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Administration of Estates

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Administration of Estates

Administration of Estates; probate

Civil Code §§5129 (repealed); 226.12, 5135.5 (new); 63*, 224.1, 730.05, 1389.4, 1624, 4352 (amended); Code of Civil Procedure §§353.5, 377, 1443 (amended); Education Code §24606 (amended); Government Code §21371 (amended); Penal Code §3524 (amended); Probate Code §§1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 20, 21, 22, 22.1, 23, 24, 25, 26, 27, 28, 29, 50, 51, 52, 53, 56, 56.1, 56.2, 56.3, 56.4, 56.5, 56.6, 56.7, 56.8, 56.9, 56.10, 56.11, 56.12, 56.13, 56.14, 60, 60.1, 60.2, 60.3, 60.4, 60.5, 60.6, 60.7, 60.8, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 90, 91, 92, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 120, 121, 122, 123, 124, 125, 126, 140, 141, 142, 143, 160, 161, 162, 162.5, 163, 170, 171, 172, 173, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 186.1, 186.2, 186.3, 186.4, 186.5, 186.6, 186.7, 186.8, 186.9, 190, 190.1, 190.2, 190.3, 190.4, 190.5, 190.6, 190.7, 190.8, 190.9, 190.10, 200, 201, 201.5, 201.6, 201.7, 201.8, 202, 203, 204, 205, 206, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 250, 251, 252, 253, 254, 255, 257, 258, 296, 296.1, 296.2, 296.3, 296.4, 296.41, 296.42, 296.5, 296.6, 296.7, 296.8, 350, 660, 661, 662, 663, 664, 665, 666, 680, 681, 682, 683, 684, 1050, 1051, 1052, 1053 (repealed); 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 20, 21, 22, 24, 26, 28, 32, 34, 38, 40, 44, 48, 50, 54, 56, 58, 60, 62, 66, 68, 70, 78, 80, 82, 84, 88, 100, 101, 102, 103, 104, 120, 140, 141, 142, 143, 144, 145, 146, 147, 150, 160, 200, 201, 202, 203, 204, 205, 206, 220, 221, 222, 223, 224, 230, 231, 232, 233, 234, 240, 328.7, 372.5, 632, 640, 641, 645, 645.3, 650, 655, 660, 661, 662, 663, 664, 1026, 6100, 6101, 6102, 6110, 6111, 6112, 6113, 6120, 6121, 6122, 6123, 6130, 6131, 6140, 6141, 6142, 6143, 6144, 6145, 6146, 6147, 6148, 6149, 6150, 6151, 6152, 6160, 6161, 6162, 6165, 6170, 6171, 6172, 6173, 6174, 6175, 6176, 6177, 6178, 6200, 6201, 6202, 6203, 6204, 6205, 6206, 6207, 6208, 6209, 6210, 6220, 6221, 6221.5, 6222, 6223, 6224, 6225, 6226, 6240, 6241, 6242, 6243, 6244, 6245, 6246, 6247, 6248, 6300, 6301, 6302, 6303, 6320, 6321, 6322, 6323, 6324, 6325, 6326, 6327, 6328, 6329, 6340, 6341, 6342, 6343, 6344, 6345, 6346, 6347, 6348, 6349, 6380, 6381, 6382, 6383, 6384, 6385, 6386, 6387, 6388, 6389, 6400, 6401, 6402, 6402.5, 6403, 6404, 6406, 6407, 6408, 6408.5, 6409, 6410, 6411, 6412, 6413, 6500, 6501, 6510, 6511, 6520, 6521, 6522, 6523, 6524, 6525,

* Until the operative date of Chapter 842, Chapter 6 of the 1983 Cal. Stat. shall be effective.

6526, 6527, 6528, 6540, 6541, 6542, 6543, 6544, 6545, 6560, 6561, 6562, 6570, 6571, 6572, 6573, 6800, 6801, 6802, 6803, 6804, 6805, 6806 (new); 300, 323, 351, 704.2, 736, 1054, 1139, 1139.6, 1215, 1871, 2580, 3012 (amended).

AB 25 (McAllister); 1983 STAT. Ch 842

(Effective January 1, 1985) **

Support: California Law Revision Commission; American Association of Retired Persons

Abolishes quasi-community election requirement; permits recapture of quasi-community property when the decedent dies intestate; includes quasi-community property within simultaneous death provisions; provides for the enforcement of contractual arrangements before death; exempts promises relating to wills from the Statute of Frauds; enforces contractual pay-on-death provisions; revises provisions concerning homicide and changes standard of proof; modifies simultaneous death provisions and requisite standards of proof; changes distribution by right of representation; relaxes formalities for executing a will; clarifies choice of law provisions for validity of will; changes revocation requirements; provides that dissolution of marriage revokes provisions in the will favoring an ex-spouse; revises provisions concerning revival of revoked will; codifies practice of incorporation by reference; establishes a constructional preference in favor of contingent remainders; changes interpretation of death "with or without issue" clauses; expands provisions concerning class gifts; amends requirements for exoneration and ademption; revises intestate succession procedures; changes parent-child relationship provisions; modifies the rule for advancements of intervivos gifts; expands Family Protection provisions; modifies provisions for pretermitted heirs.

The California law governing wills and intestate succession has not been thoroughly revised for over a century.¹ Existing law contains technical requirements and mechanical rules that often invalidate wills and pro-

** The operative date of Chapter 842 is deferred one year to give the bench, bar, and public time to become familiar with its provisions. Chapter 842 applies only to cases where the decedent dies on or after the operative date. Prior law will continue to govern cases where the decedent dies before the operative date. RECOMMENDATIONS, *infra* note 1, at 2320.

1. TENTATIVE RECOMMENDATION RELATING TO WILLS AND INTESTATE SUCCESSION.

duce results inconsistent with the testator's intent.² Chapter 842 represents an extensive revision of the laws governing wills, intestate succession, and related matters.³ To promote uniformity, the California Legislature has drawn provisions from the Uniform Probate Code when a special local rule is not required.⁴ In addition, Chapter 842 enacts new provisions concerning contractual arrangements relating to rights at death and division by representation.⁵

Effect of Death on Married Person's Property

Existing law provides that upon the death of a spouse, one-half of the community property⁶ belongs to the surviving spouse.⁷ The other half of the community property is subject to the testamentary disposition of the decedent.⁸ If the decedent has no will,⁹ one-half of the community property share belonging to the decedent passes to the surviving spouse.¹⁰ In addition, under existing law, the rule governing the descent of quasi-community property¹¹ is the same as the rule governing the descent of community property.¹² Under prior law, however, the surviving spouse was required to elect to take either the quasi-community property devised under the decedent's will or the statutory half-share against the will.¹³ Chapter 842 abolishes this election requirement¹⁴ and permits the surviving spouse to claim the statutory share of quasi-community property without sacrificing benefits under the will.¹⁵

Existing law allows a surviving spouse to recapture¹⁶ one-half of any

SION, 16 CAL. L. REVISION COMM'N REPORTS 2301, 2318 (1982) [hereinafter referred to as RECOMMENDATION].

2. *Id.*

3. *Id.* at 2319.

4. *Id.*

5. See CAL. PROB. CODE §§140-160, 240.

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

7. *Id.* §100 (incorporating 1935 Cal. Stat. c. 831, §2, at 2249 (amending CAL. PROB. CODE §201)); see *id.* §78 (definition of surviving spouse).

8. *Id.* §100 (incorporating 1935 Cal. Stat. c. 831, §2, at 2249 (amending CAL. PROB. CODE §201)).

9. *Id.* §88 (definition of a will).

10. *Id.* §6401(a) (incorporating 1935 Cal. Stat. c. 831, §2, at 2249 (amending CAL. PROB. CODE §201)).

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

12. Compare *id.* §101 with 1980 Cal. Stat. c. 955, §1, at 3007 (amending CAL. PROB. CODE §201.5).

13. 1957 Cal. Stat. c. 490, §3, at 1521 (enacting CAL. PROB. CODE §201.7). This election was required unless it appeared the testator intended the surviving spouse to take both under the will and against the will. *Id.* See RECOMMENDATION, *supra* note 1, at 2352.

14. 1983 Cal. Stat. c. 842, §19, at ___ (repealing CAL. PROB. CODE §201.7).

15. CAL. PROB. CODE §102(a); see Estate of Kilingenberg, 94 Cal. App. 2d 240, 244, 210 P.2d 514, 517 (1949) (election required if the will so states); see also 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate*, §21-22 (8th ed. 1974) (election also may be imposed to avoid thwarting the testator's apparent intent) [hereinafter referred to as WITKIN, *Wills and Probate*].

16. If the transferee has not retained the property, one-half of the proceeds from the

quasi-community property in which the surviving spouse had an expectancy interest¹⁷ at the time the decedent transferred the property to another.¹⁸ Prior law specified, however, that if the decedent had provided for the surviving spouse by will, and the surviving spouse chose to take under the will, recapture was no longer available.¹⁹ Chapter 842 abolishes this requirement²⁰ and allows the surviving spouse to recover the property whether the decedent died testate or intestate.²¹

Chapter 842 expands existing provisions relating to the division of community property to include quasi-community property upon the simultaneous death²² of both spouses.²³ Under Chapter 842, both the community and quasi-community property will be distributed as if each spouse had survived and owned one-half of the property.²⁴

Contractual Arrangements

A. Rights at Death

Prior to the enactment of Chapter 842, the waiver²⁵ of a surviving spouse's rights in the decedent's estate was virtually ignored by statutory law.²⁶ Case law, however, has strictly construed waivers to prevent the loss of valuable property rights.²⁷ Chapter 842 establishes provisions governing these spousal waivers in a manner generally consistent with existing case law.²⁸ Under Chapter 842, a present or prospective spouse may waive certain property rights in whole or in part.²⁹ To be valid, the waiver

property or value at the time of transfer may be recaptured. CAL. PROB. CODE §102 (incorporating 1957 Cal. Stat. c. 490, §4, at 1521 (enacting CAL. PROB. CODE §201.8)).

17. RECOMMENDATION, *supra* note 1, at 2373 (expectancy meaning at a time when the transferor is domiciled in California).

18. CAL. PROB. CODE §102 (incorporating 1957 Cal. Stat. c. 490, §4, at 1521 (enacting CAL. PROB. CODE §201.8)). The following requirements must be met: (1) the decedent died while domiciled in the state, (2) the decedent made the transfer without receiving valuable consideration, and (3) the testator had a substantial quantum of ownership over the property at death. *Id.*

19. 1957 Cal. Stat. c. 490, §4, at 1521 (enacting CAL. PROB. CODE §201.8).

20. Compare CAL. PROB. CODE §102 with 1957 Cal. Stat. c. 490, §4, at 1521 (enacting CAL. PROB. CODE §201.8).

21. CAL. PROB. CODE §102(a); see 1983 Sen. Daily J. 4869.

22. See CAL. PROB. CODE §§220-234 (proceedings to determine simultaneous death).

23. Compare *id.* §103 with 1976 Cal. Stat. c. 649, §2, at 1601 (amending CAL. PROB. CODE §296.4).

24. CAL. PROB. CODE §103 (incorporating 1976 Cal. Stat. c. 649, §2, at 1601 (amending CAL. PROB. CODE §296.4)). This distribution is subject to the provisions governing the disposition of life or accident insurance benefits. See *id.* §224.

25. *Id.* §140 (definition of waiver).

26. See RECOMMENDATION, *supra* note 1, at 2347.

27. See, e.g., Estate of Howe, 81 Cal. App. 2d 95, 99, 183 P.2d 329, 331 (1947) (waiver of probate homestead upheld).

28. CAL. PROB. CODE §§140-147; see RECOMMENDATION, *supra* note 1, at 2376; UNIF. PROBATE CODE §2-204, 8 U.L.A. 82 (1968).

29. CAL. PROB. CODE §141(a).

must be in writing and signed by the surviving spouse.³⁰ A person purporting to relinquish "all rights"³¹ in the property only waives those rights allowed by statutory law.³² Furthermore, both prenuptial and antenuptial property settlements may act as valid waivers under Chapter 842.³³

A waiver of a surviving spouse's property rights is unenforceable if a court finds that (1) a fair and reasonable disclosure of the decedent's property was not provided to the surviving spouse before the execution of the waiver,³⁴ or (2) the surviving spouse was not represented by independent legal counsel at the time the waiver was executed.³⁵ Even though a waiver falls into one of these two categories, that waiver may be enforced if a court finds that the surviving spouse voluntarily executed and understood the effect of the waiver, and (1) the waiver was a reasonable disposition of the rights of the surviving spouse,³⁶ or (2) the surviving spouse had, or reasonably should have had, adequate knowledge of the decedent's property.³⁷ Moreover, the court may refuse to enforce or limit the effect of the waiver to avoid an unconscionable result.³⁸ Chapter 842 also permits agreements to alter, amend, or revoke a waiver.³⁹ To be enforceable, these agreements must meet substantially the same requirements as the original waiver.⁴⁰

B. Wills or Succession

Prior to the enactment of Chapter 842, a promise to make or not to revoke a will was governed by the Statute of Frauds.⁴¹ The courts, however, permitted enforcement of oral promises either to make or not to revoke a will which resulted in the opportunity for fabrication of testimony concerning the existence of the agreement.⁴² To ameliorate this problem, Chapter 842 uses the approach suggested by the Uniform Probate Code providing that a contract⁴³ to make a will, not to revoke a will, or to die intestate can be established only by (1) a statement of the material contract

30. *Id.* §142.

31. *Id.* §145 (or equivalent language).

32. *Id.* §141 (rights that may be waived).

33. *Id.* §145.

34. *Id.* §143(a).

35. *Id.* §143(b).

36. *Id.* §144(a)(1).

37. *Id.* §144(a)(2).

38. *Id.* §144(b).

39. *Id.* §146(b).

40. *Id.* §146(c)-(e); *see id.* §147 (effective date of waivers, agreements, and property settlements).

41. *See* 1967 Cal. Stat. c. 52, §1, at 953 (amending CAL. CIV. CODE §1624); *see also* *Zaring v. Brown*, 41 Cal. App. 2d 227, 231, 106 P.2d 224, 226 (1940).

42. *See* RECOMMENDATION, *supra* note 1, at 2348.

43. The contract must be executed after December 31, 1984. CAL. PROB. CODE §150(a).

provisions in the will,⁴⁴ (2) an express reference to the contract in the will and extrinsic evidence proving the terms of the contract,⁴⁵ or (3) a writing signed by the decedent evidencing the contract.⁴⁶ In accordance with existing case law, Chapter 842 provides that the execution of either a joint will⁴⁷ or mutual wills⁴⁸ does not create a presumption of a contract not to revoke a will.⁴⁹

C. Contractual Pay-on-Death Provisions

Prior to the enactment of Chapter 842, specified contractual arrangements providing for the payment of money to another after the decedent's death were invalid testamentary transfers.⁵⁰ Chapter 842 states that specified pay-on-death provisions in written contracts⁵¹ are valid even though the instrument does not comply with requirements for executing a will.⁵² Specifically, the Probate Code does not invalidate a written instrument providing that money belonging to the decedent must be paid to a person designated in the instrument or a separate writing, or that specified property must be passed to a person designated in the instrument or a separate writing.⁵³ The separate writing, including a will, must have been executed at the same time as, or subsequent to, the execution of the written instrument.⁵⁴ Furthermore, Chapter 842 does not invalidate a provision stipulating that money due or to become due under the written instrument or a separate writing will not be paid if either the promisee or the promisor dies before payment is made.⁵⁵

44. *Id.* §150(a)(1).

45. *Id.* §150(a)(2).

46. *Id.* §150(a)(3); see UNIF. PROBATE CODE, §2-701, 8 U.L.A. 155 (1968) (contracts concerning succession); see also *Potter v. Bland*, 136 Cal. App. 2d 125, 131, 288 P.2d 569, 573 (1955) (oral agreement may be evidenced by a subsequent writing).

47. *Daniels v. Bridges*, 123 Cal. App. 2d 585, 588, 267 P.2d 343, 345 (1954) (definition of joint will).

48. *Id.* (definition of mutual wills).

49. CAL. PROB. CODE §150(b); see *Daniels v. Bridges*, 123 Cal. App. 2d 585, 586, 267 P.2d 343, 345 (1954); see also RECOMMENDATION, *supra* note 1, at 2349 (sound policy requires some form of written evidence).

50. See, e.g., *Estate of McEuen*, 18 Cal. App. 2d 180, 181, 63 P.2d 332, 332 (1936) (installment contract for sale of real property). See generally WITKIN *Wills and Probate*, *supra* note 15, §§88-89, at 5607-09 (contracts as attempted testamentary dispositions).

51. Written contracts include: insurance policies, contracts of employment, bonds, mortgages, promissory notes, deposit agreements, pensions or profit-sharing plans, trust agreements, conveyances, or any other written instruments effective as a contract, gift, conveyance, or trust. CAL. PROB. CODE §160(a).

52. *Id.* §160(a). See generally RECOMMENDATION, *supra* note 1, at 2350 (California case law).

53. CAL. PROB. CODE §160(a)(1), (a)(3).

54. *Id.* §160(a)(1).

55. *Id.* §160(a)(2); see also *Bergman v. Ornbaun*, 33 Cal. App. 2d 680, 683, 92 P.2d 654, 655 (1939) (agreement concerning cancellation of debt on death of payee not an attempted testamentary transfer). Rights of creditors are not limited by these provisions. CAL. PROB. CODE §160(b).

Effect of Homicide

Prior to the enactment of Chapter 842, a person who killed a decedent could not take under the decedent's will or by intestate succession if the killing was *unlawful* and *intentional* or was committed accidentally during the commission of a specified felony.⁵⁶ With the enactment of Chapter 842, a person who *feloniously* and *intentionally* kills a decedent is not entitled to take any of the following: (1) property, an interest, or benefit under the will of the decedent;⁵⁷ (2) property of the decedent by intestate succession;⁵⁸ (3) the decedent's quasi-community property;⁵⁹ and (4) property of the decedent pursuant to the family protection provisions.⁶⁰ In these circumstances, the part of the decedent's estate that would have passed to the person who killed the decedent passes as if the person had predeceased the decedent.⁶¹

Chapter 842 codifies case law holding that when a joint tenant⁶² feloniously and intentionally kills another joint tenant, the joint tenancy is severed,⁶³ and the decedent's share passes as if it exclusively belonged to the decedent.⁶⁴ Additionally, Chapter 842 codifies case law holding that the benefits of a decedent's bond or life insurance policy naming the person who killed the decedent as a beneficiary⁶⁵ are payable as if the person had predeceased the decedent.⁶⁶

Prior to the enactment of Chapter 842, a determination of the intent of the person who killed the decedent was based upon proof beyond a reasonable doubt.⁶⁷ With the enactment of Chapter 842, the court may deter-

56. 1963 Cal. Stat. c. 857, §1, at 2081 (amending CAL. PROB. CODE §258) (specified felonies were those contained in felony murder rule and section 288 of the Penal Code).

