

STATE OF CALIFORNIA
California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

MISCELLANEOUS PROBATE CODE REVISIONS

September 1989

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1990. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN OCTOBER 31, 1989.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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September 13, 1989

Letter of Transmittal

The enclosed tentative recommendation of the California Law Revision Commission proposes a number of unrelated substantive and technical revisions of the Probate Code. The proposals are part of the Commission's cleanup project for the entire code, and would be enacted either as part of the Probate Code recodification (AB 759) or separately. The revisions are drafted on the assumption that legislation pending in the 1989 Legislature affecting the Probate Code will be enacted and in effect when the revisions are submitted to the Legislature.

Comments on this tentative recommendation should be received by the Commission not later than October 31, 1989.

TENTATIVE RECOMMENDATION
relating to
MISCELLANEOUS PROBATE CODE REVISIONS

CONTINUATION OF EXISTING LAW
[Probate Code § 2]

Section 2(a) states that, to the extent a new provision of the code is substantially the same as an old provision, the new provision is to be construed as a restatement and continuation of the old provision and not as a new enactment. The section, however, fails to expressly spell out an important implication of that principle: the subject matter of the provision is governed by the new provision in which the old provision is continued, notwithstanding the repeal of the old provision.¹ The section should be amended to fill this technical gap.

REFERENCE TO STATUTE INCLUDES AMENDMENTS AND ADDITIONS
[Probate Code § 7]

Section 7 provides that a Probate Code reference to a statute includes amendments and additions to the statute. For completeness, Section 7 should include renumberings of the statute, and should apply as well to references made by other statutes to the Probate Code.

1. Thus, for example, if under the old law a fiduciary relationship is created, an obligation is entered into, a liability is incurred, an appointment is made, an order or judgment is made or entered, a petition is filed or proceeding is commenced, or a transaction is executed, its validity and continued existence is unaffected by the restatement and continuation of the old law in the new law.

120-HOUR SURVIVAL REQUIREMENT

[Probate Code §§ 221, 230, 6211]

Newly-enacted legislation applies a 120-hour survival requirement in order for an heir to take by intestate succession.² The policies that suggest a 120-hour survival requirement for intestate succession³ apply with equal force to devolution under a statutory will. However, the statutory will fails to include any survival requirement. The law of intestate succession is, in effect, a statutory will for persons who have failed to execute their own wills, and the statutory will should be conformed by incorporating a 120-hour survival requirement.

ACCEPTANCE BY DISTRIBUTEES

[Probate Code §§ 1206, 11850]

Section 1206(b) provides that notice need not be given to an heir or devisee "if the person's interest has been satisfied pursuant to court order or as evidenced by the person's written receipt or written acceptance." Section 11850(b) refers to a distributee who refuses to "accept or give a receipt for the property."

The concept of an acceptance is not implemented in the statutes on distribution; the statutes provide only for a "receipt" by the distributee, which may also take the form of recordation of a court order or the personal representative's deed.⁴ Section 11751. Sections 1206(b) and 11850(b) should be made consistent by eliminating the reference to an acceptance.

2. Prob. Code § 6403, as amended by 1989 Cal. Stat. ch. [AB 158], § 5.

3. See *Recommendation Relating to 120-Hour Survival Requirement*, 20 Cal. L. Revision Comm'n Reports 21 (1990).

4. Prob. Code § 11751.

~~TRANSITIONAL PROVISIONS FOR GUARDIANSHIP-CONSERVATORSHIP LAW OF 1981~~

[Probate Code §§ 1480-1491]

The Guardianship-Conservatorship Law became operative on January 1, 1981.⁵ Because the new law made significant substantive and procedural changes, elaborate transitional provisions were also provided.⁶ Most of the transitional provisions no longer serve a function and should be repealed. In addition, general transitional provisions for the entire Probate Code adequately cover most problems.⁷

THIRD PERSONS ACTING IN GOOD FAITH

[Probate Code §§ 1875, 3074, 11750, 13106.5, 13203, 18103, 18104]

Various provisions of the Probate Code are inconsistent in the standard they apply to protection of third persons who rely on ostensible authority or title in good faith and for valuable consideration. While a number of provisions broadly protect a third person who acts in good faith,⁸ other statutes are limited to a good faith "purchaser,"⁹ or to a good faith "encumbrancer"¹⁰ or "lessee,"¹¹ or to a miscellaneous combination of persons acting in good faith and for value.¹²

5. 1979 Cal. Stat. ch. 726, § 4.

6. Prob. Code §§ 1480-1491.

7. See Prob. Code §§ 2, 3.

8. Prob. Code §§ 2545 (guardianship and conservatorship sales), 8272 (revocation of probate), 18100-18102 (third persons dealing with trustee).

9. Prob. Code §§ 11750 (distribution of property), 18103 (effect on purchaser of omission of trust from grant of real property).

10. Prob. Code §§ 1875 (legal capacity of conservatee), 3074 (management or disposition of community property where spouse lacks legal capacity), 18104 (effect on real property transactions where beneficiary undisclosed).

11. Prob. Code § 13106.5.

12. Prob. Code §§ 13106.5, 13203 (affidavit procedure).

There is no occasion to distinguish among the various persons protected under most of these statutes. Many of them are unduly narrow in their coverage, and the variances in wording may, by implication, cause them to be construed more narrowly still.¹³ The existing references to "third persons acting in good faith" are both better and more prevalent in the code than the other references, and this language should be standardized throughout the code.

LIABILITY OF FIDUCIARY WHO SIGNS INSTRUMENT

[Probate Code §§ 2110, 2551, 9606, 9805]

A personal representative may, pursuant to court order, execute a note and mortgage or deed of trust on estate property.¹⁴ The phrasing of these particular provisions creates an implication that the personal representative may be personally liable for signing other instruments in cases where the statute is silent on the issue.

The general rule is that a personal representative is not personally liable to third persons on instruments signed by the personal representative if the personal representative makes clear that the action is being taken in a representative capacity.¹⁵ The predecessor of Section 9805(b), former Section 833, addressed this point specifically.¹⁶ By comparison, the trust law is clear as to the

13. It is not clear, for example, whether protection of an "encumbrancer" extends to a lessee. Civil Code 1114 defines "incumbrances" to include taxes, assessments, and all liens on real property. Cases have applied the term "encumbrance" to covenants, restrictions, reservations of right-of-way, easements, leases, and deeds of trust, among other interests. 1 A. Bowman, Ogden's Revised California Real Property Law §§ 3.4, 11.20 (1974).

14. Prob. Code §§ 2550, 9805.

15. See, e.g., 3 California Decedent Estate Practice § 23.13 at 23-11 (Cal. Cont. Ed. Bar, rev. ed. July 1988).

16. "The note or notes and mortgage or deed of trust shall be signed by the executor or administrator as such, and shall create no personal liability against the person so signing." Former Prob. Code § 833 (emphasis added.) A comparable provision in the Guardianship-Conservatorship Law retains the "as such" limitation. Prob. Code § 2551(d).

general immunity of a trustee where the fiduciary capacity is disclosed.¹⁷

A general provision should be added to the Probate Code, along the lines of the trust law, that makes clear that a personal representative acting in a fiduciary capacity is not personally liable on the instruments in which the fiduciary capacity is disclosed. A similar change should be made in the comparable provision governing a guardian or conservator of the estate.¹⁸

LIMITATION PERIOD FOR ACTION AGAINST SURETY
IN GUARDIANSHIP OR CONSERVATORSHIP PROCEEDING
[Probate Code § 2333]

An action against sureties on a bond in a guardianship or conservatorship proceeding must be commenced within four years from discharge or removal of the guardian or conservator, or within four years from the date the order surcharging the guardian or conservator becomes final, whichever is later.¹⁹ If a person entitled to bring the action is under a legal disability to sue, the person may commence the action within four years after the disability is removed.²⁰

For decedents' estates, the period for bringing an action on the bond is four years, without any tolling period for legal disability.²¹ This provision was adopted for decedents' estates because of the need to ensure finality in probate proceedings. If

17. Probate Code Section 18000(a) provides: "Unless otherwise provided in the contract or in this chapter, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract."

18. Prob. Code § 2551(d).

19. Prob. Code § 2333.

20. Prob. Code § 2333.

21. See Prob. Code § 8488.

necessary to protect the interests of a person under legal disability, a guardian ad litem may be appointed to bring the action.²²

It is not desirable to have one limitation period for decedents' estates and a different period for guardianships and conservatorships. The guardianship-conservatorship law should be conformed to the law governing decedents' estates, so there will be a uniform four-year limitation period without tolling. A guardian ad litem may be appointed in an action on the bond in guardianship and conservatorship proceedings, the same as in decedents' estates.²³

COURT-AUTHORIZED MEDICAL TREATMENT FOR MINOR OR INCOMPETENT

[Probate Code §§ 2357, 3208]

Where an adult for whom no conservator has been appointed is in need of medical treatment but is unable to give informed consent, an interested person can petition the court to authorize medical treatment.²⁴ Where a ward or conservatee is in need of medical treatment that may not be authorized by the guardian or conservator and the ward or conservatee is unable to give informed consent, the guardian or conservator can petition the court to authorize medical treatment.²⁵ In either of these situations the court may authorize the treatment on a determination that the person's medical condition requires the treatment and, if untreated, the condition will become life-endangering or "result in a serious threat to the physical health" of the person.²⁶

This standard is unduly narrow in its restriction to treatment for problems that are a threat to the physical, as opposed to mental, health of the person. The standard should be expanded to cover threats to the person's mental health as well. There are numerous protections

22. Prob. Code § 1003.

23. Prob. Code § 1003.

24. Prob. Code § 3208.

25. Prob. Code § 2357.

26. Prob. Code §§ 2357((h)(2), 3208(a)(2).

against abuse built into the statutes in the form of appointment of an attorney to represent the person's interest, notice to interested persons, court determination that treatment is necessary, and limitation on the type of treatment that can be given.²⁷

EXECUTION, EXTENSION, RENEWAL, OR MODIFICATION OF LEASE

[Probate Code §§ 2501, 2555, 9832, 9941]

A guardian or conservator may execute a real property lease without court authorization if the monthly rental does not exceed \$1,500²⁸ and may extend, renew, or modify a real property lease without court authorization if the monthly rental does not exceed \$750.²⁹ A personal representative likewise may execute, extend, renew, or modify a real property lease without court authorization if the monthly rental does not exceed \$1,500.³⁰

The \$1,500 maximum rental for a fiduciary to deal with a lease without court authorization should be increased to \$2,500. Recent price increases in the real estate market in California have resulted in substantial rises in rentals. It is not uncommon for monthly rentals, even for residential properties, to exceed \$1,500.

The fiduciary should not be required to obtain a court order, with the attendant delay and cost to the estate, simply to deal with ordinary lease transactions at market rates. Increasing the maximum rental to \$2,500 monthly for independent fiduciary action would take routine cases out of court review.

EXAMINATION OF WRONGDOER

[Probate Code §§ 2616-2619.5]

Guardianship-conservatorship law permits the court to require a person to appear and be examined under oath if the person is suspected

27. Prob. Code § 2357, 3200-3211.

28. Prob. Code § 2555.

29. Prob. Code § 2501(b).

30. Prob. Code §§ 9832(b), 9941(a).

of having fraudulently obtained or wrongfully disposed of property of the ward or conservatee, if the person has an instrument in writing belonging to the ward or conservatee, if the person asserts a claim against the ward or conservatee, or if the estate asserts a claim against the person.³¹ The guardianship-conservatorship provision is not a complete, self-contained statute; it incorporates by reference some, but not all, of the parallel provisions for decedents' estates.³² The incorporation is confusing because it is unclear which decedents' estates provisions apply and which do not. For example, it is not clear whether guardianship-conservatorship law authorizes written interrogatories,³³ or whether the double damages provision of the decedents' estates law applies.³⁴

The incomplete guardianship-conservatorship provision should be replaced with a new self-contained article drawn from the decedents' estates provisions. This will eliminate the confusion under the present statute.

