transferred does not exceed \$10,000, an obligor of a minor has the option of either (1) requiring that a guardian be appointed to receive the property, or (2) transferring the property to an adult member of the minor's family²⁷ or a trust company as custodian for the benefit of the minor.²⁸ Chapter 243 additionally gives the court the option to order the property transferred to a custodian for the benefit of the minor.²⁹

Creation of Custodial Property

Chapter 243 contains more detailed provisions concerning the manner of creating custodial property and effectuating transfer than were found under the California Uniform Gifts to Minors Act.³⁰

A. Securities

Prior to enactment of Chapter 243, a security in registered form could be transferred to a custodian by registering it in the custodian's name as custodian for the minor.³¹ Chapter 243 additionally permits a transfer of securities in registered form to be made to a custodian without registering the securities in the custodian's name.³²

25. CAL. PROB. CODE §3412(b). The transfer may not be made if prohibited by or inconsistent with the terms of any governing instrument. *Id.* §3906(c)(2). *See also Recommendation, supra* note 4, at 615-16.

26. 1979 Cal. Stat. c. 726 §3, at 2335 (enacting CAL. PROB. CODE §3413). *See also* CAL. PROB. CODE §3401 (delivery of money or property to parent to be held in trust for minor).

27. CAL. PROB. CODE §3901(j) (definition of a member of minor's family).

28. *Id.* §3907(c). *See Official Comments, supra* note 13, at 8 (Probate Code section 3907 is permissive in nature and does not preclude the obligor from requiring the establishment of a guardianship of the estate to receive payment).

29. *Id.* §3413(b).

30. *Recommendation, supra* note 4, at 618. *Compare* CAL. PROB. CODE §3909 with 1982 Cal. Stat. c. 591, §2, at 2555 (amending CAL. CIV. CODE §1156).

31. CAL. PROB. CODE §3909 (incorporating 1982 Cal. Stat. c. 591, §2, at 2555 (amending CAL. CIV. CODE §1156(2))).

32. CAL. PROB. CODE §3909(a)(1).

B. Interests in Real Property

Under prior law, an interest in real property was transferred to a custodian by the execution and delivery of a deed, assignment, or similar instrument to the custodian.³³ Chapter 243 provides that custodial property is created and a transfer is made when an interest in real property is recorded in the custodian's name as custodian.³⁴

C. Tangible Personal Property

Prior law had no provision governing the transfer of tangible personal property subject to registration of ownership with a state or federal agency.³⁵ Chapter 243 provides that either registration of the transfer in the custodian's name or delivery of the endorsed certificate in registerable form effectuates the transfer.³⁶

D. Powers of Appointment and Present Assignment of Future Rights

The California Uniform Gifts to Minors Act contained no provision governing the present assignment of future payment rights or the transfer of property by the exercise of a power of appointment.³⁷ Chapter 243 provides that the transfer to a custodian of future payment rights or property transferred by exercise of a power of appointment is effective upon written notification to the payor, issuer, or other obligor that the right is transferred to the custodian.³⁸

E. Insurance Policies and Annuity Contracts

Chapter 243 provides that ownership of a life or endowment insurance policy or annuity contract may be transferred to a custodian by registering the policy or contract in the custodian's name as custodian for the minor.³⁹ Similarly, an assignment of the policy or annuity contract may be effected by assignment to the custodian as custodian for the minor.⁴⁰

33. 1982 Cal. Stat. c. 591, §2, at 2555 (amending CAL. CIV. CODE §1156(5)).

34. CAL. PROB. CODE §3909(a)(5).

35. *Recommendation, supra* note 4, at 619.

36. CAL. PROB. CODE §3909(a)(6).

37. *Recommendation, supra* note 4, at 619.

38. CAL. PROB. CODE §3909(a)(4).

39. *Id.* §3909(a)(3)(A).

40. *Id.* §3909(a)(3)(B).

F. Money

Custodial property is created under Chapter 243 when money is paid or delivered to a broker or financial institution for credit to an account in the name of the custodian as custodian for the benefit of the minor.⁴¹ Chapter 243 also provides that money may be given to an adult other than the transferor, or a trust company.⁴²

G. Other Property Interests

Chapter 243 includes a form of transfer document that must be substantially executed in order to effect a transfer to a custodian of a property interest not specifically covered by the provisions of the chapter.⁴³ The transfer document in this situation must contain an acknowledgement of receipt of the property by the custodian.⁴⁴

Transferor as Custodian

Prior law was unclear as to when a transferor could be named as custodian for a minor.⁴⁵ Chapter 243 expressly provides that a transferor may be named as custodian.⁴⁶ Transfer of possession and control of the property to a person other than the transferor, however, may be necessary to establish the donative intent required to complete the transfer.⁴⁷ Prior law permitted a transfer of money or other property to a guardian of a minor as custodian.⁴⁸ Chapter 243 allows a conservator⁴⁹ of the minor's estate to serve as custodian⁵⁰ but requires that all custodial property be kept separate and distinct.⁵¹

Compensation of Custodian

Existing law provides that a non-donor custodian may elect to charge reasonable compensation for services performed in the custodial

41. *Id.* §3909(a)(2).

42. *Id.*

43. *Id.* §§3909(a)(7), 3909(b).

44. *Id.* §3909(b); see also *Recommendation*, *supra* note 4, at 622.

45. *Recommendation*, *supra* note 4, at 619-20.

46. CAL. PROB. CODE §3909.

47. *Recommendation*, *supra* note 4, at 620.

48. 1982 Cal. Stat. c. 591, §2, at 2555 (amending CAL. CIV. CODE §1156).

49. The term "conservator" is used instead of "guardian" to conform to the Uniform Transfers to Minors Act. In California, the term means the guardian of the estate of the minor. *Recommendation*, *supra* note 4, at 644.

50. CAL. PROB. CODE §3911(d), (e).

51. *Id.* §3912(d).

capacity.⁵² Chapter 243 provides that this election is non-cumulative and must be exercised annually for services rendered in a particular calendar year or the right to compensation for services in that year lapses.⁵³

Powers and Duties of Custodian

The California Uniform Gifts to Minors Act listed the specific powers of the custodian.⁵⁴ Chapter 243 replaces this specific list of powers with a provision granting custodians broad powers with respect to the custodial property.⁵⁵ Under Chapter 243, custodians have all the rights, powers, and authority over the custodial property as they have over their own property.⁵⁶

Prior law held the custodian to the standard of care in the management of the custodial property that a prudent person would exercise in seeking a reasonable income and the preservation of capital.⁵⁷ Chapter 243 imposes a more strenuous standard by requiring the custodian to exercise the degree of care that a prudent person would exercise when dealing with the property of *another*.⁵⁸ The custodian has no obligation under Chapter 243 to diversify the investment of any property received.⁵⁹ Chapter 243 expands the duties of the custodian to include the duty to take control and register or record custodial property in the name of the custodian as custodian.⁶⁰ The custodian also is required under Chapter 243 to maintain income tax information and make the information available for preparation of the minor's tax returns.⁶¹

Chapter 243 imposes the requirement that custodial property consisting of an undivided interest be held as tenancy in common.⁶² Chapter 243 permits the custodian to invest custodial property in life insurance either on the life of the minor, if the minor's estate is the

52. *Id.* §3915 (incorporating 1954 Cal. Stat. c. 709, §2, at 2689 (enacting CAL. CIV. CODE §1159(a),(b))).

53. *Id.* §3915(b); *Recommendation*, *supra* note 4, at 668.

