

Memorandum 89-51

Subject: Study L-608 - Will Depositaries

The main policy questions presented by this Memorandum are:

(1) Are more detailed rules than are now in the Civil Code needed to govern handling and disposition of wills, trusts, and other estate planning documents by depositaries?

(2) Should the California Secretary of State be the depositary of last resort for wills, trusts, and other estate planning documents when the testator or settlor cannot be found?

(3) Should financial institutions be required to permit access to decedent's safe deposit box to a family member who has a key, presents a death certificate, and establishes his or her identity?

BACKGROUND

Wills and other estate planning documents are often left with the attorney who drafted the document or, when a bank or trust company is named as executor, with the bank or trust company. See California Will Drafting Practice § 2.25, at 62-63 (Cal. Cont. Ed. Bar 1982). This creates a bailment (8 Am. Jur.2d *Bailments* § 4 (1980)) governed by Sections 1813-1858.3 of the Civil Code (attached as Exhibit 5). A bailee must return property deposited on demand. Civ. Code §§ 1817, 1822. A bailee may not turn the property over to someone else without consent of the bailor.

Under the Civil Code, if the bailor cannot be found, the attorney, bank, or trust company having custody of a will must continue to hold it indefinitely. This is true for an attorney even after retirement. The Resolutions Committee of the State Bar Conference of Delegates has called this "one of the more troubling aspects of an estate planning practice."

According to the trust department of Wells Fargo Bank, there are hundreds of thousands of wills in the custody of banks and trust companies, some going back to the early part of this century. Agents who represent athletes and entertainment figures may keep wills among the client's personal papers.

## STATE BAR CONFERENCE OF DELEGATES PROPOSAL

In 1988, the State Bar Conference of Delegates approved a proposal to permit depositaries of estate planning documents to deliver the document to the California Secretary of State (1) if the depositary has held the document for more than 20 years without any communication from the depositor or (2) if the depositor would be at least 100 years of age. Assembly Member Isenberg, Chairman of the Assembly Judiciary Committee, and Assembly Member Friedman, author of several Commission probate bills, asked the Commission to study the proposal.

Exhibit 4 is the Conference of Delegates proposal revised by the Commission's staff. The revised proposal has the following features:

(1) The depositary must keep the document in a secure place. Proposed Section 720.

(2) The depositary must use ordinary care for preservation of the document, whether or not consideration is paid. Proposed Section 721. (Under Section 1846 of the Civil Code, a gratuitous depositary need only use slight care.)

(3) The depositary is not liable for loss or destruction of a document if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document. Proposed Section 721. (There is no comparable provision in the Civil Code.)

(4) The depositor need not compensate the depositary unless so provided in a written agreement. Proposed Section 724.

(5) The depositary has no lien on the document, even if provided by agreement. Proposed Section 725. (This is contrary to Section 1856 of the Civil Code, which allows a lien for costs.)

(6) A depositor may terminate a deposit on demand, and the depositary must deliver the document to the depositor. Proposed Section 730. (This is consistent with Section 1822 of the Civil Code, except that no lien is permitted.)

(7) A depositary may terminate a deposit by personal delivery of the document to the depositor, by transferring the document to another depositary and notifying the Secretary of State of the transfer, or by such method as may be agreed between the depositor and depositary. Proposed Section 732.

(8) After the depositor's death, the depositary may terminate the

deposit by delivering the document to the depositor's personal representative or trustee, or to the court clerk. Proposed Section 733.

(9) The depositary may deliver the document to the Secretary of State if the depositary has held the document for more than 20 years without any communication from the depositor or if the depositor would be at least 100 years of age, and the depositary has mailed a notice to the depositor's last-known address and has had no response for at least 30 days. Proposed Section 734. (This is not authorized under the Civil Code.)

(10) A person who establishes the death of the depositor may obtain a certified copy of the document from the Secretary of State. In other cases, an interested person may petition for a court order that the Secretary of State deliver the document to the petitioner. Proposed Sections 735-736.

(11) The Secretary of State may destroy a document if all depositaries have held the document for more than 50 years without any communication from the depositor, or the depositor would be more than 150 years of age. Proposed Section 735.

Attorney May Accept Document for Deposit Only on Specific Unsolicited Request of Depositor

Proposed Section 710 in the staff draft provides that an attorney may accept a document for deposit from a depositor with whom the attorney has no family or prior professional relationship only if the depositor has made a specific unsolicited request that the attorney do so. A CEB publication suggests that it may be solicitation for the attorney to ask the testator to leave the original will with the attorney:

There is considerable controversy about this: One state supreme court held this was equivalent to taking unfair advantage of a client or, at the least, solicitation. Also, how does the attorney keep track of clients who moved and did not notify the attorney of the new address? What is the responsibility and the liability of the attorney for not keeping track of the clients whose wills the attorney keeps? Was there an implied contract not only to keep track of the client but to notify the client of all changes in the law necessary to keep the will current? These are unpleasant questions most attorneys do not want to ask.

Kellogg, Managing An Estate Planning Practice, Client Communication and

Automatic Drafting § 6.4, at 213 (Cal. Cont. Ed. Bar, 3d ed. 1978).

The case referred to above is *State v. Gulbankian*, 54 Wis. 2d 605, 196 N.W.2d 733, 57 A.L.R.3d 696 (1972). In that case, the Wisconsin Supreme Court said:

Nor do we approve of attorneys' "safekeeping" wills. In the old days this may have been explained on the ground many people did not have a safe place to keep their valuable papers, but there is little justification today because most people do have safekeeping boxes, and if not, sec. 853.09, Stats., provides for the deposit of a will with the register in probate for safekeeping during the lifetime of the testator. The correct practice is that the original will should be delivered to the testator and should only be kept by the attorney upon specific unsolicited request of the client.

