

Memorandum 91-68

Subject: Study L-608 - Deposit of Estate Planning Documents With Attorney (Revised Tentative Recommendation)

Attached is a staff draft of a *Revised Tentative Recommendation Relating to Deposit of Estate Planning Documents With Attorney*. A previous *Tentative Recommendation* on this subject was circulated in January 1990, and brought a mixed response. The most significant opposition was from the State Bar Board of Governors, which was concerned about the cost of storing notices of transfer of these documents and responding to inquiries.

The Commission considered this subject again at the last meeting. The Commission accepted the view that a public depository is needed for old wills because of the unlikelihood that attorneys or trust companies will accept wills if the whereabouts of the testator is unknown.

The staff considered three possible public depositories:

(1) The California Secretary of State. This office now files corporate documents, and must maintain a registry system for international wills. See Prob. Code § 6389. This office has opposed previous proposals to make it a depository for wills.

(2) The State Registrar of Vital Statistics. This office now keeps certificates of death. Health & Safety Code §§ 10000, 10035, 10061. Attorney Don Green of the State Bar Probate Section is trying to determine the attitude of this office toward receiving and storing old wills.

(3) The county clerks (superior court clerks) of the 58 counties. The superior court clerk in the county where the testator's estate may be administered (normally county of domicile -- Prob. Code § 7051) now must accept wills on death of the testator. Prob. Code § 8200. So it makes some sense to have the clerk be depository for old wills if the testator cannot be found and may well be deceased. The objection to using the clerk is that it would be burdensome to have to search many counties to find a will. But this objection would be addressed by having a central registry for notices of transfer, such as the State Bar. One searching for a will could inquire of the central registry and learn where a transferred will was sent.

The attached *Revised Tentative Recommendation* provides that the superior court clerk in the county of the depositor's last known residence is a permissible depository. Although the clerks have opposed this idea, this proposal may be more acceptable because of three features:

(1) It authorizes the clerk to microfilm the transferred document and destroy the original.

(2) It authorizes the clerk to microfilm and destroy wills received under Probate Code Section 8200 on death of the testator if the clerk has held the will for at least ten years.

(3) It provides a filing fee of \$14. This fee was selected arbitrarily. The clerks may suggest some other figure. In any event, we anticipate that the system should be self-supporting.

The *Revised Tentative Recommendation* provides for filing of a notice of transfer with the State Bar. Thus there will be one central registry where one can get information. It also provides for permissive notice by the attorney to the client, advising that the client must keep the attorney advised of changes of address, and provides for written acknowledgment by the client. If the client fails to keep the attorney informed, the attorney's duty of care is reduced from the "ordinary care" established by this proposal to the "slight care" for a gratuitous depository under existing law. Civ. Code § 1846.

These features of the *Revised Tentative Recommendation* are generally consistent with Commission views at the last meeting. The staff recommends we circulate this *Revised Tentative Recommendation* for comment again because of significant substantive changes to the January 1990 draft. The staff has incorporated into this draft many suggestions made by commentators on the previous draft. These were analyzed in Memorandum 91-47, but the Commission did not consider these in detail. We propose to rely on commentators on this *Revised Tentative Recommendation* to identify any remaining problems. The most crucial views will be those of the clerks and State Bar Board of Governors.

Respectfully submitted,

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10/2/91

REVISED TENTATIVE RECOMMENDATION
relating to
DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Wills and other estate planning documents are often left with the attorney who drafted them.¹ This creates a bailment.² A bailee ordinarily has no authority to transfer the property being held to someone else without consent of the bailor.³ Thus when an attorney accepts an estate planning document for safekeeping, the attorney must continue to hold the document indefinitely if the depositor cannot be found. This creates a serious problem for an estate planning attorney who wants to retire, resign, become inactive, or change to some other kind of practice.