57. CAL. PROB. CODE §200(a)(1); *see* New York Life Ins. Co. v. Cawthorne, 48 Cal. App. 3d 651, 654, 121 Cal. Rptr. 808, 810 (1975). Persons should not profit from their killing even if the profit is in the form of a bequest. *Id.*

58. CAL. PROB. CODE §200(a)(2).

59. *Id.* §200(a)(3).

60. *Id.* §200(a)(4); *see* RECOMMENDATION, *supra* note 1, at 2383 (discussion of change); Estate of Helwinkel, 199 Cal. App. 2d 283, 288, 18 Cal. Rptr. 473, 476 (1962) (murderer disqualified from family allowance); CAL. PROB. CODE §§6500-6573 (provisions concerning family protection).

61. CAL. PROB. CODE §200(b)(1); *see also id.* §§200(b)(2)(3) (provisions in decedent's will affecting killer's rights), 6147 (anti-lapse provisions apply).

62. *See* Abbey v. Lord, 168 Cal. App. 2d 449, 508, 336 P.2d 226, 233 (1959).

63. *See* CAL. PROB. CODE §201 (including joint tenancies in real and personal property, joint and multiple-party accounts in financial institutions, and any other form of co-ownership with survivorship incidents); Estate of Hart, 135 Cal. App. 3d 684, 688, 185 Cal. Rptr. 544, 546 (1982).

64. CAL. PROB. CODE §201.

65. *Id.* §24 (definition of beneficiary).

66. *Id.* §202; *see id.* §203 (includes cases not enumerated in these provisions); *see also* Estate of Jeffers, 134 Cal. App. 3d 729, 736, 182 Cal. Rptr. 300, 304 (1982) (killer cannot claim as a beneficiary).

67. *See* Estate of McGowan, 35 Cal. App. 3d 611, 618, 111 Cal. Rptr. 39, 45 (1973). Under existing law, a conviction is given conclusive effect in the civil proceeding. CAL. PROB. CODE §204(a) (incorporating 1963 Cal. Stat. c. 857, §1, at 2081 (amending CAL. PROB. CODE §258)).

mine that the killing was felonious and intentional by a preponderance of the evidence.⁶⁸ Furthermore, for purposes of distributing the decedent's estate, prior law provided that an acquittal in a criminal trial was given conclusive effect on the issue of the defendant's innocence.⁶⁹ With the enactment of Chapter 842, the absence of a conviction establishes only that the burden of proof beyond a reasonable doubt was not satisfied.⁷⁰

Simultaneous Death

Existing law specifies that if two or more persons die simultaneously, and title to property or the descent of property depends upon priority of death, the property is distributed as if each person survived the other.⁷¹ Prior law provided that property was distributed in this manner if the evidence was insufficient to demonstrate that the persons died other than simultaneously.⁷² Consequently, speculative lawsuits often resulted when circumstantial evidence was used to indicate a person's survival for only a brief period of time.⁷³ Under Chapter 842, distribution occurs when clear and convincing evidence proves that one person survived the other.⁷⁴ The provisions governing simultaneous death, however, do not apply (1) to community and quasi-community property,⁷⁵ (2) when a devisee⁷⁶ does not survive the testator,⁷⁷ or (3) for purposes of intestate succession.⁷⁸ Furthermore, these simultaneous death provisions are controlled by property distribution provisions in a trust,⁷⁹ deed, contract for insurance or any other instrument that explicitly addresses simultaneous death⁸⁰ or which requires one person to survive another for a stated period of time.⁸¹

68. CAL. PROB. CODE §204(b); *see* RECOMMENDATION, *supra* note 1, at 2346 (the extraordinary burden of proof attached to a criminal penalty not appropriate when civil matters and the competing interests of heirs are concerned). *But see* Estate of McGowan, 35 Cal. App. 3d 611, 619, 111 Cal. Rptr. 39, 45 (1973) (application of the preponderance of the evidence standard would amount to an arbitrary discrimination in the resolution of valuable property rights, and consequently would violate the equal protection clauses of the constitution).

69. 1963 Cal. Stat. c. 857, §1, at 2081 (amending CAL. PROB. CODE §258).

70. CAL. PROB. CODE §204(b) (burden of proof on party seeking to establish that the killing was intentional and felonious); *see* RECOMMENDATION, *supra* note 1, at 2346.

71. CAL. PROB. CODE §220 (incorporating 1945 Cal. Stat. c. 988, §1, at 1885 (enacting CAL. PROB. CODE §296)).

72. 1945 Cal. Stat. c. 988, §1, at 1885 (enacting CAL. PROB. CODE §296); *see also* Estate of Rowley, 257 Cal. App. 2d 324, 327, 65 Cal. Rptr. 139, 141 (1967) (meaning of sufficient evidence under prior law).

73. *See* RECOMMENDATION, *supra* note 1, at 2345-46.

74. CAL. PROB. CODE §220.

75. *Id.* §221(a); *see id.* §103 (effect on community and quasi-community property when married persons die simultaneously).

76. *Id.* §34 (definition of devisee).

77. *Id.* §221(a); *see id.* §6146 (requirement that devisee survive testator).

78. *Id.* §221(a); *see id.* §6403 (requirement that heir survive decedent).

79. *Id.* §82 (definition of trust).

80. *Id.* §221(b)(1). Chapter 842 also does not apply to provisions in a trust deed or contract of insurance explicitly dealing with deaths in a common disaster. *Id.*

81. *Id.* §221(b).

Survival of Beneficiaries

Chapter 842 provides that if (1) the right of a beneficiary to succeed to any interest in the property of another depends upon the beneficiary surviving another person, and (2) survival cannot be established by clear and convincing evidence, then the beneficiary is deemed not to have survived the other person.⁸² Furthermore, clear and convincing evidence is needed (1) to establish survivorship between joint tenants,⁸³ and (2) to determine survivorship in situations where the priority of death must be determined for two or more beneficiaries designated to take under another person's will by reason of survivorship.⁸⁴

Existing law provides that if the insured and the beneficiary under a life or accident insurance policy die simultaneously, the insurance proceeds are distributed as if the insured had survived the beneficiary.⁸⁵ Chapter 842 specifies that this provision applies to cases in which the insured and beneficiary are married to each other,⁸⁶ whether the insurance policy is community, quasi-community, or separate property.⁸⁷

Proceedings to Determine Survival Petitions

Existing law provides that specified persons may file a petition during the administration of an estate to determine the order of survival.⁸⁸ Prior to the enactment of Chapter 842, that petition could be filed alleging the evidence was insufficient to show that the persons whose survival was at issue died other than a simultaneous death.⁸⁹ Chapter 842 provides a list of various circumstances presenting an issue of survivorship which can be the basis for filing a petition.⁹⁰

Pursuant to existing law, notice of the hearing on the petition is given to the executor or administrator of each person whose priority of death is in issue.⁹¹ Under prior law, the heirs and devisees were notified only if the pe-

82. *Id.* §222(a); *see also* UNIFORM SIMULTANEOUS DEATH ACT, §2, 84 U.L.A. 569 (1968).

83. CAL. PROB. CODE §223.

84. *Id.* §222(b). Otherwise, the property must be divided into as many equal portions as the number of beneficiaries and the portion given to each beneficiary shall be administered as if that beneficiary had survived the other beneficiary. *Id.*

85. CAL. PROB. CODE §224 (incorporating 1945 Cal. Stat. c. 988, §1, at 1886 (enacting CAL. PROB. CODE §296.3)).

86. *Compare id.* §224(b) with 1945 Cal. Stat. c. 988, §1, at 1886 (enacting CAL. PROB. CODE §296.3)); *see also* RECOMMENDATION, *supra* note 1, at 2389 (provisions subject to contrary language in the insurance contract).

87. CAL. PROB. CODE §224(b).

88. *Id.* §231 (incorporating 1979 Cal. Stat. c. 731, §2, at 2554 (amending CAL. PROB. CODE §296.41)). A "specified person" is an executor or administrator, or any person interested in the estate of a person whose priority of death is in issue. *Id.*

89. 1979 Cal. Stat. c. 731, §2, at 2554 (amending CAL. PROB. CODE §296.41).

90. CAL. PROB. CODE §230(a) - (e).

91. *Id.* §233(b)(l) (incorporating 1979 Cal. Stat. c. 731, §2, at 2554 (amending CAL. PROB. CODE §296.41)).

tioner was the decedent's representative.⁹² Under Chapter 842, notice must be given to all devisees and heirs⁹³ of the decedent⁹⁴ and any other persons who have requested special notice in the proceeding.⁹⁵

Division by Representation

Under prior law, if all the decedent's surviving descendants were of the same generation, the decedent's estate was divided among the descendants per capita.⁹⁶ If, however, the descendants were not all of the same generation, the estate was distributed per stirpes.⁹⁷ Chapter 842 adopts the approach taken by the Uniform Probate Code⁹⁸ and requires the estate of the decedent to be divided into as many equal shares as there are (1) living members of the nearest generation of issue⁹⁹ then living, and (2) deceased members of that generation who leave issue then living.¹⁰⁰ Each living member of the nearest generation of issue then living receives one share and the *issue* of the deceased member each receives one share.¹⁰¹ This distribution procedure is applied when a will expresses no contrary intent and does not specify the manner of distribution, or requires distribution per stirpes or by right of representation.¹⁰²

Wills

A. Execution of Wills

Under existing law, any individual who is eighteen years of age or older and of sound mind¹⁰³ may execute a will.¹⁰⁴ The will must be in writing and signed by the testator.¹⁰⁵ Prior law required (1) that the signature be at the

92. 1979 Cal. Stat. c. 731, §2, at 2554 (amending CAL. PROB. CODE §296.41).

93. CAL. PROB. CODE §44 (definition of heirs).

94. *Id.* §233(b)(2), (b)(3).

95. *Id.* §233(b)(4).

96. 1931 Cal. Stat. c. 281, §221, at 596 (enacting CAL. PROB. CODE §222); see *Lombardi v. Blois*, 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899, 904 (1964) (definition of per capita).

97. 1931 Cal. Stat. c. 281, §221, at 596 (enacting CAL. PROB. CODE §221); see *Lombardi*, 230 Cal. App. 2d at 198, 40 Cal. Rptr. at 904 (definition of per stirpes).

98. UNIF. PROBATE CODE §2-106, 8 U.L.A. 65 (1968).

99. CAL. PROB. CODE §50 (definition of issue).

100. *Id.* §240; see 1983 Sen. Daily J. 4871 (discussion of change).

101. CAL. PROB. CODE §240; see 1983 Sen. Daily J. 4871 (discussion of change).

102. CAL. PROB. CODE §240; see 1983 Sen. Daily J. 4871 (discussion of change) (also in cases where representation is called for by other provisions of the Probate Code).

103. See *In re Wolf's Estate*, 174 Cal. App. 2d 144, 150, 344 P.2d 37, 41 (1959) (meaning of sound mind).

104. CAL. PROB. CODE §6100 (incorporating 1957 Cal. Stat. c. 1950, §1, at 3492 (amending CAL. PROB. CODE §20)).

105. *Id.* §6110(a) (incorporating 1982 Cal. Stat. c. 187, §1, at ____ (amending CAL. PROB. CODE §50)). The will also may be signed in the testator's name by another person who is in the testator's presence, and under the direction of the testator. *Id.* §6110(b)(1), (2) (incorporating 1982 Cal. Stat. c. 187, §1, at ____ (amending CAL. PROB. CODE §50(1))).

end of the will,¹⁰⁶ (2) that the testator declare to the witnesses that the instrument was the testator's will,¹⁰⁷ and (3) that the testator request the witnesses to sign the will.¹⁰⁸ The witnesses were required to sign at the end of the will and in the testator's presence.¹⁰⁹

With the enactment of Chapter 842, the testator and witnesses are not required to sign at the end of the will, and the testator is not required to make a declaration to the witnesses, or request that the witnesses sign the will.¹¹⁰ A will is sufficiently witnessed if signed by at least two persons who (1) were present and witnessed the signing of the will,¹¹¹ and (2) understood that the instrument was the testator's will.¹¹²

B. Who May Witness a Will

Under prior law, subscribing witnesses who were also beneficiaries of the will were prevented from taking a share under the will larger than the intestate share they would have received unless the will was subscribed by two other disinterested witnesses.¹¹³ Chapter 842 abolishes the requirement of disinterested witnesses.¹¹⁴

C. Choice of Law

Under existing law, a will executed outside California and offered for probate in California is deemed valid if the will is executed in compliance with the law (1) in California,¹¹⁵ (2) in effect at the time and place of execution,¹¹⁶ or (3) in effect in the testator's domicile at the time of execution or

106. 1982 Cal. Stat. c. 187, §1, at ____ (amending CAL. PROB. CODE §50); *see also In re Chase's Estate*, 51 Cal. App. 2d 353, 357, 124 P.2d 895, 897 (1942) (meaning of "at the end"). In the case of a person subscribing the name of the testator, prior law required that person also to sign as a witness. 1982 Cal. Stat. c. 187, §1, at ____ (amending CAL. PROB. CODE §50).

107. 1982 Cal. Stat. c. 187, §1, at ____ (amending CAL. PROB. CODE §50). *In re Jackson's Estate*, 157 Cal. App. 2d 198, 201, 320 P.2d 563, 565 (1958).

108. 1982 Cal. Stat. c. 187, §1, at ____ (amending CAL. PROB. CODE §50); *see also Camperi v. Chiechi*, 134 Cal. App. 2d 485, 501, 286 P.2d 399, 408 (1955) (request inferred from conduct).

109. 1982 Cal. Stat. c. 187, §1, at ____ (amending CAL. PROB. CODE §50).

110. *See RECOMMENDATION, supra* note 1, at 2320; *see also* 1983 Sen. Daily J. 4872.

111. CAL. PROB. CODE §6110(c)(1). Case law provides that the witnesses need not sign in the presence of each other. *In re Estate of Armstrong*, 8 Cal. 2d 204, 209-10, 64 P.2d 1093, 1096 (1937).

112. CAL. PROB. CODE §110(c)(2).

113. 1931 Cal. Stat. c. 281, §51, at 590 (enacting CAL. PROB. CODE §51).

114. CAL. PROB. CODE §6112(b) (incorporating 1931 Cal. Stat. c. 281, §51, at 590 (enacting CAL. PROB. CODE §51)). The fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. *Id. See also* 1983 Cal. Stat. c. 842, §26, at ____ (enacting CAL. PROB. CODE §328.3). A will or part thereof procured to be made by duress, menace, fraud, or undue influence may be denied probate. *Id.*

115. CAL. PROB. CODE §6113(a) (incorporating 1972 Cal. Stat. c. 713, §1, at 1301 (enacting CAL. PROB. CODE §26(l))).

116. *Id.* §6113(b) (incorporating 1972 Cal. Stat. c. 713, §1, at 1301 (enacting CAL. PROB. CODE §26)).

death.¹¹⁷ Chapter 842 clarifies that a will executed inside California is also valid under the choice of law provisions if the will would be valid under the law of another appropriate jurisdiction.¹¹⁸

D. Revocation

Existing law specifies that a will may be revoked by a subsequent will, the destruction of the will by the testator, or by a person in the testator's presence.¹¹⁹ Under prior law, the act of destruction by a person other than the testator, and the testator's intent to revoke the will, had to be proved by two witnesses.¹²⁰ Chapter 842 abolishes these requirements of proof.¹²¹

E. Dissolution of Marriage

Prior to the enactment of Chapter 842, the dissolution or annulment of a testator's marriage had no effect on provisions in the will favoring the former spouse.¹²² Chapter 842 provides that after execution of the will, a testator's marriage which is dissolved or annulled¹²³ revokes any provision in the will (1) distributing property to the former spouse,¹²⁴ (2) conferring a power of appointment on the former spouse,¹²⁵ or (3) nominating the former spouse as executor, trustee,¹²⁶ conservator, or guardian.¹²⁷ These enumerated provisions of the testator's will are interpreted as if the former spouse failed to survive the testator.¹²⁸ Chapter 842 also provides that a provision of the will that is revoked by the dissolution or annulment of a marriage will be revived if the testator remarries the former

117. *Id.* §6113(c) (incorporating 1972 Cal. Stat. c. 713, §1, at 1301 (enacting CAL. PROB. CODE §26)). Chapter 842 includes, in addition to domicile, places in which the testator had a place of abode, or is a national. *Id.*

118. *Id.* §6113; UNIF. PROBATE CODE § 2-506, 8 U.L.A. 116 (1968); *see also* RECOMMENDATION, *supra* note 1, at 2323) (Chapter 842 may be codifying existing practice).

119. CAL. PROB. CODE §6120 (incorporating 1931 Cal. Stat. c. 281, §72, at 591 (enacting CAL. PROB. CODE §§72, 74)); *see also id.* §6120 (incorporating 1931 Cal. Stat. c. 281, §74(2), at 591 (enacting CAL. PROB. CODE §74)) (provisions on revocation).

120. 1931 Cal. Stat. c. 281, §74(2), at 591 (enacting CAL. PROB. CODE §74).

121. *Compare* CAL. PROB. CODE §6120 with 1931 Cal. Stat. c. 281, §74(2), at 591 (enacting CAL. PROB. CODE §74).

122. 1980 Cal. Stat. c. 1188, §1, at 3972 (enacting CAL. CIV. CODE §4352). A provision affecting the will could be made, however, in the property settlement. *Id.* *See* RECOMMENDATION, *supra* note 1, at 2325. *See generally*, WITKIN, *Wills and Probate*, *supra* note 15, §150.

123. CAL. PROB. CODE §6122(d). Dissolution or annulment results from proceedings in which the spouse would be excluded as a surviving spouse within the meaning of section 78 of the Probate Code. *Id.*

124. *Id.* §6122(a)(1).

125. *Id.* §6122(a)(2).

126. *Id.* §84 (definition of trustee).

127. *Id.* §6122(a)(3). Chapter 842 applies unless the will expressly provides otherwise. *Id.* *See also id.* §6226 (conforming revisions in California Statutory Will form).