DISPOSITION OF ASSETS ON DEATH OF WARD OR CONSERVATEE

[Probate Code § 2631]

If a ward or conservatee dies while the guardianship or conservatorship proceeding is pending, the guardian or conservator may pay debts and expenses and, if the estate value is less than \$10,000, may petition for an order authorizing the guardian or conservator to liquidate the estate by withdrawing funds on deposit in financial institutions, collecting insurance and other property of the ward or conservatee, and selling personal property of the ward or

31. Prob. Code § 2616.

32. See Prob. Code §§ 8870-8874.

33. Written interrogatories are authorized under decedents' estates law by Probate Code Section 8871.

34. See Prob. Code § 8874.

conservatee.³⁵ After paying expenses, the guardian or conservator may distribute the estate to those entitled to it.³⁶

The statutes authorize summary distribution of a decedent's estate if the estate value is less than \$60,000.³⁷ The guardianship-conservatorship provisions should be conformed to the decedents' estates provisions by increasing the maximum estate value to \$60,000 for use of the court-authorized liquidation procedure.

IMMUNITY OF COUNTY RECORDER
[Probate Code §§ 2901, 7603]

Section 2901(d)(2) gives the county recorder immunity for recording a written certification of the public guardian, and Section 7603(d)(2) gives a similar immunity in the case of a certification of the public administrator. The county recorder is not as a general principle subject to liability for recording any instrument authorized or required by law to be recorded. Rather, the opposite is true: the county recorder is liable for failing to record as required.³⁸ The immunity provided by Sections 2901(d)(2) and 7603(d)(2) is unnecessary and should be repealed.

NOTICE IN COMMUNITY PROPERTY PROCEEDING
[Probate Code § 3131]

If an elderly married person who lacks legal capacity needs to enter a nursing facility for care, it may be necessary to divide the community property into two equal shares of separate property to establish eligibility for Medi-Cal. This will require a petition by the competent spouse for court authorization of the proposed community property transaction.³⁹ Notice of the time and place of hearing and a

35. Prob. Code § 2631.

36. Prob. Code § 2631.

37. Prob. Code §§ 13000-13157.

38. See, e.g., Gov't Code §§ 27101, 27203.

39. Prob. Code §§ 3100-3154.

copy of the petition must be sent to adult relatives within the second degree of the spouse who lacks legal capacity.⁴⁰ The petition must contain a description and estimated value of the community property.⁴¹

The Commission is informed that the competent spouse often objects to being required to send a copy of the petition to his or her in-laws, thus divulging the details of family finances and property.⁴² It should be sufficient to send the notice of the time and place of hearing, which describes the general nature of the matter to be heard.⁴³ A family member who wants the details of the transaction may obtain a copy of the petition from the court file.

The Commission recommends deleting the requirement that a copy of the petition be sent with the notice of hearing in proceedings for court approval of a community property transaction.

DURATION OF CUSTODIANSHIP UNDER UNIFORM TRANSFERS TO MINORS ACT

[Probate Code § 3920.5]

Under the California Uniform Transfers to Minors Act, the general rule is that the custodianship of a minor's property terminates when the minor reaches 18 and the property is transferred to the minor.⁴⁴ However, a person who transfers property under the act by will, trust, nomination, irrevocable exercise of power of appointment, or irrevocable gift may specify that the custodianship is to extend beyond the age of 18. Under Section 3920.5, the age may be extended to 25, except in the case of an irrevocable gift, in which case it may be extended only to age 21.

The reason for the limitation to age 21 in the case of a gift is that a gift held beyond age 21 will not qualify for the \$10,000 annual gift tax exclusion under Internal Revenue Code Section 2503(c).

40. Prob. Code §§ 3121, 3131.

41. Prob. Code § 3121.

42. Letter from Catherine L. Hughes, Legal Center for the Elderly and Disabled (Sacramento), to John DeMouly (February 1, 1989).

43. See Prob. Code § 1211.

44. Prob. Code § 3920.

However, a person may wish to make a gift to a minor in custodianship that continues until age 25, even though it means paying a gift tax. The law should not assume that avoidance of gift tax liability is always the controlling factor, but should allow a donor to extend custodianship of an irrevocable gift to age 25, if desired.

PARENT-CHILD RELATIONSHIP IN INTESTATE SUCCESSION

[Probate Code §§ 6408, 6408.5]

Probate Code Sections 6408 and 6408.5 specify when an adopted person inherits from or through the person's natural parents, and vice versa. These statutes are complicated and the interrelationship of these two sections is confusing. Section 6408 appears to be a complete statement of the law, while Section 6408.5 modifies the application of Section 6408 by a "notwithstanding" clause.

These two sections should be consolidated into one longer section, without changing the substance of the law. This will make the law clearer and easier to use.

PROPERTY DEPOSITED WITH COUNTY TREASURER

[Probate Code § 7663]

Probate Code Sections 7660-7666 provide a summary procedure for disposition of small estates (under \$60,000) by the public administrator. Under this procedure the public administrator may summarily liquidate assets, pay debts and expenses, and make distribution to beneficiaries, outside the normal probate notice and hearing procedures. Beneficiaries are thereafter liable to unpaid creditors, and the public administrator must file a statement of disposition with the county clerk and retain records of disposition for three years.

If the decedent has no beneficiaries, the public administrator deposits the balance with the county treasurer for use in the general fund.⁴⁵ Section 7663(b). Although there is a general procedure in the Government Code for beneficiaries to make a claim on funds

45. Prob. Code § 7663(b).

deposited with the county treasurer, the law is not clear that the general procedure applies to funds deposited under Probate Code Section 7663(b).

The general Government Code procedure is found in Sections 50050-50056. These provisions specify that unclaimed funds in the county treasury are subject to claim and escheat as follows:

(1) The treasurer must hold the funds for at least three years.

(2) During the three-year holding period the funds may be released to an heir, beneficiary, or duly appointed representative upon submitting proof satisfactory to the treasurer. If the treasurer rejects the claim, the claimant may commence an action to recover the funds.

(3) If the funds have not been claimed after three years, the property may be escheated to the county on a procedure that involves publication of notice in a newspaper of general circulation in the county stating the amount of money, the fund in which it is held, and the proposed date of escheat (45 to 60 days thereafter).

(4) In response to the published notice, any person who claims the funds may file a claim with the county treasurer. If the treasurer rejects the claim, the claimant may file a complaint and serve summons within 30 days and no funds may be escheated until the action is resolved.

(5) The publication procedure only applies to amounts of \$10 or greater. Amounts of less than \$10 may be escheated after three years without notice.

The general procedure is applicable to unclaimed funds deposited with the county treasurer from any source, including probate. Any doubt that this procedure applies as well to funds deposited under Probate Code Section 7663(b) should be eliminated by an express reference to the Government Code procedure. This will clarify existing law and eliminate future litigation over the issue.

In addition, because deposits under Section 7663(b) are not publicized at the time of the deposit, the claim procedure should be augmented by public notice, at least where the amount deposited is substantial. Where any amount deposited with the county treasurer exceeds \$10,000, the public administrator should transmit relevant information concerning the deposit to the State Controller for

~~compilation and reporting along with other information concerning unclaimed estates held by the state.~~

FRAUD IN PROCURING ORDER ADMITTING WILL TO PROBATE
OR APPOINTING PERSONAL REPRESENTATIVE

[Probate Code § 8007]

Under Probate Code Section 8007, a court order admitting a will to probate or appointing a personal representative is not conclusive if it is procured by fraud. By case law, "fraud" in this context means extrinsic, not intrinsic, fraud.⁴⁶ Section 8007 should be conformed to case law by making clear that it is only extrinsic fraud that prevents the order from having conclusive effect.

STATEMENT OF DUTIES OF PERSONAL REPRESENTATIVE

[Probate Code § 8404]

A personal representative that is not a trust company must file an acknowledgment of receipt of a statement of duties and liabilities of the office before letters are issued.⁴⁷ Trust companies are exempted from this requirement because of their expertise as personal representative.

The law provides no comparable exemption for the public administrator, despite the fact that the public administrator has expertise as personal representative. To require the public

46. Estate of Crisler, 83 Cal. App. 2d 431, 188 P.2d 772 (1948). Extrinsic fraud is that which prevents a fair adversary hearing by deliberately keeping a party in ignorance of the proceeding or in some other way fraudulently preventing the party from presenting a claim or defense. An order procured by extrinsic fraud is subject to collateral attack. *Id.*; 8 B. Witkin, California Procedure *Attack on Judgment in Trial Court* § 204, at 602 (3d ed. 1985). Intrinsic fraud is fraud occurring during the course of an adversary proceeding. An order procured by intrinsic fraud is not subject to collateral attack. The theory is that intrinsic fraud will ordinarily be exposed during the proceeding by diligence of the party and counsel, and that occasional unfortunate results of undiscovered perjury or other intrinsic fraud must be endured in the interest of stability of judgments. 8 B. Witkin, *supra* § 221, at 625.

47. Prob. Code § 8404.

administrator to file an acknowledgment of receipt of a statement of duties and liabilities merely creates unnecessary paperwork.

Public administrators should be exempted from the requirement of filing an acknowledgment of receipt of the statement of duties and liabilities.

LIABILITY OF PERSONAL REPRESENTATIVE FOR CLAIMS AGAINST DECEDENT

[Probate Code § 8544]

Section 8544(c) provides that a special administrator "is not liable to a creditor" on a claim against the decedent, except where the special administrator is granted the powers of a general personal representative. The implication of this language is that a general personal representative may be personally liable for claims of a decedent.

Although a personal representative is named as the defendant in a lawsuit to recover on a claim against the decedent,⁴⁸ the personal representative is not personally liable for claims against the decedent. The law should be revised to eliminate the implication that a general personal representative is personally liable on a creditor's claim.

APPRAISAL OF PROPERTY SUBJECT TO OPTION

[Probate Code § 9962]

Section 9962 requires that an option to sell real property in the estate must be for at least 90% of the appraised value of the property, based on a probate referee's appraisal. The section fails to recognize that appraisal by a probate referee may have been waived under Section 8903 and the property appraised by another person. This situation is recognized in Section 10309(c), the general Probate Code statute requiring estate sales to be at 90% of appraised value. Section 9962 should be conformed with Section 10309(c).

48. See, e.g., Section 573(a) (cause of action may be maintained "against the decedent's personal representative").

SALE OF DECEDENT'S INTEREST IN COTENANCY

[Probate Code § 10006]

If a decedent owned an undivided interest in property as a joint tenant or tenant in common and the personal representative wants to sell the decedent's interest, the personal representative needs the cooperation of the cotenants. For real property, the only way the estate can get a good price for the decedent's interest is if the other cotenants are willing to sell their interests, so the buyer can become sole owner. This is complicated by the requirement that, under supervised administration, sale of the decedent's interest is subject to courtroom overbidding and court approval.⁴⁹

The living cotenants should be authorized voluntarily to subject their interests to the overbid and court approval procedure. This will ensure that the successful bidder can obtain the entire property.

BROKERS' COMMISSIONS

[Probate Code § 10162.6]

Existing law does not provide rules governing the compensation of brokers where the personal representative makes an exclusive listing contract to sell estate property and the contract provides that no commission is due to the exclusive listing broker if the property is sold to a particular person named in the contract.⁵⁰ Guidance is needed in this area so that the parties to sales of estate property can plan their conduct rationally, and to resolve disputes that may arise concerning entitlement to compensation.

Where a sale is made to a bidder named in the contract between the personal representative and the exclusive listing broker, the commissions due any brokers involved should be computed under the

49. The problem is less acute with fungible personal property such as stocks, because the property can be divided in kind and only the decedent's interest sold.

50. For provisions governing brokers' commissions, see Prob. Code §§ 10150-10167.

normal rules,⁵¹ except that the commission that would be payable to the broker holding the contract is not paid. Thus, the estate gets the benefit of the provision excluding compensation to the listing broker where a sale is made to the purchaser named in the contract.⁵²

Under the proposed rule, if the sale is made to the person named in the contract (Bidder X), the rules governing situations where no broker has an exclusive listing contract are applicable. Consequently, the broker with the limited exclusive listing contract (Broker A) is not entitled to any commission, and the commissions of any other brokers involved in the sale are determined as if Broker A were not involved in the sale. If the sale is not made to Bidder X, the rules governing situations where a broker has an exclusive listing contract are applicable. Consequently, the limitation in the exclusive listing contract is ignored and the normal rules applicable where a broker has an exclusive listing contract are used to determine the compensation of Broker A and any other brokers involved in the sale.

INFORMAL DISTRIBUTION

[Probate Code § 12250]

Section 12250 provides for discharge of the personal representative after compliance with the terms of the order for final distribution. While the section does not preclude discharge where distribution is made before entry of an order for distribution, it does not expressly recognize this practice either.

