

## Memorandum 82-36

Subject: Study L-601 - Probate Law (Nonprobate Transfers)

At the last meeting, the Commission was in general agreement that we should reintroduce the nonprobate transfer bill (AB 325) that was killed in the Assembly Judiciary Committee in 1981. This would be a part of the Commission's 1983 legislative program.

Attached to this Memorandum is a staff draft of a Recommendation relating to Nonprobate Transfers drawn from UPC Sections 6-101 to 6-113. The proposed legislation is in the same form as the last amended version of AB 325, except for the omission of provisions relating to rights of the decedent's creditors in a joint account, P.O.D. account, or Totten trust account (Sections 6107 and 6107.5 in AB 325). These provisions were not acceptable to the members of the Assembly Judiciary Committee.

We may assume that the financial institutions will continue to object to this legislation. We could neutralize these objections by omitting from the bill the provisions that relate to financial institutions (proposed Probate Code Sections 6401-6406 and conforming revisions in the Financial Code), and proposing only to enact the provisions that relate to the rights as between depositors and other claimants, together with a provision like subdivision (a) of Section 6201 to make clear that the bill has no effect on financial institutions or the power of withdrawal from any account. Does the Commission wish to do this, or to recommend the legislation in its present draft form?

Assemblyman McAlister has introduced legislation (AB 2643) to authorize the P.O.D. account.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

STATE OF CALIFORNIA

CALIFORNIA LAW  
REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Relating to

NON-PROBATE TRANSFERS

March 8, 1982

California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306

## CALIFORNIA LAW REVISION COMMISSION

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March 8, 1982

To: The Honorable Edmund G. Brown Jr.  
Governor of California and  
The Legislature of California

The Legislature has directed the Law Revision Commission to make a study to determine whether the California Probate Code should be revised and to consider the Uniform Probate Code in the course of that study. See 1980 Cal. Stats. res. ch. 37.

In 1980, the Commission recommended that the substance of Article VI of the Uniform Probate Code be enacted in California. See Recommendation Relating to Non-Probate Transfers, 15 Cal. L. Revision Comm'n Reports 1605 (1980). This article of the Uniform Probate Code relates to multiple-party accounts in banks and other financial institutions and to "pay-on-death" provisions in contracts, deeds, and other written instruments.

Assembly Bill No. 325 was introduced at the 1981-82 session of the Legislature to effectuate the 1980 recommendation but was not enacted. A principal objection to the bill was its provision to permit creditors of a deceased depositor to reach funds on deposit in a multiple-party account where the other assets of the estate were insufficient to satisfy the debt of the deceased depositor. This new recommendation omits this provision, leaving the matter to be determined under California decisional law. With this exception, the recommended legislation would enact the substance of Article VI.

The enactment of the recommended legislation will make it easier-- particularly for those who have small estates--to transfer property upon death to designated beneficiaries without the need for probate.

Respectfully submitted,

Jean C. Love  
Chairperson

# RECOMMENDATION

*relating to*

## NON-PROBATE TRANSFERS

### INTRODUCTION

This recommendation is submitted as a result of the Law Revision Commission's continuing study of Article VI of the Uniform Probate Code.<sup>1</sup> This article, entitled "Non-Probate Transfers," relates to multiple-party accounts in banks and other financial institutions and to "pay-on-death" provisions in contracts, deeds, and other written instruments.

### THE UNIFORM PROBATE CODE PROVISIONS

Article VI of the Uniform Probate Code consists of two parts. The first part provides rules as to the ownership of multiple-party accounts and simplifies the procedure for transfer of funds by the bank or other financial institution following the death of the depositor. The second part validates pay-on-death provisions in contracts, deeds, and other instruments.

#### Multiple-Party Accounts

The Uniform Probate Code (UPC) gives statutory recognition to three types of "multiple-party accounts" designed for the transfer of property at death:

(1) *The joint account.* A joint account is one payable on request to one or more of two or more parties. A right of survivorship exists in such an account whether or not mention is made in the deposit agreement of any right of survivorship unless there is clear and convincing evidence

1. Twenty states have adopted legislation comparable to Article VI of the Uniform Probate Code. See Alaska Stat. § 13.31.005-13.31.070 (19\_\_); Ariz. Rev. Stat. Ann. §§ 14-6101 to 14-6201 (19\_\_); Colo. Rev. Stat. §§ 15-15-101 to 15-15-201 (19\_\_); Ga. Code Ann. §§ 41A-3801 to 41A-3812 (19\_\_); Haw. Rev. Stat. §§ 560:6-101 to 560:6-113 (19\_\_); Idaho Code §§ 15-6-101 to 15-6-201 (19\_\_); Ind. Code Ann. §§ 32-4-1.5-1 to 32-4-1.5-14 (Burns 19\_\_); Ky. Rev. Stat. §§ 391.300-391.360 (19\_\_); Me. Rev. Stat. tit. \_\_, §§ 6-101 to 6-201 (19\_\_); Mich. Stat. Ann. §§ 23.510(1)-23.510(15) (West 19\_\_); Minn. Stat. Ann. §§ 528.01-528.16 (West 19\_\_); Neb. Rev. Stat. §§ 30-2701 to 30-2714 (19\_\_); N.J. Stat. Ann. §§ 17:16I-1 to 17:16I-17 (West 19\_\_); N.M. Stat. Ann. §§ 45-6-101 to 45-6-201 (19\_\_); N.D. Cent. Code §§ 30.1-31-01 to 30.1-31-14 (19\_\_); Or. Rev. Stat. §§ 708.611-708.661 (19\_\_); Pa. Cons. Stat. Ann. §§ 6301-6306 (Purdon 19\_\_); Tex. §§ 436-450 (Vernon 19\_\_); Utah Code Ann. §§ 75-6-101 to 75-6-201 (19\_\_); Va. Code §§ 6.1-125.1 to 6.1-125.16 (19\_\_).

of a contrary intention at the time the account is created. This is comparable to the familiar joint tenancy account used in California.<sup>3</sup>

(2) *The P.O.D. account.* This is an account payable on request (1) to one person during lifetime and on the death of that person to one or more P.O.D. payees or (2) to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees. This type of account is not presently authorized in California, but its objective can be accomplished under existing California law by the use of a "Totten" trust account.

(3) *The trust account.* This account—a "Totten" trust account—is an account in the name of one or more persons as trustee for one or more beneficiaries where (1) the relationship is established by the form of the account and the deposit agreement with the financial institution, and (2) there is no subject of the trust other than the sums on deposit in the account. The "Totten" trust account is a method of transfer on death that has been widely used in California.<sup>4</sup>

Under the UPC, a multiple-party account may be created by a deposit agreement for a checking account, savings account, certificate of deposit, share account, or other like arrangement.<sup>5</sup>

**Ownership of multiple-party accounts while depositor is living.** The UPC specifies the ownership rules regarding multiple-party accounts while the depositor is living:

(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(2) A P.O.D. account belongs to the depositor during the depositor's lifetime and not to the P.O.D. payee or payees. If two or more persons are co-depositors, rights between them are governed during their lifetimes by the rules concerning joint accounts discussed above.

2. [Omitted.]

<sup>3</sup> See Fin. Code §§ 852 (banks), 7602 (savings and loan associations), 11204 (federal savings and loan associations). See also Fin. Code § 14860 (credit unions). Under existing California law, a joint account with a right of survivorship creates a rebuttable presumption of a joint tenancy. *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 315-16, 49 Cal. Rptr. 523 (1966).

<sup>4</sup> State Bar of California, *The Uniform Probate Code: Analysis and Critique* 184 (1973).

<sup>5</sup> The UPC provisions do not apply to:

(1) Accounts established for the deposit of funds of a partnership, joint venture, or other association for business purposes.

(2) Accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, or charitable or civic organization.

(3) A regular fiduciary or trust account where the relationship is established other than by the deposit agreement.

(3) The trust account is treated the same as the P.O.D. account. The trustee—but not the trust beneficiary—has the power to make withdrawals during the trustee's lifetime.

**Rights of creditors while depositor is living.** Creditors can reach the ownership interest (outlined above) of the depositor prior to the death of the depositor. Creditors of the P.O.D. payee may not reach funds in the P.O.D. account during the lifetime of the depositor. Likewise, creditors of the trust beneficiary may not reach funds in the trust account during the lifetime of the trustee.

**Facilitating transfer of funds by financial institution after death of depositor.** The UPC protects the bank or other financial institution that releases an account upon the death of the depositor in accordance with its deposit agreement unless before payment the institution has been served with process in a proceeding by the personal representative of the deceased depositor. This protection is provided to facilitate release of the funds by the financial institution after death.

**Rights of survivorship.** The UPC contains detailed provisions governing the right of survivorship with respect to various types of accounts:

(1) *Joint account.* The amount on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the deceased party unless there is clear and convincing evidence of a different intention at the time the account is created.<sup>6</sup> The right of survivorship continues between the surviving parties after the death of a party.