128. *Id.* §6122(c); *see also* 1983 Cal. Stat. c. 842, §55, at ____ (amending CAL. CIV. CODE §4352). A judgment declaring a marriage annulity or dissolving a marriage shall contain a notice that the action revokes any disposition made by a will. *Id.*

spouse.¹²⁹

F. Revival of a Revoked Will

Under prior law, the revocation of a second will revived the first will if (1) the second will were revoked by an instrument showing the testator's intent to revive the first will, or (2) the terms of the first will were republished.¹³⁰ If, however, the second will were revoked by a physical act of destruction, that revocation did not revive the first will, regardless of the testator's intent.¹³¹ Chapter 842 states that if a second will¹³² is revoked, the first will is revoked in whole or in part when the circumstances surrounding the revocation of the second will, or the testator's contemporary or subsequent declarations, show an intention to revive the first will.¹³³ Furthermore, if the testator in a third will revokes the second will, the first will is fully or partially revoked except to the extent that the terms of the third will show an intent to revive the first will.¹³⁴

G. Reference to Matters Outside the Will

Under existing case law, a will may incorporate by reference extrinsic documents or papers in existence at the time the will was executed.¹³⁵ In codifying this doctrine,¹³⁶ Chapter 842 specifies that a writing in existence at the time a will is executed may be incorporated into the will if the language of the will demonstrates the intent to incorporate the extrinsic document and adequately identifies the writing that is being incorporated.¹³⁷ Chapter 842 also codifies existing case law permitting the disposition of property through references to acts and events of independent significance¹³⁸ apart from their effect upon the disposition made by the will.¹³⁹

129. *Id.* §6122(b).

130. 1931 Cal. Stat. c. 281, §75, at 591 (enacting CAL. PROB. CODE §75).

131. RECOMMENDATION, *supra* note 1, at 2324. *See In re Estate of Lones*, 108 Cal. 688, 689, 41 P. 771, 771 (1895).

132. A second will is one that would have revoked the first will had the will remained effective at death. CAL. PROB. CODE §6123(a).

133. *Id.*

134. *Id.* §6123(b).

135. *See Estate of Plumel*, 151 Cal. 77, 80, 90 P. 192, 194 (1907) (incorporating prior defective will); *see also* WITKIN, *Wills and Probate*, *supra* note 15, §143 (summary of cases allowing incorporation by reference).

136. CAL. PROB. CODE §§6130, 6131; *see also* UNIF. PROB. CODE §2-510, 8 U.L.A. 125 (1968).

137. CAL. PROB. CODE §6130.

138. These acts may occur before or after the execution of the will, or before or after the death of the testator. *Id.* §6131; *see also* WITKIN, *Wills and Probate*, *supra* note 15, §147 (discussion of doctrine); UNIF. PROB. CODE §2-512, 8 U.L.A. 126 (1968) (events of independent significance).

139. CAL. PROB. CODE §6131. For example, the execution or revocation of a will of another person. *Id.*

Rules of Construction

A. Interpretation

Under prior law, the interpretation of a will disposing of property within the state was governed by California law unless an intention to the contrary appeared.¹⁴⁰ Chapter 842 provides that the meaning and legal effect of a disposition in a will must be construed according to the testator's intent¹⁴¹ and determined by the law of the particular state selected by the testator.¹⁴² The law of the specified state is not applied, however, if that law is contrary to (1) the rights of a surviving spouse in community or quasi-community property,¹⁴³ (2) family protection provisions,¹⁴⁴ or (3) any other public policy of California applicable to the disposition.¹⁴⁵

B. Requirement that Devisee Survive Testator

Under existing law, a devisee who does not survive the testator does not take under the will.¹⁴⁶ With the enactment of Chapter 842, a testator also may require that a devisee survive until a future date to take under the will.¹⁴⁷ Prior to the enactment of Chapter 842, case law held that a person need not survive the testator if the will provided for that person to take as a devisee of a future interest.¹⁴⁸ Chapter 842 instead establishes a constructional preference in favor of contingent remainders when survivorship is required.¹⁴⁹

C. Anti-lapse

Under existing law, when an estate is devised or bequeathed to any kindred of the testator and the kindred are dead when the will is executed, or fail to survive the testator, the kindred's issue take in the devisee's place by right of representation.¹⁵⁰ Chapter 842 expands this provision to include

140. 1931 Cal. Stat. c. 281, §100, at 592 (enacting CAL. PROB. CODE §100).

141. CAL. PROB. CODE §6140.

142. *Id.* §6141.

143. *Id.* §6141(a).

144. *Id.* §6141(b); *see also id.* §§6500-6573 (provisions on Family Protection).

145. *Id.* §6141(c).

146. *Id.* §6146(a) (incorporating 1931 Cal. Stat. c. 281, §92, at 592 (enacting CAL. PROB. CODE §92)).

147. *Compare id.* §6146(a) with 1931 Cal. Stat. c. 281, §92, at 592 (enacting CAL. PROB. CODE §92).

148. 1983 Sen. Daily J. 4874; *see, e.g.,* Estate of Stanford, 49 Cal. 2d 120, 126, 315 P.2d 681, 685 (1957) (remaindermen not required to survive income beneficiary).

149. CAL. PROB. CODE §6146(a) (unless a contrary intention is indicated by the will). If clear and convincing evidence does not establish that the devisee (1) survived the testator, or (2) survived until the specified future time, the devisee is deemed not to have survived the testator. *Id.* §6146(b)(2).

150. *Id.* §6147(b) (incorporating 1931 Cal. Stat. c. 281, §92, at 592 (enacting CAL. PROB. CODE §92)).

kindred of a surviving, deceased, or former spouse of the testator.¹⁵¹ In cases treating devisees as having predeceased the testator, anti-lapse provisions also apply.¹⁵²

D. Failure of Devise

Chapter 842 states that if a devise¹⁵³ fails, the property becomes part of the residue of the estate.¹⁵⁴ Prior to the enactment of Chapter 842, if a share of one of several residuary devises failed, that share passed by intestacy.¹⁵⁵ With the enactment of Chapter 842, if the residue or a future interest is devised to two or more persons, and the share of a devisee fails, that share passes to the other devisees in proportion to their interest in the residue or the future interest.¹⁵⁶

E. Meaning of “Death Without Issue”

Since 1911, California has preferred the theory of indefinite failure of issue¹⁵⁷ when a condition in a devise of a present or future interest referred to a specified person dying “with or without issue.”¹⁵⁸ Chapter 842 changes this much criticized interpretation¹⁵⁹ by construing a condition that refers to a person’s death “with or without issue” as referring (1) to that person’s being dead at the time the devise takes effect in enjoyment, and (2) to those issue who are alive to enjoy the devise at the time of the specified person’s death.¹⁶⁰

F. Class Gifts

Existing law provides for a testamentary disposition of a present interest to a class.¹⁶¹ The members of the class include all persons answering the

151. Compare *id.* §6147(a) with 1931 Cal. Stat. c. 281, §92, at 592 (enacting CAL. PROB. CODE §92).

152. Compare CAL. PROB. CODE §6147(b) with 1931 Cal. Stat. c. 281, §92, at 592 (enacting CAL. PROB. CODE §92); see also CAL. PROB. CODE §6147(c) (incorporating 1931 Cal. Stat. c. 281, §92, at 592 (enacting CAL. PROB. CODE §92)) (will expressing a contrary intention).

153. CAL. PROB. CODE §32 (definition of devise). Residuary devisee, or a devisee of a future interest is not included in this definition. *Id.* §6148(a).

154. *Id.* §6148(a); see also UNIF. PROB. CODE §2-606(a), 6 U.L.A. 146 (1968) (failure of testamentary provision).

155. 1983 Sen. Daily J. 4876.

156. CAL. PROB. CODE §6148(b) (the share passes in proportion to the interest of other devisees in the residue or future interest); see also UNIF. PROB. CODE §2-606(a), 8 U.L.A. 146 (1968).

157. See *Estate of Carothers*, 161 Cal. 588, 119 P. 966 (1911) (establishing indefinite failure of issue).

158. 1983 Sen. Daily J. 4876.

159. RESTATEMENT OF PROPERTY §266 comment d (1926); see also WITKIN, *Wills and Probate*, *supra* note 15, §§192-193.

160. CAL. PROB. CODE §6149.

161. *Id.* §6150 (incorporating 1931 Cal. Stat. c. 281, §123, at 594 (enacting CAL. PROB. CODE §123)).

class description at the time the devise takes effect.¹⁶² Chapter 842 permits the class to be enlarged after the testator's death and before the devise takes effect in enjoyment.¹⁶³ A devise of a future interest to a class now includes all persons answering the class description at the time the devise takes effect in enjoyment.¹⁶⁴

California case law has created a constructional preference favoring the inclusion of adopted children within a class.¹⁶⁵ Chapter 842 further extends this constructional preference to include within the class persons born out of wedlock, half-bloods, and their issue.¹⁶⁶ Certain children of adoptive parents or children born out of wedlock, however, are excluded from the class.¹⁶⁷ In the case of a devise by a testator who is not the adoptive parent, the adoptee will not be considered the child of the adoptive parent for purposes of construing the devise unless the adoptee, while a minor,¹⁶⁸ was a regular member of the adopting parent's household.¹⁶⁹ This provision is intended to preclude adoptive parents from adopting a person solely for the purpose of permitting the adoptee to take as a member of the class.¹⁷⁰ Chapter 842 also excludes a child born out of wedlock from taking through that child's natural parent unless the child, while a minor, was a regular member of the household of the natural parent or of that parent's parent, brother, sister, or surviving spouse.¹⁷¹

Exoneration and Ademption

Under California case law, if the testator was personally liable for a debt encumbering specifically devised property, the devisee was entitled to exoneration.¹⁷² Chapter 842 nullifies this case law by stating that in the absence of a contrary intention by the testator,¹⁷³ a specific devise passes property subject to a mortgage, deed of trust, or other lien existing at the testator's death.¹⁷⁴ No right of exoneration exists regardless of a general

162. *Id.* §6150 (incorporating 1931 Cal. Stat. c. 281, §123, at 594 (enacting CAL. PROB. CODE §123)).

163. *Id.* §6150(b) (incorporating 1931 Cal. Stat. c. 281, §123, at 594 (enacting CAL. PROB. CODE §123)); *see also* 1983 Sen. Daily J. 4877 (postponing the determination of class membership will reduce the uncertainty of result under prior law).

164. CAL. PROB. CODE §6150(b).

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

166. CAL. PROB. CODE §6152(a).

167. *Id.* §6152(b).

168. *Id.* (either before or after the adoption).

169. *Id.* (household may also be of the adopting parent's parent, brother, sister, or surviving spouse).

170. 1983 Sen. Daily J. 4877.

171. CAL. PROB. CODE §6152(b).

172. *See* Estate of Barnal, 165 Cal. 223, 233, 131 P. 375, 379 (1913) (definition of exoneration).

173. CAL. PROB. CODE §6165.

174. *Id.*

directive in the will to pay debts out of the estate.¹⁷⁵

Under existing case law, ademption¹⁷⁶ will not occur if the particular subject of the gift merely changes in form.¹⁷⁷ With the enactment of Chapter 842, if the testator intended a specific devise of certain securities,¹⁷⁸ rather than the equivalent value, the devisee is entitled to as much of the devised securities as are part of the estate at the time of the testator's death.¹⁷⁹ The devisee also is entitled to (1) additional securities of the same entity resulting from a stock split¹⁸⁰ or a reinvestment plan if the entity is a regulated investment company,¹⁸¹ or (2) securities of another entity owned by the testator as the result of a merger, consolidation, reorganization, or other similar action initiated by the entity.¹⁸² Additionally, the devisee has the right to any remaining specifically devised property and (1) the balance of the purchase price owing from a purchaser to the testator at death from sale of the property;¹⁸³ (2) any amount of an eminent domain award unpaid at death;¹⁸⁴ (3) any unpaid proceeds from fire or casualty insurance on the property;¹⁸⁵ and (4) property owned by the testator at death resulting from foreclosure of the security for a specifically devised obligation.¹⁸⁶

In the event specifically devised property is sold by a conservator, Chapter 842 mandates that the specific devisee receive money from the estate equal to the net sale price of the property.¹⁸⁷ In addition, if an eminent domain award or fire or casualty insurance proceeds are paid to a conservator, the specific devisee has the right to money from the estate equal to the award or proceeds.¹⁸⁸

Under existing law, an inter vivos gift of the devised property is com-

175. *Id.* §6170.

176. *Estate of Newsome*, 248 Cal. App. 2d 712, 714, 56 Cal. Rptr. 874, 876 (1967) (definition of ademption).

177. *See Estate of Helfman*, 193 Cal. App. 2d 652, 656, 14 Cal. Rptr. 484, 485 (1961) (stock split merely change in form and legatee gets increased number of shares); *see also* WITKIN, *Wills and Probate*, *supra* note 15, §220.

178. CAL. PROB. CODE §70 (definition of security).

179. *Id.* §6171(a).

180. *Id.* §6171(a)(2) (excluding any additional securities acquired by purchase options).

181. *Id.* §6171(a)(4).

182. *Id.* 6171(a)(3).

183. *Id.* §6172(a); *Estate of Shubin*, 252 Cal. App. 2d 588, 590, 60 Cal. Rptr. 678, 680 (1967) (ademption would have occurred but for lack of testator's intent).

184. CAL. PROB. CODE §6172(b).

185. *Id.* §6172(c).

186. *Id.* §6172(d) (or obtained in lieu of foreclosure); *see also* 1983 Sen. Daily J. 4879. The rules of nonademption are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption. *Id.* *See also* UNIF. PROB. CODE §2-607, 8 U.L.A. 147 (1968) (change in securities).

187. CAL. PROB. CODE §6173(a); *see also Estate of Packham*, 232 Cal. App. 2d 847, 850, 43 Cal. Rptr. 318, 320 (1965) (proceeds of sale of realty not adeemed); UNIF. PROB. CODE §2-608, 8 U.L.A. 150 (1968) (nonexoneration).

188. CAL. PROB. CODE §6173(b). These rights, however, do not exist if, after the sale, award, or payment of the insurance proceeds, the conservatorship is terminated and the

pletely or partially adeemed if the testator's intention is expressed in the grant¹⁸⁹ or the devisee acknowledges in writing that the gift satisfies the devise.¹⁹⁰ Chapter 842 further provides that the testator's will may also require (1) the deduction of lifetime gifts from the devised property,¹⁹¹ or (2) for the purposes of partial satisfaction, that the gift property be valued as of the time that the devisee came into possession or enjoyment of the property, or at the time of the testator's death, whichever occurs first.¹⁹²

Intestate Succession

A. Heirs Other than Surviving Spouse

Existing law provides that the portion of the intestate estate that does not pass first to the surviving spouse passes to the issue of the decedent¹⁹³ who take equally if they are of the same degree of kinship.¹⁹⁴ Prior law specified that if all the issue were *not* of the same degree of kinship, the issue took by representation.¹⁹⁵ Under Chapter 842, the primary division of the estate takes place at the first generation having any living members, and only the issue of more remote kinship take by representation.¹⁹⁶

In the event no issue are alive, existing law provides that the estate passes to the decedent's parent or parents equally.¹⁹⁷ If no parent is living, the issue take equally if all are of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation.¹⁹⁸ Under prior law, if the decedent died leaving no spouse, issue, parent, or issue of parent, the estate went to the next of kin.¹⁹⁹ Chapter 842 instead provides that the estate passes to a surviving grandparent or grandparents who take equally if all are of the same degree of kinship to

testator survives the termination by one year. *Id.* §6173(c). *See also id.* §6173(d) (rights of specific devisee reduced by rights under Probate Code §6172).

189. *Id.* §6174(a)(2) (incorporating 1931 Cal. Stat. c. 281, §1050, at 655 (enacting CAL. PROB. CODE §6150)). Chapter 482 refers to the grant as contemporaneous writing. *Id.*

190. *Id.* §6174(a)(3) (incorporating 1931 Cal. Stat. c. 28, §1050, at 655 (enacting CAL. PROB. CODE §1050)).

191. *Id.* §6174(a)(1); *see also* RECOMMENDATION, *supra* note 1, at 2331.

192. CAL. PROB. CODE §6174(b). When the value of the gift is expressed in the contemporaneous writing of the testator or in the devisee's acknowledgment, however, that value is conclusive. *Id.* §6174(c).

193. *Id.* §6402(a) (incorporating 1931 Cal. Stat. c. 281, §222, at 596 (enacting CAL. PROB. CODE §222)); *see id.* §6401 (intestate share of surviving spouse).

194. *Id.* §6402 (incorporating 1931 Cal. Stat. c. 28, §222, at 596 (enacting CAL. PROB. CODE §222)).

195. 1931 Cal. Stat. c. 281, §222, at 596 (enacting CAL. PROB. CODE §222).

196. CAL. PROB. CODE §6402(a); *see also id.* §6402.5 (provisions distributing a portion of the decedent's estate in the event the decedent had a predeceased spouse who dies not more than 15 years before the decedent who leaves no surviving spouse or issue); *see* 1983 Sen. Daily J. 4871-72, 4881.

197. CAL. PROB. CODE §6402(b) (incorporating 1931 Cal. Stat. c. 281, §225, at 597 (enacting CAL. PROB. CODE §225(1))).

198. *Id.* §6402(c).

199. 1931 Cal. Stat. c. 281, §226, at 597 (enacting CAL. PROB. CODE §226).

the decedent, but if of unequal degree, those of more remote kinship take by representation.²⁰⁰ If no grandparent survives, the grandparent's issue take subject to the new rule of representation.²⁰¹ Furthermore, before the next of kin can take, if the decedent is survived by the issue of a predeceased spouse, then those issue take equally if all are of the same degree of kinship to the decedent, but if of unequal degree, the issue of more remote kinship take by representation.²⁰²

Chapter 842 recodifies the provisions governing the distribution of the estate to the next of kin in the event of no surviving spouse, issue, parent, issue of parent, grandparent, issue of grandparent, or issue of predeceased spouse.²⁰³ If no next of kin are living but the decedent is survived by parents of a predeceased spouse or the issue of those parents, existing law provides that the estate first passes to the parent or parents of the predeceased spouse equally.²⁰⁴ If both those parents are deceased, Chapter 842 provides that the issue take equally if all are of the same degree of kinship to the decedent, but if of unequal degree, those of more remote kinship take by representation.²⁰⁵ Under existing law, half blood relatives of the decedent inherit the decedent's estate equally with those who are of the decedent's whole blood ancestry.²⁰⁶ Prior law, however, prevented half blood relatives from inheriting property of the decedent that came to the decedent from one of the decedent's ancestors.²⁰⁷ Chapter 842 abolishes this requirement.²⁰⁸ Furthermore, relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born during the decedent's lifetime.²⁰⁹

B. Parent-Child Relationship and Adopted Children

For purposes of determining intestate succession, existing law provides that a parent-child relationship exists between an adopted person and the adopting parent.²¹⁰ Chapter 842 provides that the relationship between a person and that person's foster parent or stepparent has the same legal effect as if the relationship were an adoptive relationship if (1) the relation-

200. CAL. PROB. CODE §6402(d).

201. *Id.*

202. *Id.* §6402(e).