By way of contrast, the provisions governing payment of debts state that the personal representative is not required to pay a debt until the court has ordered payment, but that "[n]othing in this section precludes settlement of an account of a personal representative for payment of a debt made without prior court authorization."⁵³

51. See Prob. Code §§ 10160-10167.

52. The application of this rule in a variety of situations to which it would apply is illustrated in the examples set out in the Comment to proposed Probate Code Section 10162.6, at pages [52-54] *infra*.

53. Prob. Code § 11422(d).

The practice of making informal distribution should be recognized by statute, just as the practice of informal payment of debts is statutorily recognized in Section 12250.

QUALIFIED DOMESTIC TRUSTS

[Probate Code §§ 21524, 21526]

NOTE. The Commission is aware of pending federal legislation to revise the law governing qualified domestic trusts (H.R. 3150), and will make corresponding revisions in the proposed California legislation if federal revisions are enacted.

The federal estate and gift tax marital deduction provisions⁵⁴ were modified in 1988 by the new limitation that a marital deduction is not allowed for property passing to the surviving spouse unless the surviving spouse is a citizen of the United States.⁵⁵ The new citizenship requirement does not apply if property passes to the surviving spouse in a "qualified domestic trust."⁵⁶

The new federal law creates problems in California because of California's large immigrant population. It is not uncommon for a California decedent with a substantial estate to leave a surviving

54. IRC §§ 2056, 2523.

55. IRC §§ 2056(d)(1), 2523(1), enacted by the Technical and Miscellaneous Revenue Act of 1988 (Nov. 10, 1988). The new provision applies to estates of decedents dying after the date of enactment.

56. IRC § 2056(d)(2). A trust is a qualified domestic trust if all of the following conditions are satisfied:

(1) the trust instrument requires that all trustees of the trust be individual citizens of the United States or domestic corporations,

(2) the surviving spouse of the decedent is entitled to all the income from the property in such trust, payable annually or at more frequent intervals,

(3) such trust meets such requirements as the Secretary may by regulations prescribe to ensure the collection of any tax imposed by subsection (b), and

(4) an election under this section by the executor of the decedent applies to such trust.

See IRC § 2056A(a).

spouse who is not a United States citizen.⁵⁷ Standard marital deduction estate plans involving such persons are now obsolete and may produce unfortunate results for many California residents.⁵⁸

While the new federal law allows a marital deduction for property that passes to a surviving noncitizen spouse under a "qualified domestic trust," the law as written appears to require the trust instrument to include an express statement that all trustees must be citizens or domestic corporations.⁵⁹ This is obviously a problem for marital deduction trusts drafted before the new federal law was enacted, as well as for trust instruments drafted defectively after the new federal law was enacted.

California law should, to the extent practicable, validate the estate plan of a California decedent who makes a marital deduction gift to the decedent's noncitizen spouse. If the gift is intended to qualify for the marital deduction and is made in trust, California law should ensure that the trust is a qualified domestic trust by requiring that all trustees be individual citizens of the United States or domestic corporations. If the trust instrument names a disqualifying trustee, the disqualifying trustee should be replaced by a qualified successor trustee named in the trust instrument or, if no qualified successor trustee is named in the instrument, by a qualified successor trustee named by the disqualifying trustee. The trust also should be required to comply with relevant federal regulations for qualified domestic trusts.

57. See, e.g., Gerstenfeld, *The QDT: New Solution for a New Problem?*, 10 Est. Plan. & Cal. Prob. Rep. 113 (1989).

58. *Id.*

59. See note 56, *supra*. This rule appears to apply even though the trust instrument actually names a United States citizen or a domestic corporation as trustee.

The Commission's recommendations would be implemented by enactment of the following provisions:

Probate Code § 2 (amended). Continuation of existing law

2. (a) A provision of this code, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment, and the subject matter continues to be governed by the provision of this code notwithstanding repeal of the previously existing provision.

(b) A provision of this code, insofar as it is the same in substance as a provision of a uniform act, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision.

Comment. Subdivision (a) of Section 2 is amended to emphasize that the repeal of previously existing law does not affect the continued coverage of new law that is substantially the same. Thus, for example, if a fiduciary relationship is created, an obligation is entered into, a liability is incurred, an appointment is made, an order or judgment is made or entered, a petition is filed or proceeding is commenced, or a transaction is executed, under the previously existing law, its validity and continued existence is unaffected by the restatement and continuation of the previously existing law in this code.

Probate Code § 7 (amended). Reference to statute includes amendments and additions

7. Whenever a reference is made in this code to any portion of this code or to any other law, or in any other law to any portion of this code, the reference applies to all amendments and additions and renumberings heretofore or hereafter made.

Comment. Section 7 is amended to expand its coverage to references made to this code in other laws, notwithstanding Section 6 (construction of code). Section 7 is also amended to make clear that a reference in this code or elsewhere to a provision of this code by section number picks up subsequent renumberings of the section. See also Section 2 (continuation of existing law).

Probate Code § 221 (amended). 120-hour survival requirement

221. (a) This chapter does not apply in any case where Section 103, 6146, 6211, or 6403 applies.

(b) This chapter does not apply in the case of a trust, deed, or contract of insurance, or any other situation, where (1) provision is made dealing explicitly with simultaneous deaths or deaths in a common disaster or otherwise providing for distribution of property different from the provisions of this chapter or (2) provision is made requiring one person to survive another for a stated period in order to take property or providing for a presumption as to survivorship that results in a distribution of property different from that provided by this chapter.

Comment. Section 221 is amended to refer to Section 6211 (120-hour survival requirement under statutory will).

Probate Code § 230 (amended). 120-hour survival requirement

230. A petition may be filed under this chapter for any one or more of the following purposes:

(a) To determine for the purposes of Section 103, 220, 222, 223, 224, 6146, 6147, 6211, 6242, 6243, 6244, or 6403, or other provision of this code whether one person survived another.

(b) To determine for the purposes of Section 1389.4 of the Civil Code whether issue of an appointee survived the donee.

(c) To determine for the purposes of Section 24606 of the Education Code whether a person has survived in order to receive benefits payable under the system.

(d) To determine for the purposes of Section 21371 of the Government Code whether a person has survived in order to receive money payable under the system.

(e) To determine for the purposes of a case governed by former Sections 296 to 296.8, inclusive, whether persons have died other than simultaneously.

Comment. Section 230 is amended to add the reference to Section 6211 (120-hour survival requirement under statutory will).

Probate Code § 1206 (amended). Acceptance by distributee

1206. (a) Subject to subdivision (b), where notice is required to be given to known heirs or devisees, notice shall be given to the

following persons:

(1) If the estate is an intestate estate, to the heirs named in the petition for letters of administration and to any additional heirs who become known to the person giving the notice prior to the giving of the notice.

(2) If the estate is a testate estate, to the devisees named in the petition for probate of the will and to any additional devisees who become known to the person giving the notice prior to the giving of the notice.

(b) Notice need not be given to a person under subdivision (a) if the person's interest has been satisfied pursuant to court order or as evidenced by the person's written receipt or written acceptance.

Comment. Subdivision (b) of Section 1206 is amended to delete the reference to a written receipt and the reference to an acceptance by the distributee. The nature of a receipt is determined by other statutes. See, e.g., Section 11751. The concept of an acceptance is not implemented in the statutes on distribution.

Probate Code §§ 1480-1491 (amended or repealed). Transitional provisions for Guardianship-Conservatorship Law of 1981

CHAPTER 5. TRANSITIONAL PROVISIONS

Comment. Sections 1480-1491 are amended or repealed to eliminate transitional provisions from the 1981 Guardianship-Conservatorship Law that are no longer necessary or that are superseded by general transitional provisions. See Sections 2 and 3.

~~1480. As used in this chapter:~~

~~(a) "Operative date" means January 1, 1981.~~

~~(b) "Prior law" means the applicable law in effect on December 31, 1980.~~

~~1481. Subject to Sections 1484 and 1485, a guardianship or conservatorship in existence under this code on the operative date continues in existence and is governed by this division.~~

~~1482. (a) The bonds, security, and other similar obligations in effect immediately prior to the operative date shall continue to apply~~

~~on and after the operative date the same as if filed, issued, taken, or incurred under this division after the operative date.~~

~~(b) If a guardian or conservator or surety is liable under prior law for any act or omission prior to the operative date, the repeals made by this act do not affect such liability. Such liability may be determined and enforced under prior law as fully and to the same extent as if such repeals had not been made.~~

~~1483. The changes made in prior law by this division on and after the operative date in the standards for appointment of a guardian shall not affect the validity of any nomination, appointment, or confirmation made under prior law, but any appointment on or after the operative date is governed by this division.~~

~~1484. (a) Any order, judgment, or decree made under prior law shall continue in full force and effect in accordance with its terms or until modified or terminated by the court.~~

~~(b) Any petition, report, account, or other matter filed or commenced before the operative date shall be continued under this division, so far as applicable, unless in the opinion of the court application of a particular provision of this division would substantially interfere with the effective conduct of the matter or with the rights of the parties or other interested persons, in which case the particular provision of this division does not apply and prior law applies.~~

~~1485. (a) A guardianship of an adult, or a guardianship of the person of a married minor, in existence under this code on the operative date shall be deemed to be a conservatorship and is governed by the provisions of law applicable to conservatorships without petition or order, whether or not the letters of guardianship or the title of the proceeding are amended as provided in this chapter.~~

~~(b) The validity of transactions and acts of a guardian or conservator shall not be affected by a misdescription of the office, nor shall any judgment, decree, or order of the court be invalidated by any such misdescription.~~

~~1487. (a) At or before the time of the court's first periodic review after the operative date under Section 1850, the court shall review the conservatorship to determine whether an order should be made under Section 1873 broadening the legal capacity of the conservatee.~~

~~(b) This section does not apply with respect to guardianships described in Section 1485 or to conservatorships where the conservator was appointed under prior law on the ground that the conservatee was a person for whom a guardian could have been appointed.~~

~~(c) Noncompliance with this section gives rise to no penalty.~~

1488. If, ~~prior to the operative date~~ before January 1, 1981, an adult has in a signed writing nominated a person to serve as guardian if a guardian is in the future appointed for such adult, such nomination shall be deemed to be a nomination of a conservator. This section applies whether or not the signed writing was executed in the same manner as a witnessed will so long as the person signing the writing had at the time the writing was signed sufficient capacity to form an intelligent preference.

1489. If, ~~prior to the operative date~~ before January 1, 1981, a parent or other person has in a signed writing appointed a person to serve as the guardian of the person or estate or both of a minor, or as the guardian of the property the minor receives from or by designation of the person making the appointment, such appointment shall be deemed to be a nomination of a guardian if the requirements of Section 1500 or 1501 are satisfied and, in such case, shall be given the same effect it would have under Section 1500 or 1501, as the case may be, if made ~~after the operative date~~ on or after January 1, 1981. This section applies whether or not the signed writing is a will or deed so long as the person signing the writing had at the time the writing was signed sufficient capacity to form an intelligent preference.

1490. (a) When used in any statute of this state with reference to an adult or to the person of a married minor, "guardian" means the conservator of that adult or the conservator of the person in case of the married minor.

~~(b) Any reference in the statutes of this state to the term "absentee" or "secretary concerned" as defined in former Section 1751.5~~

~~of the Probate Code shall be deemed to be a reference to the definitions of these terms in this division.~~

~~(e) Any reference in the statutes of this state to the definitions of the terms "account in an insured savings and loan association," "shares of an insured credit union," or "single premium deferred annuity" in former Section 1510 of the Probate Code shall be deemed to be a reference to the definitions of these terms in this division.~~

~~1491. The Judicial Council may provide by rule for the orderly transition of pending proceedings on the operative date, including but not limited to rules relating to amendment of title of the proceedings and amendment of, or issuance of, letters of guardianship or conservatorship.~~

Probate Code § 1875 (amended). Third persons acting in good faith

1875. A transaction that affects real property of the conservatorship estate, entered into by a ~~purchaser or encumbrancer~~ third person acting in good faith and for a valuable consideration and without knowledge of the establishment of the conservatorship, is not affected by any provision of this article or any order made under this article unless a notice of the establishment of the conservatorship has been recorded prior to the transaction in the county in which the property is located.

Comment. Section 1875 is amended to extend to any person who enters into a transaction in good faith and for a valuable consideration, and is not limited to a purchaser or encumbrancer.