54. 1982 Cal. Stat. c. 591, §3, at 2556 (amending CAL. CIV. CODE §1158).

55. CAL. PROB. CODE §3913; *Recommendation*, *supra* note 4, at 664.

56. CAL. PROB. CODE §3913; *Recommendation*, *supra* note 4, at 664.

57. 1982 Cal. Stat. c. 591, §3, at 2556 (amending CAL. CIV. CODE §1158(e)).

58. CAL. PROB. CODE §3912(b); *Official Comments*, *supra* note 13, at 12. If the custodian is not compensated, the custodian is not liable for losses to custodial property unless the losses result, for example, from the custodian's gross negligence. *See* CAL. PROB. CODE §3912(b)(1).

59. CAL. PROB. CODE §3912(b); *Official Comments*, *supra* note 13, at 12.

60. *Id.* §3912(a)(2).

61. *Id.* §3912(e).

62. *Id.* §3912(d). The provision is designed to permit the custodian to invest custodial property in common trust funds, mutual funds, or an interest in a "jumbo" certificate of deposit. *Official Comments*, *supra* note 13, at 12.

sole beneficiary of the policy, or on the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the custodial capacity is made beneficiary of the policy.⁶³

Use of Custodial Property

The standard under prior law for expenditure of custodial property provided that custodial property could be used for the support, maintenance, education, and benefit of the minor.⁶⁴ Chapter 243 changes the standard to allow delivery or expenditure of custodial property as the custodian deems advisable for the use and benefit of the minor.⁶⁵ Chapter 243 also provides that use of custodial property for the use and benefit of the minor is in addition to, and does not affect, any obligation of a person to support the minor.⁶⁶

Liability of Custodian

Prior law contained no specific provision limiting the personal liability of the custodian to third persons.⁶⁷ Chapter 243 provides limitations on the personal liability of the custodian unless the custodian (1) fails to reveal the custodianship to the third party when entering a contract, or (2) is personally responsible for a tort committed during the custodianship.⁶⁸ Third persons who, in good faith, act on the instructions of or otherwise deal with a person purporting to make a transfer of custodial property, or purporting to act in the capacity of a custodian, are protected from any liability under Chapter 243.⁶⁹

Accounting

Existing law permits (1) the minor, upon attaining the age of fourteen years, (2) the legal representative of the minor, (3) an adult member of the minor's family, or (4) a donor or the donor's legal

63. CAL. PROB. CODE §3912(c).

64. 1982 Cal. Stat. c. 591, §3, at 2556 (amending CAL. CIV. CODE §1158).

65. CAL. PROB. CODE §3914(a). The new standard is intended to avoid any implication that custodial property can be used only for the *required* support of the minor. *Recommendation*, *supra* note 4, at 626.

66. CAL. PROB. CODE §3914(c). This provision is designed to avoid the attribution of custodial property income to the person obligated to support the minor. *Recommendation*, *supra* note 4, at 626.

67. *Recommendation*, *supra* note 4, at 628.

68. CAL. PROB. CODE §3917(b). The minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault. *Id.* §3917(c).

69. *Id.* §3916.

representative to petition the court for an accounting by the custodian.⁷⁰ Chapter 243 additionally provides that any person who made a transfer to the custodian or the minor's guardian of the person may petition the court for an accounting.⁷¹ Chapter 243 also allows a successor custodian to petition the court for an accounting by the predecessor custodian.⁷²

Age at which Custodianship Terminates

Under the California Uniform Gifts to Minors Act, a custodianship terminated when the minor reached eighteen years of age, at which time the custodian was required to transfer any unexpended custodial property to the minor.⁷³ If the custodianship is created by the nomination of the custodian to receive property upon occurrence of a future event, or pursuant to a will or trust, Chapter 243 allows the termination of the custodianship to be delayed up to the time the minor reaches twenty-five years of age, provided the will, trust, or nomination states that the custodianship is to continue to a specified age.⁷⁴ Chapter 243 also provides that the termination of a custodianship created by the irrevocable exercise of a power of appointment may be delayed up to the time the minor attains twenty-five years of age, if the transfer document specifies the age for termination of the custodianship.⁷⁵ Termination of a custodianship created by an irrevocable gift also may be postponed until the minor reaches twenty-one years of age.⁷⁶ Under Chapter 243, if the transfer document, will, trust, or nomination does not specify at what age of the minor the custodianship terminates, the custodianship is deemed to terminate when the minor reaches eighteen.⁷⁷

Resignation

Prior law did not specify the manner in which a custodian could resign or provide for the disclaimer of office by designated or successor custodians.⁷⁸ With the enactment of Chapter 243, a custodian may

70. *Id.* §3919 (incorporating 1959 Cal. Stat. c. 709, §2, at 2690 (enacting CAL. CIV. CODE §1162)).

71. CAL. PROB. CODE §3919(a).

72. *Id.* §3919(b).

73. 1982 Cal. Stat. c. 591, §3, at 2556 (amending CAL. CIV. CODE §1158).

74. CAL. PROB. CODE §3920.5(c).

75. *Id.* §3920.5(d).

76. *Id.* §3920.5(e).

77. *Id.* §3920.5(f). If the transfer document provides for the custodianship to endure longer than that allowed by subsections (c), (d), and (e) of California Probate Code section 3920.5, the custodianship is deemed to continue only until the time the minor attains the maximum age permitted by statute. *Id.* §3920.5(g).

78. *Recommendation, supra* note 4, at 631.

resign at any time by delivering written notice to the successor custodian and the minor if the minor is at least fourteen years old, and by delivering the custodial property to the successor custodian.⁷⁹ A person nominated to serve as a custodian may decline to serve by delivering a valid disclaimer to the person who made the nomination or to the transferor.⁸⁰

Venue

Existing law specifies the venue for court proceedings involving a custodianship.⁸¹ Under the California Uniform Gifts to Minors Act, the county where the custodian resided was not specifically listed as a proper county for venue purposes.⁸² Chapter 243 specifically provides that the county where the custodian resides is one of the proper counties for venue purposes.⁸³

Retroactive Effect

The California Uniform Transfers to Minors Act, as enacted by Chapter 243, applies to all transfers made before the effective date of January 1, 1985, except when the application would impair constitutionally vested rights created by custodianships in existence on the effective date.⁸⁴ Chapter 243 validates any transfer of custodial property made before the effective date even though no specific authority existed in California law for the transfer of custodial property of that kind or from that source at the time the transfer was made.⁸⁵

79. CAL. PROB. CODE §3918(c). A custodian may designate at any time a trust company or other adult as successor custodian by executing and dating an instrument of designation. *Id.* §3918(b). If the custodian fails to designate a successor custodian and resigns or is removed for any reason, the minor, if over 14 years old, may designate an adult member of the minor's family, a conservator of the minor, or a trust company as successor custodian. *Id.* §3918(d). If the minor is not over 14 years old or fails to designate a successor custodian within 60 days of the original custodian's resignation, the minor's conservator becomes successor custodian. *Id.* §3918(d).

80. *Id.* §3918(a).

81. *Id.* §3921 (incorporating 1972 Cal. Stat. c. 440, §1, at 806 (enacting CAL. CIV. CODE §1162.5)).

82. 1972 Cal. Stat. c. 440, §1, at 806 (enacting CAL. CIV. CODE §1162.5). A proceeding could be brought in any county, including the county where the custodian resided, if neither the minor, nor the donor, nor any parent resided within California, and no estate of a deceased or legally incapacitated custodian or successor custodian was being administered within the state. *Id.*

83. CAL. PROB. CODE §3921.

84. *Id.* §3923. This provision avoids having two bodies of law in force for 18 years until all custodianships created under prior law have terminated. *Official Comments, supra* note 13, at 19, 20.