203. Compare *id.* §6402(f) with 1931 Cal. Stat. c. 281, §226, at 597 (enacting CAL. PROB. CODE §226).

204. CAL. PROB. CODE §6402(g) (incorporating 1980 Cal. Stat. c. 136, §2, at 320 (amending CAL. PROB. CODE §229(a))).

205. *Id.* §6402(g).

206. *Id.* §254 (incorporating 1931 Cal. Stat. c. 281, §254, at 599 (enacting CAL. PROB. CODE §254)).

207. 1931 Cal. Stat. c. 281, §254, at 599 (enacting CAL. PROB. CODE §254).

208. 1983 Cal. Stat. c. 842, §19, at — (repealing CAL. PROB. CODE §254).

209. CAL. PROB. CODE §6407.

210. *Id.* §6408(a)(2) (incorporating 1955 Cal. Stat. c. 1478, §1, at 2690 (amending CAL. PROB. CODE §257)).

ship began during the person's minority and continued throughout the parties' joint lifetimes, and (2) clear and convincing evidence establishes that the foster parent or stepparent would have adopted the person but for a legal barrier.²¹¹

Prior law prevented a child from inheriting from or through the natural parent when the relationship was severed by an adoption.²¹² Chapter 842 specifies that the adopted children can inherit from or through both their natural and adoptive parents if the natural parent and adopted person lived together, at any time, as parent and child, and the adoption was (1) by the spouse of either natural parent, or (2) after the death of either natural parent.²¹³ Chapter 842, however, provides that a natural parent or relative of a parent²¹⁴ cannot inherit from or through the parent's child on the basis of the parent-child relationship, if the child has been adopted by someone other than the natural parent's spouse or surviving spouse.²¹⁵ A parent or relative of a parent also cannot inherit from or through a child on the basis of a parent-child relationship if the child were born out of wedlock and has neither been acknowledged nor supported by that parent.²¹⁶

Advancements

Under prior law, if a donor died testate, any property given to an heir as donee during the donor's lifetime was treated as an advancement to the donee,²¹⁷ and if the donee were deceased, as an advancement to the donee's heirs.²¹⁸ Under Chapter 842, an inter vivos transfer will be an advancement to the donee if the donor dies intestate²¹⁹ and only will be an advancement to the donee's heirs if the donor expresses an intent to affect their share, or if the donee acknowledges in writing that the gift is to be an advancement.²²⁰

Additional Provisions

Chapter 842 codifies case law providing that a debt owed to a decedent is not chargeable against the intestate share of any person except the

211. *Id.*

212. 1955 Cal. Stat. c. 1478, §1, at 2690 (amending CAL. PROB. CODE §257); *see also* RECOMMENDATION, *supra* note 1, at 2340 (effect new law will have).

213. CAL. PROB. CODE §6408(a)(3).

214. For the purposes of this provision, issue of the child, a whole blooded brother or sister of the child, or the issue of that brother or sister are not considered relatives. *Id.* §6408(a).

215. *Id.*

216. *Id.* §6408.5(b).

217. 1931 Cal. Stat. c. 281, §1050, at 655 (enacting CAL. PROB. CODE §1050).

218. 1931 Cal. Stat. c. 281, §1053, at 655 (enacting CAL. PROB. CODE §1053).

219. CAL. PROB. CODE §6409(a).

220. *Id.* §6409(d).

debtor.²²¹ If, however, the debtor fails to survive the decedent, the debt is not considered in computing the intestate share of the debtor's issue.²²² Chapter 842 specifies that a person related to the decedent through two lines of relationship²²³ is entitled to only a single share of the decedent's estate based upon the relationship entitling the person to the larger share.²²⁴

Family Protection

A. Setting Aside Exempt Property

The Probate Code provides for the protection of a decedent's family during settlement of the estate.²²⁵ Under existing law, a court is allowed discretion to exempt any part of the decedent's property other than the family dwelling²²⁶ from the enforcement of a money judgment for the benefit of the decedent's surviving spouse or minor children during administration of the estate.²²⁷ Prior law permitted an award to the minor children only when the surviving spouse also died.²²⁸ Chapter 842 allows the minor child to have an award even when a surviving spouse survives.²²⁹

B. Family Allowance

Under existing law, the surviving spouse, minor children, or adult children who are physically or mentally incapacitated from earning a living and actually dependent upon the decedent for support, are entitled to a reasonable family allowance during the time that the estate is being settled.²³⁰ Additionally, existing law gives the court discretion to grant a family allowance to other adult children who were actually dependent upon the decedent for support.²³¹ This discretionary group of people eligible for a family allowance is expanded under Chapter 842 to include parents of the decedent who were actually dependent upon the decedent for sup-

221. *Id.* §6410(a); *see also* Estate of Berk, 196 Cal. App. 2d 278, 287, 16 Cal. Rptr. 492, 498 (1961); *see also* UNIF. PROB. CODE §2-111, 8 U.L.A. 70 (1968) (debts to decedent).

222. CAL. PROB. CODE §6410(b).

223. For example, where the natural parents of a child are killed in an accident and the child is adopted by a brother or sister of the natural mother of the child. Thus, the child is both a natural and adopted grandchild of the natural mother's parents. 1983 Sen. Daily J. 4883.

224. CAL. PROB. CODE §6413.

225. *See id.* §§6500-6806 (provisions concerning family protection).

226. *See id.* §§6500-6501 (provisions relating to temporary possession of family dwelling).

227. *Id.* §6510 (incorporating 1982 Cal. Stat. c. 497, §141.3, at ____ (amending CAL. PROB. CODE §660)).

228. 1983 Cal. Stat. c. 497, §141.3, at ____ (amending CAL. PROB. CODE §660(b)(1)).

229. CAL. PROB. CODE §6510; *see also* RECOMMENDATION, *supra* note 1, at 2463.

230. CAL. PROB. CODE §6540(a) (incorporating 1982 Cal. Stat. c. 520, §6, at ____ (amending CAL. PROB. CODE §680(a))).

231. *Id.* §6540(b)(1) (incorporating 1982 Cal. Stat. c. 520, §6, at ____ (amending CAL. PROB. CODE §680(b))).

port.²³²

Chapter 842 also codifies the existing practice²³³ of permitting a family allowance to commence on the date of the court order granting the allowance²³⁴ or at another time provided in the order.²³⁵ If the allowance takes effect retroactively, Chapter 842 provides that the allowance may not be extended beyond a date earlier than the date of the decedent's death.²³⁶

Existing law provides that in the case of an insolvent estate, the family allowance must terminate no later than one year after the granting of letters.²³⁷ With the enactment of Chapter 842, a family allowance also must terminate no later than the final settlement of a solvent estate.²³⁸ Before these maximum time limits have elapsed, however, a family allowance continues until modified or terminated by the court or until the time provided by the court in its order.²³⁹

Spouses and Children Unprovided for in the Will

A. Omitted Spouses

Under prior law, if a testator failed to provide²⁴⁰ by will for a surviving spouse who married the testator after execution of the will, the omitted spouse took as if the testator had died intestate.²⁴¹ With the enactment of Chapter 842, the omitted spouse instead is entitled to (1) one-half of the community property that belonged to the testator,²⁴² (2) one-half of the quasi-community property that belonged to the testator,²⁴³ and (3) one-half of the separate property of the testator.²⁴⁴ These provisions do not apply, however, if (1) apparent from the will, the testator intentionally failed to provide for the spouse,²⁴⁵ (2) the testator provided for the spouse by a

232. Compare *id.* §6540(b)(2) with 1982 Cal. Stat. c. 520, §6, at ____ (amending CAL. PROB. CODE §680(b)). This change mitigates the hardship that would exist if support to an aged parent were terminated. RECOMMENDATION, *supra* note 1, at 2342. See also CAL. PROB. CODE §6540(c) (if person has reasonable maintenance from other sources).

233. See Pigott, *Family Allowance*, 1 CALIFORNIA DECEDENT ESTATE ADMINISTRATION §§ 11.12, 11.18, 11.19 (Cal. Cont. Ed. Bar 1971) (existing practice).

234. CAL. PROB. CODE §6542 (or such other time as may be provided in the court order).

235. *Id.* (other time may be before or after the date of the order).

236. *Id.* §6542.

237. *Id.* §6543(a) (incorporating 1982 Cal. Stat. c. 520, §6, at ____ (amending CAL. PROB. CODE §680(c))(1)).

238. *Id.* §6543(a).

239. *Id.* §6543(b).

240. 1931 Cal. Stat. c. 281, §70, at 590 (enacting CAL. PROB. CODE §70) (provision could have been in the will or the marriage contract).

241. *Id.*

242. CAL. PROB. CODE §6560(a); see also *id.* §100 (decedent's share of community property).

243. *Id.* §6560(b); see also *id.* §101 (decedent's share of quasi-community property).

244. *Id.* §6560(c).

245. *Id.* §6561(a).

transfer outside the will intended to take the place of a testamentary provision,²⁴⁶ or (3) the surviving spouse executed a valid agreement waiving the right to share in the testator's estate.²⁴⁷

B. Pretermitted Children

Prior to the enactment of Chapter 842, if a testator failed to provide for a child or issue of any deceased child, whether born before or after the making of the will, the omitted child or issue received a portion of the testator's estate equal in value to the share that the child would have received had the testator died intestate.²⁴⁸ With the enactment of Chapter 842, only children born or adopted *after* the will was executed are entitled to receive this portion of the testator's estate.²⁴⁹ Additionally, Chapter 842 provides that a child living at the time the will was executed only receives that share of the testator's estate if the testator believed the child was dead, or was unaware of the child's birth at the time the will was executed.²⁵⁰ An omitted child does not receive a share of the estate if (1) the testator's failure to provide for the child appears on the face of the will to have been intentional,²⁵¹ (2) the testator had one or more children when the will was executed and devised substantially all the estate to the other parent of the omitted child,²⁵² or (3) the testator provided for the child by transfer outside the will.²⁵³

Conclusion

Chapter 842 makes substantial revisions in the Probate Code concerning wills, intestate succession, and related matters.²⁵⁴ Among the most significant changes made by Chapter 842 is the strengthening of provisions aimed at effectuating the intentions of the testator when construing a will.²⁵⁵ In addition, Chapter 842 gives greater rights in the decedent's

246. *Id.* §6561(b).

247. *Id.* §6561(c). The general California abatement rules apply to satisfy the share of the omitted spouse. *Id.* §6562.

248. 1931 Cal. Stat. c. 281, §90, at 592 (amending CAL. PROB. CODE §90).

249. CAL. PROB. CODE §6570; *see also* 1983 Sen Daily J. 4883.

250. CAL. PROB. CODE §6572.

251. *Id.* §6571(a) (incorporating 1931 Cal. Stat. c. 281, §90, at 592 (amending CAL. PROB. CODE §90)); *see also* Estate of Smith, 9 Cal. 3d 74, 79-80, 507 P.2d 78, 82, 106 Cal. Rptr. 744, 778 (1973) (intrinsic evidence inadmissible to prove intent to disinherit).

252. CAL. PROB. CODE §6571(b).

253. *Id.* §6571(c). In satisfying a share, a devise made by the will abates according to the general California abatement rules. *Id.* §6573.

254. RECOMMENDATION, *supra* note 1, at 2318.

255. *See supra* notes 110-14 and accompanying text; *e.g.*, CAL. PROB. CODE §§6110-6113 (execution of wills), §6122 (dissolution of marriage). Chapter 842 eliminates requirements that invalidated wills on technical grounds even though testator intended the instrument to be a will. RECOMMENDATION, *supra* note 1, at 2320.

estate to a surviving spouse.²⁵⁶

256. See *supra* notes 6-24 and accompanying text (rights of spouse in quasi-community property); e.g., CAL. PROB. CODE §102(a) (permitting surviving spouse to claim statutory share of quasi-community property); *supra* notes 193-209 and accompanying text; e.g., CAL. PROB. CODE §§6400-6403 (intestate succession); see also CAL. PROB. CODE §240 (division by representation). Prior law gave members of the same generation unequal shares of the estate. RECOMMENDATION, *supra* note 1, at 2339.

Administration of Estates; nonprobate transfers

Civil Code §683 (amended); Financial Code §14854 (amended, repealed and new*); Probate Code §§5100, 5101, 5201, 5202, 5301, 5302, 5303, 5304, 5305, 5306, 5401, 5402, 5403, 5404, 5405, 5406, 5407 (new); §647 (amended).

AB 53 (McAlister); 1983 STAT. Ch 92

(Effective July 1, 1984)

Support: California Department of Corporations; California Law Revision Commission

Determines ownership of joint accounts; strengthens the Totten trust; provides ownership rights of parties to P.O.D. accounts; creates presumption of community property in joint accounts; provides survivorship rights in joint accounts; protects financial institutions offering multiple-party accounts.

By enacting Chapter 92, known as the California Multiple-Party Accounts Law,¹ the Legislature significantly changed nonprobate transfers when a credit union² or industrial loan company³ is involved.⁴ The provi-

* CAL. FIN. CODE §14854, as amended by 1983 Cal. Stat. c. 6, §5, is effective on January 1, 1984, is repealed on July 1, 1984, and replaced with new §14854.

1. CAL. PROB. CODE §§5100 (short title), 5101(e) (defines multiple-party account as a joint account, a P.O.D. account, or a trust account, and does not include (1) accounts established for depositing funds of a partnership, joint venture, or other association for business purposes, (2) accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or (3) a regular fiduciary or trust account in which the relationship is established other than by deposit agreement).

2. CAL. FIN. CODE §14002 (definition of credit union).

3. *Id.* §18003 (definition of industrial loan company).

4. See *infra* notes 12-84 and accompanying text. The California Law Revision Commission recommended that the substance of Article VI of the Uniform Probate Code, dealing with nonprobate transfers, be adopted in California. See RECOMMENDATION RELATING TO NONPROBATE TRANSFERS, 16 CAL. L. REVISION COMM'N REPORTS 129 (1982) [hereinafter cited as RECOMMENDATION]. The Legislature has followed most of the recommendations of the Law Revision Commission, but has limited the scope of the legislation to credit unions and industrial loan companies. Compare CAL. PROB. CODE §5101 with RECOMMENDATION, *supra*, at 161 (proposed §5101(c)).

sions of Chapter 92 affect (1) ownership in a joint account,⁵ (2) tentative ("Totten")⁶ trust accounts,⁷ (3) pay-on-death accounts⁸ (hereinafter referred to as P.O.D. accounts), (4) community property rights in joint accounts,⁹ (5) rights of survivorship in a joint account,¹⁰ and (6) protection of financial institutions.¹¹

Ownership in a joint account

Under existing law, a joint tenancy account is presumed to belong *equally* to the co-depositors during their lifetimes.¹² This presumption is rebutted, however, by showing that a different intent existed when the account was formed.¹³ Chapter 92 changes the law regarding accounts held in joint tenancy and deposited in credit unions and industrial loan companies to provide that during the lifetime of all parties,¹⁴ a joint account¹⁵ belongs to the parties in proportion to the net contribution¹⁶ each makes to the sums on deposit.¹⁷ This presumption may be overcome by clear and convincing evidence¹⁸ of a different intent.¹⁹ Consequently, the depositor will no longer inadvertently make a gift of one-half of the funds in the account to the other joint tenant when the depositor's intention is to only facilitate withdrawal and transfer of funds by the joint tenant.²⁰

5. CAL. PROB. CODE §5301(a).

6. *In re Totten*, 179 N.Y. 112, 73 N.E.748 (1904).

7. CAL. PROB. CODE §§5301(c), 5302(e), 5306.

8. *Id.* §§5101(i), 5301(b), 5302(b).

9. *Id.* §5305.

10. *Id.* §§5302(a), 5302(e), 5306.

11. *Id.* §§5401-5407; 1983 Cal. Stat. c. 92, §6, at ____.

12. CAL. FIN. CODE §14854 (incorporating 1983 Cal. Stat. c. 6, §5, at ____ (amending CAL. FIN. CODE §14854)) (shares or certificates for funds owned in joint tenancy, whether the tenants are minors or adults, may be paid to any of the joint tenants during their lifetime); see *Wallace v. Riley*, 23 Cal. App. 2d 654, 664, 74 P.2d 807, 813 (1937) ("...when a joint tenancy account is created substantially, if not precisely, in the statutory form, a presumption of cojoint ownership of the fund in equal shares arises.").

13. *Wallace v. Riley*, 23 Cal. App. 2d at 664, 74 P.2d at 813.

14. CAL. PROB. CODE §5101(g) (definition of party).

15. *Id.* §5101(d) (definition of joint account).

16. "Net contribution" is defined as the sum of all deposits to the account made by or for the party, less all withdrawals made by or for the party that have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. *Id.* §5105(f). Net contribution includes any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question. *Id.*

17. *Id.* §5301(a).

18. "A rule, statutory or otherwise, that the evidence to prove a given fact must be clear and convincing or free from doubt, means that the trial court ought always to be governed by this rule in weighing the evidence and reaching the conclusion as to the facts." *Estate of Moramarco*, 86 Cal. App. 2d 326, 333, 194 P.2d 740, 744 (1948).