(2) *P.O.D. account.* On the death of the sole owner of a P.O.D. account or the death of the survivor of two or more owners, the amount on deposit at the time of death belongs to the P.O.D. payee or payees if they are alive at that time or to the survivors if one or more have previously died.<sup>7</sup> If one of two or more of the owners of the account dies, the remaining owners hold the account subject to the rules concerning joint accounts and the P.O.D. provision.

(3) *Trust account.* On the death of the sole trustee or the survivor of two or more trustees, the amount on deposit at the time of death belongs to the person or persons named

<sup>6</sup> If there are two or more surviving parties, their ownership shares are increased by an equal share for each survivor of any interest the deceased party may have owned in the account immediately before death.

<sup>7</sup> When the account becomes the property of two or more P.O.D. payees, there is no right of survivorship if one of the P.O.D. payees thereafter dies unless the deposit agreement expressly provides otherwise.

as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear evidence of a contrary intent.<sup>8</sup>

(4) *Multiple-party accounts without right of survivorship.* In other cases (such as a joint account where survivorship is expressly negated), the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

**Limitation on effect of will.** Although the UPC permits changes in the deposit agreement during the lifetime of the depositors, a testator cannot change by will:

(1) A right of survivorship arising from the express terms of the account or arising under the UPC provisions described above.

(2) A beneficiary designation in a trust account.

(3) A P.O.D. designation in a P.O.D. account.

### **Pay-on-Death Provisions in Contracts and Instruments**

The UPC authorizes pay-on-death provisions in bonds, mortgages, promissory notes, and conveyances, as well as other contractual instruments and deems such provisions to be nontestamentary. In particular, the UPC validates contractual provisions that money or other benefits payable to or owned by the decedent may be paid after his death "to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently." The provision validates contractual arrangements which might be held testamentary and invalid under existing law because not made in a valid will. The sole purpose of the provision is to eliminate the testamentary characterization of arrangements falling within the terms of the provision. The provision avoids the need to execute the contract in compliance with the requirements for a will and avoids the need to have the instrument probated. Nothing in the provision limits the rights of creditors under other laws of this state.

## **RECOMMENDATIONS**

The Law Revisor Commission recommends that the substance of Article VI of the Uniform Probate Code, less the provision which permits creditors of a depositor in a multiple-party account to reach account funds after the depositor's death,<sup>8a</sup> be enacted in California with some substantive and technical

<sup>8</sup> If two or more beneficiaries survive, there is no right of survivorship if one of them dies thereafter unless the deposit agreement expressly provides otherwise.

8a. Uniform Probate Code § 6-107. Omission of this provision will preserve existing California decisional law.

revisions. The enactment of Article VI with these revisions will make it easier—particularly for those who have small estates—to transfer property upon death to their designated beneficiaries without the need for probate.

### Multiple-Party Accounts

The legislation recommended by the Commission would make substantive and technical changes in the UPC provisions relating to accounts held by banks and other financial institutions. These changes are described below. Also described below are the major substantive changes in existing law that are made in the recommended legislation.

**Ownership of joint account.** The UPC provides that a joint account belongs to the parties during their lifetimes in proportion to their net contributions unless there is clear and convincing evidence of a contrary intent. This adopts the gift tax rule of the Internal Revenue Service (IRS) in place of the existing California rule that a joint tenancy account belongs equally to the co-depositors.<sup>9</sup> For gift tax purposes, IRS has taken the position that no completed gift occurs upon the opening of the account; rather the gift occurs when the nondepositing tenant makes a withdrawal.<sup>10</sup> Adoption of the IRS concept is a desirable modification of existing law. Many lay persons have the erroneous understanding that creation of a joint tenancy account has no effect until death.<sup>11</sup> Often the person making a deposit names another as a joint tenant merely to facilitate the withdrawal of funds by the joint tenant for the depositor and the transfer of the funds to the joint tenant upon death of the depositor. The depositor often has no intent to make a gift of one-half of the funds to the other joint tenant merely by making the person a joint tenant. The depositor can, of course, clearly indicate a different intent (as by executing an instrument that makes clear the intent to make a gift) and then that intent will be given effect.

**Right of survivorship.** The UPC provides for a right of survivorship in a joint account (whether or not the account is described as a "joint tenancy" or mentions any right of survivorship) which may be rebutted by clear and convincing evidence of a different intention.<sup>12</sup> This

<sup>9</sup> *Wallace v. Riley*, 23 Cal. App.2d 654, 667, 74 P.2d 807 (1937).

<sup>10</sup> See Treas. Reg. § 25.2511-1 (1958). See also Rev. & Tax. Code §§ 13671-13672 (California inheritance tax treatment of joint bank account).

<sup>11</sup> State Bar of California, *The Uniform Probate Code: Analysis and Critique* 184-85 (1973).

<sup>12</sup> The legislation recommended by the Commission does not include the UPC requirement that the evidence of a different intention exist "at the time the account is created." Thus, the intention to negate survivorship may be shown to have existed after the account's creation, although the evidence must be clear and convincing.

strengthens survivorship rights, since under existing law the presumption of survivorship arising from the joint tenancy form of the account may be overcome by a preponderance of the evidence.<sup>13</sup> Most persons who use joint accounts want the survivor or survivors to have all balances remaining at death, and the UPC presumption of survivorship for joint accounts gives effect to this intent.

**Tentative trust accounts.** The UPC makes the tentative or "Totten" trust a more reliable estate planning device by making it more difficult for heirs of the depositor to break the trust: Under the UPC, the presumption that the account funds vest in the named beneficiary on the depositor's death can be overcome only by "clear and convincing" evidence, and the trust cannot be revoked or modified by the depositor's will. These UPC provisions will have the beneficial effect of reducing litigation after the depositor's death,<sup>18</sup> and will permit depositors to create tentative trusts with confidence. Under existing law, a tentative trust has sometimes been defeated on flimsy or circumstantial evidence that the depositor intended some other disposition of the proceeds.<sup>19</sup>

**P.O.D. accounts.** The UPC authorizes the "pay-on-death" account. Such an account is not now authorized in California. This new authority permits a depositor to use an account form which accomplishes his or her objective without the need to resort to trust theory or other legal fictions. When the depositor's intent in creating a multiple-party account is solely to provide for payment of the funds to a named beneficiary on the depositor's death, the "pay-on-death" account is superior to the joint account because the depositor retains sole ownership of the account funds during his or her lifetime. It is superior to the tentative or "Totten" trust account for such purpose

<sup>13</sup> See *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 313-16, 49 Cal. Rptr. 523 (1966) (presumption rebuttable); Evid. Code § 115 (except as otherwise provided by law, burden of proof requires preponderance of evidence); Comment to Evid. Code § 606 (ordinarily party against whom a rebuttable presumption operates must overcome the presumption by a preponderance of the evidence).

Existing statutes provide that if a deposit is made in the names of two or more persons in such form that the moneys in the account are payable to the survivor or survivors, then the deposit is the property of such persons as joint tenants. Fin. Code §§ 852 (banks), 7602 (savings and loan associations), 11204 (federal savings and loan associations). It is not necessary, however, that the account expressly provide for a right of survivorship; survivorship follows as a legal incident of the creation of a joint tenancy account. *Kennedy v. McMurray*, 169 Cal. 287, 294, 146 P. 647 (1915).

14. [Omitted.]

15. [Omitted.]

16. [Omitted.]

17. [Omitted.]

<sup>18</sup> See G. Bogert, *The Law of Trusts and Trustees* § 47, at 335, 354 (2d ed. 1965); Estes, *In Search of a Less Tentative Totten*, 5 *Pepperdine L. Rev.* 21, 36, 39 (1977).

<sup>19</sup> See 7 B. Witkin, *Summary of California Law Trusts* § 18, at 5380-82 (8th ed. 1974).

because the effect of the "pay-on-death" account form will be more readily understood by lay persons who use it.

**Community property rights.** Article VI was drafted principally with common law states in mind.<sup>20</sup> If Article VI is to be enacted in California, a provision should be added to make clear its effect when community property funds are deposited in a joint account.

Under existing California law, when married persons deposit community funds into a joint tenancy bank account, a presumption arises that they thereby intended to transmute their community funds into a true common law joint tenancy.<sup>21</sup> If the presumption is overcome, the funds are treated as community property notwithstanding the joint tenancy form of the account. The result is a hybrid kind of property: community property in joint tenancy form.<sup>22</sup>

In most cases, when married persons put community funds into a joint tenancy account they do so to permit both spouses to make withdrawals during their lifetimes and to avoid the delay and expense of probate by taking advantage of the automatic survivorship feature; but they do not intend to give up the other advantages of community property.<sup>23</sup> The law should carry out this intent since it generally produces desirable results.<sup>24</sup>

If the spouse dies without a will, the community funds in joint tenancy form go to the surviving spouse by right of survivorship according to the ostensible joint tenancy form if there is no probate, or by intestate succession as community property if probate proceedings are commenced.<sup>25</sup> The survivorship feature of community property in joint tenancy form is particularly advantageous

<sup>20</sup> See, e.g., Uniform Probate Code § 6-106; Comment to Part 2 of Article II of the Uniform Probate Code.