85. CAL. PROB. CODE §3923.

Administration of Estates; probate

Civil Code §§226.12, 5103 (amended); Code of Civil Procedure §709.010 (amended); Probate Code §§3, 6206 (repealed); §§59, 105, 207, 225, 226, 241, 257, 647.5, 649.6, 658, 665, 1055, 6103, 6153, 6206, 6330, 6390, 6414, 6580 (new); §§26, 54, 82, 140, 142, 143, 144, 146, 147, 150, 224, 240, 282, 372.5, 736, 6112, 6122, 6140, 6142, 6143, 6144, 6146, 6147, 6152, 6165, 6205, 6226, 6247, 6248, 6300, 6401, 6402, 6408, 6408.5, 6409, 6412, 6560, 6562, 6573 (amended).

AB 2290 (McAlister); 1984 STAT. Ch 892

In 1983, the California Legislature extensively revised the probate laws relating to wills¹ and intestate succession,² which revisions became effective on January 1, 1985 (hereinafter referred to as Probate Revisions).³ Chapter 892 makes further revisions to California probate law and procedure that also are effective on January 1, 1985.⁴

Contractual Arrangements

A. Rights at Death

Existing law permits individuals to enter into property transactions with each other regardless of their marital status.⁵ Spouses who enter into these transactions are subject to the general rules relating to persons with confidential relations.⁶ Chapter 892, however, provides that these fiduciary standards are not applicable to transactions concerning certain contractual arrangements relating to rights at death.⁷

B. Waiver

Under existing law, a surviving spouse's⁸ waiver⁹ of rights in the

1. CAL. PROB. CODE §88 (definition of a will).

2. California Law Revision Commission, *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 CAL. L. REVISION COMM'N REPORTS 2301, 2318 (1982); see also *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 423 (1984) (analysis of Probate Revisions) [hereinafter referred to as *Review of 1983 Legislation*].

3. 1983 Cal. Stat. c. 842, at ____.

4. Compare 1984 Cal. Stat. c. 892, at ____ with 1983 Cal. Stat. c. 842, at ____; see also California Law Revision Commission, *Recommendation Relating to Revision of Wills and Intestate Succession Law*, 17 CAL. L. REVISION COMM'N REPORTS 537, 541 (1983) [hereinafter referred to as 1983 RECOMMENDATION].

5. CAL. CIV. CODE §5103(a).

6. *Id.* §5103(b).

7. *Id.*; see also CAL. PROB. CODE §§143, 144, 146 (exceptions).

8. *Id.* §78 (definition of surviving spouse).

9. CAL. PROB. CODE §140 (definition of waiver).

decedent spouse's estate must be signed and in writing to be enforceable.¹⁰ Chapter 892 additionally provides that enforcement of the waiver against a surviving spouse is subject to the same defenses as enforcement of a contract.¹¹ Chapter 892, however, provides that lack of consideration is not a defense to enforcement of the waiver.¹² Furthermore, a minor intending to marry may make a waiver as if married, but Chapter 892 provides that the waiver becomes effective only upon completion of that marriage.¹³

The Probate Revisions provided that a waiver was enforceable unless the *court* determined that (1) a fair and reasonable disclosure of the property or financial obligations of the decedent was not made, or (2) the surviving spouse did not have independent legal representation at the time the waiver was signed.¹⁴ Chapter 892, however, requires the *surviving spouse* to prove either of these requirements in order to invalidate the waiver.¹⁵ The Probate Revisions allowed a waiver to be enforceable if, at the time of execution, a fair and reasonable disposition of the rights of the surviving spouse were made and the surviving spouse understood the effect of the waiver.¹⁶ Chapter 892 eliminates the requirement that the surviving spouse understand the effect of the waiver and makes the significant date the time of signing instead of the time of execution.¹⁷ The Probate Revisions permit agreements to alter, amend, or revoke a waiver.¹⁸ Chapter 892 revises the requirements for agreements and substantially aligns them with the new waiver requirements.¹⁹ Furthermore, Chapter 892 stipulates that premarital property agreements are not affected by Chapter 892, but are governed by the law applicable to premarital agreements.²⁰

10. *Id.* §142(a).

11. *Id.* §142(c); *see also id.* §142(a)(b) (conditions).

12. *Id.* §142(c)(1).

13. *Id.* §142(c)(2).

14. 1983 Cal. Stat. c. 842, §22, at ____ (amending CAL. PROB. CODE §143); *Review of 1983 Legislation*, *supra* note 2, at 426. *See also* CALIFORNIA CONTINUING EDUCATION OF THE BAR, 2 CALIFORNIA MARITAL DISSOLUTION PRACTICE (1983) §29.2, at 1175 (necessity of independent counsel), §29.4, at 1176 (capacity and consent); CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING PRACTICE (1982) §§5.31-5.33, at 205-07 (implications of an election by a surviving spouse).

15. CAL. PROB. CODE §143(a). In transactions between themselves, spouses are subject to rules governing confidential relations unless a waiver is enforceable under this section. *Id.* §143(b).

16. 1983 Cal. Stat. c. 842, §22, at ____ (enacting CAL. PROB. CODE §143).

17. CAL. PROB. CODE §144(a)(1).

18. *Id.* §146.

19. *Id.* §146. *See supra* notes 7-11 and accompanying text.

20. CAL. PROB. CODE §147(c). The right of a spouse to revoke consent or election to

Simultaneous Death

Existing law provides that if the insured and the beneficiary of an insurance policy die simultaneously,²¹ the proceeds of the policy are distributed as if the insured had survived the beneficiary.²² Under the Probate Revisions, if the insured and the beneficiary were married, this distribution rule applied whether the policy was community,²³ quasi-community,²⁴ or separate property.²⁵ With the enactment of Chapter 892, however, if the policy is community or quasi-community property, and no alternative beneficiary except the estate or personal representatives of the insured exists, the proceeds of the policy are distributed as if they were community property.²⁶

Division by Representation

The Probate Revisions provide for a new rule of representation by which the decedent's estate is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living.²⁷ Each living member receives one share, and the share of *each* deceased member is divided equally among the living issue of the deceased member.²⁸ Under the Probate Revisions, this new rule of representation applied when a *will* expressing no contrary intention called for distribution per stirpes²⁹ or by representation.³⁰ Chapter 892, however, stipulates that the new rule of representation only applies if a *will* or *trust* that expresses no contrary intention provides for issue or

disposition of one-half of the community or quasi-community property under the will of the other spouse is not limited by this chapter. *Id.* §147(d). *See also Official Comments to AB 2290*, CALIFORNIA LAW REVISION COMM'N at [hereinafter referred to as *Official Comments*].

21. *See* CAL. PROB. CODE §224 (no clear and convincing evidence one survived the other).

22. *Id.*

23. *Id.* §28 (definition of community property).

24. *Id.* §66 (definition of quasi-community property).

25. 1983 Cal. Stat. c. 842, §22, at _____. CAL. CIV. CODE §§5107, 5108 (definition of separate property).

26. CAL. PROB. CODE §224. *See also id.* §103 (distribution of community property). The Legislature intends to make uniform the California Simultaneous Death Laws and the law in those states that have enacted the Uniform Simultaneous Death Act insofar as the rules are identical in substance. CAL. PROB. CODE §225; *see also* Uniform Simultaneous Death Act (U.L.A.) §5 (uniform rules). The 1984 revisions only apply to persons who died on or after January 1, 1985. CAL. PROB. CODE §226.