The rules against solicitation have been eroded by U. S. Supreme Court decisions holding that the First Amendment affords some protection to attorney advertising. See 1 B. Witkin, *California Procedure Attorneys* §§ 421-424, at 472-75 (3d ed. 1985). However, the Supreme Court noted that restraints on in-person solicitation are not precluded. *Id.* § 421, at 472.

The California State Bar Rules of Professional Conduct have been revised in light of recent U. S. Supreme Court decisions. *Id.* § 422, at 473. Rule 1-400 defines "solicitation" as a communication concerning an attorney's availability for professional employment "in which a significant motive is pecuniary gain" and which is "delivered in person or by telephone," and provides:

A solicitation shall not be made . . . to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgement by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

Proposed Section 710 is consistent with the Wisconsin case and with Rule 1-400.

#### Other Provisions Concerning Custody of Wills

In addition to the Civil Code provisions on bailments attached as Exhibit 5, there are a number of statutes and rules in California concerning the duty of a custodian of a will:

(1) Probate Code Section 8200 requires a custodian of a will who learns of the testator's death to deliver the will to the clerk of the proper court within 30 days. Under Section 8200, a custodian who fails to comply is "liable for all damages sustained by any person injured by the failure."

(2) Business and Professions Code Sections 6180-6180.14 deal with an attorney going out of practice: If a practicing attorney dies, resigns, becomes inactive, or is disbarred, notice must be given to all clients and others who have reason to be informed. *Id.* §§ 6180, 6180.1. The court may take control of the attorney's practice and appoint another attorney to deliver the client's papers. *Id.* § 6180.5.

(3) The Rules of Professional Conduct require members of the State Bar promptly to "deliver, as requested by the client . . . properties in the possession of the member which the client is entitled to receive." California Rules of Professional Conduct, Rule 4-100(B)(4).

#### Views of Probate Bar

When the proposal was being considered by the Conference of Delegates, both the Estate Planning, Trust, and Probate Law Section of the State Bar and the Beverly Hills Bar Association opposed it, saying it is burdensome and would delay probate and impose costs by requiring a search of the Secretary of State's files. This point may be well taken. If wills are filed with the Secretary of State, it seems likely that estate attorneys will have to check with the Secretary of State to determine whether there may be a will of the decedent on file.

Now the probate bar is more supportive of the proposal. Attorney Herbert Graham advises that the Legislative Committee of the Probate, Estate Planning and Trust Section of the Beverly Hills Bar Association supports the proposal in concept. His letter (Exhibit 1, attached) has specific comments which we have tried to deal with in the staff draft.

Attorney Richard Stack, writing for the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 2, attached), reports that a subcommittee of his Executive Committee drafted the original proposal, and that his Executive Committee still supports it. He thinks "few documents will end up being deposited with the Secretary of State." He believes most documents will be transferred from one depository to another, such as

from one lawyer or law firm to another. He also raises specific problems which we have tried to deal with in the staff draft.

The State Bar has informed the staff informally that they support the proposal and will send comments before the meeting.

#### Notice of Will Proposal Defeated in 1984

A related proposal of the Commission was defeated a few years ago: In 1983, the Commission recommended a voluntary system for filing with the Secretary of State a notice of the existence and location of a will. This recommendation was opposed by the State Bar Probate Section for the same reasons it originally opposed the will depositary proposal -- cost and delay. In 1984, the bill passed the Assembly, but was defeated in the Senate Judiciary Committee. The Commission has not renewed this recommendation.

#### ACCESS TO SAFE DEPOSIT BOX ON DEPOSITOR'S DEATH

Exhibit 3 is a letter from Kenneth Klug concerning the duty of a financial institution to permit access to a safe deposit box on the depositor's death. Most financial institutions apparently permit the attorney and a member of the surviving family to get access to the safe deposit box to remove a will or burial instructions, if the person has a key and a death certificate. See Gould, *First Steps in Handling a Decedent's Estate*, in 1 California Decedent Estate Practice § 2.25 (Cal. Cont. Ed. Bar, Feb. 1989). See also Kellogg, *supra* (executor, surviving spouse, or close relative may ask bank to open safe deposit box to remove will). However, at least one financial institution (Guaranty Savings) has refused access to a safe deposit box until after letters were issued.

Mr. Klug wants "to require the bank or safe deposit company to search for a Will or burial instructions upon request by an interested person after the death of the renter, and to require that the bank or safe deposit company deliver the Will to the clerk of the court." The problem with this is that the financial institution does not keep a key to the safe deposit box, and so cannot examine its contents without drilling the box.

The practice of financial institutions to permit a family member with a key and a death certificate to have access to decedent's safe deposit box to remove a will or burial instructions seems sound.

Former Section 14344 of the Revenue and Taxation Code allowed removal of a will or burial instructions, and the practice is consistent with the provision just enacted on Commission recommendation to permit a public administrator, government official, law enforcement agency, hospital, or decedent's employer to deliver decedent's personal property to decedent's surviving spouse, relative, or conservator, without waiting 40 days after death. However, a person without a key who wants access to decedent's safe deposit box should be viewed with caution, since this is an opportunity for fraud.

Should financial institutions be required to permit access to decedent's safe deposit box to a family member with a key on presenting a death certificate and establishing his or her identity? This could be accomplished by the following section:

Probate Code § 331 (added). Access to safe deposit box

331. (a) A safe deposit company or trust company shall permit the decedent's surviving spouse, issue, parent, brother, or sister to have access to the decedent's safe deposit box to remove a will or burial instructions if the person seeking access has a key to the safe deposit box and furnishes an affidavit or declaration under penalty of perjury with a certified copy of the decedent's death certificate attached and stating all of the following:

- (1) The decedent's name.
- (2) The date and place of the decedent's death.
- (3) The relationship to the decedent of the person seeking access.
- (4) Reasonable proof of the identity of the person seeking access. Reasonable proof of identity is provided for the purpose of this subdivision if the requirements of Section 13104 are satisfied.