<sup>21</sup> See *In re McCoin*, 9 Cal. App.2d 480, 50 P.2d 114 (1935) (presumption of transmutation); *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 49 Cal. Rptr. 523 (1966) (presumption rebuttable).

<sup>22</sup> Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87 (1961). Courts in finding property to be community property notwithstanding its ostensible joint tenancy form have reached the following results: (1) The first spouse to die may dispose of his or her half by will; (2) creditors of the deceased spouse may reach the property to the same extent that they could reach any other community property; (3) tax authorities must treat the property as community, not joint tenancy, for all tax purposes; (4) an attempted gift or other transfer by one spouse without consent of the other causes no severance but may be set aside on discovery; (5) the property is divisible on dissolution of their marriage; (6) under the laws of succession one-half of the property which had been community with a previously deceased spouse goes to relatives of that spouse in spite of the joint tenancy form. *Id.* at 93-94. However, the property does not lose all of the characteristics of a joint tenancy since a bona fide purchaser is protected. See *id.* at 94.

<sup>23</sup> *Id.* at 90, 95, 106-09.

<sup>24</sup> See note 22 *supra*.

<sup>25</sup> Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87, 96 (1961).

where the decedent's estate is small and there are no unpaid debts or taxes: The surviving spouse may have immediate access to the funds and probate is unnecessary.<sup>26</sup> Creditors are not prejudiced since they may petition for probate<sup>27</sup> and prove their claims.

The Commission recommends that a provision be added to Article VI to make it easier for married persons who deposit community funds into a joint tenancy account simultaneously to have the advantages of community property and the survivorship feature of joint tenancy property as they generally intend. The provision would reverse the present unrealistic presumption of transmutation, and instead create a rebuttable<sup>28</sup> presumption that funds of married persons on deposit in an account to which they are both parties are presumed to be their community property, whether or not they are described in the deposit agreement as husband and wife.<sup>29</sup> This will preserve the testamentary power of each spouse to the extent of half of the funds,<sup>30</sup> and will permit division of the funds on dissolution of their marriage.<sup>31</sup>

**Conforming revisions.** The provisions of the Financial Code and Civil Code relating to joint tenancy account in financial institutions<sup>32</sup> should be revised to be consistent with the new provisions concerning multiple-party accounts. The provisions of the Financial Code which permit joint tenants to require more than one signature for withdrawals or on checks or receipts in the case of banks,<sup>34</sup> savings and loan associations,<sup>35</sup> federal savings and loan

<sup>26</sup> See *id.*

<sup>27</sup> Prob. Code § 422.

<sup>28</sup> Under the proposed law, the presumption may be rebutted (1) by tracing the funds from separate property (absent an agreement expressing a clear intent to transmute the funds to community property) or (2) by an agreement separate from the deposit agreement which expressly provides that the funds are not community property. If separate funds have been so commingled with community funds that it is no longer possible to segregate one from the other, the separate funds will lose their separate character and be treated as community funds. See 7 B. Witkin, *Summary of California Law Community Property* §§ 33-34, at 5126-29 (8th ed. 1974).

<sup>29</sup> This would not change the rule with respect to inheritance taxes. See Rev. & Tax. Code § 13671.5 (funds in joint bank account having their source in community property treated as community property for inheritance tax purposes).

<sup>30</sup> See Prob. Code § 201.

<sup>31</sup> On dissolution of marriage, the court may divide the community and quasi-community property of the parties. Civil Code § 4800. True joint tenancy property (*i.e.*, joint tenancy property which is not merely community property held in joint tenancy form) is ordinarily beyond the power of the court to divide upon dissolution of marriage. *Walker v. Walker*, 108 Cal. App.2d 605, 608, 239 P.2d 106 (1952).

32. [Omitted.]

<sup>33</sup> See Civil Code § 683; Fin. Code §§ 852, 853, 7602, 7603, 7603.5, 7604, 7606, 11203, 11204, 11205, 11206, 11206.5, 14854.

<sup>34</sup> Fin. Code § 852 (third sentence).

<sup>35</sup> Fin. Code § 7603 (second sentence).

associations,<sup>36</sup> and credit unions<sup>37</sup> should be relocated in a single comprehensive provision in the new provisions concerning multiple-party accounts. The Financial Code provision which permits trust account funds to be paid to a minor beneficiary on the death of the trustee<sup>38</sup> should be revised to make such payment subject to the general rules concerning payment to a minor,<sup>39</sup> and moved from the Financial Code to the new statute.

### Pay-on-Death Provisions in Contracts and Instruments

The UPC would make clear the validity of the following "pay-on-death" provisions in a broad class of written instruments (including contracts, gifts, and conveyances):

(1) A provision that money or other benefits theretofore due to the maker of the instrument shall be paid to a designated person on the death of the maker.

(2) A provision that money due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or promisor before payment or demand.

(3) A provision that any property which is the subject of the instrument shall pass to a designated person on death of the maker.

Enactment of this portion of the UPC would codify California case law that a promissory note may contain a provision for the cancellation of the debt on the death of the payee,<sup>40</sup> and that an employment contract may provide for ownership of a business to pass to the employee-manager on the death of the owner.<sup>41</sup> The UPC may expand California law by validating a provision in a promissory note that on the payee's death the note shall be paid to another person.<sup>42</sup> There appears to be no sound reason for holding these types of provisions in written instruments to be invalid merely because the instrument has not been executed in accordance with the formalities of the will statutes.<sup>43</sup> Experience with insurance contracts, revocable living trusts, multiple-party bank accounts, and United States

<sup>36</sup> Fin. Code § 11204 (third sentence).

<sup>37</sup> Fin. Code § 14854 (second sentence).

<sup>38</sup> Fin. Code § 853.

<sup>39</sup> Prob. Code §§ 3400-3413.

<sup>40</sup> *Bergman v. Ornbaun*, 33 Cal. App.2d 680, 92 P.2d 654 (1939).

<sup>41</sup> *Estate of Howe*, 31 Cal.2d 395, 189 P.2d 5 (1948). See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 87-89, at 5607-09 (8th ed. 1974).

<sup>42</sup> Although the issue has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code § 6-201.

<sup>43</sup> The requisites of a formal or witnessed will are (1) a writing, (2) subscription by the testator, (3) acknowledgment and publication by the testator, and (4) attestation by witnesses. Prob. Code § 50; 7 B. Witkin, *Summary of California Law Wills and Probate* § 113, at 5628 (8th ed. 1974).

government bonds with "pay-on-death" provisions demonstrates that the evils envisioned if will statutes are not rigidly enforced simply do not materialize.<sup>44</sup>

### RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 683 of the Civil Code, to amend Sections 7603.5, 7606, 11206, and 11206.5 of, to add Section 14854 to, and to repeal Sections 852, 853, 7602, 7603, 7604, 11203, 11204, 11205, and 14854 of, the Financial Code, and to amend Section 647 of, and to add Division 5 (commencing with Section 6100) to, the Probate Code, relating to nonprobate transfers.

*The people of the State of California do enact as follows:*

**Civil Code § 683 (amended). Joint interest defined; creation of joint tenancy in personal property**

**SECTION 1.** Section 683 of the Civil Code is amended to read:

**683. (a)** A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself or herself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

**(b)** Provisions of this section shall do not restrict the creation of apply to a joint tenancy in a bank deposit as provided for in the Bank Act account in a financial institution if Part 1 (commencing with Section 6100) of Division 5 of the Probate Code applies to such account.

**Comment.** Section 683 is amended to change the former reference to a joint tenancy in a bank deposit under the Bank Act to a reference to joint account in a financial institution under newly-enacted provisions of the Probate Code (Sections 6100-6408). Such accounts are governed by the new Probate Code sections and various provisions of the Financial Code.

<sup>44</sup> Comment to Uniform Probate Code § 6-201.

## Financial Code § 852 (repealed). Joint accounts

SEC. 2. Section 852 of the Financial Code is repealed.

852. When a deposit is made in a bank in the names of two or more persons, whether minor or adult, in such form that the moneys in the account are payable to the survivor or survivors then such deposit and all additions thereto shall be the property of such persons as joint tenants. The moneys in such account may be paid to or on the order of any one of such persons during their lifetimes or to or on the order of any one of the survivors of them after the death of any one or more of them. By written instructions given to the bank by the depositor or depositors, the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them may be required on any check, receipt, or withdrawal order in which case the bank shall pay the moneys in the account only in accordance with such instructions but no such instructions shall limit the right of the survivor or survivors to receive the moneys in the account.