27. *Id.* §240.

28. *Id.* 1983 RECOMMENDATION, *supra* note 4, at 542; CALIFORNIA CONTINUING EDUCATION OF THE BAR, ESTATE PLANNING AND CALIFORNIA PROBATE REPORTER 103 (February 1984).

descendants to take without specifying the manner of taking.³¹ If a will or trust calls for distribution per stirpes or by right of representation, the estate will be distributed according to the law in effect prior to enactment of the Probate Revisions.³²

Who May Witness a Will

The Probate Revisions abolished prior law that prevented subscribing witnesses to a will who were also beneficiaries from taking, under the will, a share under the will larger than their intestate share unless two other disinterested witnesses subscribed to the will.³³ The Probate Revisions also created the presumption that, if a will made a devise to an interested witness, the witness procured the devise by duress, menace, fraud, or undue influence.³⁴ Chapter 892 specifies that the presumption does not apply if two disinterested witnesses also subscribe to the will.³⁵ Chapter 892 thus is consistent with prior law that permitted an interested witness to take under a will if two disinterested witnesses signed the will.³⁶ Under Chapter 892, interested witnesses who fail to rebut the presumption take a share of the estate not to exceed the share the witness would have received if no will were established.³⁷

Under existing law, an interested person may contest, without forfeiting any benefits under the will, a provision that benefits a witness a witness to the will.³⁸ Chapter 892 eliminates the requirement imposed by the Probate Revisions that the interested person could only contest without forfeiting benefits if that witness were needed to establish the validity of the will.³⁹

29. *Lombardi v. Blois*, 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899, 904 (definition of per stirpes).

30. CAL. PROB. CODE §240.

31. *Id.*

32. *Id.* See 1931 Cal. Stat. c. 280, §221, at 596 (enacting CAL. PROB. CODE §222); see also *Review of 1983 Legislation*, *supra* note 1, at 432 (explanation of division by representation).

33. 1983 Cal. Stat. c. 842, §55, at ____ (enacting CAL. PROB. CODE §6112).

34. *Id.*

35. CAL. PROB. CODE §6112(b).

36. Compare *id.* with 1931 Cal. Stat. c. 281, §51, at 590 (enacting CAL. PROB. CODE §51).

37. CAL. PROB. CODE §6112(c).

38. *Id.* §372.5.

39. Compare *id.* §372.5 with 1983 Cal. Stat. c. 842, §30, at ____ (enacting CAL. PROB. CODE §372.5).

Rules of Construction

A. Interpretation

Under the Probate Revisions, a will is to be construed according to the testator's intention.⁴⁰ Chapter 892 expressly distinguishes a will that expresses the testator's intention from one that does not.⁴¹ If the testator's intention is clear, that intention controls the legal effect of dispositions made in the will.⁴² If the intention is unclear, Chapter 892 provides rules for disposition.⁴³ The Probate Revisions created a constructional preference in favor of contingent remainders rather than vested remainders.⁴⁴ Chapter 892 eliminates the preference and, therefore, general rules of construction apply.⁴⁵

B. Class Gifts

California case law has created a constructional preference favoring inclusion of adopted children within a class for purposes of distribution.⁴⁶ The Probate Revisions extended this constructional preference to include within the class persons born out of wedlock and halfbloods, and their issue.⁴⁷ Chapter 892 further extends the constructional preference to include stepchildren and foster children.⁴⁸

Pour-Over Trusts

Under existing law, a trust may be amended after the testator's death unless the testator's will provides that it may not be amended with respect to testamentary assets.⁴⁹ Under prior law, different rules applied with respect to inter vivos assets and testamentary assets during administration.⁵⁰ Chapter 892 governs trust assets by a single set of

40. 1983 Cal. Stat. c. 842, §55, at ____ (enacting CAL. PROB. CODE §6140).

41. Compare CAL. PROB. CODE §6140(a) with *id.* §6140(b).

42. *Id.* §6140(a).

43. *Id.* §6140(b).

44. 1983 Cal. Stat. c. 842, §55, at ____ (enacting CAL. PROB. CODE §6146). *Official Comments*, *supra* note 20, at 11.

45. CAL. PROB. CODE §6146; *Official Comments*, *supra* note 20, at 11.

46. See, e.g., *Estate of Pierce*, 32 Cal. 2d 265, 268, 196 P.2d 1, 3 (1948) (including adopted children).

47. 1983 Cal. Stat. c. 842, §55, at ____ (enacting CAL. PROB. CODE §6140).

48. CAL. PROB. CODE §6152.

49. CAL. PROB. CODE §6300 (incorporating 1965 Cal. Stat. c. 1640, §1, at 3735 (enacting CAL. PROB. CODE §170)).

50. 1965 Cal. Stat. c. 1640, §1, at 3735; see 1983 RECOMMENDATION, *supra* note 4, at 544 (rules distinguished).

rules and provides that a trust may be amended after the testator's death unless the will specifically provides otherwise.⁵¹

Pretermitted Spouses and Children

Under prior law, if a testator failed to provide by will for a surviving spouse who married the testator after the execution of the will, the omitted spouse took as if the testator had died intestate.⁵² Existing law prohibits a spouse from receiving a share under the will if (1) the testator intentionally omitted the spouse, (2) the spouse was provided for outside the will, or (3) the spouse waived any rights to a share.⁵³ Under the Probate Revisions, an omitted spouse, who was not prohibited from taking a share, took one-half of the testator's separate property.⁵⁴ Thus, statutory shares could possibly amount to more than 100% of the estate.⁵⁵ Chapter 892 eliminates this possibility by providing for an omitted spouse to receive the lesser of an intestate share or one-half of the testator's separate property.⁵⁶

The Probate Revisions applied the general California abatement rules for the purpose of satisfying an omitted spouse's share.⁵⁷ Chapter 892 provides a proportional schedule of abatement for payment of the share of either a spouse or a child omitted from the testator's will.⁵⁸

Garnishment of Amounts Payable to Trust Beneficiary

Under existing law, a judgment creditor⁵⁹ must petition a court to enforce a money judgment against the amounts payable to a judgment debtor⁶⁰ who is a beneficiary of a trust.⁶¹ The court has discretion to determine the proper means by which the judgment creditor may have satisfaction.⁶² Under Chapter 892, the court may order the trustee to withhold and pay to the judgment creditor all or part of periodic payments that would otherwise be distributed to the beneficiary.⁶³

51. CAL. PROB. CODE §6300; 1983 RECOMMENDATION, *supra* note 4, at 544.

52. 1931 Cal. Stat. c. 281, §670, at 590 (enacting CAL. PROB. CODE §70); *see also* CAL. PROB. CODE §§221, 223, 224 (related rules).

53. *Id.* §6561.

54. 1983 Cal. Stat. c. 842, §55, at ____ (enacting CAL. PROB. CODE §6560).

55. *Official Comments*, *supra* note 20, at 15.

56. CAL. PROB. CODE §6560.

57. 1983 Cal. Stat. c. 842, §55, at ____ (enacting CAL. PROB. CODE §6560); *see also* 1983 RECOMMENDATION *supra* note 4, at 545 (abatement rules).

58. *See* CAL. PROB. CODE §6562 (spouses); *id.* §6573 (children).

59. CAL. CIV. PROC. CODE §680.240 (definition of judgment creditor).

60. *Id.* §680.250 (definition of judgment debtor).