(b) The safe deposit company or trust company may rely in good faith on the statements in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

Comment. Section 331 is new, and permits near relatives of the decedent to gain access to the decedent's safe deposit box to remove a will or burial instructions. Section 331 is consistent with former Section 14344 of the Revenue and Taxation Code (repealed by 1980 Cal. Stat. ch. 634).

A danger in enacting a section like this is that it may change the present informal practice of allowing decedent's family members to gain access to decedent's safe deposit box: Financial institutions may insist on an affidavit. If so, this section may be undesirable. Also,

the requirement that only a will or burial instructions may be removed requires the financial institution to supervise the opening of the box, but this may not pose an insurmountable obstacle, since that practice was authorized under former Section 14344 of the Revenue and Taxation Code.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

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June 2, 1989

CA LAW REV. COMM'N

JUN 06 1989

RECEIVED

Nathanial Sterling  
 Assistant Executive Secretary  
 California Law Revision Committee  
 4000 Middlefield Road  
 Suite D-2  
 Palo Alto, California 94303-4739

Re: Deposit of Wills and other documents

Dear Mr. Sterling:

The Beverly Hills Bar Association Legislative Committee of the Probate, Estate Planning and Trust Section, has reviewed the draft of Will Depository provisions which you forwarded to us on April 18, 1989 and have the following suggestions and comments:

Section 721(c) as stated, provides that " the depository has no duty to seek information as to whether a conservatorship has been created for a depositor." Inasmuch as no other asset of a conservatee may be transferred without presentation of Letters of Conservatorship, we do not believe it would be an excessive burden to require the conservator to present that document to the Depository before terminating a deposit. There is certainly the possibility that the wishes of the conservatee will be thwarted if an improper person gains custody of the Will.

Section 723 (c) - The purpose of this Section is unclear to us. If the Will is in the depositor's safe deposit box, then no other individual would seem to be the depository as defined in Section 702. Since the definition in Section 702 appears to infer only to natural persons, a bank or safe deposit company cannot be the depository. Even if the depository were a bank this entity would not wish to retain the document in the safe deposit box without receiving payment thereafter.

LAW OFFICES

GRAHAM & MITZENMACHER  
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Nathaniel Sterling  
May 22, 1989  
Page two

Section 723 (d) - In the third line of this Section there is a typographical error. The word "of" probably should be "or".

Cordially,

GRAHAM & MITZENMACHER



Herbert Graham

HG/mm



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# Probate and Trust Law

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June 14, 1989

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Assistant Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: **Proposed Legislation Concerning  
Deposit of Wills and Other Documents**

Dear Nat:

I am writing to you on behalf of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association in response to your April 18, 1989 letter soliciting comments on the proposed legislation concerning the deposit of wills and other documents. The original version of the proposal was drafted in 1986-87 by a subcommittee of our Executive Committee in response to a problem presented to us by a local magistrate. The magistrate's former law firm had dissolved and turned over to him original documents, including wills, of his former clients. The magistrate asked the Executive Committee for suggestions as to what he should do.

In the course of preparing a response, our subcommittee found that existing law does not provide an answer to the magistrate's question. The Civil Code sections dealing with bailments provide the only potentially applicable statutory law. Being aware of other lawyers and law firms retiring or terminating their practices, we decided it would be useful to have specific statutory language addressing this concern as to estate planning documents.

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We attempted to draft a straight-forward set of provisions to answer questions associated with the depositor-depository relationship. You will note that several provisions are drawn from the bailor-bailee sections, modified to apply more aptly to a depositor-depository relationship. Building from that foundation, the proposal deals with the applicable standard of care, the liability on transfers, the depository's duty of notification, the preservation of the attorney-client privilege, and other concerns.

The proposal attempts to handle several special problems unique to wills and other testamentary documents. For example, Section 712(b) provides that the depository is not liable for loss and has a reasonable opportunity to replace the document, thereby creating a specific mitigation rule especially appropriate for estate planning documents.

The heart of the proposal is Chapter 3, which addresses the magistrate's dilemma by providing alternatives for handling the termination of the deposit. It is our expectation that under these provisions few documents will end up being deposited with the Secretary of State. Rather, we believe these provisions will facilitate the transfer of these documents from one depository to another, such as from one lawyer to another or from one law firm to another.

In again reviewing this legislation we noted two items that should be considered by the Commission. First, it may be appropriate also to amend the conservatorship laws to grant authority to a conservator to terminate a deposit as provided in Section 721(c). Second, Section 721(e)(2) perhaps should be revised to refer to the court that "then has jurisdiction or would have jurisdiction upon the filing of a proceeding."

June 14, 1989  
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We continue to support the proposed legislation and believe it provides the right answers and clarification for dealing with a practical problem we expect to be seeing with increasing frequency.

Sincerely,  


Richard L. Stack  
Chairman

RLS:lgc

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March 15, 1989

CA LAW REV. COMM'N

MAR 20 1989

RECEIVED

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Suite D-2  
4000 Middlefield Road  
Palo Alto, California 94303-4739

Dear John:

Enclosed please find a copy of a letter to me from Jill Spaulding, a Fresno attorney, raising what appears to be a very serious problem where a decedent's Will is located in a safe deposit box. Prior to the repeal of the inheritance tax, Revenue and Taxation Code Section 14344 was cited as the authority for removal of a Will or burial instructions.

Existing Probate Code Section 320 and new Probate Code Section 8200 both provide penalties where a custodian of a Will fails to deliver the Will to the court clerk within 30 days after knowledge of the death of the testator. It is not at all clear that a bank or safe deposit company is a "custodian" within the meaning of those sections.