Payment of all or any of the moneys in such account as provided in the preceding paragraph of this section shall discharge the bank from liability with respect to the moneys so paid, prior to receipt by the particular office or branch office of the bank where such account is carried of a written notice from any one of them directing the bank not to permit withdrawals in accordance with the terms of the account or the instructions. After receipt of such notice, a bank may refuse, without liability, to honor any check, receipt, or withdrawal order on the account pending determination of the rights of the parties.

Comment. Former Section 852 is superseded by Part 1 (commencing with Section 6100) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 852 are superseded by Sections 6301, 6302, 6401, 6402, and 6408 of the Probate Code. The third sentence of former Section 852 is continued in Section 6401 of the Probate Code. The fourth and fifth sentences of former Section 852 are superseded by Section 6405 of the Probate Code.

## Financial Code § 853 (repealed). Trust accounts

SEC. 3. Section 853 of the Financial Code is repealed.

853. Whenever any deposit is made in a bank by any person which in form is in trust for another, but no other or further notice of the existence and terms of a legal and

valid trust is given in writing to the bank; in the event of the death of the trustee, the deposit or any part thereof may be paid to the person for whom the deposit was made, whether or not such person is a minor.

Comment. Former Section 853 is superseded by Sections 6404, 6407, and 6408 of the Probate Code.

#### Financial Code § 7602 (repealed). Joint tenants

SEC. 4. Section 7602 of the Financial Code is repealed.

7602. When shares or investment certificates are issued in the name of two or more persons whether minor or adult as joint tenants or in form to be paid to any of them or the survivors of them, such shares or certificates and all dues paid thereon become the property of such persons as joint tenants.

Comment. Former Section 7602 is superseded by Part 1 (commencing with Section 6100) of Division 5 of the Probate Code relating to multiple-party accounts.

#### Financial Code § 7603 (repealed). Payments to joint tenants

SEC. 5. Section 7603 of the Financial Code is repealed.

7603. Shares or investment certificates owned in joint tenancy and all dividends and interest thereon are held for the exclusive use of the joint tenants and may be paid to any of them during their lifetime or to the survivor or any one of the survivors of them after the death of one or more of the joint tenants. By written instructions of all joint tenants given to the association, they may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any notice of withdrawal, request for withdrawal, check endorsement or receipt, in which case the association shall pay withdrawals, dividends and interest only in accordance with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments, dividends and interest. Payment as provided in this section and the receipt or acquittance of any joint tenant is a valid and sufficient release and discharge of such association for all payments made on account of shares or certificates owned in joint tenancy prior to the receipt by such association of notice in writing from any one of them not to make payments in accordance with the terms of such shares or certificates or of such written instructions. After receipt

of such notice an association may refuse, without liability, to pay withdrawals, dividends or interest pending determination of the rights of the parties.

Comment. Former Section 7603 is superseded by Part 1 (commencing with Section 6100) of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 7603 is superseded by Sections 6301, 6302, 6401, 6402, and 6408 of the Probate Code. The second sentence of former Section 7603 is continued in Section 6401 of the Probate Code. The third and fourth sentences of former Section 7603 are superseded by Section 6405 of the Probate Code.

#### Financial Code, § 7603.5 (technical amendment).

##### Assignment or pledge of shares or certificates

SEC. 6. Section 7603.5 of the Financial Code is amended to read:

7603.5. (a) Shares or investment certificates owned in *joint tenancy held as a joint account* and any dividends or interest thereon may be assigned or pledged to the association by any one of the *joint tenants parties* during their lifetime or by the survivor or any one of the survivors of them after the death of one or more of the *joint tenants parties*, and such assignment or pledge may secure a loan from the association to any one or more of the *joint tenants parties* or to any one or more of the survivors of them after the death of one or more of them. By written instructions of all *joint tenants parties* given to the association, they may require the signatures of more than one of such persons during their lifetime or of more than one of the survivors after the death of any one of them for any assignment or pledge, but no such instructions shall limit the right of the sole survivor or of all of the survivors to assign or pledge to the association the shares or investment certificates and any dividends and interest thereon. No assignment or pledge to the association by less than all of the *joint tenants parties* or by less than all of the survivors of the *joint tenants parties* shall operate to sever or terminate, either in whole or in part, the continuance of the *joint tenancy joint account*, subject to the effect of such pledge or assignment.

(b) *As used in this section, "joint account" and "parties" have the meaning given those terms under Section 6101 of the Probate Code.*

Comment. Section 7603.5 is amended to replace the former references to joint tenancy with a reference to "joint account" as defined in Section 6101 of the Probate Code, and to replace the former references to joint tenants with a reference to "parties"

as defined in Section 6101 of the Probate Code. This expands the application of Section 7603.5 to include joint accounts in form other than the traditional common law joint tenancy account.

**Financial Code § 7604 (repealed). Conclusive evidence of survivorship**

**SEC. 7.** Section 7604 of the Financial Code is repealed.

~~7604. The purchase or acceptance of shares or investment certificates in the name of two or more persons as joint tenants or in form to be paid to any of them or the survivors of them; in the absence of fraud or undue influence; is conclusive evidence in any action or proceeding to which either the association or the surviving share or certificate holders may be a party; of the intention of such share or certificate holders to vest title to such shares or certificates and dues paid on account thereof and dividends and interest thereon in the survivors .~~

**Comment.** Former Section 7604 is superseded by Part 1 (commencing with Section 6100) of Division 5 of the Probate Code relating to multiple-party accounts. The conclusive presumption of former Section 7604 has been replaced by a rebuttable presumption under Section 6302 of the Probate Code: The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention. Prob. Code § 6302. However, the financial institution is protected from liability if it pays the account to the survivor. See Prob. Code §§ 6402, 6405.

**Financial Code § 7606 (amended). Payment on death of fiduciary**

**SEC. 8.** Section 7606 of the Financial Code is amended to read:

~~7606. When a person holding shares or investment certificates as trustee or guardian dies and no notice of the terms, revocation, or termination of the trust or guardianship is given in writing to the association, the withdrawal or other value of the shares or investment certificates or any part thereof may be paid to the beneficiary or ward. If no beneficiary or ward has been designated in writing to the association, the withdrawal or other value or any part thereof may be paid to the trustee's or guardian's executor or administrator. Such payment by any association is a valid and sufficient release and discharge of the association for the payment whether or not such payment is made to a minor .~~

**Comment.** Section 7606 is amended to eliminate references to guardians and wards. Insofar as Section 7606 applied to an account held by a guardian, the section was inconsistent with the

guardianship-conservatorship law. A guardianship or conservatorship of the estate does not terminate on the death of the guardian or conservator. See Prob. Code §§ 1600 (guardianship), 1860 (conservatorship). The death of the guardian or conservator merely terminates the relationship of guardian and ward or conservator and conservatee but does not terminate the guardianship or conservatorship proceeding. The court retains jurisdiction of the proceeding despite the termination of the relationship. See the Comment to Probate Code Section 1860. Upon the death of the guardian or conservator of the estate, the estate is not paid to the ward or conservatee. Instead, a successor guardian or conservator of the estate may be appointed, and the successor guardian or conservator is then responsible for the management of the estate of the ward or conservatee.

Insofar as the section dealt with payment to a trust beneficiary on the death of the trustee, the section is superseded by Section 6407 of the Probate Code. If the trust is a true trust (as distinguished from a Totten trust), the trust does not terminate on the death of the trustee and a new trustee may be appointed by the court. Civil Code § 2289; 7 B. Witkin, *Summary of California Law Trusts* § 30, at 5393 (8th ed. 1974).

#### **Financial Code § 11203 (repealed). Payment on death of fiduciary**

**SEC. 9.** Section 11203 of the Financial Code is repealed.

~~11203. Whenever a person dies holding shares or share accounts of a federal savings and loan association as trustee or other fiduciary, in trust for a named beneficiary, and no written notice of the revocation or termination of the trust relationship has been given to the association, the repurchase value of the shares or share accounts, and dividends thereon, or other rights relating thereto, may be paid or delivered, in whole or in part, to the named beneficiary of such trust. The payment or delivery to any beneficiary pursuant to this section, or a receipt or acquittance signed by such beneficiary for any payment or delivery, whether or not such person is a minor, is a valid and sufficient release and discharge of the association for the payment or delivery so made.~~

**Comment.** Section 11203 is superseded by Section 6407 of the Probate Code. Section 11203 applied to Totten trusts, since the section provided for payment to the beneficiary on the death of the trustee. See 7 B. Witkin, *Summary of California Law Trusts* § 17, at 5379 (8th ed. 1974). If the trust is a true trust, it does not terminate on the death of the trustee and a new trustee may be appointed by the court. Civil Code § 2289; 7 B. Witkin, *supra* § 30, at 5393.