61. *Id.* §709.010(b), *see* §709.101(a) (definition of a trust).

62. *Id.* §709.010(b).

63. *Id.* §709.010(c). Unless the court directs otherwise, the effect of the order continues until the judgment creditor is satisfied or the order is modified or terminated. *Id.*

Furthermore, Chapter 892 provides that in the case of a spendthrift⁶⁴ trust, the order cannot require the trustee to pay any exempt portion⁶⁵ of the trust.⁶⁶ Chapter 892 also aligns the rules for enforcing money judgments against trust beneficiaries more closely with the rules governing wage garnishment by allowing a judgment creditor to proceed under a writ of execution to the same extent as earnings.⁶⁷ State or other public entities are not limited by Chapter 892 from recovering support provided to a beneficiary.⁶⁸

Under Chapter 892, an order directing the trustee is not effective until thirty days after service on a trustee unless a court orders otherwise.⁶⁹ Within that period, a trustee may, but is not required to, file a petition requesting clarification of the order.⁷⁰ The trustee, judgment creditor, and judgment debtor may present evidence at a hearing on the trustee's petition.⁷¹

64. See 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Trusts* §94, at 5452-54 (8th ed. 1974) (definition of spendthrift trust), RESTATEMENT OF TRUSTS §152 (1935) (example of spendthrift trust); see also *Canfield v. Security-First Nat. Bank*, 13 Cal. 2d 1, 11-12, 87 P.2d 830, 835 (1939) (justification for spendthrift trusts).

65. CAL. CIV. PROC. CODE §709.010(c) (explanation of exempt portion).

66. *Id.*

67. Compare *id.* with *id.* §§706.050, 706.051, 706.052. "To provide more protection from creditors for beneficiaries of inherited wealth than is provided for wage earners is a discrimination that can no longer be tolerated." CALIFORNIA LAW REVISION COMMISSION, *Recommendation Relating to Garnishment of Amounts Payable to Trust Beneficiary*, 17 CAL. L. REVISION COMM'N REPORTS 471, 477 (1984).

68. CAL. CIV. PROC. CODE §709.010(c); see also *Estate of Lackman*, 156 Cal. App. 2d 674, 320 P.2d 186 (1958).

69. CAL. CIV. PROC. CODE §709.010(d). See also *id.* §709.010(e) (duties of a trustee under this section).

70. *Id.*

71. *Id.* §709.010(d).

Administration of Estates; probate proceedings

Probate Code §630.5 (repealed); §§608.5, 933 (new); §§462, 541, 543, 591.2, 591.3, 591.4, 591.5, 630, 632, 649.1, 649.3, 649.4, 650, 653, 655, 656, 2628 (amended).*

AB 2270 (McAlister); 1984 STAT. Ch 451

Requires showing of good cause in order for a court to require a bond; revises independent administration to include estates containing real property; allows objection to a proposed action by written objection; abolishes subsequent court review unless timely objection is made to a proposed action; permits written

objection to appraisal; modifies affidavit procedure; allows for the distribution of separate property without administration; provides for a waiver of accounting; allows dispensing with accounting for small estates.

Bonds for Personal Representatives

The purpose of a bond in a probate proceeding is to ensure that executors¹ and administrators² faithfully execute their duties of trust according to the law.³ Under prior law, a court *could* require a bond from an executor or administrator even though all the beneficiaries or all the heirs had waived the bond requirement.⁴ Prior law did not require the court to find good cause to require a bond.⁵ With the enactment of Chapter 451, a court *must* dispense with the bond requirement unless a court finds good cause to require the bond.⁶ Chapter 451 provides that good cause is shown if any of the beneficiaries or heirs request a bond.⁷

Under prior law, a bond also was required of a special administrator.⁸ Chapter 451 permits a court to dispense with the bond if beneficiaries or all the heirs have waived it, unless the will provides otherwise.⁹ A court, for good cause, may require a bond from a special administrator.¹⁰

Independent Administration

Chapter 451 enacts necessary improvements to the Independent Administration of Estates Act¹¹ under which personal representatives

*The amendments to sections 630, 632, 649.1, 649.3, 649.4, 650, 653, 655, 656, and the repeal of section 630.5, of the Probate Code, only apply to cases when the decedent died after December 31, 1984. 1984 Cal. Stat. c. 451, § 22, at ____.

1. 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate*, §286 (8th ed. 1974)(definition of executor).

2. *Id.* (definition of administrator).

3. CAL. PROB. CODE §541; California Law Revision Commission, *Recommendation Relating to Bonds for Personal Representatives*, 17 CAL. L. REVISION COMM'N REPORTS 483, 487 (1984).

4. 1983 Cal. Stat. c. 18, §26, at ____ (amending CAL. PROB. CODE §541).

5. *Id.*

6. See CAL. PROB. CODE §541(waiver by beneficiary of bond requirement). The court, nevertheless, may require a bond. *Id.* §543; California Law Revision Commission, *Recommendation Relating to Bonds for Personal Representatives*, 17 CAL. L. REVISION COMM'N REPORTS 483, 488 (1984).

7. CAL. PROB. CODE §543.

8. 1931 Cal. Stat. c. 281, §462, at 610 (enacting CAL. PROB. CODE §462). See *id.* §463 (powers and duties of special administrators); see also 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate*, §289 (8th ed. 1974) (circumstances giving rise to appointment of a special administrator).

9. CAL. PROB. CODE §462(c)(1).

10. *Id.* §§462(c)(2), 543.

11. *Id.* §§591-591.7.

may petition to administer the estate with only limited court supervision.¹²

A. Real Property Transactions

Under prior law, the court could not grant independent administration to sales or exchanges of real property, or proposed actions granting of options to purchase real property.¹³ Chapter 451 extends the independent administration procedure to include real property transactions.¹⁴ Chapter 451, however, requires an executor or administrator who has authority to act without court supervision to give an advice of proposed action¹⁵ to persons¹⁶ affected by the action.¹⁷

B. Objection to Proposed Actions

Under existing law, any person affected by a proposed action may object and request court supervision for the transaction.¹⁸ The method of objection under existing law is by application to the court for a restraining order on the proposed action.¹⁹ Chapter 451 allows objection by restraining order *or* by delivery of a written objection.²⁰ The written objection must be received by the executor or administrator before the date specified on or after which the proposed action is to be taken, or before the action is actually taken, whichever is later.²¹

12. See *id.* §§591.1, 591.2 (authority for limiting court supervision). California Law Revision Commission, *Recommendation Relating to Independent Administration of Decedent's Estate*, 17 CAL. L. REVISION COMM'N REPORTS 405, 410 (1984) [hereinafter referred to as *Recommendation on Independent Administration*].

13. 1980 Cal. Stat. c. 955, §13.8, at 3018 (amending CAL. PROB. CODE §591.2).

14. Compare CAL. PROB. CODE §591.2 with 1980 Cal. Stat. c. 955, §13.8, at 3018 (amending CAL. PROB. CODE §591.2); see *Recommendation on Independent Administration*, *supra* note 12, at 412. The alternative to independent administration is cumbersome, expensive, and time consuming. *Id.*

15. See CAL. PROB. CODE §591.4 (requirements of advice of proposed action). Real property transactions are added to other actions requiring an advice of proposed action. *Id.* The advice of proposed action for real property transactions must state the material terms, including sale price if applicable. *Id.* The date on which the proposed action is to take place is extended, in the case of mailing the advice, to twenty days after the mailing and the advice must include the telephone number of a person who can provide additional information. *Id.*

16. See CAL. PROB. CODE §591.3(a) (persons to whom the advice must be given).

17. *Id.* §591.3.