The Commission recommends legislation to permit an attorney who is holding an estate planning document for safekeeping and cannot find the depositor to transfer the document to another attorney, trust company, or the clerk of the superior court of the county of the depositor's last known residence,⁴ and to require the attorney to give notice of

1. See California Will Drafting Practice § 2.25, at 62-63 (Cal. Cont. Ed. Bar 1982).

2. 8 Am. Jur. 2d *Bailments* § 4 (1980).

3. 8 Am. Jur. 2d *Bailments* § 97 (1980).

4. Under existing law, the superior court clerk receives and stores wills of deceased testators: The custodian of the will must deliver it to the clerk of the superior court of the county in which the decedent's estate may be administered. Prob. Code § 8200.

the transfer to the State Bar.⁵ The recommended legislation has the following features:⁶

(1) The attorney must use ordinary care for preservation of the document, whether or not consideration is given, and must keep the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

(2) The attorney may give written notice to the depositor that the depositor must keep the attorney advised of any changes of address. If the depositor fails to do this and as a result the attorney cannot return a deposited document, the attorney, and any successor attorney or trust company who accepts a transfer of the document, need use only slight care for its preservation, the same as for a gratuitous depository under existing law.⁷

(3) The attorney is not liable for loss or destruction of the document if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document.

(4) The depositor need not compensate the attorney for holding the document unless so provided in a written agreement.

(5) The attorney has no lien on the document, even if provided by agreement.⁸

(6) A depositor may terminate a deposit on demand, and the attorney must deliver the document to the depositor.⁹

5. Under existing law, an attorney who intends to go out of practice must give notice of cessation of law practice to the State Bar. Bus. & Prof. Code §§ 6180, 6180.1.

6. The recommended legislation was developed from a proposal approved by the State Bar Conference of Delegates in 1988.

7. Civ. Code § 1846.

8. This is contrary to Civil Code Section 1856, which allows a lien for costs.

9. This is consistent with Civil Code Section 1822. The Commission's recommendation also would amend Section 2586 (substituted judgment) to provide that if the depositor has a conservator of the estate, the court may order that the depositor's estate planning documents be delivered to some other custodian for safekeeping.

(7) The attorney may terminate a deposit by personal delivery of the document to the depositor or by the method agreed on by the depositor and the attorney.

(8) If the attorney is unable to deliver the document to the depositor and does not have actual notice that the depositor has died, the attorney may mail notice to reclaim the document to the depositor's last known address. If the depositor fails to reclaim the document within 90 days, the attorney may transfer the document to another attorney, to a trust company, or to the clerk of the superior court of the county of the depositor's last known residence, and must file a notice of the transfer with the State Bar.

(9) Before the depositor's death, only the depositor may get from the State Bar the name and address of the transferee. After the depositor's death, the name and address of the transferee is a public record.

(10) If a document is transferred to a superior court clerk, the clerk may microfilm the document and destroy the original.¹⁰ The clerk's fee for accepting a transfer of an estate planning document is \$14.

(11) A successor attorney who accepts a document for safekeeping is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor depository.

(12) After the depositor's death, the attorney may terminate the deposit by delivering the document to the depositor's personal representative, or to the trustee in the case of a trust or court clerk in the case of a will.

10. The proposed legislation also authorizes the superior court clerk to microfilm wills delivered pursuant to Probate Code Section 8200 after the testator's death, and to destroy the original, if the clerk has held the will for at least ten years. Destruction of the original will does not prevent its admission to probate. See Prob. Code § 8223.

OUTLINE

NEW SECTIONS IN PROBATE CODE

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

CHAPTER 1. DEFINITIONS

- § 700. Application of definitions
- § 701. Attorney
- § 702. Deposit
- § 703. Depositor
- § 704. Document

CHAPTER 2. DUTIES AND LIABILITIES OF ATTORNEY

- § 710. Attorney's duty of ordinary care
- § 711. Notice on loss or destruction of document
- § 712. Nonliability for loss or destruction of document
- § 713. No duty to verify contents of document or provide continuing legal services
- § 714. Payment of compensation and expenses; no lien on document
- § 715. Attorney's notice to client
- § 716. Reduced standard of care