Financial Code § 11204 (repealed). Joint tenants

SEC. 10. Section 11204 of the Financial Code is repealed.

**11204.** When shares or share accounts in a federal savings and loan association are issued in the name of two or more persons, whether minor or adult, as joint tenants or in form to be paid to any of them or the survivors, the shares or share accounts are the property of those persons as joint tenants. Such shares or share accounts, together with all dividends thereon, shall be held for the exclusive use of such joint tenants and may be paid to any of them, or to the survivor or any one of the survivors after the death of one or more of them. By written instructions of all such joint tenants given to the association, they may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any request for withdrawal, check endorsement or receipt, in which case the association shall pay withdrawals and dividends only in accordance with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments or dividends.

Payment as provided in the preceding paragraph and the receipt or acquittance of the person to whom such payment is made is a valid and sufficient release and discharge of the association for the payment made on account of the shares or share accounts prior to the receipt by such association of a notice in writing from any one of them not to make payments in accordance with the terms of the shares or share accounts or of such instructions. After receipt of such notice an association may refuse, without liability, to pay withdrawals or dividends pending determination of the rights of the parties.

**Comment.** Former Section 11204 is superseded by Part 1 (commencing with Section 6100) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 11204 are superseded by Sections 6301, 6302, 6401, 6402, and 6408 of the Probate Code. The third sentence of former Section 11204 is continued in Section 6401 of the Probate Code. The fourth and fifth sentences of former Section 11204 are superseded by Section 6405 of the Probate Code.

**Financial Code § 11205 (repealed). Conclusive evidence of survivorship**

**SEC. 11.** Section 11205 of the Financial Code is repealed.

**11205.** The purchase or acceptance of shares or share accounts of a federal savings and loan association in the name of two or more persons to be paid to either of them or the survivors is, in the absence of fraud or undue influence, conclusive evidence, in any action or proceeding to which either the association or the surviving share or share account holders are a party, of the intention of the share or share account holders to vest title to the shares or share accounts and payments made on account thereof and dividends thereon in such survivors.

**Comment.** Former Section 11205 is superseded by Part 1 (commencing with Section 6100) of Division 5 of the Probate Code relating to multiple-party accounts. The conclusive presumption of former Section 11205 has been replaced by a rebuttable presumption under Section 6302 of the Probate Code: The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention. Prob. Code § 6302. However, the financial institution is protected against liability if it pays the account to the survivor. See Prob. Code §§ 6402, 6405.

**Financial Code § 11206 (amended). Single membership of joint share accounts**

**SEC. 12.** Section 11206 of the Financial Code is amended to read:

**11206.** Shares, or share accounts issued in the joint names of two or more persons, whether as joint tenants or as tenants in common, or otherwise, create but a single membership in the association.

**Comment.** Section 11206 is amended to include forms of joint ownership other than joint tenancy or tenancy in common. See, e.g., Prob. Code § 6101 ("joint account" defined to mean an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship).

**Financial Code § 11206.5 (amended). Assignment or pledge of savings or share accounts**

**SEC. 13.** Section 11206.5 of the Financial Code is amended to read:

**11206.5.** (a) Savings accounts and share accounts of a federal savings and loan association owned in joint tenancy

*held as a joint account* and any dividends thereon may be assigned or pledged to the association by any one of the *joint tenants parties* during their lifetime or by the survivor or any one of the survivors of them after the death of one or more of the *joint tenants parties*, and such assignment or pledge may secure a loan from the association to any one or more of the *joint tenants parties* or to any one or more of the survivors of them after the death of one or more of them. By written instructions of all *joint tenants parties* given to the association, they may require the signatures of more than one of such persons during their lifetime or of more than one of the survivors after the death of any one of them for any assignment or pledge, but no such instructions shall limit the right of the sole survivor or of all of the survivors to assign or pledge to the association the savings accounts or share accounts and any dividends thereon. No assignment or pledge to the association by less than all of the *joint tenants parties* or by less than all of the survivors of the *joint tenants parties* shall operate to sever or terminate, either in whole or in part, the continuance of the *joint tenancy joint account*, subject to the effect of such pledge or assignment.

*(b) As used in this section, "joint account" and "parties" have the meaning given those terms under Section 6101 of the Probate Code.*

Comment. Section 11206.5 is amended to replace the former references to joint tenancy with a reference to "joint account" as defined in Section 6101 of the Probate Code, and to replace the former references to joint tenants with a reference to "parties" as defined in Section 6101 of the Probate Code. This expands the application of Section 11206.5 to include joint accounts in form other than the traditional common law joint tenancy account.

#### Financial Code § 14854 (repealed). Joint tenancy

SEC. 14. Section 14854 of the Financial Code is repealed.

~~14854. Shares or certificates for funds owned in joint tenancy and all dividends and interest thereon may be paid to any of the joint tenants during their lifetime or to the survivor or any one of the survivors of them after the death of one or more of the joint tenants. By written instructions of all joint tenants given to the credit union, the joint tenants may require the signatures of more than one of such persons during their lifetimes or of more than one of the survivors after the death of any one of them on any notice of withdrawal, request for withdrawal, check endorsement or receipt, in which case the credit union shall pay withdrawals, dividends and interest only in accordance~~

with such instructions, but no such instructions shall limit the right of the sole survivor or of all of the survivors to receive withdrawal payments, dividends and interest. Payment as provided in this section and the receipt or acquittance by any joint tenant is a valid and sufficient release and discharge of the depository credit union for all payments made on account of shares or certificates for funds owned in joint tenancy prior to the receipt by such credit union of notice in writing from any one of them not to make payments in accordance with the terms of such shares or certificates for funds or of such written instructions. After receipt of such notice a credit union may refuse, without liability, to pay withdrawals, dividends, or interest pending a determination of the rights of the parties.

Comment. Former Section 14854 is superseded by Part 1 (commencing with Section 6100 of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 14854 is superseded by Sections 6301, 6302, 6401, 6402, and 6408 of the Probate Code. The second sentence of former Section 14854 is continued in Section 6401 of the Probate Code. The third and fourth sentences of former Section 14854 are superseded by Section 6405 of the Probate Code.

#### **Financial Code § 14854 (added). Multiple-party accounts**

**SEC. 14.5.** Section 14854 is added to the Financial Code, to read:

**14854.** Subject to Section 14860, a credit union share account which is a multiple-party account, as defined in Section 6101 of the Probate Code, is governed by Part 1 (commencing with Section 6100) of Division 5 (commencing with Section 6101) of the Probate Code.

Comment. Section 14854 makes reference to the California Multiple-Party Accounts Law (Probate Code §§ 6100-6408) which applies to credit unions. The section also makes clear that the restrictions found in Section 14860 of the Financial Code are not affected by the enactment of the California Multiple-Party Accounts Law.

#### **Probate Code § 647 (amended). Exclusion of certain property from set-aside provisions**

**SEC. 15.** Section 647 of the Probate Code is amended to read:

**647.** For the purposes of this article ; any :

(a) Any property or interest therein or lien thereon which, at the time of the decedent's death, was held by him

*the decedent as joint tenant, or in which he the decedent had a life or other estate terminable upon his the decedent's death, shall be excluded in determining the estate of the decedent or its value.*

*(b) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this subdivision, the terms "multiple-party account," "party," "P.O.D. payee," "beneficiary" have the meaning given those terms by Section 6101.*

**Comment.** Section 647 is amended to add subdivision (b). Subdivision (b) is a special application of subdivision (a) and continues prior law by making clear that funds in a multiple-party account as defined in Section 6101 are excluded in determining the estate of the decedent or its value under this article to the extent that the funds belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. Under prior law, joint tenancy accounts were expressly excluded from the decedent's estate for the purpose of this article, and Totten trust accounts were presumably also excluded as an estate terminable upon the decedent's death.

Subdivision (b) excludes multiple-party account funds whether or not they are community property under Section 6305 to the extent that the funds pass to a surviving party, P.O.D. payee, or beneficiary. Under prior law, when community funds were deposited into the spouses' joint tenancy account, there was a presumption of an intent to transmute the funds into true joint tenancy (see *In re McCoin*, 9 Cal. App.2d 480, 50 P.2d 114 (1935)), with the result that on the death of one spouse the funds would be excluded from the decedent's estate for the purpose of this article. To this extent, the effect of subdivision (b) on community property funds deposited into the spouses' joint account is generally the same as under prior law.

To the extent that the funds do not belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary (as, for example, an interest in community property claimed as a statutory intestate share by a surviving spouse who is not a party to the account—see Section 201), the funds are includable in the decedent's estate for the purpose of this article. See *Estate of Pezzola*, 112 Cal. App.3d 752, 169 Cal. Rptr. 464 (1980).