18. *Id.* §591.5

19. *Id.* §591.5(a)(1).

20. *Id.* §591.5(a)(2)

21. *Id.* See *Recommendation on Independent Administration*, *supra* note 12, at 410 (written objection option will be less costly and more expeditious).

C. Effect of a Failure to Object

Under prior law, a recipient of an advice of proposed action who failed to object had the right to request a later court review of the action.²² Chapter 451 provides that failure to make a timely objection operates as a waiver of a later court review unless the person failing to object shows that he or she did not actually receive advice of the proposed action before the time to object expired.²³

Inventory and Appraisement

Existing law requires an executor or administrator to file an inventory and appraisement of the estate with the court.²⁴ Chapter 451 permits an interested person to file, at any time prior to entry of the decree of final distribution of the estate, a written objection to the appraisement.²⁵ Subsequent to a hearing on the objection, the court may issue appropriate orders.²⁶

Distribution of Estates Without Administration

A. Affidavit Procedure

California Probate Law provides an affidavit procedure²⁷ for immediate collection of personal property without ordinary administration proceedings, in part for the purpose of providing a decedent's family funds for necessities.²⁸ As the value of the dollar has diminished in recent years, the value of an estate capable of taking advantage of the affidavit procedure has been statutorily increased.²⁹ Under prior law, an estate that did not include any real property

22. 1978 Cal. Stat. c. 298, §1, at 623 (amending CAL. PROB. CODE §591.4).

23. CAL. PROB. CODE §591.5(d). The court, on its own motion or motion of an interested party, may review an executor's or administrator's actions. *Id.*

24. *Id.* §600; *see also id.* §605 (appraisement procedure). In some instances, the appraisement will be made by a probate referee. *Id.*

25. *Id.* §608.5; *see id.* §608.5(b)-(d) (procedure for hearing following written objection); *see also id.* §927 (exceptions to account).

26. *Id.* §608.5(e).

27. *See* California Law Revision Commission, *Recommendation Relating to Distribution of Estates Without Administration*, 17 CAL. L. COMM'N REPORTS 421, 427 (1984) (affidavit procedure explained).

28. *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87, 88 (1921); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate*, §536 (8th ed. 1974).

29. *See Review of Selected 1972 California Legislation*, 4 PAC. L.J. 229 (1973) (increase from \$3000 to \$5000); 1972 Cal. Stat. c. 555, §1, at 957 (amending CAL. PROB. CODE §630). *See Review of Selected California Legislation*, 6 PAC. L.J. 155 (1975) (increase from \$5000 to \$10,000); 1974 Cal. Stat. c. 602, §1, at 1440 (amending CAL. PROB. CODE §630); *Review of Selected 1976 California Legislation*, 8 PAC. L.J. 182 (1977) (increase from \$10,000 to \$20,000); 1976 Cal. Stat. c. 1028, §1, at 4616 (amending CAL. PROB. CODE §630). *See* 1979 Cal. Stat. c. 730, §101, at 2514 (amending CAL. PROB. CODE §630) (increase from \$20,000 to \$30,000).

and had a value of no more than \$30,000 could be collected pursuant to the affidavit procedure.³⁰ Chapter 451 permits affidavit procedure to be used for personal property even though the estate includes real property not exceeding a gross value³¹ of \$10,000, if the gross value of real and personal property does not exceed \$60,000.³² In addition, Chapter 451 expands the group of persons who may use the affidavit procedure to include grandparents of the decedent.³³

B. Passage of Property to Surviving Spouse Without Administration

Under existing law, a surviving spouse can take all or part of the decedent spouse's community property³⁴ or quasi-community property³⁵ without administration if the decedent bequeathed or devised the property to the surviving spouse.³⁶ Chapter 451 expands the property a decedent may pass to the surviving spouse without administration to include the decedent's separate property.³⁷ The surviving spouse may elect to have portions of the estate administered³⁸ or file an election and agreement in the proceedings.³⁹ Chapter 451 provides that the maximum limit on the personal liability of the surviving spouse includes debts of the decedent chargeable against separate property.⁴⁰ Chapter 451 also conforms the remaining procedures relating to the passage of property without administration to reflect the addition of separate property.⁴¹

Waiver of Accounting

Prior to enactment of Chapter 451, authority for a sole distributee

30. 1982 Cal. Stat. c. 520, §5, at 2443 (amending CAL. PROB. CODE §630).

31. See California Law Revision Commission, *Recommendation Relating to Distribution of Estates Without Administration*, 17 CAL. L. REVISION COMM'N REPORTS 421, 431 (1984) (explanation of gross value).

32. CAL. PROB. CODE §630(a).

33. Compare *id.* §630(b) with 1982 Cal. Stat. c. 520, §5, at 2443 (amending CAL. PROB. CODE §630). Nothing in this subdivision applies to real property or an interest in real property. CAL. PROB. CODE §630(b).

34. *Id.* §28 (definition of community property).

35. *Id.* §66 (definition of quasi-community property).

36. *Id.* §649.1.

37. Compare *id.* §§649.1, 649.3 with 1983 Cal. Stat. c. 842, §36, at 778 (enacting CAL. PROB. CODE §649.1). CAL. CIV. CODE §§5107-8 (definition of separate property).

38. CAL. PROB. CODE §649.1(b).

39. *Id.* §649.1(d).

40. *Id.* §649.4.

41. See *id.* §650 (petition to have property not administered); 653 (proceedings for administration); 655 (orders, findings and finality); 656 (property consisting of a business).

to waive the accounting existed only in case law⁴² and under some local probate rules.⁴³ With the enactment of Chapter 451, if all the beneficiaries are ascertained,⁴⁴ an executor or administrator need not render an account if all the persons entitled to distribution of the estate have executed and filed either a (1) written waiver of accounting,⁴⁵ or (2) written acknowledgement indicating receipt of the share to which they were entitled.⁴⁶

Furthermore, Chapter 451 provides guidelines for the execution of the waiver or acknowledgment if the distributee is a minor,⁴⁷ a conservatee,⁴⁸ a trust,⁴⁹ or an estate.⁵⁰ The executor or administrator must file a report of fees or commission paid to the executor or administrator and to attorneys.⁵¹

*Order Dispensing With Accounting in the Case
of a Small Guardianship or Conservatorship Estate*

Under existing law, the court may order a guardian or conservator of a small estate not to present accounts otherwise required if certain conditions are met.⁵² Chapter 451 broadens the discretionary authority of the court to make the order by (1) excluding the residence of the ward or conservatee from the value of the property which may not be exceeded in order to apply this section, (2) increasing the maximum value of the estate to \$5,000, and (3) increasing the maximum monthly income of the estate to \$300.⁵³

Conclusion

Chapter 451 clarifies the Probate Code by providing a bond is not required, absent a showing of good cause, when all the beneficiaries or all the heirs have waived.⁵⁴ Furthermore, Chapter 451 gives a court discretion to dispense with a bond for a special administrator if all

42. When the representative is the sole distributee, he may waive the accounting. *Middlecoff v. Superior Court*, 149 Cal. 94, 97, 84 P. 764, 765 (1906).

43. *Official Comments* to AB 2270, CALIFORNIA LAW REVISION COMM'N, at 5 [hereinafter referred to as *Official Comments*].

44. CAL. PROB. CODE §933(d).

45. *Id.* §933(a)(1).

46. *Id.* §933(a)(2).

47. *Id.* §933(b)(2).