CHAPTER 3. TERMINATION OF DEPOSIT

Article 1. Termination by Depositor

- § 720. Termination on demand

Article 2. Termination by Attorney

- § 730. Attorney may terminate deposit only as provided in this article
- § 731. Termination by delivery, mailing, or as agreed
- § 732. Termination by transferring document to another attorney, trust company, or superior court clerk
- § 733. Notice to State Bar
- § 734. Termination after death of depositor
- § 735. Deceased or incompetent attorney

CONFORMING REVISIONS

- Prob. Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents
- Gov't Code § 26810 (added). Microfilming estate planning documents; destruction of originals
- Gov't Code § 26864 (added). Fee for filing estate planning document

RECOMMENDED LEGISLATION

Prob. Code §§ 700-735 (added). Deposit of estate planning documents with attorney

PART 14. DEPOSIT OF ESTATE PLANNING DOCUMENTS WITH ATTORNEY

Chapter 1. Definitions

§ 700. Application of definitions

700. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this part.

Comment. Section 700 is new.

§ 701. Attorney

701. "Attorney" means an individual licensed to practice law in this state.

Comment. Section 701 is new. Although the depository is the individual attorney, liability for failing to maintain an adequate standard of care may be imposed on the attorney's law partnership or law corporation under traditional rules of vicarious liability. See 2 B. Witkin, *Summary of California Law Agency and Employment* § 115, at 109-111 (9th ed. 1987); 9 B. Witkin, *Summary of California Law Partnership* § 38, at 434-35 (9th ed. 1989).

§ 702. Deposit

702. "Deposit" means delivery of a document by a depositor to an attorney for safekeeping or authorization by a depositor for an attorney to retain a document for safekeeping.

Comment. Section 702 is new.

§ 703. Depositor

703. "Depositor" means a natural person who deposits the person's document with an attorney.

Comment. Section 703 is new. The definition of "depositor" in Section 703 does not preclude the person whose document is deposited from using an agent, such as an attorney-in-fact, to make the deposit.

§ 704. Document

704. "Document" means any of the following:

- (a) A signed original will, declaration of trust, trust amendment, or other document modifying a will or trust.
- (b) A signed original power of attorney.
- (c) A signed original nomination of conservator.

(d) Any other signed original instrument that the attorney and depositor agree in writing to make subject to this part.

Comment. Section 704 is new. "Will" includes a codicil. Section 88.

Chapter 2. Duties and Liabilities of Attorney

§ 710. Attorney's duty of ordinary care

710. If a document is deposited with an attorney, the attorney, and a successor attorney or trust company that accepts transfer of the document, shall use at least ordinary care for preservation of the document on and after July 1, 1993, whether or not consideration is given, and shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

Comment. Section 710 is new. Under Section 710, an attorney must use at least ordinary care for preservation of the document deposited. This applies the rule of Civil Code Section 1852 (deposit for hire) to the attorney-depositary, whether or not consideration is given. This is a departure from Civil Code Section 1846, under which a gratuitous depositary need only use slight care for preservation of the property deposited.

The duty imposed by Section 710 to hold the document in a safe, vault, safe deposit box, or other secure place is a reasonable one, and allows reasonable periods for the document to be out of safekeeping for the purpose of examination or delivery in appropriate circumstances. At all times the document should be reasonably protected against loss or destruction, although what is reasonable may vary with the circumstances.

Although Section 710 applies to attorneys who are holding documents on July 1, 1993, an attorney is not liable for action taken before that date that was proper when the action was taken. Section 3.

For an exception to the standard of care provided in Section 710, see Section 716 (slight care after specified steps taken).

§ 711. Notice on loss or destruction of document

711. If a document deposited with the attorney is lost or destroyed, the attorney shall mail notice of the loss or destruction to the depositor's last known address.

Comment. Section 711 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 712. Nonliability for loss or destruction of document

712. Notwithstanding failure of the attorney to satisfy the standard of care required by Section 710 or 716, the attorney is not

liable for loss or destruction of the document if the depositor has actual notice of the loss or destruction and a reasonable opportunity to replace the document.