19. CAL. PROB. CODE §5301(a).

20. See RECOMMENDATION, *supra* note 4, at 138.

Tentative or Totten Trust Accounts

The Totten trust often has been referred to as the "poor man's will".²¹ This type of trust is widely used in California as a method for leaving the remainder of an account to a named beneficiary after the depositor's death.²² The trust is revocable during the lifetime of the trustor, or by will after the trustor's death.²³ A Totten trust, however, can be defeated if circumstantial evidence is permitted to show a depositor's intent.²⁴ Consequently, the trust may be unreliable.²⁵ Chapter 92 attempts to strengthen the Totten trust as an estate planning device by making it more difficult for the heirs of the depositor to break the trust.²⁶

With the enactment of Chapter 92, a trust account belongs beneficially to the trustee for life, unless the terms of the account indicate a contrary intent, or clear and convincing evidence proves that an irrevocable trust has been created.²⁷ If an irrevocable trust is found, the account belongs beneficially to the beneficiary.²⁸ When a trustee dies, any sums on deposit belong to the surviving trustees as against the estate of the decedent.²⁹ If, however, the decedent is the sole trustee or the survivor of two or more trustees, absent a showing of contrary intent through clear and convincing evidence, the sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving.³⁰ If two or more beneficiaries survive, any sums remaining on deposit belong to those beneficiaries in equal and undivided shares, unless the terms of the account or deposit agreement expressly provide for different shares.³¹ No right of survivorship is implied between the beneficiaries of these funds.³² Furthermore, these survivorship rights cannot be changed by will.³³

Pay-on-Death Account

In 1982, the Legislature enacted provisions permitting certain institu-

21. See Note, *Totten Trust: The Poor Man's Will*, 42 N.C.L. REV. 214, 214 (1963). The usual operation of the trust is "A as trustee for B". *Id.*

22. STATE BAR OF CALIFORNIA, THE UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE 184 (1973).

23. 7. B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Trusts* §17 (8th ed. 1974) [hereinafter referred to as WITKIN, *Trusts*].

24. See Estes, *In Search of a Less Tentative Totten*, 5 PEPPERDINE L. REV. 21, 39 (1977); *Brucks v. Home Federal Savings and Loan Ass'n*, 36 Cal. 2d 845, 851, 228 P.2d 545, 549 (1951) (unmailed letter revoked trust).

25. WITKIN, *Trusts*, *supra* note 23, §18.

26. See RECOMMENDATION, *supra* note 4, at 139.

27. CAL. PROB. CODE §5301(c).

28. *Id.*

29. *Id.* §5302(c)(1).

30. *Id.* §5302(c)(2)(A). If one or more of the beneficiaries dies before the trustee, the sums on deposit belong to the surviving beneficiaries on the death of the trustee. *Id.*

31. *Id.* §5302(c)(2)(B).

32. *Id.* §5302(c)(2)(C).

33. *Id.* §5302(e).

tions, including credit unions³⁴ and industrial loan companies,³⁵ to offer P.O.D. accounts.³⁶ This law was silent, however, regarding the ownership rights of the parties to a P.O.D. account.³⁷ With the enactment of Chapter 92, a P.O.D. account belongs to the original payee during that person's lifetime, and not to the P.O.D. payee³⁸ or payees.³⁹ If two or more parties are named as original payees on the account, the account belongs to those payees during their lifetimes in proportion to the net contribution each makes to the sums on deposit, unless clear and convincing evidence of a contrary intent is shown.⁴⁰

When an original payee dies, the sums on deposit belong to the surviving payee or payees as against the estate of the decedent.⁴¹ If, however, the decedent is the sole original payee, the sums remaining on deposit belong to the surviving P.O.D. payee or payees.⁴² When two or more P.O.D. payees survive, the sums on deposit belong to the payees in equal and undivided shares unless the account or deposit agreement expressly provides that the shares be divided differently.⁴³ Furthermore, Chapter 92 provides for no right of survivorship on the subsequent death of a P.O.D. payee,⁴⁴ and these survivorship rights cannot be changed by will.⁴⁵

Community Property Rights

Under case law, when married persons deposit community funds into a joint tenancy account, a presumption is created that the couple intends to transmute their community funds into a true common-law joint tenancy.⁴⁶ If the presumption is overcome, however, the funds are treated as community property, notwithstanding the joint tenancy form of the account.⁴⁷ The main reason for using the joint tenancy account is the survi-

34. See CAL. FIN. CODE §14854.5.

35. See *id.* §18318.5.

36. 1982 Cal. Stat. c. 269, at ____ (adding CAL. FIN. CODE §§14854.5, 18318.5). The P.O.D. account is viewed by the California Law Revision Commission as being superior to the tentative trust account as a device for estate planning, because the effect of the "pay-on-death" account form is more readily understood by lay persons who use it. See RECOMMENDATION, *supra* note 4, at 141.

37. See RECOMMENDATION, *supra* note 4, at 167.

38. CAL. PROB. CODE §5105(j) (definition of P.O.D. payee).

39. *Id.* §5301(b).

40. *Id.*

41. *Id.* §5302(b)(1). These belong to the surviving party unless clear and convincing evidence indicates a different intention. *Id.* §5302(a).

42. *Id.* §5302(b)(2)(A).

43. *Id.* §5302(b)(2)(B).

44. *Id.* §5302(b)(2)(C). An express agreement may provide for survivorship between P.O.D. payees. *Id.*

45. *Id.* §5302(e).

46. See *In re McCoin*, 9 Cal. App. 2d 480, 482, 50 P.2d 114, 115 (1935) (presumption of transmutation); *Schmedding v. Schmedding*, 240 Cal. App. 2d 312, 316, 49 Cal. Rptr. 523, 526 (1966).

47. See RECOMMENDATION, *supra* note 4, at 140.

vorship feature.⁴⁸ Consequently, married persons using this form of account generally have no desire to change the character of their community property,⁴⁹ and do not intend to give up the other advantages of community property.⁵⁰

Chapter 92 reverses the present presumption of transmutation by creating a rebuttable presumption that funds of married persons are community property when on deposit in accounts to which both are parties, whether or not the parties are described as husband and wife in the deposit agreement.⁵¹ Since this presumption affects the burden of proof,⁵² the presumption may be rebutted by proving that (1) the sums on deposit and claimed to be separate property can be traced from separate property,⁵³ or (2) the married persons made an agreement, *separate from the deposit agreement*, expressly providing that the disputed sums on deposit were not intended to be community property.⁵⁴ Once the account is established, survivorship rights or beneficiary designations in multiple-party accounts cannot be changed by will.⁵⁵

Rights of Survivorship in Joint Accounts

Prior law presumed that the survivor in a joint account owned the funds in that account.⁵⁶ This presumption of survivorship could be overcome by a preponderance of the evidence.⁵⁷ Chapter 92 retains the rights of the surviving party or parties to the joint account funds, unless *clear and convincing* evidence establishes a different intention.⁵⁸ The ownership rights of two or more surviving parties are proportionate to each party's net contribution, plus an equal share of the deceased party's interest.⁵⁹

Under Chapter 92, a right of survivorship in a multiple-party account

48. See Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 90 (1961).

49. *Id.* at 95.

50. *Id.* at 90.

51. CAL. PROB. CODE §5305(a); see RECOMMENDATION, *supra* note 4, at 141. By using the term "account," the presumption of community property applies to more accounts than if the term multiple-party account was used. See *id.* at 171; CAL. PROB. CODE §5101(a) (definition of account).

52. CAL. PROB. CODE §5305(b).

53. *Id.* §5305(b)(1). The property is separate property unless the evidence demonstrates that the married persons made an agreement expressing their clear intent that the sums be their community property. *Id.*

54. *Id.* §5305(b)(2). The separate agreement protects the spouses against unintentionally changing community property into separate property merely by signing a deposit agreement. See RECOMMENDATION, *supra* note 4, at 173.

55. CAL. PROB. CODE §5305(b)(2)(c).

56. Schmedding v. Schmedding, 240 Cal. App. 2d 312, 316, 49 Cal. Rptr. 523, 526 (1966).

57. *Id.*

58. CAL. PROB. CODE §5302(a).

59. *Id.* Right of survivorship continues between the surviving parties. *Id.* Transfers under the provisions of Chapter 92 are effective by reason of the account contracts involved, and are not testamentary transfers. *Id.* §5304.

cannot be changed by will.⁶⁰ The right of a surviving party, beneficiary, or P.O.D. payee to the sums on deposit upon the death of a party to a multiple-party account are not to be denied, abridged, or affected because the right is not a valid testamentary disposition of property.⁶¹ Additionally, a multiple-party account to which the decedent was a party will be excluded from the determination of the estate of the decedent or the value of the estate.⁶² Finally, Chapter 92 does not create a right of survivorship in a joint account established before July 1, 1984, if the account was a "tenancy in common" account.⁶³

Protection of Financial Institutions

Chapter 93 enacts provisions of the Uniform Probate Code⁶⁴ designed to protect credit unions and industrial loan companies (hereinafter referred to as financial institutions) offering multiple-party accounts.⁶⁵ Financial institutions may enter into multiple-party accounts to the same extent as single-party accounts.⁶⁶ Furthermore, during the lifetime of the parties, the terms of the account or deposit agreement may require signatures, of more than one of the parties to the multiple-party account, or of more than one of the survivors after a survivor's death on any check, check endorsement, receipt, or notice of withdrawal order.⁶⁷ For purposes of establishing net contributions, a financial institution will not be required to inquire about the source of funds deposited in a multiple-party account, or the proposed application of any sum withdrawn from the account.⁶⁸

Sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded.⁶⁹ Furthermore, a P.O.D. account may be paid, on request, to any original party to the account.⁷⁰ Trust accounts may be paid, on request, to any trustee.⁷¹ Payment may be made to the personal

60. *Id.* §5302(e).

61. *Id.* §5304.

62. *Id.* §647. This provision nullifies *Estate of Pezzola*, 112 Cal. App. 3d 752, 169 Cal. Rptr. 465 (1980).

63. CAL. PROB. CODE §5306.

64. See generally UNIF. PROB. CODE §§6-108--6-112, 8 U.L.A. 530 (1983).

65. See CAL. PROB. CODE §§5401-5407.

66. *Id.* §5401(a). Any multiple-party account may be paid to any one or more of the parties upon request and according to its terms. *Id.* See also UNIF. PROB. CODE §6-108, 8 U.L.A. 530 (1983).

67. CAL. PROB. CODE §5401(b). In this case, a financial institution shall pay the sums on deposit only in accordance with the terms. Those terms, however, do not limit the right of the sole survivor or of all the survivors to receive the sums on deposit. *Id.*

68. *Id.* §5401(c); see also UNIF. PROB. CODE §6-108, 8 U.L.A. 530 (1983).

69. CAL. PROB. CODE §5402; see also UNIF. PROB. CODE §6-109, 8 U.L.A. 531 (1983).

70. CAL. PROB. CODE §5403; see also UNIF. PROB. CODE §6-110, 8 U.L.A. 531 (1983).

71. CAL. PROB. CODE §5404; see also UNIF. PROB. CODE §6-111, 8 U.L.A. 532 (1983).

representative or heirs of a deceased party to a joint account, a P.O.D. account, or a trust account, if proof of death⁷² is presented to the financial institution.⁷³

When payments are made pursuant to Chapter 92, the financial institution is discharged from all claims for the amounts paid, whether or not the payment is consistent with beneficial ownership of the account as between parties, P.O.D. payees, beneficiaries, or their successors.⁷⁴ This discharge of the financial institution is effective unless payments are made after the financial institution has been served with a court order restraining payment.⁷⁵ The financial institution may refuse, without liability, to pay any sums on deposit upon receiving written notice from a party that withdrawals are not to be permitted.⁷⁶ The financial institution may continue to refuse payment, pending a determination of the rights of the parties or their successors, unless the notice is withdrawn.⁷⁷ If the financial institution is required or permitted to make payments to a minor who is a party to a multiple-party account, the payment is a valid release and discharge of the financial institution.⁷⁸ If, however, the institution is to make payment because the minor was designated as a P.O.D. payee or as a beneficiary of a trust account, the financial institution protections do not apply.⁷⁹ A financial institution has no duty to inform a depositor who holds an account,⁸⁰ a beneficiary named in a trust account,⁸¹ or a P.O.D. payee designated on a P.O.D. account,⁸² of the enactment of Chapter 92.⁸³ Furthermore, liability will not be imposed on a financial institution that fails to inform these individuals.⁸⁴

72. CAL. PROB. CODE §5101(k) (definition of proof of death).

73. For a joint account, the proof must show that the decedent was the last surviving party unless no right of survivorship exists under §5302. *Id.* §5402. For a P.O.D. account, the proof of death must show that the deceased original payee was the survivor of all other persons named on the account, either as an original payee or as a P.O.D. payee. *Id.* §5403. For a trust account, the proof of death must show that the deceased trustee was the survivor of all other persons named on the account as either trustee or beneficiary. *Id.* §5404. A trust account may be paid to a beneficiary if the proof of death shows that the beneficiary survived all persons named as trustees. *Id.*

74. *Id.* §5405(a).

75. *Id.* §5405(b).

76. *Id.* §5405(c).

77. *Id.* These protections have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts. *Id.* §5405(d). These protections are in addition to, and not exclusive of, any protection provided the financial institution by any other provision of law. *Id.*

78. *Id.* §5407(a).

79. *Id.*

80. 1983 Cal. Stat. c. 92, §6(a)(1), at ____.

81. *Id.* c. 92, §6(a)(2), at ____.

82. *Id.* c. 92, §6(a)(3), at ____.

83. *Id.* c. 92, §6(a), at ____.

84. *Id.* c. 92, §6(b), at ____.

Summary

Chapter 92, while limited to credit unions and industrial loan companies,⁸⁵ enacts provisions of the Uniform Probate Code as recommended by the Law Revision Commission.⁸⁶ With the enactment of Chapter 92, legislative recognition is given to joint accounts,⁸⁷ tentative trust accounts,⁸⁸ and P.O.D. accounts.⁸⁹ Moreover, Chapter 92 describes community property⁹⁰ and survivorship rights in joint accounts.⁹¹ Finally, Chapter 92 protects credit unions and industrial loan companies offering joint, tentative trust, and P.O.D. accounts.⁹²

85. See *supra* note 4 and accompanying text.

86. See RECOMMENDATION, *supra* note 4, at 137.

87. See CAL. PROB. CODE §§5301(a), 5302(a).

88. See *id.* §§5301(c), 5302(c).

89. See *id.* §§5301(b), 5302(b).

90. See *id.* §§5305, 5306.

91. See *id.* §§5303, 5305(c), 5306.

92. See *id.* §§5401-5407.

Administration of Estates; emancipated minors

Civil Code §§63.1, 63.2 (new); 63 (amended); Financial Code §14853, (amended).

AB 29 (McAlister); 1983 STAT. Ch 6

Support: California Department of Corporations; California Law Revision Commission

The Emancipation of Minors Act¹ enables specified minors² to enter into binding contracts,³ to sue or be sued in their own names,⁴ and to enter into real property transactions.⁵ Chapter 6 supplements that Act by expanding the rights granted emancipated minors.⁶ The rights of these persons now include the capacity to act on their own account in claims and actions,⁷ estate planning, and probate.⁸ In addition, emancipated minors now have the right to participate as shareholders in corporations or as

1. CAL. CIV. CODE §60 (short title). See generally *id.* §§60-70; *Review of Selected 1979 California Legislation*, 11 PAC. L.J. 557 (1980); *Review of Selected 1978 California Legislation*, 10 PAC. L.J. 522 (1979).

2. CAL. CIV. CODE §62 (defining emancipated minor as one who has entered into a valid marriage, who is on active duty with the armed forces of the United States, or who has received a declaration of emancipation).

3. *Id.* §63(b)(1).

4. *Id.* §63(b)(3).

5. *Id.* §63(b)(2).

6. Compare *id.* §63 with 1978 Cal. Stat. c. 1059, §1, at 3267 (amending CAL. CIV. CODE §63).

7. CAL. CIV. CODE §63(b)(4).

8. *Id.* §63(b)(5)-(13).

members of nonprofit corporations.⁹ Chapter 6 also conforms the treatment given the accounts of minors by credit unions, with the treatment given those accounts by other types of financial institutions.¹⁰

Estate Planning and Probate Procedure

Prior to the enactment of Chapter 6, an emancipated minor could not dispose of property by will.¹¹ The estate of an emancipated minor was distributed according to the provisions governing intestate succession.¹² Chapter 6 grants emancipated minors the capacity to make or revoke wills,¹³ and extends to minors devices for transferring property that parallel those used by conservators.¹⁴ Emancipated minors may convey or release contingent or expectant interests in property, including marital or survivorship rights incident to joint tenancies.¹⁵ Chapter 6 also permits emancipated minors to consent to the transfer, encumbrance,¹⁶ or gift of marital property.¹⁷ Unless the creating instrument provides otherwise, the powers of a minor when a donee¹⁸ of a power of appointment¹⁹ may be exercised or released by the emancipated minor.²⁰

Additionally, Chapter 6 permits emancipated minors to create revocable or irrevocable trusts²¹ and to make gifts outright or in trust.²² Emanci-

9. See *id.* §63.2.

10. See CAL. FIN. CODE §§14853, 14854; *infra* note 45 and accompanying text.

11. See CAL. PROB. CODE §§20, 21 (requiring a person to be over the age of 18 to make a will). Under prior law, the making of a will was not an enumerated purpose for which emancipated minors were considered to be over the age of majority. 1978 Cal. Stat. c. 1059, §1, at 3268 (amending CAL. CIV. CODE §63).

12. RECOMMENDATION RELATING TO EMANCIPATED MINORS, 16 CAL. L. REVISION COMM'N REPORTS 183, 188 (1982) [hereinafter cited as RECOMMENDATION]; see also CAL. PROB. CODE §§200-230 (intestate succession). See generally 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§60, 69, 70 (8th ed. 1974), 69 (Supp. 1982) (general discussion of intestate succession).

13. CAL. CIV. CODE §63(b)(5); see CAL. PROB. CODE §§20 (persons who may make a will), 21 (disposition of community property), 70-79 (revocation of wills); see also RECOMMENDATION, *supra* note 12, at 188-89 (allowing minors emancipated by marriage to write wills enabling the surviving spouse to receive the entire estate rather than a statutory share); CAL. PROB. CODE §§221 (distribution to surviving spouse and issue), 223 (distribution to surviving spouse and immediate family in absence of issue), 224 (distribution to surviving spouse in absence of issue or immediate family).

14. See RECOMMENDATION, *supra* note 12, at 195. Compare CAL. CIV. CODE §63(b)(6)-(13) with CAL. PROB. CODE §§1870-1875.

15. CAL. CIV. CODE §63(b)(7), 683 (definition of joint tenancy).

16. *Id.* §1114 (definition of encumbrance).

17. *Id.* §§63(b)(7), 4800 (description of marital property).

18. *Id.* §1381.1(b) (definition of donee).