48. *Id.* §933(b)(3).

49. *Id.* §933(b)(4).

50. *Id.* §933(b)(5).

51. *Id.* §933(c).

52. CAL. PROB. CODE §2628.

53. Compare *id.* §2628(b) with 1980 Cal. Stat. c. 246, §6.2, at 495 (enacting CAL. PROB. CODE §2628); see also *Official Comments*, *supra* note 43, at 6.

54. See *supra* notes 3-7 and accompanying text.

beneficiaries or heirs have waived it.⁵⁵ Chapter 451 enacts many necessary improvements to the Independent Administration of Estates Act.⁵⁶ With the enactment of Chapter 451, a written objection to an appraisal may be filed by an interested person.⁵⁷ In addition, Chapter 451 modifies the affidavit procedure for collection of personal property.⁵⁸ Finally, Chapter 451 revises the procedure for waiver of accounting in probate proceedings⁵⁹ and allows dispensing with accounting for small guardian or conservatorship estates.⁶⁰

55. See *supra* notes 9-10 and accompanying text.

56. See *supra* note 12 and accompanying text.

57. See *supra* notes 24-26 and accompanying text.

58. See *supra* notes 31-33 and accompanying text.

59. See *supra* notes 44-51 and accompanying text.

60. See *supra* note 53 and accompanying text.

Administration of Estates; limited conservatorships— developmentally disabled adults

Probate Code §§1801, 1828.5 (amended).
SB 1416 (Petrís); 1984 STAT. CH 183

The intent of the Legislature is to provide developmentally disabled¹ adults with the opportunity to live as independently, productively, and normally as possible.² Existing law permits a court to appoint a limited conservator³ for developmentally disabled adults who lack the capacity to perform some, *but not all*, of the tasks necessary to provide properly for their physical health, food, clothing, or shelter, or to manage their financial resources.⁴ Developmentally disabled adults who could not perform *any* of these tasks were not expressly provided for until the enactment of Chapter 183.⁵

With the enactment of Chapter 183, a court may appoint either

1. CAL. PROB. CODE §1420 (definition of developmental disability).

2. *Id.* §1801(d)(3).

3. *Id.* §3004 (definition of conservator); see *id.* §2351.5 (powers and duties of limited conservators); see also *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 261, 262 (limits upon powers and duties of limited conservators).

4. CAL. PROB. CODE §1828.5(c). See also *id.* §1801(d). The court may appoint a limited conservator of the person or of the estate for a developmentally disabled adult. *Id.*

5. Compare *id.* §1828.5(d) with 1980 Cal. Stat. c. 1304, §13, at 4405 (enacting CAL. PROB. CODE §1828.5).

a limited conservator or a general conservator⁶ for developmentally disabled conservatees who are incapable of performing any of the tasks necessary to provide for their personal needs.⁷ In the event a court appoints a limited conservator, existing law provides that the conservator's duties will be defined by the court so as to permit developmentally disabled adults to care for themselves or manage their financial resources commensurate with their ability.⁸ Chapter 183 extends this policy to conservatees incapable of performing *any* of the specified tasks.⁹

6. See CAL. PROB. CODE §1872 (distinguishing general from limited conservatorships).

7. *Id.* §1828.5(d).

8. *Id.* §1828.5(e).

9. Compare *id.* with 1980 Cal. Stat. c. 1304, §13, at 4405 (enacting CAL. PROB. CODE §1828.5).

Administration of Estates; establishing fact of death

Probate Code §§200, 201, 202, 203, 204, 205, 206, 1170, 1171, 1172, 1174, 1175 (repealed); §§200, 201, 202, 203, 204, 210, 211, 212, 250, 251, 252, 253, 254, 255, 256 (new).
AB 2255 (McAlister); 1984 STAT. Ch 527

Existing law provides that a person who claims an interest in real or personal property affected by an individual's death may initiate a court action to establish the fact of death.¹ The decree of the court, however, is merely *prima facie* evidence of the fact of death and does not confirm title in any survivor.² Existing law, therefore, establishes the fact of death through a certified copy of a court order.³ Chapter 527 additionally authorizes the use of an affidavit⁴ of death executed by a person having knowledge of facts sufficient to establish that death.⁵

The affidavit or certified copy of a court order establishing death must be indexed by the county recorder in the county in which the

1. CAL. PROB. CODE §200 (incorporating 1970 Cal. Stat. c. 952, §1, at 1713 (amending CAL. PROB. CODE §1170)).

2. CAL. PROB. CODE §204(b).

3. CAL. CIV. PROC. CODE §210.

4. *Id.* §2003 (definition of affidavit).

5. *Id.* §210(a).

property is located.⁶ Recordation of the affidavit has the same effect as a court decree establishing a fact of death by providing prima facie evidence of the death without confirming title in any other person.⁷

This procedure serves to codify an accepted practice which establishes clear title and in many situations avoids the need for probate or other court proceedings.⁸ Chapter 527 also facilitates the clearing of title necessary to enable the survivor to obtain title insurance.⁹

6. *Id.* §210. The index entry is to be made in the grantor column, and the person whose death is established is deemed to be the grantor. *Id.* §211(b).

7. *Id.* §212.

8. California Law Revision Commission, *Recommendation Relating to Recording Affidavit of Death*, 17 CAL. L. REVISION COMM'N REPORTS 493, 498 (1984).

9. *Id.* at 498; CAL. INS. CODE §12340.6 (definition of title insurance).

Administration of Estates; standard of care for trustees

Civil Code §2261 (amended).

AB 630 (McAlister); 1984 STAT. Ch 1372

Prior to the enactment of Chapter 1372, the standard of care imposed upon a trustee making investments¹ required the trustee to exercise the judgment and care that prudent people exercise in the management of their own affairs.² Chapter 1372 provides that a trustee must act with the degree of care, skill, prudence, and diligence that a prudent trustee would use to attain the goals of the trustor as set forth in the trust instrument.³ Chapter 1372 authorizes the trustee to acquire every kind of property and investment as part of an overall investment strategy and to take into account the general economic conditions at the time and the anticipated needs of the beneficiaries of the trust.⁴ A trustor may expressly expand or restrict the minimum standards imposed upon a trustee, and a trustee is not liable for acting in good faith reliance on those express provisions to anyone whose interests arise from the trust.⁵

1. Investment includes reinvesting, purchasing, acquiring, exchanging, selling, and managing property. CAL. CIV. CODE §2261(a)(1).

2. 1969 Cal. Stat. c. 259, §1 at 611 (amending CAL. CIV. CODE §2261); see *Estate of Collins*, 72 Cal. App. 3d 663, 669, 139 Cal. Rptr. 644, 648 (1977) (applying prudent investor test).

3. CAL. CIV. CODE §2261(a)(1). The language used in this section is based upon the Employment Retirement Security Act, 29 U.S.C. §1104(a)(1)(B).

4. CAL. CIV. CODE §2261(a)(1).

5. *Id.* §2261(a)(2).

Existing law provides that a trustee may continue to hold trust property if the trustee believes in good faith that retention is in the best interests of the trust.⁶ This authority is expanded under Chapter 1372 to allow retention of trust property if the trustee believes the retention is in furtherance of the goals of the trust instrument.⁷

Existing law allows a trustee to deposit trust funds in a bank if the amount of the deposit is insured or authorized by a court.⁸ Chapter 1372 further permits the deposit of funds with a bank to the extent the deposit is collateralized under any existing or future law.⁹

6. *Id.* §2261(b).

7. *Id.*

8. *Id.* §2261(c).