Financial Code Sections 1660 et. seq. provide for a means by which bank officers can inventory (and ultimately dispose of) the contents of a safe deposit box for non-payment of rent. Financial Code Section 1662.5 allows an heir or beneficiary of a deceased renter to obtain a copy of the inventory. In view of those provisions, it would not seem unreasonable to expand Section 8200 to require the bank or safe deposit company to search for a Will or burial instructions upon request by an interested person after the death of the renter, and to require that the bank or safe deposit company deliver the Will to the clerk of the court.

The problem may become more acute because the practice seems to be evolving for the testators (rather than

Mr. John H. DeMouilly  
March 15, 1989  
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the attorneys) to retain custody of original Wills. If safe deposit box storage of Wills creates the problems Jill Spaulding apparently encountered, we may find evolution reversing itself. In any event, it would appear counter-productive to require that letters be obtained before a search for a Will could be made.

Is it too late to deal with this problem by urgency legislation before Section 8200 becomes operative?

Very truly yours,



Kenneth M. Klug

Enclosure

cc: Ms. Jill Spaulding

TO . KEN KLUG

FROM JILL SPAULDING

SUBJECT Possible new probate code section?

DATE 3 / 10 / 89

**MESSAGE**

Dear Ken,

I recently ran across a problem you may find interesting. A person who held a safe deposit box in his name alone died, and Guarantee Savings refused access to the box in order to search for a will until after Letters had been issued. We have looked everywhere for statutory authority to enter the box for this purpose, and could find none. Even the researchers at Bancroft Whitney (who offer a service of updating the Witkin volumes on Calif. law to subscribers with questions like this) could not find any authority. Yet everyone (except Guarantee Savings) agrees that this is (or should be?) permissible. The closest authority is Probate Code Section 320, which is indirect at best. Section 1141 only applies to Public Administrators. Yet Dennis Gould, in Section 2.25 of Calif. Decedent Estate Practice (CEB) flatly states access can be gained to look for a will or burial instructions, but he cites no authority. Unless we have all missed some obscure code section somewhere, it would seem that there is a void here that needs to be filled. Can you suggest someone

I should write to to point this out? Thanks. SIGNED

REDIFORM 45 468  
POLY PAK (50 SETS) 4P468

NO REPLY NECESSARY

REPLY REQUESTED - USE REVERSE SIDE

Exhibit 4

Staff Draft

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

Gov't Code § 12217 (added). Fees in connection with estate planning documents

SECTION 1. Section 12217 is added to the Government Code to read:

12217. (a) The fee for filing a document under Section 734 of the Probate Code is twenty dollars (\$20).

(b) The fee for a certificate that no document is on file is ten dollars (\$10).

(c) The fee for filing a notice of transfer of a document from one depository to another under Section 732 of the Probate Code is one dollar (\$1).

(d) The fee for a certificate that a document has been transferred from one depository to another under Section 732 of the Probate Code is ten dollars (\$10).

Comment. Section 12217 is added to provide a fee for filing a document, and for a certificate that no document is on file, as provided in Section 735 of the Probate Code. The fee for a copy of a document on file with the Secretary of State is one dollar for the first page and fifty cents for each page thereafter. Gov't Code § 12184.

Prob. Code §§ 700-737 (added). Deposit of wills and other documents

SEC. 2. Part 14 (commencing with Section 700) is added to Division 2 of the Probate Code, to read:

PART 14. DEPOSIT OF WILLS AND OTHER DOCUMENTS

Chapter 1. Definitions

§ 700. Application of definitions

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

Comment. Section 700 is new.

§ 701. Attorney

701. "Attorney" includes a law corporation as defined in Section 6160 of the Business and Professions Code.

Comment. Section 701 is new and is included for drafting convenience.

§ 702. Deposit

702. "Deposit" means the delivery of a document by a depositor to a depository, or the authorization by a depositor for a depository to keep a document, for safekeeping.

Comment. Section 702 is new.

§ 703. Depository

703. (a) "Depository" means any of the following:

(1) An attorney who receives a document for safekeeping.

(2) A trust company that receives a document for safekeeping. For this purpose, a trust company does not "receive" a document when the document is placed by a customer in a safe deposit box rented to the customer by the trust company.

(3) A person who in the ordinary course of business regularly receives documents for the purpose of safekeeping.

(b) "Depository" includes a personal representative, successor, or transferee of a person described in subdivision (a).

Comment. Section 703 is new. Paragraph (3) of subdivision (a) is drawn from Civil Code Section 1858(b). Under paragraph (3), "person" includes a corporation. Section 56. See also Section 84 ("trust company" defined); Section 710 (attorney may accept document for deposit only on specific unsolicited request).

§ 704. Depositor

704. "Depositor" means a natural person who delivers the person's document to a depository.

Comment. Section 704 is new and is drawn from Civil Code Section 1858(a).

§ 705. Document

705. "Document" means any of the following:

(a) A signed original will, declaration of trust, trust amendment, or other document modifying a will or trust.

(b) A signed original power of attorney.

(c) A signed original nomination of conservator.

(d) Any other signed original instrument for which the depository issues a receipt that expressly provides that the receipt is being issued under this part.

Comment. Section 705 is new. "Will" includes a codicil. Section 88.

#### Chapter 2. When Attorney May Accept Document for Deposit

##### § 710. When attorney may accept document for deposit

710. (a) An attorney may accept a document for deposit from a depositor with whom the attorney has no family relationship only if the depositor has made a specific request, not solicited by the attorney, for the attorney to do so.

(b) With the approval of the Supreme Court, the Board of Governors of the State Bar may provide by rule for the sanction for violation of this section.

Comment. Section 710 is new, and is consistent with Rule 1-400(C) (solicitation) of the Rules of Professional Conduct of the State Bar of California. "Attorney" includes a law corporation. Section 701. Subdivision (b) is drawn from Section 6076 of the Business and Professions Code.