Comment. Section 712 is new. Even though a will is lost or destroyed, it still may be proven and admitted to probate. See Section 8223.

§ 713. No duty to verify contents of document or provide continuing legal services

713. The acceptance by an attorney of a document for deposit imposes no duty on the attorney to do either of the following:

(a) Inquire into the content, validity, invalidity, or completeness of the document, or the correctness of any information in the document.

(b) Provide continuing legal services to the depositor or to any beneficiary under the document. This subdivision does not affect the duty, if any, of the drafter of the document to provide continuing legal services to any person.

Comment. Section 713 is new. Section 713 does not relieve the drafter of the document from the duty of drafting competently.

§ 714. Payment of compensation and expenses; no lien on document

714. (a) If so provided in a written agreement signed by the depositor, the attorney may charge the depositor for compensation and expenses incurred in safekeeping or delivery of a document deposited with the attorney.

(b) No lien arises for the benefit of an attorney on a document deposited with the attorney, whether before or after its transfer, even if provided by agreement.

Comment. Section 714 is new. Subdivision (b) is a departure from Civil Code Section 1856 (depository's lien).

§ 715. Attorney's notice to client

715. An attorney may give written notice to a depositor, and obtain written acknowledgment from the depositor, in the following form:

NOTICE AND ACKNOWLEDGMENT

To: _____
(Name of depositor)

(Address)

(City, state, and ZIP)

I have accepted your will or other estate planning document for safekeeping. I must use at least ordinary care for preservation of the document.

You must keep me advised of any change in your address shown above. If you do not and I cannot return this document to you when necessary, I will no longer be required to use ordinary care for preservation of the document, and I may transfer it to another depository and give notice of the transfer to the State Bar of California.

(Signature of attorney)

(Address of attorney)

(City, state, ZIP)

My address shown above is correct. I understand that I must keep you advised of any change in this address.

Dated: _____

(Signature of depositor)

Comment. Section 715 is new. By giving the notice and obtaining the acknowledgment provided by this section, the attorney's duty of care may be reduced to slight care if the requirements of Section 716 are satisfied. See also Section 731 (mailing document to address shown in notice and acknowledgment).

§ 716. Reduced standard of care

716. Notwithstanding Section 710, if an attorney has given written notice to the depositor, and has obtained written acknowledgment from the depositor, in substantially the form provided in Section 715, and the requirements of subdivision (a) of Section 732 are satisfied, the attorney, and a successor attorney or trust company that accepts transfer of a document, shall use at least slight care for preservation of a document deposited with the attorney.

Comment. Section 716 is new. The "slight care" standard of Section 716 is the same as the standard of care of a gratuitous depository under Civil Code Section 1846.

Chapter 3. Termination of Deposit

Article 1. Termination by Depositor

§ 720. Termination on demand

720. A depositor may terminate the deposit on demand, in which case the attorney shall deliver the document to the depositor.

Comment. Section 720 is new, and is consistent with Civil Code Section 1822, except that under Section 714 no lien is permitted against the document deposited.

If the depositor has an attorney in fact acting under a statutory form power of attorney that confers general authority with respect to estate transactions, the attorney in fact may terminate the deposit. See Civ. Code § 2493.

If the depositor has a conservator of the estate, the court may order the attorney to deliver the document to the court for examination, and for good cause may order that the document be delivered to some other custodian for safekeeping. Section 2586.

Article 2. Termination by Attorney

§ 730. Attorney may terminate deposit only as provided in this article

730. An attorney with whom a document has been deposited, or to whom a document has been transferred pursuant to this article, may terminate the deposit only as provided in this article.

Comment. Section 730 is new. The methods by which an attorney may terminate a deposit under this article are provided in Sections 731 to 735.

§ 731. Termination by delivery, mailing, or as agreed

731. An attorney may terminate the deposit by one of the following methods:

(a) Personal delivery of the document to the depositor.