SEC. 16. Division 5 (commencing with Section 6100) is added to the Probate Code, to read:

## DIVISION 5. NONPROBATE TRANSFERS

### PART 1. MULTIPLE-PARTY ACCOUNTS

#### CHAPTER 1. SHORT TITLE AND DEFINITIONS

##### Probate Code § 6100. Short title

6100. This part may be cited as the California Multiple-Party Accounts Law.

Comment. Section 6100 is a new provision not found in the Uniform Probate Code. For comparable provisions, see Minn. Stat. Ann. § 523.01 (West 1975) and N.J. Stat. Ann. § 17:161-1 (West Supp. 1981).

##### Probate Code § 6101. Definitions

6101. In this part, unless the context otherwise requires:

(a) "Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

(b) "Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee.

(c) "Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.

(d) "Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.

(e) A "multiple-party account" is any of the following types of account: (1) a joint account, (2) a P.O.D. account, or (3) a trust account. It does not include: (1) accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, (2) accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or (3) a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

(f) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for him or her, less all withdrawals made by or for him or her which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

(g) "Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him or her by reason of his or her surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, conservator, personal representative, or assignee, including a levying creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless the beneficiary has a present right of withdrawal.

(h) "Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge.

(i) "P.O.D. account" means an account payable on request to one person during his or her lifetime and on his or her death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(j) "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons.

(k) "Proof of death" includes an original or attested or certified copy of a death certificate or record or report which is prima facie evidence of death under Section 10577 of the Health and Safety Code, Sections 1530 to 1532, inclusive, of the Evidence Code, or other statute of this state.

(l) A financial institution "receives" an order or notice under this part when it is received by the particular office or branch office of the financial institution where the account is carried.

(m) "Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures, and regulations of the financial institution; but if the financial institution

conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal.

(n) "Sums on deposit" means the balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party.

(o) "Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.

(p) "Withdrawal" includes payment to a third person pursuant to check or other directive of a party.

**Comment.** Section 6101 is the same as Section 6-101 of the Uniform Probate Code with some technical modifications. These include the following:

(1) A reference to a "levying" creditor is substituted in subdivision (g) for the reference in the UPC to an "attaching" creditor; "attaching creditor" might be construed in California to be restricted to one who levies under a writ of attachment (prejudgment) and not to include one who levies under a writ of execution (postjudgment).

(2) The reference to UPC Section 1-107 has been replaced in subdivision (k) by a reference to the statutes of this state that make a death certificate or record or report prima facie evidence of death; the reference to "an original or attested or certified copy" has been added, consistent with the statutes referred to in subdivision (k).

(3) Subdivision (l) is new and is drawn from former Section 852 of the Financial Code.

## CHAPTER 2. GENERAL PROVISIONS

### Probate Code § 6201. Ownership as between parties and others; protection of financial institutions

6201. (a) The provisions of Chapter 3 (commencing with Section 6301) concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the

power of withdrawal of these persons as determined by the terms of account contracts.

(b) The provisions of Chapter 4 (commencing with Section 6401) govern the liability of financial institutions who make payments pursuant to that chapter and their set-off rights.

**Comment.** Section 6201 is the same in substance as Section 6-102 of the Uniform Probate Code.

Probate Code § 6202. Transfers in fraud of creditors

6202. Nothing in this part affects the law relating to transfers in fraud of creditors.

**Comment.** Section 6202 is included to make clear that nothing in this part supersedes the law relating to transfers in fraud of creditors.

Probate Code § 6203. Revenue and Taxation Code provisions not affected

6203. Nothing in this part affects or limits any provision of the Revenue and Taxation Code.

**Comment.** Section 6203 is included to make clear that this part has no effect on the provisions of the Revenue and Taxation Code.

**CHAPTER 3. OWNERSHIP BETWEEN PARTIES  
AND  
THEIR CREDITORS AND SUCCESSORS**

Probate Code § 6301. Ownership during lifetime

6301. (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his or her lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, during their lifetimes the account belongs to them in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a

trust account belongs beneficially to the trustee during his or her lifetime, and if two or more parties are named as trustee on the account, during their lifetimes the account belongs beneficially to them in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

**Comment.** Section 6301 is the same in substance as Section 6-103 of the Uniform Probate Code. The presumption under subdivision (a) that a joint account belongs to the parties during their lifetimes in proportion to the net contributions by each changes the rule under former law. Under former law, if the joint account provided for rights of survivorship, the account was presumed to be a joint tenancy and each joint tenant was presumed to have an equal interest in the account. *Wallace v. Riley*, 23 Cal. App.2d 654, 667, 74 P.2d 807 (1937).

Subdivision (b) is new; payable-on-death accounts were not authorized under former California law. See 1 W. Bowe & D. Parker, *Page on the Law of Wills* § 6.18, at 270-71 (3d ed. 1960).

The first sentence of subdivision (c) codifies the judicially-recognized rule that, in the case of a tentative or "Totten" trust, the depositor has unrestricted access to the funds on deposit during his or her lifetime. See 7 B. Witkin, *Summary of California Law Trusts* § 17, at 5379 (8th ed. 1974).

When a husband and wife are parties to a multiple-party account, their funds on deposit are presumed to be community property funds notwithstanding the form of the account. See Section 6305. Accordingly, unless the presumption is rebutted, during their lifetimes their interests are present, existing, and equal. See Civil Code § 5105.

#### **Probate Code § 6302. Right of survivorship**

6302. (a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 6301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his or her death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more original payees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole original payee or of the survivor of two or more original payees, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the original payee, (B) if two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a trust account:

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

**Comment.** Section 6302 is the same in substance as Section 6-104 of the Uniform Probate Code except that Section 6302 omits the UPC requirement that the intent that there be no rights of survivorship exist "at the time the account is created." Thus, under Section 6302 the intention to negate survivorship may be shown to have existed after the time of creation of the account, although the evidence must be clear and convincing.

Subdivision (a) of Section 6302 creates a right of survivorship in a joint account whether or not the account is described as a

"joint tenancy" or mentions any right of survivorship. See Section 6101 (d). The right of survivorship created by subdivision (a) may be rebutted by clear and convincing evidence of a different intention. This strengthens survivorship rights, since under prior law the presumption of survivorship arising from the joint tenancy form of the account could be overcome by a preponderance of the evidence. See *Schmedding v. Schmedding*, 240 Cal. App.2d 312, 315-16, 49 Cal. Rptr. 523 (1966) (presumption rebuttable); Evid. Code § 115 (except as otherwise provided by law, burden of proof requires preponderance of evidence); Comment to Evid. Code § 606 (ordinarily party against whom a rebuttable presumption operates must overcome the presumption by a preponderance of the evidence).

Paragraph (2) (B) of subdivision (b), and paragraph (2) (B) of subdivision (c), are clarifying provisions not found in the Uniform Probate Code. These provisions are drawn from the law of Maine. See Me. Rev. Stat. Tit. 18-A, § 6-104 (West 1981).

Community funds may be deposited in an account held jointly by one of the spouses and a third person, with the other spouse not being a party to the account. Also community funds may be deposited in an account by one spouse as a trustee for a beneficiary who is not the other spouse or in a P.O.D. account where the P.O.D. payee is not the other spouse. In any of these cases, upon the death of the spouse who is a party to the account, the non-party spouse may recover his or her half interest in the community funds in preference to the survivorship rights of the third person. See Section 201; *Mazman v. Brown*, 12 Cal. App.2d 272, 55 P.2d 539 (1936) (Probate Code Section 201 applies to nonprobate transfers with testamentary effect such as life insurance).

Even though the funds in a multiple-party account may be community funds under Section 6305, the financial institution may rely on the form of the account as a joint account, P.O.D. account, or trust account and may make payment pursuant to Chapter 4 (commencing with Section 6401), and is protected from liability in so doing. See Section 6405. The nature of the property rights in such funds is to be determined among the competing claimants, and the financial institution has no interest in this controversy. See Section 6201.

Subdivision (b) is new; payable-on-death accounts were not authorized under former California law. See 1 W. Bowe & D. Parker, *Page on the Law of Wills* § 6.18, at 270-71 (3d ed. 1960).

Subdivision (c) codifies the judicially-recognized rule that, in the case of a tentative or "Totten" trust, the sums on deposit vest in the designated beneficiary on the death of the trustee. See 7 B. Witkin, *Summary of California Law Trusts* § 17, at 5379 (8th ed. 1974). However, subdivision (c) strengthens the rights of the beneficiary by permitting the trust to be attacked only by "clear and convincing" evidence that survivorship was not intended. Under prior California law, a tentative or "Totten" trust could be defeated by circumstantial and often flimsy evidence, making its use unreliable. *Id.* § 18, at 5381-82.

Subdivision (e) changes the rule applicable to a tentative or "Totten" trust under prior California law by preventing revocation or modification of the trust by will. See *Brucks v. Home Fed. Sav. & Loan Ass'n*, 36 Cal.2d 845, 852-53, 228 P.2d 545 (1951) (testamentary plan wholly inconsistent with terms of tentative trust revokes the trust).