Section 710 applies only to original documents, not to copies. See Section 705 ("document" defined).

#### Chapter 3. Duties and Liability of Depository

##### § 720. Protecting document against loss or damage

720. The depository shall hold the document in a safe, vault, safe deposit box, or other secure place where it will be reasonably protected against loss or destruction.

Comment. Section 720 is new. A depository who fails to comply with Section 720 is liable for all damages sustained by any person injured by the failure. Section 722. Although Section 720 applies to depositories who are holding documents on the operative date, a depository is not liable for any action taken before the operative date that was proper at the time the action was taken. Section 3.

##### § 721. Depository's standard of care

721. (a) Subject to subdivision (b), a depository shall use ordinary care for the preservation of the document, whether or not consideration is paid.

(b) The depository is not liable for loss or destruction of a

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document if the depositor is notified of the loss or destruction and has a reasonable opportunity to replace the document.

Comment. Section 721 is new. Under Section 721, a depositary must use ordinary care for the preservation of the document deposited, whether or not consideration is paid. This is a departure from Civil Code Sections 1846 and 1852, under which a gratuitous depositary need only use slight care for the preservation of the property deposited.

A depositary who fails to comply with Section 721 is liable for all damages sustained by any person injured by the failure. Section 722. However, a will that is lost or destroyed may still be proven and admitted to probate. See Section 8223.

Although Section 721 applies to depositaries who are holding documents on the operative date, a depositary is not liable for any action taken before the operative date that was proper at the time the action was taken. Section 3.

§ 722. Damages for failure to comply with this part

722. A depositary who fails to comply with the provisions of this part is liable for all damages sustained by any person injured by the failure.

Comment. Section 722 is new, and is drawn from subdivision (b) of Section 8200. Although Section 722 applies to depositaries who are holding documents on the operative date, a depositary is not liable for any action taken before the operative date that was proper at the time the action was taken. Section 3.

§ 723. Successor depositary not liable for predecessor depositary

723. (a) A successor depositary is not responsible for any act of a predecessor depositary.

(b) A successor depositary is not liable for failure to verify the completeness or correctness of information or documents received from a predecessor depositary.

Comment. Section 723 is new.

§ 724. Payment of compensation and expenses of depositary

724. A depositor is not required to compensate the depositary or pay the depositary's expenses incurred in safekeeping or delivery of the document unless expressly required to do so in a written agreement signed by the depositor.

Comment. Section 724 is new.

§ 725. No lien on document

725. No lien arises for the benefit of a depositary in a document deposited with the depositary even if provided by agreement.

Comment. Section 725 is new, and is a departure from Civil Code Section 1856 (depository's lien).

#### Chapter 4. Termination of Deposit

##### § 730. Termination by depositor

730. A depositor may terminate a deposit on demand, and the depository must deliver the document to the depositor.

Comment. Section 730 is new, and is consistent with Civil Code Section 1822, except that under Section 725 no lien is permitted against the document deposited. If the depositor has a conservator of the estate, the court may order the depository to deliver the document to the court for examination. See Section 2586.

##### § 731. Depository may terminate deposit only as provided by agreement or in this chapter

731. A depository may terminate a deposit only as provided in this chapter.

Comment. Section 731 is new.

##### § 732. Termination by depository before death of depositor

732. If the depositor is living, a depository may terminate a deposit by any of the following methods:

(a) By personal delivery of the document to the depositor, whether or not the deposit was made for a specified time.

(b) By transferring the document to another depository and by notifying the Secretary of State of the transfer. For the purpose of this subdivision, unless a depository has actual knowledge of the depositor's death, the depository may assume that the depositor is living.

(c) By such method as may be agreed between the depositor and depository.

Comment. Section 732 is new. Subdivision (a) is consistent with Civil Code Section 1822. The fee for filing a notice of transfer of a document from one depository to another under subdivision (b) is one dollar. Gov't Code § 12217. The fee for a certificate that a document has been transferred from one depository to another under subdivision (b) is ten dollars. *Id.*

##### § 733. Termination by depository after death of depositor

733. After the death of the depositor, a depository may terminate a deposit by any of the following methods:

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(a) By personal delivery of the document to the depositor's personal representative.

(b) If the document is a will, as provided in Section 8200.

(c) If the document is a trust, by personal delivery of the document either (1) to the clerk of the superior court in the proper county for commencement of a proceeding under Division 9 (commencing with Section 15000), or (2) to the trustee named in the document.

(d) By such method as may be agreed between the depositor and depository.

Comment. Section 733 is new. As used in subdivision (a), "personal representative" includes a successor personal representative. Section 58.

Subdivision (c) permits delivery to the clerk of the superior court of the proper county for commencement of a proceeding under Division 9 (trust law). The proper county is specified in Section 17005. As used in subdivision (c), "trustee" includes a successor trustee. Section 84.

#### § 734. Termination by filing document with Secretary of State

734. A depository may terminate a deposit by filing the document with the Secretary of State if both of the following requirements are satisfied:

(a) The depository and all predecessor depositories have held the document for more than 20 years without any communication from the depositor, or the depositor at the time of transfer would be at least 100 years of age if living.

(b) The depository has mailed a notice to the depositor's last-known address, advising the depositor of the depository's intent to file the document with the Secretary of State, has waited at least 30 days, and has had no response from the depositor.

Comment. Section 734 is new. Under 12217 of the Government Code, the fee for filing a document with the Secretary of State is \$20.

#### § 735. Handling of document by Secretary of State

735. (a) When a document is filed with the Secretary of State under Section 734 and the fee provided in Section 12217 of the Government Code is paid, the Secretary of State shall file and index the document. If the document is a will, it shall be kept in the strictest confidence until the death of the depositor. All other documents shall be kept in the strictest confidence until a court order

is made pursuant to Section 736.