(b) Mailing the document to the depositor's last known address, by registered or certified mail with return receipt requested, and receiving the signed receipt of the depositor.

(c) The method agreed on by the depositor and attorney.

Comment. Section 731 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 715, in the depositor's advice of change of address to the attorney, or otherwise.

Section 731 is permissive. An attorney may also terminate a deposit as provided in Section 732 or, if applicable, Section 734.

§ 732. Termination by transferring document to another attorney, trust company, or superior court clerk; reduced standard of care

732. (a) An attorney may terminate a deposit under this section if both of the following requirements are satisfied:

(1) The attorney has mailed notice to reclaim the document to the depositor's last known address, or, if the attorney does not have an address for the depositor, to any person named in the document as beneficiary, executor, or trustee.

(2) The depositor has failed to reclaim the document within 90 days after the mailing.

(b) Subject to subdivision (e), an attorney may terminate a deposit under this section by transferring the document to any of the following persons:

(1) Another attorney.

(2) A trust company

(3) The clerk of the superior court of the county of the depositor's last known residence. The attorney shall advise the clerk that the document is being transferred pursuant to Probate Code Section 732.

(c) The attorney may not accept a fee or compensation from a transferee for transferring a document under this section.

(d) Transfer of a document by an attorney under this section is not a waiver or breach of any privilege or confidentiality associated with the document, and is not a violation of the rules of professional conduct. If the document is privileged under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code, the document remains privileged after the transfer.

(e) If the document is a will and the attorney has actual notice that the depositor has died, the attorney may terminate a deposit only as provided in Section 734.

Comment. Section 732 is new. The depositor's last known address may be shown in a notice and acknowledgment under Section 715, in the depositor's advice of change of address to the attorney, or otherwise.

Section 732 is permissive. An attorney may also terminate a deposit as provided in Section 731 or, if applicable, Section 734.

By permitting an attorney to transfer a document to another depository, Section 732 departs from the common law of bailments under which a depository ordinarily has no authority to transfer the property to someone else. See 8 Am. Jur. 2d *Bailments* § 97 (1980).

The fee for transferring an estate planning document to the

superior court clerk under subdivision (b) is \$14. Gov't Code § 26864.
See also Sections 1215-1217 (mailing of notice).

§ 733. Notice to State Bar

733. (a) An attorney transferring a document under Section 732 shall mail notice of the transfer to the State Bar of California. The notice shall contain the name of the depositor, the date of the transfer, a description of each document transferred, the name and address of the transferring attorney, and the name and address of the attorney, trust company, or superior court clerk to which each document is transferred. If the attorney is required to give notice of cessation of law practice under Article 11 (commencing with Section 6180) of Chapter 4 of Division 3 of the Business and Professions Code, the notice of transfer may be included in the notice of cessation of law practice.

(b) Except as provided in subdivision (c), when filed with the State Bar, information in the notice of transfer relating to a depositor shall be confidential, is not a public record, and is not open to inspection except by the public officers or employees who have the duty of receiving and storing the notice.

(c) On request by the depositor, the State Bar shall furnish to the depositor the information relating to that depositor in the notice of transfer. If the State Bar is furnished with a certified copy of the depositor's death certificate or other satisfactory proof of the depositor's death, the notice of transfer shall be a public record subject to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

Comment. Section 733 is new.

§ 734. Termination after death of depositor

734. (a) In cases not governed by subdivision (b) or (c), after the death of the depositor an attorney may terminate a deposit by personal delivery of the document to the depositor's personal representative.

(b) If the document is a will and the attorney has actual notice that the depositor has died but does not have actual notice that a personal representative has been appointed for the depositor, an attorney may terminate a deposit only as provided in Section 8200.

(c) If the document is a trust, after the death of the depositor an attorney may terminate a deposit by personal delivery of the document either to the depositor's personal representative or to the trustee named in the document.