Nothing in Section 6302 prevents the court, for example, from enforcing a promise by the surviving beneficiary to share the account funds with someone else. *Cf. Jarkieh v. Badagliacco*, 75 Cal. App.2d 505, 170 P.2d 994 (1946).

### **Probate Code § 6303. Change in terms of account**

6303. (a) The provisions of Section 6302 as to rights of survivorship are determined by the form of the account at the death of a party.

(b) Once established, the terms of a multiple-party account can be changed only by any of the following methods:

(1) Closing the account and reopening it under different terms.

(2) Presenting to the financial institution a modification agreement in a form satisfactory to the financial institution which is signed by all parties with a present right of withdrawal.

(3) If the provisions of the terms of the account or deposit agreement provide a method of modification of the terms of the account, complying with those provisions.

**Comment.** Subdivision (a) of Section 6303 is the same as the first sentence of Section 6-105 of the Uniform Probate Code.

Subdivision (b) is substituted for the remainder of the Uniform Probate Code Section and is drawn from Georgia law. See Ga. Code Ann. § 41A-3805 (Harrison Supp. 1981).

Section 6303 does not affect the presumption established by Section 6305 (funds of married persons who are parties to joint account presumed to be community property). See also Section 6405 (notice to financial institution from party that withdrawals should not be permitted).

### **Probate Code § 6304. Transfers nontestamentary**

6304. Any transfers resulting from the application of Section 6302 are effective by reason of the account contracts involved and this division and are not to be considered as testamentary. The right under this part of a surviving party to a joint account, or of a beneficiary, or of a P.O.D. payee, to the sums on deposit on the death of a party to a

multiple-party account shall not be denied, abridged, or affected because such right has not been created by a writing executed in accordance with the laws of this state prescribing the requirements to effect a valid testamentary disposition of property.

**Comment.** The first sentence of Section 6304 is the same as the first portion of Section 6-106 of the Uniform Probate Code. The remainder of the Uniform Probate Code section is omitted. The second sentence of Section 6106 is drawn from the New Jersey law. See N.J. Stat. Ann. § 17:16I-14 (West Supp. 1981). The purpose of Section 6304 is to make clear that the effectiveness of transfers under this part is not to be determined by the requirements for a will.

A transfer under this part is effective by reason of the provisions of this part and the terms of the account or deposit agreement. This transfer avoids the need for a probate proceeding to accomplish a transfer. However, the transfer does not affect rights otherwise provided by law. Also, for example, Section 6304 has no effect on a surviving spouse's right to his or her share of community funds deposited in a multiple-party account under which a third person has a survivorship right upon the death of the other spouse. See the Comment to Section 6302.

**Probate Code § 6305. Presumption that sums on deposit are community property**

**6305.** (a) Notwithstanding Sections 6301 to 6303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

(b) The presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit which are claimed to be separate property can be traced from separate property unless it is proved that the married persons made an agreement which expressed their clear intent that such sums be their community property.

(2) The married persons made an agreement, separate from the deposit agreement, which expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

(c) Notwithstanding subdivision (a), a right of survivorship arising from the express terms of the account or under Section 6302, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

(d) Except as provided in subdivision (c), a multiple-party account created with community property funds does not in any way alter community property rights.

**Comment.** Section 6305 is a new provision; there is no comparable provision in the Uniform Probate Code.

Section 6305 applies to all "accounts" (defined in subdivision (a) of Section 6101), not just "multiple-party accounts" (defined in subdivision (e) of Section 6101). Thus, the presumption of community property applies, for example, to a husband and wife who have funds on deposit in a partnership account.

Section 6305 does not affect or limit the right of the financial institution to make payments pursuant to Sections 6401-6408 and the deposit agreement. See Section 6201. For this reason, Section 6305 does not affect the definiteness and certainty that the financial institution must have in order to be induced to make payments from the account and, at the same time, the section preserves the rights of the parties, creditors, and successors that arise out of the nature of the funds—community or separate—in the account.

With respect to the spouses and those claiming under them, Section 6305 reverses the presumption under former law that community funds deposited into a joint account with right of survivorship are presumed to be converted into true joint tenancy funds and to lose their character as community property. See *In re McCoin*, 9 Cal. App.2d 480, 50 P.2d 114 (1935). See also Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87, 91-93 (1961). The former presumption was inconsistent with the general belief of married persons. Married persons generally believe that community funds deposited in a joint tenancy account remain community property. See Griffith, *supra* at 90, 95, 106-109. The presumption created by Section 6305 is consistent with this general belief.

The presumption created by Section 6305 is one affecting the burden of proof. See also Evid. Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact"). This requires proof that the funds of married persons in a joint account are not community property. Subdivision (b) of Section 6305 specifies the proof that must be made to rebut the presumption that the property is community property.

Paragraph (1) of subdivision (b) specifies one of the two methods of rebutting the presumption—the source-of-funds or tracing rule. If the person having the burden of proof can trace separate funds into a joint account, the presumption of community property is overcome and the funds retain their separate character. If separate funds have been commingled with community funds but remain ascertainable or traceable into a proportionate share of the account, the funds retain their separate character. On the other hand, if separate and community funds are so commingled that the party having the burden of proving that the funds are separate cannot meet that burden, then the entire account is treated as community property. See generally 7 B. Witkin, *Summary of California Law Community Property* §§ 33-34, at 5126-28 (8th ed. 1974). Even though the separate funds can still be traced, nothing prevents

the married persons from making an agreement that expresses their clear intent that the funds be community property. If the person claiming that such an agreement was made proves that fact by a preponderance of the evidence, the agreement is given effect as provided in the last clause of paragraph (1).

Paragraph (2) of subdivision (b) specifies the other method by which the presumption may be rebutted: The spouses may expressly agree that the sums on deposit are not community property. But lay persons often do not understand the detailed provisions of the deposit agreement, and those provisions may not reflect the intent of the spouses as to the character of the property in the joint account. For this reason, paragraph (2) provides that the character of the property as community property is not changed unless there is an agreement—*separate from the deposit agreement*—expressly providing, for example, that the sums on deposit are not community property or that such sums are the separate property of one or both of the spouses. This scheme gives the spouses the necessary flexibility to change the character of the property where that is their intention but, at the same time, protects the spouses against unintentionally changing community property into separate property merely by signing a deposit agreement that would have that unintended effect.

The presumption created by Section 6305 does not affect the provisions of Sections 6302, 6402, and 6405 that permit prompt payment of the sums on deposit in a joint account to the surviving spouse. The prompt payment provisions are most useful where the estate is small and payment to the surviving spouse will avoid the expense and delay of probate. Yet, because the presumption created by Section 6305 governs the rights between the spouses and their successors, claimants who wish to show that the funds are community funds will find it easier to do so.

In the case of dissolution of the marriage, the community property sums on deposit in the joint account are subject to division by the court. Civil Code § 4800. By way of contrast, a true joint tenancy account is ordinarily not subject to division on dissolution of marriage because the sums on deposit are separate property of the spouses. *Cf. Walker v. Walker*, 108 Cal. App.2d 605, 608, 239 P.2d 106 (1952) (real property). An attempted gift or other disposition of community sums on deposit without valuable consideration and without the consent of the other spouse may be set aside. Civil Code § 5125(b).

Community property funds on deposit in a multiple-party account are not subject to testamentary disposition by the deceased depositor. See subdivision (c). This is consistent with the general Uniform Probate Code rule stated in subdivision (e) of Section 6302. If a right to dispose of community property in a multiple-party account by will is desired to be retained, that objective can be accomplished by the two spouses establishing a joint account with the express provision that no right of survivorship arises upon the death of one of the spouses.

**Probate Code § 6306. Transitional provision**

6306. For the purposes of this chapter, if a joint account was established before July 1, 1984, and the account was established as a "tenancy in common" account, no right of survivorship arises from the terms of the account or under Section 6302.

**Comment.** Section 6306 is new; there is no comparable provision in the Uniform Probate Code. Section 6306 is to preserve the effect of a tenancy in common account established under prior law. As to accounts established after the operative date of this part, the form of the account should specifically provide that it is a nonsurvivorship account if that is the intent of the depositor. See Section 6302(a) (clear and convincing evidence of intent that account be a nonsurvivorship account required).

**CHAPTER 4. PROTECTION OF FINANCIAL INSTITUTION**

**Probate Code § 6401. Establishment of and payment from multiple-party accounts; inquiry not required to establish net contributions**

6401. (a) Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request and according to its terms, to any one or more of the parties.

(b) The terms of the account or deposit agreement may require the signatures of more than one of the parties to a multiple-party account during their lifetimes or of more than one of the survivors after the death of any one of them on any check, check endorsement, receipt, notice of withdrawal, request for withdrawal, or withdrawal order. In such case, the financial institution shall pay the sums on deposit only in accordance with such terms, but those terms do not limit the right of the sole survivor or of all of the survivors to receive the sums on deposit.