(b) Upon the request of any person, the Secretary of State shall report whether or not a document is on file, or whether or not the Secretary of State has received a notice of transfer of a document under Section 732.

(c) Upon the request of a person who presents a death certificate or other satisfactory evidence of the depositor's death, the Secretary of State shall issue a certified copy of the depositor's document on file. The fee for the certified copy is provided in Section 12184 of the Government Code. If no document is on file, the Secretary of State shall issue a certificate stating that fact. The fee for the certificate is provided in Section 12217 of the Government Code.

(d) The Secretary of State may destroy a document if the depositary, all predecessor depositaries, and the Secretary of State have held the document for more than 50 years without any communication from the depositor, or the depositor at the time of transfer would be at least 150 years of age if living.

Comment. Section 735 is new. Under 12217 of the Government Code, the fee for filing a document with the Secretary of State is \$20, and the fee for a certificate that no document is on file, or that a document has been transferred from one depositary to another under Section 732 of the Probate Code, is \$10. Under Section 12184 of the Government Code, the fee for a certified copy of the depositor's document on file with the Secretary of State is one dollar for the first page and fifty cents for each page thereafter.

*Note. The State Bar Conference of Delegates proposal did not include authority for the Secretary of State to destroy documents. This provision (proposed Section 735(d)) was added by staff. This raises the question whether it would be better to authorize attorneys and financial institutions to destroy very old documents themselves, and not permit filing with the Secretary of State.*

§ 736. Release of document upon court order

736. On petition, the appropriate court may make an order requiring the Secretary of State to deliver a document to the petitioner as follows:

(a) If the document is a will, a petitioner for appointment as personal representative may petition the court in which the estate proceeding is pending.

(b) If the document is a declaration of trust, trust amendment, or

document modifying a trust, a trustee or beneficiary of the trust may petition the court under Part 5 (commencing with Section 17000) of Division 9.

(c) If the document is a nomination of a conservator, a person specified in Section 1820 may petition the court in which the conservatorship proceeding is pending.

(d) If the document is a power of attorney, or any other instrument for which the depository has issued a receipt that expressly provides that the receipt is being issued under this part, an interested person may petition the court where any of the depositor's property is located, or, if none, the superior court of Sacramento County.

Comment. Section 736 is new, and provides a procedure for an interested person to petition the appropriate court for an order requiring the Secretary of State to deliver a document filed under this part. See also Section 48 ("interested person" defined).

§ 737. Privilege and confidentiality not affected; no breach of professional conduct

737. (a) The transfer of a document under this chapter is not a waiver or breach of any privilege or confidentiality associated with the document.

(b) If the depository is an attorney, transfer of a document under this chapter is not a violation of the rules of professional conduct.

Comment. Section 737 is new.

Title 3

DEPOSIT

Chapter	Section
1. Deposit in General .....	1813
2. Deposit for Keeping .....	1833
3. Deposit for Exchange .....	1878
4. Private Bulk Storage of Grain .....	1880

CHAPTER 1. DEPOSIT IN GENERAL

Article	Section
1. Nature and Creation of Deposit .....	1813
2. Obligations of the Depository .....	1822

ARTICLE 1. NATURE AND  
CREATION OF DEPOSIT

Section	
1813.	Kinds of deposit.
1814.	Voluntary deposit; depositor and depository defined.
1815.	Involuntary deposit.
1816.	Involuntary deposit; duty of depository.
1817.	Deposit for keeping defined.
1818.	Deposit for exchange defined.
1821.23.	Renumbered.

§ 1813. Kinds of deposit

*Deposit, kinds of.* A deposit may be voluntary or involuntary; and for safekeeping or for exchange. (Enacted 1872.)

§ 1814. Voluntary deposit; depositor and depository defined

*Voluntary deposit, how made.* A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving the depository. (Enacted 1872.)

§ 1815. Involuntary deposit

*Involuntary deposit, how made.* An involuntary deposit is made:

1. By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner; or,
2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person. (Enacted 1872.)

Cross References

Notice by gratuitous depository to owner to remove property after emergency, see § 1847.

§ 1816. Involuntary deposit; duty of depository

*Same.* The person with whom a thing is deposited in the manner described in the last section is bound to take charge of it, if able to do so. (Enacted 1872.)

§ 1817. Deposit for keeping defined

*Deposit for safe keeping, what.* A deposit for keeping is one in which the depository is bound to return the identical thing deposited. (Enacted 1872.)

§ 1818. Deposit for exchange defined

*Deposit for exchange, what.* A deposit for exchange is one in which the depository is only bound to return a thing corresponding in kind to that which is deposited. (Enacted 1872.)

Cross References

Transfer of title and relationship between parties, see § 1878.

§ 1821.23. Renumbered § 1861.23 and amended by Stats.1981, c. 714, § 53

ARTICLE 2. OBLIGATIONS OF THE DEPOSITARY

Section

- 1822. Delivery on demand.
- 1823. Necessity of demand.
- 1824. Place of delivery.
- 1825. Adverse claims; notice to beneficiary of deposit.
- 1826. Notice of deposit to true owner.
- 1827. Delivery to co-owners.
- 1828. Joint tenancy deposits; delivery.

§ 1822. Delivery on demand

*Depositary must deliver on demand.* A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required by Section 1825. (Enacted 1872.)

Cross References

Demand, necessity for, see § 1823.  
Time deposits, see Financial Code § 855.

§ 1823. Necessity of demand

*No obligation to deliver without demand.* A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time. (Enacted 1872.)

Cross References

Demand, duty to deliver on, see § 1822.

§ 1824. Place of delivery

*Place of delivery.* A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him. (Enacted 1872.)

§ 1825. Adverse claims; notice to beneficiary of deposit

*Notice to owner of adverse claim.* A depositary must give prompt notice to the person for whose benefit the deposit was made, of any proceedings taken adversely to his interest in the thing deposited, which may tend to

excuse the depository from delivering the thing to him. (Enacted 1872.)