Probate Code § 2110 (added). Liability of guardian or conservator who signs instrument

2110. Unless otherwise provided in the instrument or in this division, a guardian or conservator is not personally liable on an instrument, including but not limited to a note, mortgage, deed of trust, or other contract, properly entered into in the guardian's or conservator's fiduciary capacity in the course of the guardianship or conservatorship unless the guardian or conservator fails to reveal the guardian's or conservator's representative capacity or identify the guardianship or conservatorship estate in the instrument.

Comment. Section 2110 is new. It generalizes provisions formerly found in Section 2551(d) and is comparable to Sections 18000 (trust law) and 9606 (decendent estate administration).

Probate Code § 2333 (amended). Suit against sureties on bond; limitation period

2333. (a) In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate.

(b) ~~Except as provided in subdivision (c),~~ No action may be maintained against the sureties on the bond unless commenced within four years from the discharge or removal of the guardian or conservator or within four years from the date the order surcharging the guardian or conservator becomes final, whichever is later.

~~(c) If at the time of the discharge or removal of the guardian or conservator or when the order of surcharge becomes final any person entitled to bring the action is under any legal disability to sue, such person may commence the action within four years after the disability is removed.~~

Comment. Section 2333 is amended to delete subdivision (c) to make it consistent with the rule for decedents' estates. See Section 8488.

Probate Code § 2357 (amended). Court ordered medical treatment for minor or incompetent

2357. (a) As used in this section:

(1) "Guardian or conservator" includes a temporary guardian of the person or a temporary conservator of the person.

(2) "Ward or conservatee" includes a person for whom a temporary guardian of the person or temporary conservator of the person has been appointed.

(b) If the ward or conservatee requires medical treatment for an existing or continuing medical condition which is not authorized to be performed upon the ward or conservatee under Section 2252, 2353, 2354, or 2355, and the ward or conservatee is unable to give an informed consent to such medical treatment, the guardian or conservator may petition the court under this section for an order authorizing such

medical treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to such medical treatment.

(c) The petition shall state, or set forth by medical affidavit attached thereto, all of the following so far as is known to the petitioner at the time the petition is filed:

(1) The nature of the medical condition of the ward or conservatee which requires treatment.

(2) The recommended course of medical treatment which is considered to be medically appropriate.

(3) The threat to the health of the ward or conservatee if authorization to consent to the recommended course of treatment is delayed or denied by the court.

(4) The predictable or probable outcome of the recommended course of treatment.

(5) The medically available alternatives, if any, to the course of treatment recommended.

(6) The efforts made to obtain an informed consent from the ward or conservatee.

(d) Upon the filing of the petition, the court shall notify the attorney of record for the ward or conservatee, if any, or shall appoint the public defender or private counsel under Section 1471, to consult with and represent the ward or conservatee at the hearing on the petition and, if such appointment is made, Section 1472 applies.

(e) The hearing on the petition may be held pursuant to an order of the court prescribing the notice to be given of the hearing. The order shall specify the period of notice of the hearing and the period so fixed shall take into account (1) the existing medical facts and circumstances set forth in the petition or in a medical affidavit attached to the petition or in a medical affidavit presented to the court and (2) the desirability, where the condition of the ward or conservatee permits, of giving adequate notice to all interested persons.

(f) A copy of the notice of hearing or of the order prescribing notice of hearing, and a copy of the petition, shall be personally served or mailed, as prescribed in the order, on all of the following:

(1) The ward or conservatee.

(2) The attorney of record for the ward or conservatee, if any, or

the attorney appointed by the court to represent the ward or conservatee at the hearing.

(3) Such other persons, if any, as the court in its discretion may require in the order, which may include the spouse of the ward or conservatee and any known relatives of the ward or conservatee within the second degree.

(g) Notwithstanding subdivisions (e) and (f), the matter may be submitted for the determination of the court upon proper and sufficient medical affidavits or declarations if the attorney for the petitioner and the attorney for the ward or conservatee so stipulate and further stipulate that there remains no issue of fact to be determined.

(h) The court may make an order authorizing the recommended course of medical treatment of the ward or conservatee and authorizing the guardian or conservator to consent on behalf of the ward or conservatee to the recommended course of medical treatment for the ward or conservatee if the court determines from the evidence all of the following:

(1) The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the ward or conservatee.

(3) The ward or conservatee is unable to give an informed consent to the recommended course of treatment.

(i) Upon petition of the ward or conservatee or other interested person, the court may order that the guardian or conservator obtain or consent to, or obtain and consent to, specified medical treatment to be performed upon the ward or conservatee. Notice of the hearing on the petition under this subdivision shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

Comment. Subdivision (h)(2) of Section 2357 is amended to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 3208.

Probate Code §. 2501 (amended). Extension, renewal, or modification of lease

2501. (a) Except as provided in subdivision (b), court approval is required for a compromise, settlement, extension, renewal, or modification which affects:

(1) Title to real property.

(2) An interest in real property or a lien or encumbrance on real property.

(3) An option to purchase real property or an interest in real property.

(b) Subdivision (a) does not apply to an extension, renewal, or modification of a lease of real property having an unexpired term of two years or less where, under the lease as extended, renewed, and modified, (1) the rental does not exceed ~~seven-hundred-fifty-dollars~~ ~~(\$750)~~ two thousand five hundred dollars (\$2,500) a month and the term does not exceed two years or (2) regardless of the amount of the rental, the lease is from month to month.

Comment. Subdivision (b) of Section 2501 is amended to increase the limit on extending, renewing, or modifying a lease without court approval from \$750 to \$2,500. See also Sections 2555 (execution of lease by guardian or conservator), 9832 (extension, renewal, or modification of lease by personal representative), 9941 (execution of lease by personal representative).

Probate Code § 2551 (amended). Liability of guardian or conservator who signs instrument

2551. (a) In any case described in Section 2541 or Section 2552, the guardian or conservator, after authorization by order of the court, may borrow money upon a note or notes, either unsecured or to be secured by a security interest or other lien on the personal property of the estate or any part thereof or to be secured by a mortgage or deed of trust on the real property of the estate or any part thereof. The guardian or conservator shall apply the money to the purpose or purposes specified in the order.

(b) To obtain an order under this section, the guardian or conservator, the ward or conservatee, or any other interested person may file a petition with the court. The petition shall state the purpose for which the order is sought, the necessity for or advantage

to accrue from the order, the amount of money proposed to be raised, the rate of interest to be paid, the length of time the note or notes are to run, and a general description of the property proposed to be mortgaged or subjected to a deed of trust or other lien. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(c) The court shall hear the petition and any objection thereto and may require such additional proof of the fairness and feasibility of the transaction as the court determines is necessary. If the required showing is made, the court may make an order authorizing the transaction and may prescribe in the order the terms and conditions upon which the transaction shall be made, including but not limited to the following:

(1) Ordering that a lesser amount than that specified in the petition be borrowed.

(2) Prescribing the maximum rate of interest and the period of the loan.

(3) Requiring that the interest and the whole or any part of the principal be paid from time to time out of the estate or any part thereof.

(4) Requiring that the personal property used as security or any buildings on real property to be mortgaged or subjected to the deed of trust be insured for the further security of the lender and that the premiums be paid out of the estate.

(d) The note or notes and the mortgage or deed of trust, if any, shall be signed by the guardian or conservator ~~as such and shall create no personal liability against the person so signing.~~

(e) Jurisdiction of the court to administer the estate of the ward or conservatee shall be effectual to vest the court with jurisdiction to make the order for the note or notes and for the security interest, lien, mortgage, or deed of trust, and such jurisdiction shall conclusively inure to the benefit of the owner of the security interest or lien, mortgagee named in the mortgage, or the trustee and beneficiary named in the deed of trust, and their heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the proceedings or the note or notes, security interest, lien, mortgage, or deed of trust given in pursuance thereof.

(f) Upon any foreclosure or sale under a security interest, lien, mortgage, or deed of trust described in subdivision (a), if the proceeds of the sale of the encumbered property are insufficient to pay the note or notes, the security interest, lien, mortgage, or deed of trust, and the costs or expenses of sale, no judgment or claim for any deficiency shall be had or allowed against the ward or conservatee or the estate.

Comment. Subdivision (d) of Section 2551 is amended to delete the provision relating the personal liability of the guardian or conservator. This matter is governed by Section 2110 (liability of guardian or conservator who signs instrument).

Probate Code § 2555 (amended). Execution of lease

2555. The guardian or conservator may lease real property without authorization of the court when (a) the rental does not exceed ~~one thousand five hundred dollars~~ ~~(\$1,500)~~ two thousand five hundred dollars (\$2,500) a month and the term does not exceed two years, or (b) regardless of the amount of the rental, when the lease is from month to month.

Comment. Section 2555 is amended to increase the limit on executing a lease without court approval from \$1,500 to \$2,500. See also Sections 2501 (extension, renewal, or modification of lease by guardian or conservator), 9832 (extension, renewal, or modification of lease by personal representative), 9941 (execution of lease by personal representative).

Heading for Article 2.5 (commencing with Section 2616) (added).
Examination concerning assets of estate

Article 2.5. Examination Concerning Assets of Estate

Probate Code § 2616 (amended). Examination concerning assets of estate

2616. (a) A petition may be filed under this ~~section~~ article by any one or more of the following:

- (1) The guardian or conservator.
- (2) The ward or conservatee.

(3) A creditor or other interested person, including persons having only an expectancy or prospective interest in the estate.

~~(b) The petition may allege any one or more of the following:~~

- ~~(1) A named person is suspected of having embezzled, concealed,~~

~~smuggled, or falsely or fraudulently obtained or wrongfully disposed of any property of the ward or conservatee.~~

~~(2) A named person has in such person's possession, or has knowledge of, any instrument in writing belonging to the ward or conservatee.~~

~~(3) A named person asserts a claim against the ward or conservatee or the estate.~~

~~(4) The estate asserts a claim against a named person.~~

~~(e) Upon the filing of a petition under this section, the court may cite the named person to appear before the court, and~~

(b) Upon the filing of a petition under this article, the court may order that a citation be issued to a person to answer interrogatories, or to appear before the court and be examined under oath, or both, concerning any of the following allegations made in the petition:

(1) The person has wrongfully taken, concealed, or disposed of property of the ward or conservatee.

(2) The person has knowledge or possession of any of the following:

(A) A deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the ward or conservatee to property.

(B) An instrument in writing belonging to the ward or conservatee.

(3) The person asserts a claim against the ward or conservatee or the estate.

(4) The estate asserts a claim against the person.

(c) If the citation requires the person to appear before the court, the court and the petitioner may examine the named person under oath upon the matters recited in the petition. ~~If the named person is not in the county where letters issued, the examination shall be made under this section but otherwise the procedure and the rights and duties of the parties shall be governed by the provisions of Article 2 (commencing with Section 8870) of Chapter 2 of Part 3 of Division 7.~~

(d) Disobedience of a citation issued pursuant to this section may be punished as a contempt of the court issuing the citation.

Comment. Subdivision (b) of Section 2616 has been revised to conform it more closely to subdivision (a) of Section 8870 (decedents' estates).

The last sentence of subdivision (c), which incorporated by reference Sections 8871-8874 (decedents' estates), has been deleted.

In its place, provisions drawn from Sections 8871-8874 have been added to this article. See Sections 2617-2619.5.

Subdivision (d) is new and continues Section 8870(c) as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

For general provisions, see Sections 1000-1004 (rules of practice), 1020-1023 (petitions and other papers), 1040-1050 (hearings and orders), 1240-1242 (citations).

Probate Code § 2617 (added). Written interrogatories

2617. Interrogatories may be put to a person cited to answer interrogatories under Section 2616. The interrogatories and answers shall be in writing. The answers shall be signed under penalty of perjury by the person cited. The interrogatories and answers shall be filed with the court.

Comment. Section 2617 is new and continues Section 8871 as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

Probate Code § 2618 (added). Examination in court

2618. (a) At an examination, witnesses may be produced and examined on either side.

(b) If upon the examination it appears that the allegations of the petition are true, the court may order the person to disclose the person's knowledge of the facts.

(c) If upon the examination it appears that the allegations of the petition are not true, the person's necessary expenses, including reasonable attorney's fees, shall be charged against the petitioner or allowed out of the estate, in the discretion of the court.

Comment. Section 2618 is new and continues Section 8872 as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

Probate Code § 2619 (added). Citation to person controlling estate property

2619. (a) On petition of the guardian or conservator, the court may issue a citation to a person who has possession or control of property in the estate of the ward or conservatee to appear before the court and make an account under oath of the property and the person's actions with respect to the property.