Comment. Section 734 is new. Subdivisions (a) and (c) are permissive, but subdivision (b) is mandatory. If subdivision (b) does not apply, an attorney may terminate a deposit, for example, by the method agreed on by the depositor and attorney. Section 731.

As used in Section 734, "personal representative" includes a successor personal representative and a personal representative appointed in another state. Section 58. "Trustee" includes a successor trustee (Section 84), and "will" includes a codicil (Section 88).

§ 735. Deceased or incompetent attorney

735. (a) If the attorney is deceased or lacks legal capacity, a deposit may be terminated as provided in this article by the attorney's law partner, by a shareholder of the attorney's law corporation, or by a lawyer or nonlawyer employee of the attorney's firm, partnership, or corporation.

(b) If the attorney lacks legal capacity and there is no person to act under subdivision (a), a deposit may be terminated by the conservator of the attorney's estate or by an attorney in fact acting under a durable power of attorney. A conservator of the attorney's estate may act without court approval.

(c) If the attorney is deceased and there is no person to act under subdivision (a), a deposit may be terminated by the attorney's personal representative.

(d) If a person authorized under this section terminates a deposit as provided in Section 732, the person shall give the notice required by Section 733.

Comment. Section 735 is new.

CONFORMING REVISIONS

Probate Code § 2586 (amended). Production of conservatee's will and other relevant estate plan documents

2586. (a) As used in this section, "estate plan of the conservatee" includes but is not limited to the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any

contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated.

(b) Notwithstanding Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code (lawyer-client privilege), the court, in its discretion, may order that any person having possession of any document constituting all or part of the estate plan of the conservatee shall deliver such document to the court for examination by the court, and, in the discretion of the court, by the attorneys for the persons who have appeared in the proceedings under this article, in connection with the petition filed under this article.

(c) Unless the court otherwise orders, no person who examines any document produced pursuant to an order under this section shall disclose the contents of the document to any other person. If such disclosure is made, the court may adjudge the person making the disclosure to be in contempt of court.

(d) For good cause, the court may order that a document constituting all or part of the estate plan of the conservatee, whether or not produced pursuant to an order under this section, shall be delivered for safekeeping to the custodian designated by the court. The court may impose such conditions as it determines are appropriate for holding and safeguarding the document. The court may authorize the conservator to do any acts a depositor could do under Part 14 (commencing with Section 700) of Division 2.

Comment. Section 2586 is amended to add subdivision (d) to permit the court to order that the conservatee's estate planning documents be delivered to some other custodian for safekeeping. Under subdivision (d), "good cause" for ordering a transfer to some other custodian might include, for example, the case where the previous custodian has not used ordinary care for preservation of the document. See Section 710. See generally Sections 700-735 (deposit of estate planning documents with attorney).

Gov't Code § 26810 (added). Microfilming estate planning documents; destruction of originals

26810. (a) The superior court clerk may cause the following documents to be microphotographed or otherwise reproduced on film and stored in that form:

(1) A document transferred to the clerk under Section 732 of the Probate Code.

(2) A will delivered to the superior court clerk under Section 8200 of the Probate Code if the clerk has held the will for at least ten years.

(b) All film used in the microphotography or other process shall comply with minimum standards of quality approved by the National Bureau of Standards.

(c) Section 26809 does not apply to a will or other document referred to in subdivision (a), or to the reproduction authorized by subdivision (a).

(d) Upon making the reproduction authorized by subdivision (a), the superior court clerk may destroy the original document.

Comment. Section 26810 is new and is drawn from other comparable provisions of state law. See Com. Code § 9407.1; Gov't Code §§ 27322.2, 27322.4, 71007, Health & Safety Code § 10036.

Gov't Code § 26864 (added). Fee for filing estate planning document

26864. The fee for receiving and storing a document transferred to the superior court clerk under Section 732 of the Probate Code is \$14.

Comment. Section 26864 is new. The fee provided by this section is the same as the filing fee in a civil action for a notice of motion or other paper requiring a hearing subsequent to the first paper. See Gov't Code § 26830.