19. Compare *id.* §63(b)(8) with *id.* §1384.1 (capacity of a minor donee to exercise power of appointment). See *id.* §§1381.1 - 1384.1 (powers of appointment).

20. *Id.* §63(b)(8); see *id.* §1388.2 (release of discretionary power).

21. *Id.* §63(b)(9); see *id.* §§2221 (creation of voluntary trust as to trustor and beneficiary), 2222 (creation of voluntary trust as to trustee), 2251 (creation of trust by mutual consent).

22. *Id.* §63(b)(6).

pated minors also may exercise²³ or surrender the right to revoke a trust.²⁴

With the enactment of Chapter 6, emancipated minors may elect to (1) take under a will,²⁵ (2) take against a will,²⁶ or (3) renounce any interest acquired by inter vivos transfer, or testate or intestate succession.²⁷ As a surviving spouse, an emancipated minor has options regarding the transfer of interests in community²⁸ or quasi-community property²⁹ obtained by will or intestate succession.³⁰

Rights of Emancipated Minors

Existing law permits emancipated minors to sue or be sued in their own names.³¹ Chapter 6 expands this provision to allow an emancipated minor to compromise, settle, arbitrate, or otherwise adjust claims, actions, or proceedings by or against the minor.³² Although an emancipated minor may enter into a binding contract,³³ existing law is unclear whether this provision applies to insurance contracts.³⁴ Chapter 6 specifies that an emancipated minor may enter into a valid insurance contract with the same rights, duties, and liabilities as an adult.³⁵

Under existing law, an emancipated minor may buy or sell real property.³⁶ Chapter 6 further permits emancipated minors to lease,³⁷ encumber, exchange, or transfer any interest in real³⁸ or personal property,³⁹ including shares of corporate stock or memberships in nonprofit corporations.⁴⁰ In addition, emancipated minors are given the right to vote as shareholders in corporations or as members of nonprofit corporations,⁴¹

23. *Id.* §63(b)(10); *see id.* §2280 (revocation of trusts).

24. *Id.* §63(b)(12).

25. *Id.* §63(b)(11).

26. *Id.*

27. *Id.* §63(b)(12); *see* CAL. PROB. CODE §190.3 (effectiveness of disclaimer).

28. CAL. CIV. CODE §687 (definition of community property).

29. CAL. PROB. CODE §201.5 (definition of quasi-community property).

30. CAL. CIV. CODE §63(b)(13); *see* RECOMMENDATION, *supra* note 12, at 195.

31. CAL. CIV. CODE §63(b)(3).

32. *Compare id.* §63(b)(4) with 1978 Cal. Stat. c. 1059, §1, at 3268 (enacting CAL. CIV. CODE §63).

33. *Id.* §63(b)(1).

34. *See* RECOMMENDATION, *supra* note 12, at 195. *Compare* CAL. CIV. CODE §63(b)(1) with CAL. INS. CODE §10112.

35. CAL. CIV. CODE §63.1. The intent of Chapter 6 is to clarify that the restrictions imposed by California Insurance Code section 10112 (relating to life or disability insurance and annuity contracts) do not apply to emancipated minors. RECOMMENDATION, *supra* note 12, at 195.

36. CAL. CIV. CODE §63(b)(2).

37. CAL. REV. & TAX. CODE §6006.3 (definition of lease).

38. CAL. CIV. CODE §658 (definition of real property).

39. *Id.* §663 (definition of personal property).

40. *Compare id.* §63(b)(2) with 1978 Cal. Stat. c. 1059, §1, at 3268 (enacting CAL. CIV. CODE §63).

41. CAL. CIV. CODE §63.2.

which are rights identical to those held by guardians⁴² and conservators.⁴³

Prior to the enactment of Chapter 6, payment to a minor of dividends, interest, or other money by a credit union was conditional upon parental consent.⁴⁴ Chapter 6 deletes this consent requirement, conforming the law regarding payments by credit unions with the law governing payments by other types of financial institutions.⁴⁵

42. See generally CAL. PROB. CODE §§1500-1601 (duties of a guardian).

43. See RECOMMENDATION, *supra* note 12, at 196; CAL. PROB. CODE §§1800-1910 (duties of a conservator). Compare CAL. CIV. CODE §63.2 with CAL. PROB. CODE §2458 (voting rights of guardians or conservators regarding corporate shares, memberships, or property).

44. 1979 Cal. Stat. c. 811, §16, at 2807 (amending CAL. FIN. CODE §14853).

45. Compare CAL. FIN. CODE §14853 with 1979 Cal. Stat. c. 811, §16, at 2807 (amending CAL. FIN. CODE §14853). See CAL. FIN. CODE §§850 (minors' accounts in banks), 852 (deposits in banks in names of two or more persons), 7600 (minors' accounts in savings and loan associations), 7602 (shares of savings and loan associations issued in joint tenancy), 11200 (minors as shareholders in federal savings and loan associations), 11204 (joint tenants as shareholders in federal savings and loan associations), 18318 (issuance of investment or thrift certificates of industrial loan company to minors).

Administration of Estates; missing persons

Evidence Code §667 (amended); Health and Safety Code §8627 (amended); Probate Code §260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294 (repealed); §§1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1461.7, 1804, 1845, 1846, 1847, 1848, 1849, 1849.5, 3710, 3711, 3712, 3720 (new); §§3700, 3703 (amended).

AB 24 (McAlister); 1983 STAT. Ch 201

Support: California Judges' Association; California Law Revision Commission; State Bar Probate Law Section

Permits the appointment of a conservator for the estate of a missing person; decreases the length of time giving rise to a presumption of death for a missing person; expands the rights of recovery of property for reappearing missing persons; adds procedures for absent federal personnel.

Administration of Estates of Missing Persons Presumed Dead

Prior to the enactment of Chapter 201, California law followed the common-law presumption that persons not heard from for seven years

were presumed dead for purposes of the administration of their estates.¹ Chapter 201 decreases the time period for the presumption to five years,² thus making California law consistent with provisions of the Uniform Probate Code³ and the general trend in those states which have recently considered this area of law.⁴

Under prior law, the presumption of death was technically not conclusive at the end of the seven year period.⁵ The court was required only to fix and determine the time when the person became missing.⁶ Under Chapter 201, a person who has been absent for a continuous period of five years and has not been heard from or found after a diligent search during that time period is presumed dead.⁷ The date of the absent person's death is presumed to have occurred at the end of the five year period,⁸ unless sufficient evidence exists to establish that death occurred earlier.⁹

Under existing law, the court determines whether the absent person is a person who is presumed to be dead (hereinafter referred to as a missing person)¹⁰ at the hearing on the petition for administration of the estate.¹¹ The court may consider the testimony of any witness likely to know the whereabouts of the missing person.¹² Under Chapter 201, if the court is not satisfied that a diligent search has been made for the missing person, the court may order the petitioner to conduct a reasonably diligent search, and report the results of that search to the court.¹³ Once a court deter-

1. 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §280); see RECOMMENDATION RELATING TO MISSING PERSONS, 16 CAL. L. REVISION COMM'N REPORTS 109, 110 (1982) [hereinafter referred to as RECOMMENDATION].

2. Compare CAL. PROB. CODE §1351 with 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §280); CAL. EVID. CODE §667 with 1965 Cal. Stat. c. 299, §667, at 1297 (enacting CAL. EVID. CODE §667).

3. ESTATE, PROBATE AND RELATED LAWS §1-107(3); §8 U.L.A. 28 (1977) (presumption of death is five years).

4. At least 14 states provide for a five year period. RECOMMENDATION, *supra* note 1, at 111 n.16. Chapter 201 does not apply to those cases filed under former Sections 280-294, pending on December 31, 1983. CAL. PROB. CODE §1359(a). The law that applies to these proceedings on December 31, 1983, shall continue to apply after that date. *Id.* §1359(b). A period of absence that commences to run before December 31, 1983, may, however, be included in those cases filed after December 31, 1983. *Id.* §1359(a).

5. 1935 Cal. Stat. c. 712, §2, at 1928 (enacting CAL. PROB. CODE §292). The statute of limitations shall be deemed to have run against all claimants after the person has been missing and absent for a period of 10 years. *Id.*

6. *Id.* c. 712, §2, at 1926 (enacting CAL. PROB. CODE §284). Prior law followed the majority "English" rule that a presumption was not available as to the time of death, but was available only as to the fact of death. See Jalet, *Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees*, 54 IOWA L. REV. 177, 189 (1968); Roca, *When Did Ulysses Die or Mysterious Disappearances and Life Insurance*, 23 GEO. WASH. L. Rev. 172, 188-89 (1954).

7. CAL. PROB. CODE §1351.

8. *Id.*

9. *Id.*

10. See *id.* §1356(a) (incorporating 1935 Cal. Stat. c. 712, §2, at 1926 (enacting CAL. PROB. CODE §284)).

11. *Id.*

12. *Id.*

13. CAL. PROB. CODE §1356(b). The search may be done in any manner deemed advisable by the court, and may include publication of a notice requesting information on the

mines that the absent person is a missing person,¹⁴ Chapter 201 requires the court to fix the date of death.¹⁵ The estate of the missing person may then be administered and distributed in the same manner as the estates of deceased persons.¹⁶

Existing law protects the rights of the missing person by prohibiting preliminary¹⁷ or final distribution¹⁸ of the missing person's property within one year of the appointment and qualification of an administrator.¹⁹ Prior law prohibited distribution for an additional three years after an administrator was appointed,²⁰ unless the distributee executed a surety company bond²¹ in favor of the representative.²² Distribution of the property was not final, however, and a conclusive presumption of death did not arise until at least ten years after the missing person had disappeared.²³ Chapter 201 eliminates the requirement of executing a bond,²⁴ and provides that the decree of final distribution is conclusive as to the rights of the missing person, heirs, devisees, and legatees.²⁵

A. Probate Procedure

Existing law provides that when the missing person is a California resident at the time of disappearance, the superior court of the county of the missing person's last known place of residence has jurisdiction to hear petitions concerning the administration of the missing person's estate.²⁶ If the missing person is not a resident of California, jurisdiction is established in the county where any real property owned by the missing person

whereabouts of the missing person, informing law enforcement officials of the disappearance of the missing person, or engaging the services of a private investigator. *Id.* The costs of the search is to be borne by the petitioner or the estate. *Id.* §1356(c).

14. *Id.* §1356(a).

15. *Id.* §1357(a)(2).

16. *Id.* §1357(b).

17. *See id.* §§1000-1004 (preliminary distribution).

18. *See id.* §§1020-1029 (final distribution); *id.* §1352 (incorporating 1935 Cal. Stat. c. 712, §2, at 1926 (enacting CAL. PROB. CODE §285)).

19. *Id.* §1352 (incorporating 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §280)).

20. 1935 Cal. Stat. c. 712, §2, at 1926 (enacting CAL. PROB. CODE §284) (upon determination that a person is a person missing for seven years, an administrator, or executor must be appointed).

21. CAL. PROB. CODE §3150 (definition of a surety company bond).

22. 1935 Cal. Stat. c. 712, §2, at 1926, (enacting CAL. PROB. CODE §286).

23. *Id.* c. 712, §2, at 1927 (enacting CAL. PROB. CODE §291) (the statute of limitations against all claimants under the missing person's estate ran at the time of the final distribution).

24. Compare CAL. PROB. CODE §1358 with 1935 Cal. Stat. c. 712, §2, at 1926 (enacting CAL. PROB. CODE §286).

25. CAL. PROB. CODE §1358(c). However, an action for recovery by the missing person from the distributees is not barred until five years after filing of the petition. *Id.* §1358(a)(2).

26. *See id.* §1353(a) (incorporating 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §281)).

is located.²⁷ If, however, the missing person owns no real property, then jurisdiction is in the county where any personal property is located.²⁸ Prior to the enactment of Chapter 201, a petition for administration of the estate or probate of the last will (hereinafter referred to as a petition) could be filed by the spouse, family, or friends of the missing person.²⁹ Chapter 201 expands this category³⁰ to permit *any* person with an interest in the estate of the missing person to file a petition.³¹ Chapter 201 requires that the petition state to the best of the petitioner's knowledge (1) the last known address of the missing person,³² (2) the circumstances of the person's disappearance,³³ (3) that the person has been missing for the statutory period,³⁴ and (4) a description of any search or inquiry made.³⁵

Existing law requires the court clerk to set a hearing date not less than three months from the date the petition is filed with the court.³⁶ Notice of the hearing on the petition must be published in the same manner as notice for the administration of the estate of a deceased person.³⁷ Prior law required that notice be published at least three months before the hearing date.³⁸ Chapter 201 clarifies this time period by specifying that notice be published at least ninety days before the hearing date.³⁹

Prior law required notice to be sent by registered mail to each person named in the petition as an heir-at-law, next of kin, devisee, or legatee.⁴⁰ Under Chapter 201, service is expanded to permit personal or mail service to heirs, devisees, and legatees, and all persons named as executor who are not petitioners.⁴¹ Additionally, Chapter 201 requires notice to be given

27. *Id.* §1353(b) (incorporating 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §281)).

28. *Id.*

29. 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §282).

30. *Compare* CAL. PROB. CODE §1354(b) *with* 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §282).

31. CAL. PROB. CODE §1354(b)(2).

32. *Id.* §1354(c)(1).

33. *Id.* §1354(c)(2).

34. *Id.* §1354(c)(3).

35. *Id.* §1354(c)(4).

36. *See id.* §1355(a) (incorporating 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §282)).

37. *See id.* §1355(b) (incorporating 1963 Cal. Stat. c. 809, §2, at 1839 (amending CAL. PROB. CODE §283)). Proof of publication, service or mailing must be filed at or prior to the hearing. *Id.* §1355(d). *See* CAL. GOV'T. CODE §6040 (publication in newspaper as referring to newspaper of general circulation).

38. 1963 Cal. Stat. c. 809, §2, at 1839 (amending CAL. PROB. CODE §283).

39. *Compare* CAL. PROB. CODE §1355(b) *with* 1963 Cal. Stat. c. 809, §2, at 1839 (amending CAL. PROB. CODE §283).

40. 1963 Cal. Stat. c. 809, §2, at 1839 (amending CAL. PROB. CODE §283). Chapter 201 requires that notice of the hearing be sent within twenty days of the filing of the petition. *See* CAL. PROB. CODE §1355(c) (incorporating 1963 Cal. Stat. c. 809, §1, at 1839 (amending CAL. PROB. CODE §283)).

41. *Compare* CAL. PROB. CODE §1355(c)(1) *with* 1963 Cal. Stat. c. 809, §2, at 1839 (amending CAL. PROB. CODE §283). Existing provisions requiring notice be sent by registered mail to the last known address of the missing person are maintained by Chapter 201. CAL. PROB. CODE §1355(c)(1) (incorporating 1963 Cal. Stat. c. 809, §2, at 1839 (amending CAL. PROB. CODE §283)).

once a conservator has been appointed⁴² and a petition has been filed,⁴³ unless the court, in its discretion and for good cause, dispenses with the notice.⁴⁴

B. Reappearance of Missing Person

If a missing person subsequently reappeared within three years after the appointment of a representative, prior law required the person claiming to be the missing person to (1) file a verified petition⁴⁵ stating the facts and circumstances of the disappearance, and identifying information,⁴⁶ and (2) serve notice of the petition personally or by registered mail on the representative and each heir, legatee, and devisee.⁴⁷ In addition, the court was required to determine the identity of the claimant and, if the holding was in favor of the claimant,⁴⁸ the court was to vacate all proceedings for administration of the missing person's estate and deliver the remaining property to the claimant.⁴⁹ Chapter 201 permits a reappearing missing person to recover property remaining in the hands of the administrator at any time upon reappearance.⁵⁰ Additionally, property of the missing person's estate that is in the hands of the distributees is recoverable,⁵¹ provided the action for recovery is brought within five years from the filing of the petition for administration of the estate,⁵² and is equitable in view of all the circumstances.⁵³ Finally, Chapter 201 provides that a decree of distribution, when final, is conclusive as to the rights of the missing person,

42. CAL. PROB. CODE §1461.7(a).

43. *Id.* §1461.7(b). The petition may be filed under any one or more of the following provisions: Section 1861 or 2423; Article 7 (commencing with Section 2540) or Chapter 6 of Part 4; Sections 2570, 2571, 2580, 2592, or 2620; Chapter 8 (commencing with Section 2640) of Part 4; Chapter 3 (commencing with Section 3100) of Part 6; Chapter 9.5 (commencing with Section 2670) of Part 4. *Id.*

44. *Id.* §1461.7.

45. 1982 Cal. Stat. c. 517, §323, at ____ (amending CAL. PROB. CODE §287).

46. 1935 Cal. Stat. c. 712, §2, at 1927 (enacting CAL. PROB. CODE §288).

47. 1982 Cal. Stat. c. 517, §323, at ____ (amending CAL. PROB. CODE §287).

48. *Id.*

49. 1935 Cal. Stat. c. 712, §2, at 1927 (enacting CAL. PROB. CODE §289). The order vacating the proceedings excepts the following: payment of taxes, assessments, liens, insurance premiums, allowed claims, the specific performance of contracts, preservation of the property, and any sale, encumbrance or other disposition of the property made in compliance with an order of the court. *Id.* Prior law permitted the court to require that an undertaking be given to the court by the claimant for all costs and expenses involved in the hearing. *Id.* §1358(a)(2).

50. CAL. PROB. CODE §1358(a)(1). Should the identity of the person claiming to be the reappearing missing person be disputed, Chapter 201 permits the alleged missing person, or any other interested person, to file a petition under the existing laws of heirship to determine the identity of the person. *Id.* §1358(d).

51. *Id.* §1358(a)(2) (or the value of distributions received by distributees can be claimed by the missing person if the property is no longer in the hands of the distributees).

52. *Id.* §1354.