(b) Disobedience of a citation issued pursuant to this section may be punished as a contempt of the court issuing the citation.

Comment. Section 2619 is new and is drawn from Section 8873 (decedents' estates).

Probate Code § 2619.5 (added). Double damages

2619.5. A person who in bad faith has wrongfully taken, concealed, or disposed of property in the estate of the ward or conservatee is liable for twice the value of the property, recoverable in an action by the guardian or conservator for the benefit of the estate.

Comment. Section 2619.5 is new and continues Section 8874 as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

Probate Code § 2631 (amended). Death of ward or conservatee; disposition of assets

2631. (a) Upon the death of the ward or conservatee, the guardian or conservator may contract for and pay a reasonable sum for the expenses of the last illness and the disposition of the remains of the deceased ward or conservatee, and for unpaid ~~court--approved~~ court-approved attorney's fees, and may pay the unpaid expenses of the guardianship or conservatorship accruing before or after the death of the ward or conservatee, in full or in part, to the extent reasonable, from any ~~assets of the deceased ward or conservatee, other than real property or any interest therein, which are~~ personal property of the deceased ward or conservatee under the control of the guardian or conservator.

(b) If payment of expenses under subdivision (a) cannot be made in full and the total market value of the remaining estate of the decedent does not exceed ~~ten--thousand--dollars--(\$10,000)~~ the amount determined under Section 13100, the guardian or conservator may petition the court for an order permitting the guardian or conservator to liquidate the decedent's estate. The guardian or conservator may petition even though there is a will of the decedent in existence if the will does not appoint an executor or if the named executor refuses to act. No notice of the petition need be given. If the order is granted, the guardian or conservator may sell personal property of the

decedent, withdraw money of the decedent in an account in a financial institution, and collect a debt, claim, or insurance proceeds owed to the decedent or the decedent's estate, and a person having possession or control shall pay or deliver the money or property to the guardian or conservator.

(c) When a claim for expenses is presented to the guardian or conservator, the guardian or conservator shall endorse thereon an allowance or rejection, with the date thereof. If the claim is allowed, it shall be presented to the court and the court shall in like manner endorse thereon an allowance or rejection. If the claim is approved by the court, the claim shall be filed with the clerk within 30 days thereafter.

(d) After payment of expenses, the guardian or conservator may transfer any remaining assets as provided in Division 8 (commencing with Section 13000). For this purpose, the value of the property of the deceased ward or conservatee shall be determined after the deduction of the expenses so paid.

Comment. Section 2631 is amended to substitute a reference to Section 13100 (limit for use of affidavit procedure for collection or transfer of personal property) for the \$10,000 limit formerly found in subdivision (b). If the guardian or conservator pays expenses from assets of the ward or conservatee which are the subject of a specific gift by will, the gift is not thereby adeemed, and the rules of abatement set forth in Sections 21400-21406 apply. See Estate of Mason, 62 Cal. 2d 213, 397 P.2d 1005, 42 Cal. Rptr. 13 (1965).

Probate Code § 2901 (amended). Immunity of county recorder

2901. (a) A public guardian who is authorized to take possession or control of property under this chapter may issue a written certification of that fact. The written certification is effective for five days after the date of issuance.

(b) The public guardian may record a copy of the written certification in any county in which is situated real property of which the public guardian is authorized to take possession or control under this chapter.

(c) A financial institution or other person shall, without the necessity of inquiring into the truth of the written certification and without court order or letters being issued:

(1) Provide the public guardian information concerning property held in the sole name of the proposed ward or conservatee.

(2) Surrender to the public guardian property of the proposed ward or conservatee that is subject to loss, injury, waste, or misappropriation.

(d) Receipt of the written certification:

(1) Constitutes sufficient acquittance for providing information and for surrendering property of the proposed ward or conservatee.

(2) Fully discharges the ~~county--recorder~~, financial institution, or other person from any liability for any act or omission of the public guardian with respect to the property.

Comment. The reference to the county recorder has been omitted from subdivision (d)(2) of Section 2901 as unnecessary since the county recorder's only involvement is to record the written certification of the public guardian in the county real property records. Section 2901 is comparable to Section 7603 (providing information, access, or property to public administrator).

Probate Code § 3074 (amended). Third persons acting in good faith

3074. Notwithstanding any other provision of this article, a transaction that affects real property, entered into by a purchaser-~~or encumbrancer~~ third person acting in good faith and for a valuable consideration, is not affected by the fact that one or both spouses have conservators unless a notice of the establishment of the conservatorship or conservatorships, as the case may be, has been recorded prior to the transaction in the county in which the property is located.

Comment. Section 3074 is amended to extend to any person who enters into a transaction in good faith and for a valuable consideration, and is not limited to a purchaser or encumbrancer.

Probate Code § 3131 (amended). Notice

3131. (a) At least 15 days before the hearing on the petition, the petitioner shall cause a notice of the time and place of the hearing and a copy of the petition to be served upon any nonpetitioning spouse not alleged to lack legal capacity for the proposed transaction.

(b) Service under subdivision (a) shall be made in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such other manner as may be authorized by the court. If the person to be served is outside this state, service may also be made in the manner provided in Section 415.40 of the Code of Civil Procedure.

(c) At least 15 days before the hearing on the petition, the petitioner shall mail a notice of the time and place of the hearing on the petition, ~~accompanied by a copy of the petition,~~ to the adult relatives named in the petition at the addresses set forth in the petition.

Comment. Subdivision (c) of Section 3131 is amended to delete the requirement that a copy of the petition be mailed with the notice of the time and place of the hearing to relatives of the spouse alleged to lack legal capacity. This is to afford greater privacy to the spouses.

Probate Code § 3208 (amended). Court ordered medical treatment for incompetent

3208. (a) The court may make an order authorizing the recommended course of medical treatment of the patient and designating a person to give consent to the recommended course of medical treatment on behalf of the patient if the court determines from the evidence all of the following:

(1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.

(3) The patient is unable to give an informed consent to the recommended course of treatment.

(b) If the patient has the capacity to give an informed consent to the recommended course of medical treatment but refuses to do so, the court is not authorized to make an order under this part. If an order has been made under this part, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization of the course of medical treatment.

Comment. Subdivision (a)(2) of Section 3208 is amended to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 2357.

Probate Code § 3920.5 (amended). Duration of custodianship under CAL-UTMA

3920.5. (a) Subject to the requirements and limitations of this section, the time for transfer to the minor of custodial property

transferred under or pursuant to Section 3903, 3904, or 3905 may be delayed until a specified time after the time the minor attains the age of 18 years, which time shall be specified in the transfer pursuant to Section 3909.

(b) To specify a delayed time for transfer to the minor of the custodial property, the words

"as custodian for _____
(Name of Minor)

until age _____
(Age for Delivery of Property to Minor)

under the California Uniform Transfers to Minors Act" shall be substituted in substance for the words

"as custodian for _____
(Name of Minor)

under the California Uniform Transfers to Minors Act" in making the transfer pursuant to Section 3909.

(c) The time for transfer to the minor of custodial property transferred under or pursuant to Section 3903 or 3905 may be delayed under this section only if the governing will or trust or nomination provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time may not be later than the time the minor attains 25 years of age, and in that case the governing will or trust or nomination shall determine the time to be specified in the transfer pursuant to Section 3909.

(d) The time for transfer to the minor of custodial property transferred by irrevocable gift or the irrevocable exercise of a power of appointment under Section 3904 may be delayed under this section only if the transfer pursuant to Section 3909 provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time may not be later than the time the minor attains 25 years of age.

~~(e) The time for transfer to the minor of custodial property transferred by irrevocable gift under Section 3904 may be delayed under this section only if the transfer pursuant to Section 3909 provides in substance that the custodianship is to continue until the time the minor attains a specified age, which time may not be later than the time the minor attains 21 years of age.~~

~~(f)~~ (e) If the transfer pursuant to Section 3909 does not specify any age, the time for the transfer of the custodial property to the minor under Section 3920 is the time when the minor attains 18 years of age.

(g) (f) If the transfer pursuant to Section 3909 provides in substance that the duration of the custodianship is for a time longer than the maximum time permitted by this section for the duration of a custodianship created by that type of transfer, the custodianship shall be deemed to continue only until the time the minor attains the maximum age permitted by this section for the duration of a custodianship created by that type of transfer.

Comment. Section 3920.5 is amended to authorize extension of an irrevocable gift to age 25, rather than to age 21.

Probate Code § 6211 (added). 120-hour survival requirement under statutory will

6211. (a) A reference in a California statutory will to a person who "survives me" means a person who survives the decedent by 120 hours. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of the California statutory will, and the beneficiaries are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be a beneficiary has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state.

(b) This section does not apply to a California statutory will executed on a form that does not include the text of this section.

Comment. Section 6211 provides a 120-hour survival rule. Section 6211 is the same in substance as Section 6403 (requirement that heir survive decedent).

Probate Code § 6408 (amended). Parent and child relationship

6408. (a) A relationship of parent and child is established for the purpose of determining intestate succession by, through, or from a person in the following circumstances:

(1) Except as provided in ~~Section 6408.5~~, subdivisions (b), (c), and (d), the relationship of parent and child exists between a person and his or her natural parents, regardless of the marital status of the natural parents.

(2) The relationship of parent and child exists between an adopted person and his or her adopting parent or parents.

(b) The relationship of parent and child does not exist between an adopted person and the person's natural parent unless both of the following requirements are satisfied:

(1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to or was cohabiting with the other natural parent at the time the child was conceived and died before the birth of the child.

(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(c) Neither a parent nor a relative of a parent (except for the issue of the child or a wholeblood brother or sister of the child or the issue of such brother or sister) inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent.

(d) If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child or a natural brother or sister of the child or the issue of that brother or sister) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied:

(1) The parent or a relative of the parent acknowledged the child.

(2) The parent or a relative of the parent contributed to the support or the care of the child.

~~(b)~~ (e) For the purpose of determining intestate succession by a person or his or her descendants from or through a foster parent or stepparent, the relationship of parent and child exists between that person and his or her foster parent or stepparent if (1) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

~~(e)~~ (f) For the purpose of determining whether a person is a "natural parent" as that term is used in Section 6408 and 6408.5 this section :

(1) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

(2) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7006 of the Civil Code unless either (A) a court order was entered during the father's lifetime declaring paternity or (B) paternity is established by clear and convincing evidence that the father has openly and notoriously held out the child as his own.

~~(d)~~ (g) Nothing in this section affects or limits application of the judicial doctrine of equitable adoption for the benefit of the child or his or her descendants.

Comment. Section 6408 is amended to add the substance of former Section 6408.5. Former subdivisions (a), (b), (c), and (d) of Section 6408 are now designated as subdivisions (a), (e), (f), and (g), respectively. Subdivisions (a), (b), and (c) of former Section 6408.5 are now found in subdivisions (b), (c), and (d), respectively, of Section 6408.

Section 6408 is drawn in part from Section 2-109 of the Uniform Probate Code (1987).

In case of an adoption coming within subdivision (b), the adopted child may inherit from or through the adoptive parent and also from or through the natural parent who gave up the child for adoption or through the natural parent who died preceding the adoption. The following examples indicate in various situations whether an adopted child or the issue of an adopted child may inherit from or through the child's natural parent.

Example 1. Child never lived with either mother or father; both parents relinquish child for adoption. The adopted child's relationship with both natural parents' families is severed. The requirements of subdivision (b) are not satisfied.

Example 2. Child's mother and father were married or lived together as a family. Child lives with mother and father. Father dies. Mother relinquishes child for adoption. The adopted child remains a member of both the deceased father's family and of the relinquishing mother's family. The requirement of subdivision (b) is satisfied.

because the adoption was "after the death of either of the natural parents."

Example 3. Child's mother and father were married or lived together as a family until father died. Child lives with mother but not father because father dies prior to child's birth. Mother relinquishes child for adoption. The adopted child remains a member of both the deceased father's family and of the relinquishing mother's family. Child remains a member of the deceased father's family because the father died before the birth of the child (satisfying the subdivision (b)(1) requirement) and the adoption was after the death of the father (satisfying the subdivision (b)(2) requirement).

Example 4. Child lives with father's family but not with mother or father because mother died shortly after child's birth. Father relinquishes child for adoption. Child is not a member of either the deceased mother's family or the relinquishing father's family. This is the result even if the father is the legitimate or acknowledged father of the child and has supported the child, since the relationship fails to meet the requirement of subdivision (b)(1) that the natural parent (the father) and the adopted person have "lived together." The child does not remain a member of the deceased mother's family because the mother never lived as a parent and child with the child and the mother died after the birth of the child.