9. *Id.*

Administration of Estates; investments, objections to accounting, notice requirements

Civil Code §§1183, 2269.1 (new); Probate Code §§591.6, 709, 927, 1200.5 (amended).

AB 3085 (Harris); 1984 STAT. CH 1017

Chapter 1017 expands the law governing the discretion of a trustee regarding investment of trust funds and property options,¹ and further defines the rights of interested parties² and creditors of an estate.³ The law pertaining to the acknowledgement of instruments outside the United States also is affected by Chapter 1017.⁴

Acknowledgement of an Instrument Made Outside the United States

Under existing law, proof of an instrument can be made outside the United States by a notary public if the signature of the notary

1. Compare CAL. PROB. CODE §591.6 with 1983 Cal. Stat. c. 118, §1.5 at ____ (amending CAL. PROB. CODE §591.6); CAL. CIV. CODE §2261 with CAL. CIV. CODE §2269.1 (addition to trustee's discretionary powers).

2. Compare CAL. PROB. CODE §927 with 1981 Cal. Stat. c. 91, §1, at 256 (amending CAL. PROB. CODE §927).

3. Compare CAL. PROB. CODE §1200.5 with 1980 Cal. Stat. c. 955, §31, at 3037 (adding CAL. PROB. CODE §1200.5).

4. Compare CAL. CIV. CODE §1183 with 1982 Cal. Stat. c. 520, §13, at 2448 (amending CAL. CIV. CODE §1183).

is proved or acknowledged (1) before a judge of a court of record in the jurisdiction that proof or acknowledgement is made,⁵ or (2) by a certification in the manner provided for in the Hague Convention for Foreign Public Documents.⁶ Chapter 1017 additionally allows proof of an instrument by a notary public when the signature of the notary has been acknowledged by any American diplomatic officer, consul general, consul, vice consul, or consular agent.⁷ Chapter 1017 requires that certification in accord with the Hague Conventions be affixed⁸ to the instrument being acknowledged.⁹

Investments by Trustees

Chapter 1017 expands the investment options of a trustee.¹⁰ If a trust instrument permits investment in an obligation of the United States government,¹¹ Chapter 1017 permits a trustee to invest in a money market mutual fund¹² or an investment vehicle authorized for the collective investment of trust funds.¹³ This additional discretion given to a trustee does not change the prudent, discrete, and intelligent standard of care required of a trustee under existing law.¹⁴

Options to Sell Property

Existing law enumerates the powers that are given to an executor or administrator of a will.¹⁵ Chapter 1017 adds the right to grant

5. CAL. CIV. CODE §1183.

6. *Id.* See generally Agreement on Judicial Procedure: Abolishing Requirements of Legislation for Foreign Public Documents, 1981 T.I.A.S. no. 10072, 527 U.N.T.S. 189 (publication of the requirements of the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents); see also 65 Op. Att'y. Gen. 206 (1982) (explanation of the relationship of the Hague Convention requirements to CAL. CIV. CODE §1183).

7. CAL. CIV. CODE. §1183. Prior to 1982, California Civil Code section 1183 permitted acknowledgement by a minister, consul, vice consul, or consular agent of the United States. This provision was deleted upon conformity to the Hague Convention. 1982 Cal. Stat. c. 520, §13, at 2448; see generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate*, §118 (8th ed. 1974) (discussion of requirements of acknowledgment).

8. CAL. CIV. CODE §1183.

9. *Id.*

10. Compare CAL. CIV. CODE §2261 with CAL. CIV. CODE §2269.1.

11. See CAL. CIV. CODE §§1427, 1428 (definition, creation, and enforcement of obligation); see also *Neall v. U.S.*, 118 F. 699, 706 (9th Cir. 1902) (definition of U.S. obligations).

12. CAL. CIV. CODE §2269.1. The money market mutual fund must be registered under the Investment Company Act of 1940. *Id.* See also 15 U.S.C. §§80a-1—80c-3 (Investment Company Act of 1940).

13. CAL. CIV. CODE §2269.1. The portfolio of the investment vehicle must be limited to United States government obligations maturing not later than five years from the date of investment or reinvestment and to repurchase agreements fully collateralized by United States government obligations, pursuant to section 9.18 of part 9, title 12 of the Code of Federal Regulations. *Id.*

14. *Id.* §2261(1).

15. CAL. PROB. CODE §591.6(a)-(n).

an exclusive right to sell property, for not more than a ninety day period, unless the right is restricted by the will.¹⁶ Under existing law, the right to grant this option is available to an executor or administrator acting under the supervision of the court.¹⁷ Chapter 1017 extends this right to sell property to those who have been granted authority to administer a decedent's estate without court supervision.¹⁸

Objections to Estate Accounting

Under prior law, if an interested person¹⁹ objected to the valuation of assets in an estate and filed a written exception²⁰ to an accounting, a certificate of no estate tax also had to be filed by the estate administrator.²¹ Prior law also provided that any change in valuation would not change the state inheritance tax order.²²

The repeal of the California inheritance tax²³ made it unnecessary to file a certificate of no estate tax or issue an inheritance tax order.²⁴ Chapter 1017 conforms the law to these changes by eliminating the requirement that a certificate of no estate tax be filed as a precondition to an objection to an estate accounting.²⁵ Chapter 1017 also deletes all references to state inheritance tax.²⁶

Notice Requirements

Existing law requires that notice of the time and place of a probate hearing must be mailed to an executor or administrator at least ten days before the time set for the hearing by the petitioner.²⁷ Chapter

16. *Id.* §591.6(o).

17. *Id.* §591.2(e). The ninety day time limit, however, is not applicable to a court supervised administrator. *Id.* See also *Review of Selected 1977 California Legislation*, 9 PAC. L.J. 302 (1978) (discussion of option sales of estate property).

18. CAL. PROB. CODE §591.6(o).

19. An interested person is not defined by the statutes. *Estate of Reinicke*, 44 Cal. App. 2d 271, 273, 112 P.2d 311, 312 (1941). Generally, however, an interested person is anyone who has some control over the action, whether they will be individually affected or not. *Twigg v. Flynn*, 68 F. Supp. 23, 24 (S.D. Fla. 1946).

20. Written exception requirement is satisfied by filing a document entitled "Objections to Final Account," and by petitioning that allowance be made to objector. *Estate of McMillin*, 46 Cal. 2d 121, 128, 292 P.2d 881, 885 (1956).

21. 1981 Cal. Stat. c. 91, §1, at 215 (amending CAL. PROB. CODE §927); see also 1982 Cal. Stat. c. 327, §§168-178, at 1490-1504 (repealing CAL. REV. & TAX. CODE §§13301-14902).

22. 1981 Cal. Stat. c. §1, 91, at 215 (amending CAL. PROB. CODE §927).

23. The prohibition of Gift and Death Taxes was added by initiative adopted June 3, 1982. 1982 Cal. Stat. c. 327 §§168-178, at 1490-1504 (repealing CAL. REV. & TAX. CODE §§13301-14902).

24. *Id.*

25. CAL. PROB. CODE §927.

26. *Id.*

27. *Id.* §1200.5(b).

1017 applies this notice requirement to claims against the estate from debts incurred by the decedent prior to death that are filed after the prescribed period.²⁸ Chapter 1017 also imposes the ten day notice requirement to any other probate proceedings that require notice but does not specify a time or method.²⁹

28. *Id.* §1200.5(a)(21); *see also id.* §709 (claims of plaintiff in action pending against decedent at time of death).

29. *Id.* §1200.5(a)(2).