(c) A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

**Comment.** Subdivision (a) of Section 6401 is the same as the first two sentences of Section 6-108 of the Uniform Probate Code with the addition of the clarifying phrase "and according to its terms."

Subdivision (b) is not contained in the Uniform Probate Code. It continues the substance of provisions of former Financial Code Section 852 (third sentence) (banks), Section 7603 (second sentence) (savings and loan associations), Section 11204 (third sentence) (federal savings and loan associations), and Section 14854 (second sentence) (credit unions).

Subdivision (c) is the same as the last sentence of Section 6-108 of the Uniform Probate Code.

#### **Probate Code § 6402. Payment of joint account**

6402. Any sums in a joint account may be paid, on request and according to its terms, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under Section 6302.

**Comment.** Section 6402 is the same in substance as Section 6-109 of the Uniform Probate Code. The requirements of Revenue and Taxation Code Section 14345 (inheritance tax) must also be satisfied if payment is to be made after the death of a party. See Section 6203.

#### **Probate Code § 6403. Payment of P.O.D. account**

6403. Any P.O.D. account may be paid, on request and according to its terms, to any original party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that the deceased original payee was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

**Comment.** Section 6403 is the same in substance as Section 6-110 of the Uniform Probate Code. See also Section 6203 (inheritance tax law requirements must be satisfied if payment is to be made after death of a party).

#### Probate Code § 6404. Payment of trust account

6404. Any trust account may be paid, on request and according to its terms, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his or her surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that the deceased trustee was the survivor of all other persons named on the account either as trustee or beneficiary. A trust account may be paid to a beneficiary or beneficiaries or the personal representative or heirs of a beneficiary or beneficiaries if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as trustees.

Comment. Section 6404 is the same in substance as Section 6-111 of the Uniform Probate Code. See also Section 6203 (inheritance tax law requirements must be satisfied if payment is to be made after death of a party).

#### Probate Code § 6405. Payment as discharge

6405. (a) Payment made pursuant to Section 6401, 6402, 6403, or 6404 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors.

(b) Unless the notice is withdrawn, the protection provided by subdivision (a) does not extend to payments made after the financial institution has received written notice from any party that withdrawals in accordance with the terms of the account should not be permitted. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided by subdivision (a).

(c) After receipt of the written notice referred to in subdivision (b), the financial institution may refuse, without liability, to pay any sums on deposit pending determination of the rights of the parties or their successors.

(d) The protection provided by this section has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party

accounts and is in addition to, and not exclusive of, any protection provided the financial institution by any other provision of law.

**Comment.** Section 6405 is drawn in part from Section 6-112 of the Uniform Probate Code. Subdivision (a) is the same in substance as a portion of the Uniform Probate Code section. Subdivision (b) is similar to the comparable portion of the Uniform Probate Code section, but subdivision (b) permits any party to stop withdrawals from the account. Subdivision (c) continues the substance of the fifth sentence of former Section 852 of the Financial Code and the fourth sentence of former Section 7603 of the Financial Code. Subdivision (d) is the same in substance as the comparable portion of the Uniform Probate Code section.

#### **Probate Code § 6406. Set-off**

**6406.** Unless such right is restricted by the account contract, if a party to a multiple-party account is indebted to a financial institution, the financial institution has, to the extent otherwise permitted under applicable law, a right to set-off against the account in which the party has or had immediately before his or her death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his or her death, beneficially entitled, and in the absence of proof of net contributions, is an equal share with all parties having present rights of withdrawal. Nothing in this section limits any right the financial institution may have under any other law.

**Comment.** Section 6406 is drawn from Section 6-113 of the Uniform Probate Code. Unlike the Uniform Probate Code provision, Section 6406 does not give a financial institution a right of set-off it did not have under prior law. Rather Section 6406 incorporates existing law with respect to set-off. See Fin. Code §§ 864 (bank set-off), 7609.5 (savings and loan association set-off); *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 357, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (right of set-off is "based upon general principles of equity").

Probate Code § 6407. Payment of account held in trust form where financial institution has no notice that account is not a "trust account"

6407. The provisions of this chapter that apply to the payment of a trust account apply to an account in the name of one or more parties as trustee for one or more other persons if the financial institution has no other or further notice that the account is not a trust account as defined in Section 6101.

Comment. Section 6407 continues the substance of former Section 853 of the Financial Code which applied to banks, but extends the former provision to apply to all financial institutions (defined in Section 6101), including banks, savings and loan associations, and credit unions, except that the provision of former Section 853 concerning payment to a minor is superseded by Section 6408.

Section 6407 permits a financial institution to treat an account in trust form as a trust account (defined in Section 6101) if it is unknown to the financial institution that the funds on deposit are subject to a trust created other than by the deposit of the funds in the account in trust form. If the financial institution does not have the additional information, the financial institution is protected from liability if it pays the account as provided in this chapter. See Section 6405. However, Section 6407 does not affect the rights as between the parties to the account, the beneficiary, or their successors. See Sections 6201, 6301(c), and 6302(c).

Probate Code § 6408. Payment to minor

6408. If a financial institution is required or permitted to make payment pursuant to this chapter to a person who is a minor:

(a) If the minor is a party to a multiple-party account, payment may be made to the minor or to the minor's order, and payment so made is a valid release and discharge of the financial institution, but this subdivision does not apply if the account is to be paid to the minor because the minor was designated as a P.O.D. payee or as a beneficiary of a trust account.

(b) In cases where subdivision (a) does not apply, payment shall be made as provided in Chapter 2 (commencing with Section 3400) of Part 8 of Division 4.

Comment. Section 6408 is new; there is no comparable provision in Article VI of the Uniform Probate Code. Subdivision (a) of Section 6408 is consistent with Section 850 of the Financial Code but applies to all financial institutions, not merely banks. Subdivision (b) supersedes the last portion of former Section 853 of the Financial Code (direct payment to minor beneficiary permitted on death of trustee), and substitutes the protective provisions of Sections 3400-3413 of the Probate Code.

## PART 2. DISPOSITIVE PROVISIONS IN WRITTEN INSTRUMENTS

### Probate Code § 6501. Dispositive provisions in written instruments

6501. (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension or profit-sharing plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is not invalid because the instrument is not executed with the formalities of a will, and this code does not invalidate the instrument or any of the following provisions:

(1) That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his or her death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(2) That any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.

**Comment.** Section 6501 is the same in substance as Section 6-201 of the Uniform Probate Code. The Uniform Probate Code language that the provisions referred to in this section are "deemed to be nontestamentary" has been replaced by the language making them "not invalid because the instrument is not executed with the formalities of a will." See generally 7 B. Witkin, *Summary of California Law Wills and Probate* § 113, at 5628 (8th ed. 1974). This change is nonsubstantive.

Paragraphs (1) and (3) of subdivision (a) may expand California law with respect to the kinds of transfers on death which are valid. For example, although the question has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to Uniform Probate Code Section 6-201. However, a contractual provision has been upheld that should the owner of a business predecease the manager, the manager would receive the

business, on the theory that it was additional compensation to the manager and could not be severed from the remainder of the agreement. Estate of Howe, 31 Cal.2d 395, 189 P.2d 5 (1948). Also, the payment of employee death benefits to a designated beneficiary has long been statutorily recognized in California. See, e.g., Gov't Code §§ 21332-21335 (public employees' death benefits). See also Civil Code § 704 (payable-on-death designations in United States bonds and obligations).

Paragraph (2) codifies California case law. See Bergman v. Ornbaun, 33 Cal. App.2d 680, 92 P.2d 654 (1939) (unpaid installments under promissory note cancelled on death of promisee). See generally 7 B. Witkin, Summary of California Law *Wills and Probate* §§ 87-89, at 5607-09 (8th ed. 1974).

### Duty of financial institutions

**SEC. 17.** A financial institution has no duty to inform depositors holding accounts on the operative date of Part 1 (commencing with Section 6100) of Division 5 of the Probate Code of the enactment of this act, and no liability shall be imposed if the financial institution fails to inform such depositors of the enactment of that part.

**Comment.** Section 17 is designed to avoid any expense to financial institutions of advising existing depositors concerning the enactment of this act.

### **Operative date**

**SEC. 18.** Sections 6100 to 6408, inclusive, which are added to the Probate Code by this act shall become operative on July 1, 1984, and shall apply to accounts in existence on that date and accounts thereafter established.

**Comment.** Section 18 is drafted on the assumption that this act will become effective on January 1, 1984. The operative date is delayed until July 1, 1984, so that financial institutions will have time to take any necessary action to operate under the provisions of the act and so persons who have accounts in existence on the effective date (January 1, 1984) will have time to make any changes in the deposit agreement that they believe are desirable in view of the enactment of this act.