In case of an adoption described in subdivision (c), the natural relatives cannot inherit from the adopted child, even though under subdivision (a)(1) the child could inherit from the natural relatives.

Subdivision (e) applies, for example, where a foster child or stepchild is not adopted because a parent of the child refuses to consent to the adoption. See also *Estate of Lind*, 209 Cal. App. 3d 1424 (1989); *Estate of Claffey*, 209 Cal. App. 3d 254 (1989). Even though the requirements of subdivision (e) are satisfied, the natural parent may continue to inherit from the child under subdivision (a)(1). The foster parent or stepparent may not inherit from the child: Subdivision (a)(2) does not apply because the adoption was not completed, and subdivision (e) does not apply because that subdivision applies only to inheritance by the foster child or stepchild or the child's issue "from" or "through" a foster parent or stepparent, not to inheritance "by" a foster parent or stepparent. The child, however, may inherit both from the natural parent under subdivision (a)(1), and from the foster parent or stepparent under subdivision (e).

Subdivision (g) makes clear that Section 6408 has no effect on the judicial doctrine of equitable adoption for the benefit of the child or his or her descendants. See, e.g., *Estate of Wilson*, 111 Cal. App. 3d 242, 168 Cal. Rptr. 533 (1980).

The definitions of "child" (Section 26), "issue" (Section 50), and "parent" (Section 54) adopt the rules set out in Section 6408. See also Section 6152 (construction of wills).

Probate Code § 6408.5 (repealed). Inheritance by natural relatives from or through adopted child or child born out of wedlock

~~6408.5.---Notwithstanding subdivisions (a) and (b) of Section 6408.5,~~

~~(a) The relationship of parent and child does not exist between an adopted person and his or her natural parent unless both of the following requirements are satisfied:~~

~~(1) The natural parent and adopted person lived together at any time as parent and child, or the natural parent was married to or was cohabiting with the other natural parent at the time the child was conceived and died before the birth of the child.~~

~~(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.~~

~~(b) Neither a parent nor a relative of a parent (except for the issue of the child or a wholeblood brother or sister of the child or the issue of such brother or sister) inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent.~~

~~(c) If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child or a natural brother or sister of the child or the issue of that brother or sister) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied:~~

~~(1) The parent or a relative of the parent acknowledged the child.~~

~~(2) The parent or a relative of the parent contributed to the support or the care of the child.~~

Comment. Subdivision (a) of former Section 6408.5 is continued in subdivision (b) of Section 6408 without change. Subdivision (b) of former Section 6408.5 is continued in subdivision (c) of Section 6408 without change. Subdivision (c) of former Section 6408.5 is continued in subdivision (d) of Section 6408 without change.

Probate Code § 7603 (amended). Immunity of county recorder

7603. (a) A public administrator who is authorized to take possession or control of property of a decedent pursuant to this article may issue a written certification of that fact. The written certification is effective for five days after the date of issuance.

(b) The public administrator may record a copy of the written certification in any county in which is situated real property of which the public administrator is authorized to take possession or control under this article.

(c) A financial institution or other person shall, without the necessity of inquiring into the truth of the written certification and without court order or letters being issued:

(1) Provide the public administrator information concerning property held in the sole name of the decedent.

(2) Grant the public administrator access to a safe deposit box rented in the sole name of the decedent for the purpose of inspection and removal of any will or instructions for disposition of the decedent's remains. Costs and expenses incurred in drilling or forcing a safe deposit box shall be borne by the estate of the decedent.

(3) Surrender to the public administrator property of the decedent that is subject to loss, injury, waste, or misappropriation.

(d) Receipt of the written certification provided by this section:

(1) Constitutes sufficient acquittance for providing information or granting access to the safe deposit box, for removal of the decedent's will and instructions for disposition of the decedent's remains, and for surrendering property of the decedent.

(2) Fully discharges the ~~county recorder~~, financial institution, or other person from any liability for granting access or for any act or omission of the public administrator with respect to the safe deposit box.

Comment. The reference to the county recorder has been omitted from subdivision (d)(2) of Section 7603 as unnecessary since the county recorder's only involvement is to record the written certification of the public guardian in the county real property records. Section 7603 is comparable to Section 2901 (providing information, access, or property to public guardian).

Probate Code § 7663 (amended). Property deposited with county treasurer

7663. (a) After payment of debts pursuant to Section 7662, but in no case before four months after court authorization of the public administrator to act under this article or after the public administrator takes possession or control of the estate, the public administrator shall distribute to the decedent's beneficiaries any

money or other property of the decedent remaining in the possession of the public administrator.

(b) If there are no beneficiaries, the public administrator shall deposit the balance with the county treasurer for use in the general fund of the county, subject to Article 3 (commencing with Section 50050) of Chapter 1 of Part 1 of Division 1 of Title 5 of the Government Code. If the amount deposited exceeds ten thousand dollars (\$10,000), the public administrator shall at the time of the deposit give the State Controller written notice of the information specified in Section 1311 of the Code of Civil Procedure, and the Controller shall compile and report the information in the same manner as information concerning estates delivered to the State Treasurer or the Controller under Section 7643 or 7644 of the Probate Code.

Comment. Section 7663 is amended to make clear that the procedure for disposition of unclaimed funds in the county treasury provided by Government Code Sections 50050-50056 applies to funds deposited by the public administrator under subdivision (b). Although the county treasurer has the duty to administer the funds deposited, a public record of the deposit is maintained by the State Controller as well as by the public administrator pursuant to Section 7665.

Probate Code § 8007 (amended). Determination of jurisdiction conclusive

8007. (a) Except as provided in subdivision (b), an order admitting a will to probate or appointing a personal representative, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked.

(b) Subdivision (a) does not apply in either of the following cases:

(1) The presence of extrinsic fraud in the procurement of the order.

(2) The court order is based on the erroneous determination of the decedent's death.

Comment. Paragraph (1) of subdivision (b) of Section 8007 is amended to make clear that the fraud referred to is extrinsic fraud. This is consistent with case law. See Estate of Robinson, 19 Cal. 2d 534, 121 P.2d 734 (1942); Estate of Crisler, 83 Cal. App. 2d 431, 188 P.2d 772 (1948).

Probate Code § 8404 (amended). Statement of duties and liabilities of personal representative

8404. (a) Before letters are issued, the personal representative, other than a trust company or a public administrator, shall file an acknowledgment of receipt of a statement of duties and liabilities of the office. The statement shall be in the form provided in subdivision (c) or, if the Judicial Council prescribes the form of the statement, in the form prescribed by the Judicial Council. The court may by local rule require the acknowledgment of receipt to include the personal representative's social security number and driver's license number, if any, provided that the court ensures their confidentiality.

(b) The statement of duties and liabilities, whether in the form provided in subdivision (c) or prescribed by the Judicial Council, does not supersede the law on which the statement is based.

(c) The form for the statement of duties and liabilities of a personal representative is as follows:

DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVE

When you have been appointed as personal representative of an estate by the court, you become an officer of the court and assume certain duties and obligations. An attorney is best qualified to advise you regarding these matters. You should clearly understand the following:

1. You must manage the estate assets with the care of a prudent person dealing with someone else's property. This means you must be cautious and you may not make any speculative investments. You may deposit estate funds in insured accounts in financial institutions, but you should consult with an attorney before making other investments.

2. You must keep the money and property in this estate separate from anyone else's, including your own. When you open a bank account for the estate, the account name must indicate that it is an estate account and not your personal account. Estate accounts, other than checking accounts intended for ordinary administration expenses, must earn interest. Never deposit estate funds in your personal account or otherwise commingle them with anyone else's property. Securities in the estate must also be held in a name that shows they are estate property and not your personal property.

3. There are many restrictions on your authority to deal with estate property. You should not spend any of the estate's money until you have received permission from the court or if so advised by an attorney. You may reimburse yourself for official court costs paid by you to the county clerk and for the premium on your bond. You may not pay fees to your attorney, if any, or to yourself without prior order

of the court. If you do not obtain the court's permission when it is required, you may be removed as personal representative, or you may have to reimburse the estate from your own personal funds, or both. You should consult with an attorney concerning the legal requirements affecting sales, leases, mortgages, and investments of estate property.

4. You must attempt to locate and take possession of all the decedent's property to be administered in the estate. You must arrange to have a court-appointed referee determine the value of the property unless this is waived by the court. (You, rather than the referee, must determine the value of certain "cash items"; an attorney can advise you as to this procedure.) Within four months after your appointment as personal representative you must file with the court an inventory and appraisal of all the assets in the estate. At the time you file the inventory and appraisal you must also file a change of ownership statement with the county recorder or assessor in each county where the decedent owned real property at the time of death, as provided in Section 480 of the California Revenue and Taxation Code.

5. You must mail notice of administration to each known creditor of the decedent within four months after your appointment as personal representative. If the decedent received Medi-Cal assistance you must notify the State Director of Health Services within 90 days after appointment.

6. You should determine that there is appropriate and adequate insurance covering the assets and risks of the estate. Maintain the insurance in force during the entire period of the administration.

7. You must keep complete and accurate records of each financial transaction affecting the estate. You will have to prepare an account of all money and property you have received, what you have spent, and the date of each transaction. You must describe in detail what you have left after the payment of expenses. Your account will be reviewed by the court. Save your receipts because the court may ask to review them. If you do not file your accounts as required, the court will order you to do so. You may be removed as personal representative if you fail to comply.

This statement of duties and liabilities is a summary and is not a complete statement of the law. Your conduct as a personal representative is governed by the law itself and not by this summary.

If you have an attorney, you should cooperate with the attorney at all times. You and your attorney are responsible for completing the estate administration as promptly as possible. When in doubt, contact your attorney.

Comment. Section 8404 is amended to exempt the public administrator from the requirement of filing an acknowledgment of receipt of the statement of duties and liabilities.

[Note. Section 8404 includes amendments made by the Commission's 1989 urgency probate bill (AB 156, enacted as 1989 Cal. Stat. ch. 21), but does not include the further amendments in AB 759.]

Probate Code § 8544 (amended). Liability of personal representative for claims

8544. (a) Except to the extent the order appointing a special administrator prescribes terms, the special administrator has the power to do all of the following without further order of the court:

(1) Take possession of all of the real and personal property of the decedent and preserve it from damage, waste, and injury.

(2) Collect all claims, rents, and other income belonging to the estate.

(3) Commence and maintain or defend suits and other legal proceedings.

(4) Sell perishable property.

(b) Except to the extent the order prescribes terms, the special administrator has the power to do all of the following on order of the court:

(1) Borrow money, or lease, mortgage, or execute a deed of trust on real property, in the same manner as an administrator.

(2) Pay the interest due or all or any part of an obligation secured by a mortgage, lien, or deed of trust on property in the estate, where there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation. This power may be ordered only on petition of the special administrator or any interested person, with any notice that the court deems proper, and shall remain in effect until appointment of a successor personal representative. The order may also direct that interest not yet accrued be paid as it becomes due, and the order shall remain in effect and cover the future interest unless and until for good cause set aside or modified by the court in the same manner as for the original order.

(3) Exercise other powers that are conferred by order of the court.

(c) Except where the powers, duties, and obligations of a general personal representative are granted under Section 8545, the special administrator is not ~~liable to a creditor~~ a proper party to an action on a claim against the decedent.

(d) A special administrator appointed to perform a particular act has no duty to take any other action to protect the estate.

Comment. - Subdivision (c) of Section 8544 is amended to eliminate the implication that a general personal representative is personally liable on a creditor's claim.

Probate Code § 9606 (added). Liability of personal representative who signs instrument

9606. Unless otherwise provided in the instrument or in this division, a personal representative is not personally liable on an instrument, including but not limited to a note, mortgage, deed of trust, or other contract, properly entered into in the personal representative's fiduciary capacity in the course of administration of the estate unless the personal representative fails to reveal the personal representative's representative capacity or identify the estate in the instrument.

Comment. Section 9606 is new. It generalizes provisions formerly found in Section 9805(b) and is comparable to Sections 18000 (trust law) and 2110 (guardianship-conservatorship law).

Probate Code § 9805 (amended). Liability of personal representative who signs instrument

9805. (a) The personal representative shall execute and deliver the mortgage or deed of trust, or execute and deliver the instrument creating the security interest, setting forth therein that it is made by authority of the order, giving the date of the order.