Cross References

Adverse claim to bank deposit, see Financial Code § 952.  
Deliver, inability to, see § 1822.

§ 1826. Notice of deposit to true owner

*Notice to owner of thing wrongfully detained.* A depository, who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit; and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depository against the claim of the depositor, the depository is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing, to his prejudice. (Enacted 1872.)

§ 1827. Delivery to co-owners

*Delivery of thing owned jointly, etc.* If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depository may deliver to each his proper share thereof, if it can be done without injury to the thing. (Enacted 1872.)

§ 1828. Joint tenancy deposits; delivery

When a deposit is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business. (Added by Stats.1907, c. 75, § 1.)

Cross References

Delivery of joint bank deposits, see Financial Code § 852.  
Inheritance tax, see Revenue and Taxation Code § 13671.  
Joint tenancy, definition and method of creation, see § 683.

CHAPTER 2. DEPOSIT FOR KEEPING

Article	Section
1. General Provisions .....	1833
2. Gratuitous Deposit .....	1844
3. Storage .....	1851
3A. Warehousemen [Repealed] .....	1858
3B. Warehouse Receipts Act [Repealed] .....	1858.01
3C. Warehouse Receipts for Goods Out-of-State [Repealed] .....	1858.90
3.5. Deposits for Repair, Alteration or Sale .....	1858
4. Innkeepers .....	1859
5. Finding [Repealed] .....	1864

ARTICLE 1. GENERAL PROVISIONS

Section

- 1833. Indemnification of depository.
- 1834. Depository of animals; duties.
- 1834.5. Abandoned animals; disposition; notice.
- 1834.6. Use of abandoned animals for scientific or other experimentation prohibited.
- 1834.7. Use of animals turned into shelter for research; sign on pound or animal regulation department.

**Section**

- 1835. Use of thing deposited; opening fastened thing.
- 1836. Wrongful use; damages.
- 1837. Sale of thing in danger of perishing.
- 1838. Loss of or injury to thing deposited.
- 1839. Services by depositary.
- 1840. Negligence; limitation of liability.

**§ 1833. Indemnification of depositary**

*Depositor must indemnify depositary.* A depositor must indemnify the depositary:

1. For all damage caused to him by the defects or vices of the thing deposited; and,
2. For all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking. (*Enacted 1872.*)

**§ 1834. Depositary of animals; duties**

*Obligation of depositary of animals.* A depositary of living animals must provide them with suitable food and shelter, and treat them kindly. (*Enacted 1872.*)

**§ 1834.5. Abandoned animals; disposition; notice**

Notwithstanding any other provision of law, whenever any animal is delivered to any veterinarian, dog kennel, cat kennel, pet-grooming parlor, animal hospital, or any other animal care facility pursuant to any written or oral agreement entered into after the effective date of this section, and the owner of such animal does not pick up the animal within 14 calendar days after the day the animal was due to be picked up, the animal shall be deemed to be abandoned. The person into whose custody the animal was placed for care shall first try for a period of not less than 10 days to find a new owner for the animal, and, if unable to place the animal with a new owner, shall thereafter humanely destroy the animal so abandoned.

If an animal so abandoned was left with a veterinarian or with a facility which has a veterinarian, and a new owner cannot be found pursuant to this section, such veterinarian shall humanely destroy the animal.

There shall be a notice posted in a conspicuous place, or in conspicuous type in a written receipt given, to warn each person depositing an animal at such animal care facilities of the provisions of this section. (*Added by Stats.1969, c. 1138, § 1. Amended by Stats.1970, c. 1166, § 1; Stats.1971, c. 477, § 1.*)

**§ 1834.6. Use of abandoned animals for scientific or other experimentation prohibited**

An abandoned animal, as described in Section 1834.5, shall not be used for scientific or any other type of experimentation, nor shall such an abandoned animal be turned over to a pound or animal regulation department of a public agency. (*Added by Stats.1969, c. 1138, § 2.*)

**§ 1834.7. Use of animals turned into shelter for research; sign on pound or animal regulation department**

In any pound or animal regulation department of a public or private agency where animals are turned over to

a research facility, a sign (measuring a minimum of 28 × 21 cm—11 × 8½ inches—with lettering of a minimum of 3.2 cm high and 1.2 cm wide—1¼ × ½ inch—(91 point)) stating:

“Animals Turned Into This Shelter May Be Used For Research Purposes”

shall be posted in such a place that it will be clearly visible to a majority of persons when turning animals over to the shelter.

For purposes of this section, “animal research facility” includes any laboratory, firm, association, corporation, copartnership, and educational institution. (*Added by Stats.1978, c. 777, § 1. Amended by Stats.1980, c. 676, § 50.*)

**§ 1835. Use of thing deposited; opening fastened thing**

*Obligations as to use of thing deposited.* A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor. He may not, if it is purposely fastened by the depositor, open it without the consent of the latter, except in case of necessity. (*Enacted 1872.*)

**§ 1836. Wrongful use; damages**

*Liability for damage arising from wrongful use.* A depositary is liable for any damage happening to the thing deposited, during his wrongful use thereof, unless such damage must inevitably have happened though the property had not been thus used. (*Enacted 1872.*)

**Cross References**

Liability of depositary for negligence, see §§ 1840, 1852.