53. *Id.* §1358(a)(2). However, Chapter 201 provides that any action taken by the missing person to recover property from distributees is forever barred five years after the filing of the petition. *Id.*

heirs, devisees, and legatees.⁵⁴

Conservators for Estates of Missing Persons

Prior law provided for the appointment of a *trustee*⁵⁵ for a person who was missing or whose whereabouts were unknown for more than ninety days if the missing person was a resident of California and owned or was entitled to property within California.⁵⁶ Chapter 201 instead authorizes the appointment of a *conservator*⁵⁷ for the estate of a missing person.⁵⁸ Furthermore, the requirement that the person be a California resident missing for more than ninety days is eliminated.⁵⁹ Chapter 201, therefore, reflects existing California practice⁶⁰ and law⁶¹ by permitting the use of a conservator when an immediate need exists,⁶² and provides more adequate procedures for the protection and management of a missing nonresident's property.⁶³

Under prior law, the petition for the appointment of a *trustee* was required to state that the alleged missing person owned or was entitled to property within California,⁶⁴ and that the missing person's estate required attention, supervision, and care.⁶⁵ Chapter 201 incorporates these provisions into the petition for a *conservator*,⁶⁶ and additionally requires the petition to state (1) the time and circumstances of the person's disappearance,⁶⁷ (2) the last known residence of the missing person,⁶⁸ and (3) a description of any search or inquiry made concerning the wherea-

54. *Id.* §1358(c). However, Chapter 201 provides for recovery from the administrator and distributees and remedies available to the missing person due to fraud or intentional wrongdoing. *Id.* §1358(b). Prior law permitted the court to require an undertaking for costs and expenses involved in the hearing, should the case be decided against the claimant. 1935 Cal. Stat. c. 712, §2, at 1926 (enacting CAL. PROB. CODE §287). Chapter 201 eliminates the requirement of an undertaking. Compare CAL. PROB. CODE §1358 with 1935 Cal. Stat. c. 712, §2, at 1926 (enacting CAL. PROB. CODE §287).

55. The trustee is the person holding the property in trust. RESTATEMENT OF TRUSTS §3(3), (12).

56. 1968 Cal. Stat. c. 475, §1, at 1114 (amending CAL. PROB. CODE §260).

57. CAL. PROB. CODE §2400 (definition of a conservator).

58. *Id.* §1845(a). In the case of a missing minor, a guardian can be appointed pursuant to provisions of existing law. *Id.* §1514. Chapter 201 does not apply where the proposed conservatee is an absentee. *Id.* §1845(b). See *id.* §1403 (definition of absentee).

59. Compare CAL. PROB. CODE §1845(a) with 1968 Cal. Stat. c. 475, §1, at 1114 (amending CAL. PROB. CODE §260).

60. See 3 J. GODDARD, PROBATE COURT PRACTICE §1921 (2d Ed. 1977); see ROSS, L. PRUETT, AND M. LEVINE, CALIFORNIA CONSERVATORSHIPS SUPPLEMENT §3.24, at 46 (Cal. Cont. Ed. Bar 1981).

61. CAL. PROB. CODE §§2250, 2252.

62. *Id.* §1800.

63. RECOMMENDATION, *supra* note 1, at 110 n. 4.

64. 1968 Cal. Stat. c. 475, §1, at 1114 (amending CAL. PROB. CODE §260).

65. *Id.*

66. CAL. PROB. CODE §1846 (incorporating 1968 Cal. Stat. c. 475, §1, at 1114 (amending CAL. PROB. CODE §260)).

67. *Id.* §1846(b).

68. *Id.* §1846(c).

bouts of the missing person.⁶⁹

Chapter 201 applies to petitions filed after December 31, 1983, regardless of when the proposed conservatee became missing, or how long the proposed conservatee has been missing.⁷⁰ A trusteeship created under prior law⁷¹ may continue to operate under the superceded Probate Code provisions.⁷² The provisions of Chapter 201, however, are available upon petition after December 31, 1983.⁷³

Absent Federal Personnel

Existing law establishes procedures for the disposition of the personal property of absent federal personnel (hereinafter referred to as absentee).⁷⁴ Under existing law, the family of an absentee may petition the court to set aside the absentee's personal property located in California for the purpose of managing the property in the best interests of the absentee.⁷⁵ Additionally, existing law permits the management and disposition of personal property of the absentee without court proceedings.⁷⁶ Chapter 201 supplements these provisions by providing that a "certificate of missing status"⁷⁷ be attached to the petition to set aside personal property.⁷⁸

69. *Id.* §1846(d). Prior law required publication in a newspaper in the county where the hearing on the petition was to be held. 1935 Cal. Stat. c. 712, §2, at 1923 (enacting CAL. PROB. CODE §261). Chapter 201 requires that notice be mailed to the last known address of the proposed conservatee. CAL. PROB. CODE §1847(a); see RECOMMENDATION, *supra* note 1, at 122 (publishing notice in the county of the last known address more likely to give actual notice to the proposed conservatee). Chapter 201 does not require the performance of any act that required knowledge of the location of the proposed conservatee, including the issuance of a citation to the proposed conservatee, service of citation and petition, production of the proposed conservatee at the hearing, or performance of the duties of a court investigator. CAL. PROB. CODE §1848.

70. CAL. PROB. CODE §1849.5(a).

71. 1935 Cal. Stat. c. 712, §2, at 1923 (enacting CAL. PROB. CODE §262).

72. 1983 Cal. Stat. c. 201, §3, at — (repealing CAL. PROB. CODE §§260-272).

73. CAL. PROB. CODE §§1849.5(b), 3700-3708.

74. *Id.* §§3700-3708. An absentee is a member of a uniformed service covered by U.S.C., Title 37, Chapter 10 or an employee of the U.S. government or an agency covered by U.S.C., Title 5, Chapter 55 who is determined to be of missing status. *Id.* §1403.

75. *Id.* §3701.

76. Personal property may be disposed of without a court proceeding if (1) the absentee owns no real property in California, (2) the aggregate value of all the absentee's personal property is five thousand dollars or less, and (3) the family of the absentee needs to dispose of the property for shelter, food, health care, education, transportation, or the maintenance of an adequate standard of living. See *id.* §3710 (incorporating 1972 Cal. Stat. c. 632, §1, at 1181 (enacting CAL. PROB. CODE §295.1)). An action by an absentee must be brought either within 90 days after the absentee returns to the United States or 2 years after termination of the condition that caused the classification of an absentee, whichever is less. See *id.* §3712 (incorporating 1972 Cal. Stat. c. 632, §1, at 1181 (enacting CAL. PROB. CODE §295.3)). See also *id.* §3720 (incorporating 1972 Cal. Stat. c. 632, §1, at 1181 (enacting CAL. PROB. CODE §295.4) (effect of an absentee's power of attorney)).

77. *Id.* §3700(b). Certificate of missing status is an official written report complying with Section 1283 of the Evidence Code and showing a determination by the secretary of the military department, head of the department or agency concerned, or the delegate of the secretary or head, that the absentee is in missing status. *Id.* The certificate of missing status shall be received as evidence of that fact, and the court shall not determine the status of the absentee inconsistent with the status shown on the certificate. *Id.* §3703(b).

78. *Id.* §3703. Existing law requires that the petition state (1) the filing chapter, (2)

Furthermore, a person claiming to be eligible as family of the absentee⁷⁹ must be a dependent of the absentee.⁸⁰

Conclusion

Chapter 201 decreases the time period giving rise to the presumption of death.⁸¹ In addition, Chapter 201 provides better protection for the property of a missing person by eliminating the residency and time requirements,⁸² and by enabling the use of existing conservatorship laws to govern the management and distribution of the missing person's estate.⁸³ Finally, Chapter 201 brings consistency to the laws regarding disposition of the personal property of absent federal personnel.⁸⁴

the last known military rank or grade and social security number of the absentee, (3) a description and estimation of the value of all the absentee's property, (4) a designation of the property to be set aside, (5) an allegation that the spouse is an eligible spouse, and (6) the names and residence of all persons comprising the family of the absentee and an allegation stating whether a guardian or conservator has been appointed. *Id.*

79. *Id.* §3700(d) (definition of an absentee's family requiring the persons be dependents of the absentee as defined in Section 401 of Title 37 of the United States Code).

80. *Id.* §3700(b)(d).

81. Compare *id.* §1351 with 1935 Cal. Stat. c. 712, §2, at 1925 (enacting CAL. PROB. CODE §280).

82. See RECOMMENDATION, *supra* note 1, at 110.

83. See *id.* at 109.

84. See *id.* §3700(b)(d).

Administration of Estates; disclaimer of interests

Probate Code §§190, 190.1, 190.2, 190.3, 190.4, 190.5, 190.6, 190.7, 190.8, 190.9, 190.10 (repealed); §§260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 295 (new); §§591.6, 2580 (amended).

AB 28 (McAlister); 1983 STAT. Ch 17

Support: California Law Revision Commission

Under existing law, the beneficiary¹ of an interest under a will may file a disclaimer² of that interest.³ The disclaimed interest then is distributed as if the disclaiming beneficiary had predeceased the creator of the interest.⁴

1. CAL. PROB. CODE §262 (definition of beneficiary).

2. *Id.* §265 (definition of disclaimer).

3. See *id.* §§260-288 (incorporating 1972 Cal. Stat. c. 990, §1, at 404 (enacting CAL. PROB. CODE §§190-190.10)); §267 (definition of interest).

4. *Id.* §282(a) (incorporating 1972 Cal. Stat. c. 990, §1, at 1806 (enacting CAL. PROB. CODE §190.6)). If an interest created by intestate succession is disclaimed, the beneficiary is not treated as having predeceased the decedent for the purpose of determining the generation at which the division of the estate must be made. *Id.* §282(b)(1).

Chapter 17 reorganizes and clarifies provisions relating to disclaimers.⁵ Disclaimers that are valid under federal law are now valid in California.⁶

Chapter 17 provides that a beneficiary may disclaim all or part of an interest⁷ by filing a signed disclaimer.⁸ A court order is required, however, for disclaimers made by a guardian on behalf of a minor,⁹ a conservator on behalf of a conservatee,¹⁰ or a personal representative on behalf of a decedent.¹¹ The disclaimer may be filed with the superior court in the county in which the estate is administered, or if the estate has not been administered, in any county in which administration would be proper.¹² Alternatively, the disclaimer may be filed with the person who (1) is responsible for distributing the interest,¹³ (2) has custody, possession, or title to the interest,¹⁴ or (3) created the interest.¹⁵

Prior to the enactment of Chapter 17, disclaimers must have been filed within a specified time limit to be effective.¹⁶ Chapter 17 requires a disclaimer to be filed within a reasonable time after the person disclaiming the interest learns of that interest.¹⁷ For purposes of this provision, Chapter 17 specifies that a disclaimer concerning an interest created by specified testamentary devices,¹⁸ intestate succession,¹⁹ or the death of a joint tenant²⁰ is conclusively presumed to have been filed within a reasonable time if filed within nine months after the later of (1) the death of the crea-

5. See RECOMMENDATION RELATING TO DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS, 16 CAL. L. REVISION COMM'N REPORTS, 207, 211 (1982) [hereinafter referred to as RECOMMENDATION].

6. See *id.* at 211; see also CAL. PROB. CODE §295.

7. CAL. PROB. CODE §275.

8. See *id.* §§275, 278 (elements necessary in the disclaimer).

9. *Id.* §277(a); see *id.* §2350(b) (definition of guardian).

10. *Id.* §276; see *id.* §2580(a)(9) (permitting a conservator to file a petition for a court order allowing a disclaimer on behalf of a conservatee); see also *id.* §2350(a) (definition of conservator).

11. *Id.* §277(b); see *id.* §§276, 277(a). A petition for this order must be filed with the superior court in the county administering the estate of the minor or decedent, or, if the estate has not been administered, in any county where administration would be proper. *Id.* §277(c).

12. See *id.* §280(a)(1) (incorporating 1972 Cal. Stat. c. 990, §1, at 1806 (enacting CAL. PROB. CODE §190.4)).

13. *Id.* §280(a)(2).

14. *Id.* §280(a)(3).

15. *Id.* §280(a)(4). Disclaimers affecting real property, or an obligation secured by real property, may be recorded in a like manner and with like effect as a grant of real property, and are subject to statutory provisions regarding recordation of real property. *Id.* §280(b).

16. See 1982 Cal. Stat. c. 466, §81, at 2821 (amending 1972 Cal. Stat. c. 990, §1, at 1806 (enacting CAL. PROB. CODE §190.3)).

17. CAL. PROB. CODE §279(a).

18. *Id.* §279(b), (c). The testamentary devices specified by Chapter 17 are a will, a testamentary power of appointment, a Totten trust or a P.O.D. account, a life insurance or annuity contract, an employee benefit plan, a retirement account, or an inter vivos trust or gift. See *id.* §§1381.1 (classifications of powers of appointment), 269, 279 (definitions of P.O.D. account and Totten trust), 2238 (definition of inter vivos trust), 279(d) (provisions for timeliness of disclaimers for interests not described above).

19. *Id.* §279(b)(2).

20. *Id.* §279(b)(6).

tor of the interest, or (2) the indefeasible vesting of the interest.²¹ In the case of a future interest, a disclaimer is conclusively presumed to have been filed within a reasonable time if filed within nine months after (1) the interest becomes a possessory estate, (2) the disclaiming person learns of the interest, or (3) the death of the creator of the interest.²²

If a present interest is disclaimed, Chapter 17 provides that the disclaimed interest is to be distributed as if the disclaimant had predeceased the creator of the interest.²³ Likewise, if a future interest is disclaimed, the interest is distributed as if the disclaimant died before the taker of the interest had been ascertained and before the taker's interest had indefeasibly vested.²⁴

Under Chapter 17, a beneficiary may not file a disclaimer after accepting an interest.²⁵ A disclaimer is proper, however, when beneficiaries acquire the interest through the disclaimer of another person and have no knowledge of the interest at the time of acceptance.²⁶ Moreover, an interest may be disclaimed regardless of any express or implied spendthrift provision or similar restriction on the interest of the beneficiary.²⁷

Additionally, Chapter 17 validates a disclaimer in California if the disclaimer is valid under federal law.²⁸ Furthermore, the executor²⁹ of an estate, unless restricted by the will, is permitted to make a disclaimer.³⁰ Finally, the conservator of an estate³¹ may disclaim, unless prohibited from doing so by the trust.³²

21. *Id.* §279(b), (c), (d).

22. *Id.* §279(e)(1); *see also id.* §279(e)(2).

23. *Id.* §282(a).

24. *Id.* If a disclaimed interest is created by intestate succession, however, the disclaimant is not treated as having predeceased the decedent for purposes of determining the generation at which the distribution of the estate must be made. *Id.* §282(b)(1).

25. *See* CAL. PROB. CODE §285(a) (incorporating 1972 Cal. Stat. c. 990, §1, at 1806 (enacting CAL. PROB. CODE §190.7)). A beneficiary accepts the interest by (1) making a voluntary pledge, transfer, encumbrance, assignment, or conveyance of the interest, (2) executing a written waiver of the right to disclaim, (3) accepting all or part of the interest, or (4) selling the interest at a judicial sale. *Id.* §285(b).

26. *Id.* §285(c). No interest arising before January 1, 1984, may be diminished by any action of the disclaimant taken under Chapter 17. *Id.* §287. Any interest acquired after December 31, 1983, must be disclaimed according to provisions of Chapter 17. *Id.* §288.

27. *Id.* §286.

28. *Id.* §295; *see* RECOMMENDATION, *supra* note 5, at 211; *see also* 26 U.S.C. §2518 (federal provisions regarding disclaimers).

29. CAL. PROB. CODE §56(c) (definition of executor).

30. *Id.* §591.6(n).

31. *Id.* §2400 (definition of conservator of an estate).

32. *Id.* §2580(b)(9). A conservator may also surrender the right to revoke revocable trust. *Id.* §2580(b)(10). Chapter 17 discontinues provisions of prior law allowing common law disclaimers. *See* RECOMMENDATION, *supra* note 5, at 213. *Compare* CAL. PROB. CODE §§260-288 with 1972 Cal. Stat. c. 990, §1, at 1806 (enacting CAL. PROB. CODE §190.10).

Administration of Estates; judicial supervision of testamentary trusts

Probate Code §§1120.1a, 1138.3, 1138.4 (amended).

AB 482 (Harris); 1983 STAT. Ch 137

(Effective June 28, 1983)

Support: California State Employees Association

In 1982, the California Legislature enacted procedures to remove from mandatory court supervision¹ a trust² created by a will,³ unless the testator provides otherwise.⁴ If the trust was created by a will executed before July 1, 1977, existing statutory requirements must be met to remove the trust from court supervision.⁵ Prior to the enactment of Chapter 137, notice of removal of the trust from mandatory court supervision⁶ was given only by registered or certified mail.⁷ Chapter 137 provides that notice instead may be effected by first class mail if an acknowledgement of receipt of notice is signed by the beneficiary⁸ and returned to the trustee.⁹

Under existing law, if the trustee is not a trust company,¹⁰ a testamen-

1. 1982 Cal. Stat. c. 1199, §2, at ____ (enacting CAL. PROB. CODE §1120.1a).

2. CAL. CIV. CODE §2216 (definition of trust).

3. *In re Moody's Estate*, 118 Cal. App. 2d 300, 307, 257 P.2d 709, 713 (1953) (definition of a will).

4. CAL. PROB. CODE §1120; see 1982 Cal. Stat. c. 1199, §2, at ____ (enacting CAL. PROB. CODE §1120.1a); see also *Review of Selected 1982 California Legislation*, 14 Pac. L.J. 376 (1983) (discussion of legislation eliminating mandatory court supervision of testamentary trusts).

5. CAL. PROB. CODE §1120.1a(a).

6. *Id.* §1120.1a(a)(1)-(5) (contents of notice). If the trustee, on or before the effective date of this act, sent a notice that complied with the notice required prior to the enactment of this Chapter 137, the trustee shall be deemed in compliance and is not required to send a subsequent notice reflecting the changes made by this act. 1983 Cal. Stat. c. 137, §4, at ____ . Income beneficiaries automatically are entitled, under existing law, to an annual statement. Upon written request to the trustee, any other beneficiary or remainderman *also* is entitled to this information, at least annually. Compare *id.* §1120.1a(a)(3) with 1982 Cal. Stat. c. 1199, §2, at ____ (enacting CAL. PROB. CODE §1120.1a). The petition of a beneficiary or remainderman requesting a court to settle the accounts and pass upon the acts of the trustee can be filed either with the court having jurisdiction over the administration of the estate, or the court of the county that is the principal place for the administration of the trust. See CAL. PROB. CODE §301 (jurisdiction and venue over administration of decedent's estate). Compare *id.* §1120.1a(a)(5) with 1982 Cal. Stat. c. 1199, §2, at ____ (enacting CAL. PROB. CODE §1120.1a).

7. 1982 Cal. Stat. c. 1199, §2, at ____ (enacting CAL. PROB. CODE §1120.1a). The trustee shall give notice on or before July 1, 1983, or within six months after the initial funding of the trust, whichever occurs later. *Id.* §1120.1a(a).