(b) The note and the mortgage or deed of trust or other instrument creating the security interest, if any, shall be signed by the personal representative and shall be acknowledged by the personal representative if the instrument creates alien on real property. ~~The personal representative is not personally liable on the note or the mortgage or deed of trust or other instrument by reason of so signing.~~

Comment. Subdivision (b) of Section 9805 is amended to delete the provision relating the personal liability of the personal representative. This matter is governed by Section 9606 (liability of personal representative who signs instrument).

Probate Code § 9832 (amended). Extension, renewal, or modification of lease

9832. (a) Except as provided in subdivision (b), authorization by order of court is required for a compromise, settlement, extension,

renewal, or modification which affects any of the following:

- (1) Title to real property.
- (2) An interest in real property or a lien or encumbrance on real property.
- (3) An option to purchase real property or an interest in real property.

(b) If it is to the advantage of the estate, the personal representative without prior court authorization may extend, renew, or modify a lease of real property having an unexpired term of one year or less where, under the lease as extended, renewed, or modified (1) the rental does not exceed ~~one thousand five hundred dollars (\$1,500)~~ two thousand five hundred dollars (\$2,500) a month and the term does not exceed one year or (2) regardless of the amount of the rental, the lease is from month to month. For the purposes of this subdivision, if the lease gives the lessee the right to extend the term of the lease, the length of the term shall be considered as though the right to extend had been exercised.

Comment. Subdivision (b) of Section 9832 is amended to increase the limit on extending, renewing, or modifying a lease without court approval from \$1,500 to \$2,500. See also Sections 2501 (extension, renewal, or modification of lease by guardian or conservator), 2555 (execution of lease by guardian or conservator), 9941 (execution of lease by personal representative).

Probate Code § 9941 (amended). Execution of lease

9941. If it is to the advantage of the estate, the personal representative may lease, as lessor, real property of the estate without authorization of the court in either of the following cases:

(a) Where the rental does not exceed ~~one thousand five hundred dollars (\$1,500)~~ two thousand five hundred dollars (\$2,500) a month and the term does not exceed one year.

(b) Where the lease is from month to month, regardless of the amount of the rental.

Comment. Subdivision (a) of Section 9941 is amended to increase the limit on executing a lease without court approval from \$1,500 to \$2,500. See also Sections 2501 (extension, renewal, or modification of lease by guardian or conservator), 2555 (execution of lease by guardian or conservator), 9832 (extension, renewal, or modification of lease by personal representative).

Probate Code § 9962 (amended). Appraisal of property subject to option
9962. The purchase price of the real property subject to the option shall be at least 90 percent of the appraised value of the real property. The appraisal shall be one made by ~~a probate referee~~ in the manner provided in subdivision (c) of Section 10309 within one year prior to the hearing of the petition.

Comment. Section 9962 incorporates the appraisal procedure of Section 10309(c). Under that provision, if a new appraisal is needed, the new appraisal need not be made by a probate referee if the original appraisal of the property was made by a person other than a probate referee. If the original appraisal of the property was made by a probate referee, the new appraisal may be made by the probate referee who made the original appraisal without further order of the court or further request for the appointment of a new probate referee. If appraisal by a probate referee is required, a new probate referee must be appointed, using the same procedure as for the appointment of an original referee, to make the new appraisal if the original probate referee is dead, has been removed, or is otherwise unable to act, or if there is other reason to appoint another probate referee.

Probate Code § 10006 (added). Cotenants' consent to sale

10006. If estate property to be sold is an undivided interest in a cotenancy, the cotenants may file in the estate proceeding written consent to have their interests sold pursuant to this chapter. Thereafter, the court's orders made pursuant to this chapter are as binding on the consenting cotenants as on the personal representative.

Comment. Section 10006 is new and is to facilitate estate sales of decedent's interest in a joint tenancy or tenancy in common. Section 10006 is consistent with existing practice. See 1 California Decedent Estate Practice § 6.19 (Cal. Cont. Ed. Bar 1989) (probate court may by stipulation consider any matter in connection with and in aid of proceeding).

Probate Code § 10162.5 (amended). Compensation where there is an exclusive contract and no other broker or agent is involved in sale

10162.5. Where Subject to Section 10162.6, where an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property, the court shall allow to the agent or broker holding the contract the compensation determined under Section 10161 on:

(a) The full amount for which the sale is confirmed in either of the following circumstances:

(1) The bid returned to the court for confirmation is made by a purchaser who is not represented by an agent or broker and the court confirms the sale to that purchaser on that bid.

(2) The bid returned to the court for confirmation is made by a purchaser who is represented by the agent or broker holding the contract and the court confirms the sale to that purchaser on an increased bid made at the time of the hearing on the petition for confirmation.

(b) The amount of the original bid if both of the following circumstances exist:

(1) The bid returned to court for confirmation is made by a purchaser who is not represented by an agent or broker or who is represented by the agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

Comment. Subdivision (a) of Section 10162.5 is amended to recognize the special rules in Section 10162.6 applicable where there is an exclusive contract providing that no compensation is payable if sale is confirmed to a particular purchaser named in the contract.

Probate Code § 10162.6 (added). Exclusive contract providing that no compensation payable if sale confirmed to particular purchaser named in contract

10162.6. (a) This section applies if both of the following circumstances exist:

(1) An agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property.

(2) The contract provides that no compensation is payable to the agent or broker holding the contract if sale is confirmed to a particular purchaser named in the contract.

(b) If the court confirms the sale to the purchaser named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation, the compensation of any agents or brokers involved in the sale is determined as provided in this article, except that no compensation is payable to the agent or broker holding the contract.

(c) If the court confirms the sale to a purchaser other than the person named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation, the compensation of the agent or broker holding the contract, and of any other agents or brokers involved in the sale, is determined under this article as if the limitation in the contract did not exist.

Comment. Section 10162.6 is new, and deals with the situation where the personal representative makes an exclusive listing contract with a broker (Broker A) to sell estate property, but the contract provides that no commission is payable to Broker A if sale is confirmed to a particular purchaser (or purchasers) named in the contract. See subdivision (a). Special rules apply in this situation, as provided in subdivisions (b) and (c).

Subdivision (b) applies to the situation where the sale is made to the purchaser named in the contract. In this case, Broker A is not entitled to any commission, even if Broker A produced the original bid returned to the court. Under subdivision (b), if sale is confirmed to the named person, the commission that would have been paid to Broker A, except for the limitation in the contract, is not paid. In this case, the estate receives the benefit of the commission, just as if the estate were acting as the agent with the exclusive listing contract. The compensation due any other brokers involved in the sale is determined under the normal rules that apply where there is a broker with an exclusive listing contract.

Subdivision (c) makes clear that the limitation in the exclusive listing contract does not affect the compensation of the broker holding the contract or any other brokers in a case where the sale is not made to the person named in the exclusive listing contract. In such case, the rules governing compensation where there is an exclusive listing contract apply and the limitation concerning the person named in the contract is ignored.

The following examples illustrate the application of this section. In these examples, Broker A refers to the broker holding the exclusive listing contract with the limitation that no compensation is due Broker A if sale is made to Bidder X. Broker B refers to a broker who does not hold a contract with the personal representative and who produces the bid returned to the court for confirmation. Broker C refers to a broker who does not have a contract with the personal representative and who produces a successful overbid.

Example 1. Exclusive listing contract excluding compensation if sale to Bidder X; Bidder X is original bidder, not produced by broker; no overbid. The original bid returned to court for confirmation is made by Bidder X who is not represented by a broker. The sale is confirmed to the original bidder on that bid. Under subdivision (b) and Section 10162.5(a), no commission is payable. This example is comparable to Example 11 in the Comment to Section 10161 [as revised for AB 759], except that Broker A receives no compensation.

Example 2. Exclusive listing contract excluding compensation if sale to Bidder X; Bidder X produced by Broker B; no overbid. The original bid returned to court for confirmation is made by Bidder X produced by Broker B. The sale is confirmed to that bidder on that bid. The reasonable compensation allowed by the court on the amount for which the sale is confirmed is divided equally. Under subdivision (b) and Section 10162.7, one-half of the commission is paid to Broker B and the other half, which would have been paid to Broker A except for the limitation in the contract, is not paid. This example is comparable to Example 14 in the Comment to Section 10161 [as revised for AB 759], except that Broker A receives no compensation.

Example 3. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder not produced by broker; successful overbid by Bidder X, not produced by broker. The original bid returned to court for confirmation is made by a bidder who is not represented by a broker. At the confirmation hearing, the highest bid is made by Bidder X who is not produced by a broker. The court confirms the sale to Bidder X. Under subdivision (b) and Section 10162.5(b), no commission is payable. This example is comparable to Example 12 in the Comment to Section 10161 [as revised for AB 759], except that Broker A receives no compensation.

The result would be the same where the original bidder in this example is produced by Broker A.

Example 4. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder not produced by broker; successful overbid by Bidder X produced by Broker C. The original bid returned to court for confirmation is made by a bidder who is not represented by a broker. At the confirmation hearing, the highest bid is made by Bidder X who is produced by Broker C. The court confirms the sale to Bidder X. Under subdivision (b), and subject to Section 10162, Broker C is entitled to half of the commission on the original bid plus all of the commission on the overbid; the other half of the commission on the original bid is not paid. See Section 10165(a)(2), (b), (c)(4). This example is comparable to Example 13 in the Comment to Section 10161 [as revised for AB 759], except that Broker A receives no compensation.

The result would be the same where the original bidder in this example is produced by Broker A.

Example 5. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder produced by Broker B; successful overbid by Bidder X not produced by broker. The original bid returned to court for confirmation is made by a bidder produced by Broker B. At the confirmation hearing, the highest bid is made by Bidder X who is not produced by a broker. The court confirms the sale to Bidder X. Under subdivision (b) and Section 10164(c), Broker

B is entitled to half of the commission on the original bid. The other half of the commission on the original bid is not paid. This example is comparable to Example 3 in the Comment to Section 10161 [as revised for AB 759], except that Broker A receives no compensation.

Example 6. Exclusive listing contract excluding compensation if sale to Bidder X; original bidder produced by Broker B; successful overbid by Bidder X produced by Broker C. The original bid returned to court for confirmation is made by a bidder produced by Broker B. At the confirmation hearing, the highest bid is made by Bidder X who is produced by Broker C. The court confirms the sale to Bidder X. Under subdivision (b), Broker B is entitled to one-fourth of the commission on the original bid and Broker C is entitled to half of the commission on the original bid plus all of the commission on the overbid. The other fourth of the commission on the original bid is not paid. See Section 10165(a)(1), (b), (c)(3). This example is comparable to Example 8 in the Comment to Section 10161 [as revised for AB 759], except that Broker A receives no compensation.

Example 7. Exclusive listing contract excluding compensation if sale to Bidder X; original bid by Bidder X, not produced by broker; successful overbidder not produced by broker. The original bid returned to court for confirmation is made by Bidder X who is not represented by a broker. At the confirmation hearing, the highest bid is made by a different bidder not produced by a broker. The court confirms the sale to the overbidder. Under subdivision (c) and Section 10162.5(b), Broker A receives a commission on the amount of the original bid and the limitation in the contract has no effect. This result in this example is the same as Example 12 in the Comment to Section 10161 [as revised for AB 759].

Example 8. Exclusive listing contract excluding compensation if sale to Bidder X; original bid by Bidder X produced by Broker B; successful overbidder not produced by broker. The original bid returned to court for confirmation is made by Bidder X produced by Broker B. At the confirmation hearing, the highest bid is made by a different bidder not produced by a broker. The court confirms the sale to the overbidder. Under subdivision (c), the commission on the original bid is divided equally between Broker A and Broker B. The limitation in the contract has no effect. This result in this example is the same as Example 3 in the Comment to Section 10161 [as revised for AB 759].

Probate Code § 10162.7 (amended). Compensation where there is an exclusive contract and sale is made to purchaser produced by another agent or broker on bid returned to court or on overbid

10162.7. (a) This Subject to Section 10162.6, this section applies if all of the following circumstances exist:

(1) There is an agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(2) The bid returned to court for confirmation is made by a purchaser procured by another agent or broker.

(3) The court confirms the sale to that purchaser either on the bid returned to court for confirmation or on an increased bid made at the time of the hearing on the petition for confirmation.