**§ 1837. Sale of thing in danger of perishing**

*Sale of thing in danger of perishing.* If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable, and retain the proceeds as a deposit, giving immediate notice of his proceedings to the depositor. (*Enacted 1872.*)

**§ 1838. Loss of or injury to thing deposited**

*Injury to, or loss of thing deposited.* If a thing is lost or injured during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, so far as he has information concerning them, or willfully misrepresents the circumstances to him, the depositary is presumed to have willfully, or by gross negligence, permitted the loss or injury to occur. (*Enacted 1872.*)

**§ 1839. Services by depositary**

*Service rendered by depositary.* So far as any service is rendered by a depositary, or required from him, his duties and liabilities are prescribed by the Title on Employment and Service. (*Enacted 1872.*)

**§ 1840. Negligence; limitation of liability**

The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor,

or has reason to suppose, the thing deposited to be worth. (Enacted 1872. Amended by Code Am. 1873-74, c. 612, § 200.)

ARTICLE 2. GRATUITOUS DEPOSIT

Section

- 1844. Gratuitous deposit defined.
- 1845. Involuntary deposit.
- 1846. Degree of care required.
- 1847. Termination of duties of depositary.

§ 1844. Gratuitous deposit defined

*Gratuitous deposit, what.* Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited. (Enacted 1872.)

§ 1845. Involuntary deposit

*Nature of involuntary deposit.* An involuntary deposit is gratuitous, the depositary being entitled to no reward. (Enacted 1872.)

§ 1846. Degree of care required

*Degrees of care required of gratuitous depositary.* A gratuitous depositary must use, at least, slight care for the preservation of the thing deposited. (Enacted 1872.)

§ 1847. Termination of duties of depositary

*His duties cease, when.* The duties of a gratuitous depositary cease:

1. Upon his restoring the thing deposited to its owner; or,
2. Upon his giving reasonable notice to the owner to remove it, and the owner failing to do so within a reasonable time. But an involuntary depositary, under Subdivision 2 of Section 1815, cannot give such notice until the emergency which gave rise to the deposit is past. (Enacted 1872.)

ARTICLE 3. STORAGE

Section

- 1851. Storage; deposit for hire.
- 1852. Degree of care required.
- 1853. Hire for fraction of week or month.
- 1854. Termination of deposit.
- 1855. Termination of deposit; agreement respecting time.
- 1856. Depositary's lien.
- 1857. Depositary's lien; sale.

§ 1851. Storage; deposit for hire

*Deposit for hire.* A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire. (Enacted 1872.)

§ 1852. Degree of care required

*Degree of care required of depositary for hire.* A depositary for hire must use at least ordinary care for the preservation of the thing deposited. (Enacted 1872.)

§ 1853. Hire for fraction of week or month

*Rate of compensation for fraction of a week, etc.* In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week, and to half a month's hire for the storage of any other property during any fraction of a half month. (Enacted 1872.)

§ 1854. Termination of deposit

*Termination of deposit.* In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time, and by the depositary upon reasonable notice. (Enacted 1872.)

§ 1855. Termination of deposit; agreement respecting time

*Same.* Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit so continuing. (Enacted 1872.)

§ 1856. Depositary's lien

A depositary for hire has a lien for storage charges and for advances and insurance incurred at the request of the bailor, and for money necessarily expended in and about the care, preservation and keeping of the property stored, and he also has a lien for money advanced at the request of the bailor, to discharge a prior lien, and for the expenses of a sale where default has been made in satisfying a valid lien. The rights of the depositary for hire to such lien are regulated by the title on liens. (Added by Stats. 1891, c. 249, § 1. Amended by Stats. 1909, c. 664, § 1.)

Cross References

Liens, see § 2872 et seq.

§ 1857. Depositary's lien; sale

If from any cause other than want of ordinary care and diligence on his part, a depositary for hire is unable to deliver perishable property, baggage, or luggage received by him for storage, or to collect his charges for storage due thereon, he may cause such property to be sold, in open market, to satisfy his lien for storage; *provided*, that no property except perishable property shall be sold, under the provisions of this section, upon which storage charges shall not be due and unpaid for one year at the time of such sale. (Added by Stats. 1891, c. 249, § 2.)

ARTICLE 3.5. DEPOSITS FOR REPAIR, ALTERATION OR SALE

Section

- 1858. Definitions.
- 1858.1. Customer's receipt; contents.
- 1858.2. Failure to furnish receipt; strict liability.
- 1858.3. Insurance protection.

§ 1858. Definitions

As used in this article:

- (a) "Customer" means a natural person who deals with a depositary.

**Part 4**

(b) "Depositary" means a person who in the ordinary course of business regularly receives property from customers for the purpose of repair or alteration.

(c) "Property" means personal property used for or intended for personal, family, or household purposes, but does not include any motor vehicle within the meaning of Section 415 of the Vehicle Code. *(Added by Stats.1970, c. 1185, § 1. Amended by Stats.1971, c. 180, § 1.)*

**§ 1858.1. Customer's receipt; contents**

Every depositary shall, upon accepting property from a customer, present the customer with written receipt which shall include a statement, if such is the case, that such deposited property is not insured or protected to the amount of the actual cash value thereof by the depositary against loss occasioned by theft, fire, and vandalism while such property remains with the depositary. *(Added by Stats.1970, c. 1185, § 1.)*

**§ 1858.2. Failure to furnish receipt; strict liability**

Every depositary who fails to furnish the receipt, or a statement thereon as required by Section 1858.1, or who makes any misrepresentation in such receipt, shall be strictly liable to the customer for any loss occasioned by theft, fire, or vandalism while such property remains with the depositary and shall forfeit any lien or other right to hold the property arising from services rendered in holding, repairing, altering, or selling the property. When liability is imposed upon a depositary under this section it shall be deemed as having been imposed for the commission of a willful act for the purposes of Section 533 of the Insurance Code. *(Added by Stats.1970, c. 1185, § 1.)*

**§ 1858.3. Insurance protection**

If the depositary by insurance or by self-insurance does protect property deposited by customers for loss or damage occasioned by theft, fire or vandalism while such property remains with the depositary, such depositary need not make or deliver to customer any notice thereof. *(Added by Stats.1970, c. 1185, § 1.)*