8. CAL. PROB. CODE §1139.19 (definition of beneficiary).

9. *Id.* §1120.1a(a); see CAL. CIV. CODE §2219 (definition of trustee). Proof of service of notice must be filed with the court which had jurisdiction over the administration of the estate before August 1, 1983, or within seven months after the initial funding of the trust. CAL. PROB. CODE §1120.1a(a).

10. CAL. FIN. CODE §107 (definition of trust company).

tary trust may be removed from the continuing jurisdiction of the superior court only with the approval of the court having jurisdiction over the trust administration.¹¹ If the petition is granted, Chapter 137 provides that the trustee shall send notice and a copy of the court order granting the petition to each income beneficiary¹² within six months from the date the petition is granted.¹³ In addition, proof of service of the notice must be filed within seven months from the date the petition is granted.¹⁴ Although a petition for removal may be filed at any time at the discretion of the trustee,¹⁵ Chapter 137 emphasizes that the trustee is *not required* to file a petition for removal.¹⁶

Chapter 137 establishes procedures for trust companies to follow when appointed as successor trustees of a trust not removed from the continuing jurisdiction of the court.¹⁷ The successor trustee must send each beneficiary the required notice, and proof of service of that notice, within six and seven months, respectively, of the date of appointment.¹⁸ Chapter 137 provides that once a trust has been removed from the supervision of the court, neither a change in trustees, nor any other event, will cause the trust to be subject to the continuing jurisdiction of the court.¹⁹ Finally, proceedings involving trusts that have been removed from court supervision may be commenced in *either* the superior court of the county having jurisdiction over the principal place of the trust administration, or the superior court with jurisdiction over the administration of the estate.²⁰

11. CAL. PROB. CODE §1120.1a(d); *see id.* §1120; *see also id.* §1138.3 (venue; principal place of administration of trust defined). If the petition is filed with the court, the trustee need not attach a copy of the decree setting forth all the trust provisions. *Id.* §1120.1a(d).

12. *Id.* §1120.1a(d). Upon written request, notice also must be sent to any other beneficiary or remainderman. *Id.* *See also* CAL. CIV. CODE §730.01(1) (definition of income beneficiary).

13. CAL. PROB. CODE §1120.1a(d). If the petition is not granted, the trust shall continue to be administered as if the testator had provided in the will that the superior court shall not lose jurisdiction. *Id.*

14. *Id.*

15. *Id.* No filing fee is required for a petition filed with respect to a trust created by a will subject to continuing court supervision. *Id.* §1138.4.

16. *Id.* §1120.1a(d). If the trust is not removed from court supervision, the trustee is not required to send the notice, annual statement, or annual summary described in California Probate Code section 1120.1a(a), (b), (c). *Id.* §1120.1a(d).

17. CAL. PROB. CODE §1120.1a(g).

18. *Id.*

19. *Id.*

20. Compare *id.* §1138.3 with 1970 Cal. Stat. c. 849, §2, at 1582 (enacting CAL. PROB. CODE §1138.3); *see also* CAL. PROB. CODE §301 (jurisdiction and venue).

Administration of Estates; merger of voluntary trusts

Civil Code §2225 (new).

AB 638 (McAlister); 1983 STAT. Ch 138

Support: State Bar of California

Existing case law provides that when a trustee¹ is also the beneficiary² of a voluntary trust,³ the doctrine of merger⁴ terminates the trust.⁵ Chapter 138 mandates that a voluntary trust is *not* merged, invalidated, or terminated if the trust provides for one or more successor beneficiaries⁶ or remaindermen⁷ after the death of the trustor,⁸ when (1) the trustor is also the sole trustee and sole beneficiary during the trustor's lifetime, or (2) the trust has two or more trustors, one or more of whom is a trustee, and the beneficial interest⁹ is in the trustors during their lifetimes.¹⁰ The provisions of Chapter 138 are to be applied to all voluntary trusts created prior to, on, or after January 1, 1984.¹¹

1. CAL. CIV. CODE §2219 (definition of trustee).

2. *Id.* §2218 (definition of beneficiary).

3. *Id.* §2216 (definition of voluntary trust).

4. *See* Estate of Washburn, 11 Cal. App. 735, 746, 106 P. 415, 420 (1910) (merger operates to combine legal and equitable estates when both are owned by one person); *see also* RESTATEMENT (SECOND) OF TRUSTS §341 (1959) (explanation of operation of merger).

5. *Estate of Washburn*, 11 Cal. App. at 746, 106 P. at 420.

6. *See generally* RESTATEMENT (SECOND) OF TRUSTS §§232-241 (successor beneficiaries).

7. CAL. CIV. CODE §731.03(d) (definition of remainderman).

8. *Id.* §2218 (definition of trustor).

9. *See* Papineau v. Security-First National Bank of Los Angeles, 45 Cal. App. 2d 690, 693, 114 P.2d 629, 630 (1941) (the term beneficial interest is commonly used to designate the entire interest of a beneficiary in a trust); RESTATEMENT (SECOND) OF TRUSTS §112 (1959) (a trust is not created unless a beneficiary is definitely ascertained at time of creation of trust, or ascertainable within period of the rule against perpetuities).

10. CAL. CIV. CODE §2225.

11. *Id.* Chapter 138 is subject to existing provisions establishing the requirements of a valid trust. *Id.* §852.

Administration of Estates; notice requirements for claims of community property

Probate Code §653 (amended).

AB 421 (Davis); 1983 STAT. Ch 77

Support: Beverly Hills Bar Association; State Bar of California

Existing law permits the surviving spouse or the personal representative,¹ guardian,² or conservator³ of the surviving spouse's estate to petition the superior court for an exemption from administration of all or part of

1. *See* CAL. REV. & TAX. CODE §13403 (definition of personal representative).

2. CAL. PROB. CODE §2400(b) (definition of guardian).

3. *Id.* §2400(a) (definition of conservator).

the deceased spouse's estate.⁴ This exemption is available only if all or part of the estate is community or quasi-community property passing or belonging to the surviving spouse.⁵ A hearing on the petition for the exemption is required if (1) proceedings for the administration of the estate are pending when the petition is filed, or (2) proceedings are not pending and the petition is not joined with a petition for probate of the will or administration of the estate.⁶

The petitioner must serve a notice of the hearing and a copy of the petition to specified persons⁷ at least twenty days before the hearing.⁸ With the enactment of Chapter 77, the petitioner is exempt from serving a copy of the petition with the notice of the hearing if (1) the surviving spouse receives all the decedent's property under the will,⁹ and (2) all contingencies of the will are satisfied at the time the petition is filed.¹⁰

4. *Id.* §650(a).

5. *Id.*; see also CONTINUING EDUCATION OF THE BAR, 1 CALIFORNIA DECEDENT ESTATE ADMINISTRATION §3.34 (Supp. 1983).

6. CAL. PROB. CODE §653(a); see *id.* §654 (notice requirements if the petition is joined with a petition for probate of the will or for administration of the estate).

7. *Id.* §653(a). The persons to be notified are (1) all personal representatives of the estate, including all successor personal representatives named in the will, whether or not acting, (2) all heirs, devisees, and legatees, (3) all persons requesting special notice under Probate Code Section 1202, (4) all persons giving notice of appearance, (5) the attorney general, if charitable bequests or devises have been made without an identified trustee, resident in California, legatee, devisee, or beneficiary, and (6) all other persons named in the will if the petitioner bases the allegation that all or part of the estate of the deceased is community or quasi-community property passing to the surviving spouse upon the will. *Id.* See also CONTINUING EDUCATION OF THE BAR, 1 CALIFORNIA DECEDENT ESTATE ADMINISTRATION §3.34 (Supp. 1983).

8. CAL. PROB. CODE §653(a).

9. *Id.* §653(b)(1).

10. *Id.* §653(b)(2). The notice of the hearing must specify that the contingencies of the will apply to the estate that is the subject of the petition. *Id.* §653(b).

Administration of Estates; duties of fiduciaries and trustees

Civil Code §§2238, 2258, 2269, 2282, 2355 (amended); Probate Code §§657 (repealed); 733, 772, 851.5, 902 (amended).

AB 261 (Harris); 1983 STAT. Ch 99

Support: California Bankers Association; County Clerk's Association; State Bar Conference of Delegates

Chapter 99 revises the law governing trust administration, and specifically, the duties to be performed by the trustee of a revocable trust¹ and the standards of a fiduciary-beneficiary.² The law of estate administration

1. See CAL. CIV. CODE §§2238(b), 2258(b).

2. See *id.* §2269(c).

also is revised regarding (1) interest allowed on estate claims,³ (2) procedures for notification of the sale of a decedent's personal property,⁴ (3) abatement of petitions to the Probate Court,⁵ and (4) compensable expenses of estate administration.⁶

Duties of the Trustee of a Revocable Trust

Under existing law, a trustee⁷ must fulfill the purpose of the trust,⁸ as declared at the time the trust is created.⁹ The trustee also must follow all directions of the trustor¹⁰ *given at that time*, unless those directions are modified with the consent of *all* interested parties.¹¹ If the trustee disposes of trust property in any manner not authorized by the trust, the trustee is liable to the beneficiary,¹² regardless of whether the trustee was acting in good faith and with an intent to serve the interests of the beneficiary.¹³ The trustee's liability is limited, however, to the extent of the losses attributable to the trustee's error.¹⁴ Chapter 99 requires the trustee of a *revocable trust*¹⁵ to follow all written instructions acceptable to the trustee and *given from time to time* by the person having the power to revoke either the entire trust, or those portions of the trust affected by the instructions.¹⁶ Consequently, in following these instructions, the trustee is exempt from liability to the beneficiary¹⁷ or any person with a vested or contingent interest¹⁸ in the trust.¹⁹ Furthermore, the trustee may follow the instructions regardless of any fiduciary obligations owed by the directing party.²⁰

3. See CAL. PROB. CODE §733.

4. See *id.* §772.

5. See *id.* §851.5.

6. See *id.* §902. Chapter 99 effects other nonsubstantive, technical changes in the Civil and Probate Codes. Compare CAL. CIV. CODE §2282 with 1961 Cal. Stat. c. 1042, §2, at 2726 (amending CAL. CIV. CODE §2282) (being judged incompetent no longer specified grounds for discharge of a trustee); CAL. CIV. CODE §2355 with 1980 Cal. Stat. c. 246, §1, at 491 (amending CAL. CIV. CODE §2355) (word 'agent' substituted for 'agency' in situations where an agency relationship is being terminated due to the incapacity of the agent); 1983 Cal. Stat. c. 99, §6, at — (repealing CAL. PROB. CODE §657) (appointment of inheritance tax referees no longer required to appraise property passing from a decedent to a surviving spouse).

7. CAL. CIV. CODE §2219 (definition of trustee).

8. *Id.* §§2215-2224 (provisions relating to the nature and creation of trusts).

9. *Id.* §2258(a).

10. *Id.* §2218 (definition of trustor).

11. *Id.* §2258(a).

12. CAL. PROB. CODE §190 (definition of beneficiary).

13. CAL. CIV. CODE §2238(a).

14. *Id.*

15. *Id.* §2280 (unless made irrevocable by the trust instrument, every voluntary trust is revocable by the trustor by filing a writing with the trustee).

16. *Id.* §2258(b). Trustees also are bound by instructions given by persons delegated the right to direct the trustee by the trustor. *Id.*

17. *Id.* §§2238(b), 2258(b).

18. 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§248, 252 (8th ed. 1973) (definition of vested and contingent remainders).

19. CAL. CIV. CODE §2258(b).

20. *Id.*

Standards of a Fiduciary-Beneficiary

Existing law provides that a discretionary power conferred upon a trustee must be exercised reasonably.²¹ When a trustee-beneficiary has absolute, sole, or uncontrolled discretion, and also the power to take or distribute income or principal subject to a standard of behavior, the trustee-beneficiary must exercise that power reasonably and in accord with the specified standard.²² In addition, Chapter 99 imposes upon the trustee-beneficiary the duty to exercise power in accordance with fiduciary principles, and not in bad faith or in disregard of the purposes of the trust.²³

Interest on Estate Claims

Under existing law, interest²⁴ paid on claims against the *solvent* estate of a decedent may not exceed ten percent per annum.²⁵ Interest on claims against an *insolvent* estate, however, is limited to the rate allowed by statute for judgments.²⁶ With the enactment of Chapter 99, when claims against an estate are based upon a written contract, the rate of interest specified in the contract controls.²⁷

Notification of Sale of Personal Property

Under existing law, the executor or administrator²⁸ of an estate has the duty and authority to sell property of the estate when the sale is necessary or advantageous.²⁹ In addition, existing law mandates that notice be given before the sale of personal property.³⁰ Under prior law, the court clerk was required to post notice at the courthouse at least ten days before the hearing of sale,³¹ and the executor or administrator was required to notify per-

21. See *id.* §2269(a), (b) (the exercise of a discretionary power is subject to review by a court of competent jurisdiction).

22. See *id.* §2269(d); see also *Review of Selected 1981 California Legislation*, 13 PAC. L.J. 527 (1982).

23. Compare CAL. CIV. CODE §2269(c) with 1981 Cal. Stat. c. 1046, §1, at 4032 (enacting CAL. CIV. CODE §2269).

24. CAL. CIV. CODE §1915 (definition of interest).

25. CAL. PROB. CODE §733.

26. *Id.*; CAL. CIV. PROC. CODE §577 (definition of judgment); see *id.* §685.010(a) (setting the rate of interest at 10 percent per annum on the principal amount of judgments).

27. CAL. PROB. CODE §733.

28. See generally *id.* §§403-409 (appointment of executors and administrators with the will annexed), 420-450 (appointment of administrators).

29. *Id.* §754; see 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §460 (8th ed. 1974) [hereinafter cited as WITKIN].

30. See CAL. PROB. CODE §772 (notice is not required for the sale of securities or perishable property, or sale by auction); *Id.* §§ 757, 770, 771, 772 (definition of personal property).

31. See 1980 Cal. Stat. c. 955, §18.8, at 3025 (amending CAL. PROB. CODE §772) (requiring notice to be given by court clerks in the manner provided by CAL. PROB. CODE §1200, and by the executor or administrator in the manner specified in CAL. PROB. CODE §1200.5).

sons who had requested notice or who had given a notice of appearance in the estate as an heir, devisee, legatee, or creditor.³² Chapter 99 places the sole responsibility of providing notice in these situations upon the executor or administrator.³³ Notice may be given by (1) posting at the county courthouse at least ten days before the sale,³⁴ (2) publication in a newspaper in the county,³⁵ or (3) both posting and publication.³⁶

Abatement of Petitions to Probate Court

Existing law allows individuals claiming an interest in the real or personal property of a decedent to petition the Probate Court for a determination of their claim, instead of being relegated solely to a separate civil action.³⁷ In the event that a civil action involving the subject matter of the petition is pending at the time the claim is filed, the Probate Court must abate the petition until the civil action is concluded.³⁸ This statutory requirement, however, has been interpreted by case law as conferring upon the Probate Court the power to abate the petition, rather than making the abatement automatic.³⁹ Chapter 99 states that the court is only obligated to abate the petition if the civil action was pending prior to the filing of the probate claim.⁴⁰

Compensable Expenses of Estate Administration

The amount of compensation given to an executor or administrator for ordinary services is established by statute.⁴¹ Under existing law, the court may allow an additional payment of just and reasonable fees for any services the court deems extraordinary.⁴² Since an executor has no duty to defend a will against a person who contests the probate of the will, compensation of an executor for attorneys' fees incurred in successfully defending the will has been disallowed as an unnecessary expense.⁴³ Once

32. *See id.*

33. CAL. PROB. CODE §772.

34. *Id.* In the case of private sales, posting must be at least ten days before the day on or after which the sale is to be made. *Id.*

35. *Id.*

36. *Id.* Selection of the appropriate method of notice is left to the determination of the executor or administrator. *Id.* See CAL. GOVT. CODE §6063a (requirements for notice by publication).

37. See CAL. PROB. CODE §851.5. See generally WITKIN, *supra* note 29, at §§241, 242, 243, 244.

38. CAL. PROB. CODE §851.5.

39. See *Richer v. Superior Court*, 63 Cal. App. 3d 748, 134 Cal. Rptr. 52 (1976); WITKIN, *supra* note 29, at §244(f) (Supp. 1982).

40. Compare CAL. PROB. CODE §851.5 with 1979 Cal. Stat. c. 731, §23, at 2562 (amending CAL. PROB. CODE §851.5).

41. See CAL. PROB. CODE §901. The statutory compensation may be superseded by provisions for payment in the will. *Id.*

42. See *id.* §902.

43. See WITKIN, *supra* note 29, at §362.

a will has been admitted to probate, however, the executor has a duty to defend the will.⁴⁴ Consequently, reasonable costs and attorneys' fees for defending the will are then allowed.⁴⁵ In contrast, Chapter 99 specifies that the successful defense of a will is a compensable extraordinary service, whether contested *before or after* the will is admitted to probate.⁴⁶

Summary

In conclusion, Chapter 99 affords trustees of revocable trusts greater flexibility by permitting them to follow written instructions not contained in the original trust instrument.⁴⁷ Furthermore, trustee-beneficiaries with absolute discretion must not only act reasonably and in accordance with the standards of behavior created by the trust, but they also must act in accordance with the purposes of the trust and fiduciary principles.⁴⁸ In addition, Chapter 99 provides that petitions for abatement of probate proceedings will not be granted on grounds that a civil action is pending, unless the civil claim was filed before the probate claim.⁴⁹ Moreover, Chapter 99 permits the interest rate on claims against a decedent's estate to be established by contract, rather than being limited to the current statutory maximum.⁵⁰ Furthermore, responsibility for giving notice of the sale of a decedent's personal property is conferred upon the executor or administrator.⁵¹ Finally, the successful defense of a will contest now is a compensable extraordinary service performed by an executor.⁵² As a result, an executor's attorney may recover reasonable attorneys' fees incurred in defending the will.⁵³

44. *Id.*

45. *Id.*

46. Compare CAL. PROB. CODE §902 with 1951 Cal. Stat. c. 1604, §1, at 3607 (amending CAL. PROB. CODE §902).

47. CAL. CIV. CODE §§2238(b), 2258(b).

48. *Id.* §2269(c).

49. CAL. PROB. CODE §851.5

50. *Id.* §733.

51. *Id.* §772.

52. *Id.* §902.

53. *Id.*