(b) If all the circumstances described in subdivision (a) exist, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed. The compensation allowed by the court shall be divided between the agent or broker holding the contract and the other agent or broker as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the compensation on the amount of the original bid returned to the court shall be divided equally between the agent or broker holding the contract and the other agent or broker and, if the sale is confirmed on an increased bid, the other agent or broker shall be paid all of the compensation on the difference between the original bid and the amount for which the sale is confirmed.

Comment. Subdivision (a) of Section 10162.7 is amended to recognize the special rules in Section 10162.6 applicable where there is an exclusive contract providing that no compensation is payable if sale is confirmed to a particular purchaser named in the contract.

Probate Code § 10163 (amended). Compensation where original bid made by purchaser not produced by agent or broker and sale made to overbidder produced by agent or broker

10163. Subject to ~~Section~~ Sections 10162 and 10162.6, where the original bid returned to the court for confirmation was made by a purchaser who was not procured by an agent or broker, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed to the agent or broker who

procured the purchaser to whom the sale is confirmed if either of the following conditions is satisfied:

(a) The court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by an agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(b) There is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property and the court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker.

Comment. Section 10163 is amended to recognize the special rules in Section 10162.6 applicable where there is an exclusive contract providing that no compensation is payable if sale is confirmed to a particular purchaser named in the contract.

Probate Code § 10165 (amended). Sale made on increased bid by purchaser produced by agent or broker; compensation where original bid returned to court made by a purchaser produced by another agent or broker; compensation where another agent or broker holds exclusive right to sell contract

10165. (a) Where Subject to Section 10162.6, where the court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed, as provided in this section, if either of the following conditions is satisfied:

(1) The original bid returned to the court for confirmation was made by a purchaser who was procured by another agent or broker.

(2) The original bid returned to the court for confirmation was made by a purchaser who was not represented by an agent or broker, and another agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property.

(b) The agent or broker who procured the purchaser to whom the sale is confirmed shall be paid one-half of the compensation on the amount of the original bid and all of the compensation on the difference between the original bid and the amount for which the sale is confirmed.

(c) The other one-half of the compensation on the amount of the original bid shall be paid as follows:

(1) If the original bid returned to the court is made by a purchaser who was procured by the agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to that agent or broker.

(2) If the original bid returned to the court is made by a purchaser who was procured by a bona fide agent or broker and there is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to that agent or broker.

(3) If there is an agent or broker who holds a contract under Section 10150 granting the exclusive right to sell the property and the original bid returned to the court is made by a purchaser who was procured by another agent or broker, the one-half of the compensation on the amount of the original bid shall be divided between the agent or broker holding the contract granting the exclusive right to sell the property and the other agent or broker whose original bid was returned to the court for confirmation as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the one-half of the compensation on the amount of the original bid shall be divided equally between the agent or broker holding the contract and the other agent or broker whose original bid was returned to the court for confirmation.

(4) If there is an agent or broker who holds a contract under Section 10150 granting the exclusive right to sell the property, the original bid returned to the court is made by a purchaser who is not represented by an agent or broker, and the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by another agent or broker, the entire one-half of the compensation on the original bid shall be paid to the agent or broker holding the contract.

(5) If the agent or broker compensated under subdivision (b) holds a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to the other agent or broker who procured the original bid returned to the court.

Comment. Subdivisions (a) of Section 10165 is amended to recognize the special rules in Section 10162.6 applicable where there is an exclusive contract providing that no compensation is payable if sale is confirmed to a particular purchaser named in the contract.

Probate Code § 11750 (amended). Third persons acting in good faith

11750. (a) The personal representative is responsible for distribution of the property in the estate in compliance with the terms of the court order for distribution.

(b) A distributee may demand, sue for, and recover from the personal representative or any person in possession, property to which the distributee is entitled.

(c) A distribution of property made in compliance with the terms of the court order for distribution is valid as to a ~~good-faith purchaser of the property for value~~ third person acting in good faith and for a valuable consideration.

Comment. Section 11750 is amended to extend to any person who enters into a transaction in good faith and for a valuable consideration, and is not limited to a purchaser.

Probate Code § 11850 (amended). Acceptance by distributee

11850. Subject to Section 11851, the personal representative may deposit property to be distributed with the county treasurer of the county in which the proceedings are pending in the name of the distributee in any of the following cases:

(a) The property remains in the possession of the personal representative unclaimed or the whereabouts of the distributee is unknown.

(b) The distributee refuses to ~~accept~~ or give a receipt for the property.

(c) The distributee is a minor or incompetent person who has no guardian, conservator, or other fiduciary to receive the property or person authorized to give a receipt for the property.

(d) For any other reason the property cannot be distributed, and the personal representative desires discharge. Notwithstanding Section 11851, deposit may not be made under this subdivision except on court order.

Comment. Subdivision (b) of Section 11850 is amended to delete the reference to an acceptance by the distributee. The concept of an acceptance is not implemented in the statutes on distribution.

Probate Code § 12250 (amended). Informal distribution

12250. (a) When the personal representative has complied with the terms of the order for final distribution and has filed the appropriate receipts or the court has excused the filing of a receipt, the court shall, on ex parte petition, make an order discharging the personal representative from all liability incurred thereafter.

(b) Nothing in this section precludes discharge of the personal representative for distribution made without prior court order, so long as the terms of the order for final distribution are satisfied.

Comment. Subdivision (b) is added to Section 12250 to codify existing practice.

Probate Code § 13106.5 (amended). Third persons acting in good faith

13106.5. (a) If the particular item of property transferred under this chapter is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration described in Section 13101 shall be recorded in the office of the county recorder of that county and, in addition to the contents required by Section 13101, shall include both of the following:

(1) The recording reference of the instrument creating the lien.

(2) A notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration.

(b) The transfer under this chapter of the debt or obligation secured by a lien on real property has the same effect as would be given to an assignment of the right to collect the debt or enforce the obligation. The recording of the affidavit or declaration under subdivision (a) shall be given the same effect as is given under Sections 2934 and 2935 of the Civil Code to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust.

(c) If a deed of trust upon the real property was given to secure the debt and the requirements of subdivision (a) and of Sections 13100 to 13103, inclusive, are satisfied:

(1) The trustee under the deed of trust may rely in good faith on the statements made in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

(2) A ~~good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt~~ third person acting in good faith and for a valuable consideration may rely upon a recorded reconveyance of the trustee under the deed of trust.

(d) If a mortgage upon the real property was given to secure the debt and the requirements of subdivision (a) and of Sections 13100 to 13103, inclusive, are satisfied, a ~~good faith purchaser or lessee of the real property for value from, or a good faith lender to, the obligor on the debt~~ third person acting in good faith and for a valuable consideration may rely upon a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent or by their successors in interest.

Comment. Section 13106.5 is amended to extend to any person who enters into a transaction in good faith and for a valuable consideration, and is not limited to a purchaser, lessee, or lender.

Probate Code § 13203 (amended). Third persons acting in good faith

13203. (a) A ~~good faith purchaser or lessee of real property for value from, or a good faith lender to,~~ third person acting in good faith and for a valuable consideration with a person designated as a successor of the decedent to a particular item of property in a certified copy of an affidavit issued under Section 13202 and recorded in the county in which the real property is located has the same rights and protections as the ~~purchaser, lessee, or lender~~ third person would have if each person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in an order for distribution that had become final.

(b) The issuance and recording of a certified copy of an affidavit under this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Section 13203 is amended to extend to any person who enters into a transaction in good faith and for a valuable consideration, and is not limited to a purchaser, lessee, or lender.

Probate Code § 18103 (amended). Third persons acting in good faith

18103. If an express trust relating to real property is not contained or declared in the grant to the trustee, or in an instrument signed by the trustee and recorded in the same office with the grant to the trustee, the grant shall be deemed absolute in favor of ~~purhasers~~ ~~from the trustee without notice~~ a third person dealing with the trustee in good faith and for a valuable consideration.

Comment. Section 18103 is amended to extend to any person who enters into a transaction in good faith and for a valuable consideration, and is not limited to a purchaser.

Probate Code § 18104 (amended). Third persons acting in good faith

18104. (a) If an interest in or lien or encumbrance on real property is conveyed, created, or affected by an instrument in favor of a person in trust but no beneficiary is indicated in the instrument, it is presumed that the person holds the interest, lien, or encumbrance absolutely and free of the trust. This is a presumption affecting the burden of proof. In an action or proceeding involving the interest, lien, or encumbrance instituted against the person, the person shall be deemed the only necessary representative of the undisclosed beneficiary and of the original grantor or settlor and anyone claiming under them. A judgment is binding upon and conclusive against these persons as to all matters finally adjudicated in the judgment.

(b) An instrument executed by the person holding an interest, lien, or encumbrance described in subdivision (a), whether purporting to be the act of that person in his or her own right or in the capacity of a trustee, is presumed to affect the interest, lien, or encumbrance according to the tenor of the instrument. This is a presumption affecting the burden of proof. Upon the recording of the instrument in the county where the land affected by the instrument is situated, the presumption is conclusive in favor of a ~~purhaser-or-encumbrancer~~ third person acting in good faith and for valuable consideration.

Comment. Section 18104 is amended to extend to any person who enters into a transaction in good faith and for a valuable consideration, and is not limited to a purchaser or encumbrancer.

Probate Code § 21524 (amended). Qualified domestic trusts

21524. If a marital deduction gift is made in trust, in addition

to the other provisions of this chapter, each of the following provisions also applies to the marital deduction trust:

(a) The transferor's spouse is the only beneficiary of income or principal of the marital deduction property as long as the spouse is alive. Nothing in this subdivision precludes exercise by the transferor's spouse of a power of appointment included in a trust that qualifies as a general power of appointment marital deduction trust.

(b) Subject to subdivision (d), the transferor's spouse is entitled to all of the income of the marital deduction property not less frequently than annually, as long as the spouse is alive.

(c) The transferor's spouse has the right to require that the trustee of the trust make unproductive marital deduction property productive or to convert it into productive property within a reasonable time.

(d) Notwithstanding subdivision (d) of Section 16304, in the case of qualified terminable interest property under Section 2056(b)(7) or Section 2523(f) of the Internal Revenue Code, on termination of the interest of the transferor's spouse in the trust all of the remaining accrued or undistributed income shall pass to the estate of the transferor's spouse, unless the instrument provides a different disposition that qualifies for the marital deduction.

(e) In the case of an election under Section 2056A of the Internal Revenue Code that applies to the trust, if the transferor's spouse is not a citizen of the United States:

(1) The trust instrument shall be construed to require that all trustees of the trust be individual citizens of the United States or domestic corporations.

(2) If a person named in the trust instrument or otherwise appointed as trustee is not an individual citizen of the United States or a domestic corporation, the person shall be replaced by an individual citizen of the United States or a domestic corporation named in the instrument as successor trustee or, if none, selected by the person named in the instrument or otherwise appointed as trustee.

(3) The trust shall meet such requirements as the Secretary of the Treasury may by regulations prescribe to ensure the collection of any tax imposed by subsection (b) of Section 2056A of the Internal Revenue Code, and the trustee has the authority necessary to implement this paragraph.

(4) This subdivision applies to estates of decedents dying after November 10, 1988.

Comment. Subdivision (e) is added to Section 21524 to make clear that in the case of a decedent's marital deduction gift in trust to a surviving spouse who is not a United States citizen, the trust instrument is construed to require a trustee who is an individual United States citizen or a domestic corporation, as provided in Internal Revenue Code Section 2056A(a) for a qualified domestic trust. See also Section 15660 (filling vacancy in office of trustee). This is a specific elaboration of the general requirement of Section 21522(a) that the provisions of the instrument be construed to comply with the marital deduction provisions of the Internal Revenue Code. The subdivision is applicable to estates of decedents dying after the date of enactment of the Technical and Miscellaneous Revenue Act of 1988 (P.L. 100-647, Nov. 10, 1988).

NOTE. The Commission is aware of pending federal legislation to revise the law governing qualified domestic trusts (H.R. 3150), and will make corresponding revisions in the proposed California legislation if federal revisions are enacted.

Probate Code § 21526 (amended). Qualified domestic trusts

21526. A fiduciary is not liable for a good faith decision to make any election, or not to make any election, referred to in Section 2056(b)(7) ~~or Section, 2056A(d), or 2523(f)~~ of the Internal Revenue Code.

Comment. Section 21526 is amended include an election made under Internal Revenue Code § 2056A(d) (qualified domestic trusts).