

Memorandum 2003-4

**Probate Code Technical Corrections
(Comments on Tentative Recommendation)**

The Commission has circulated for comment its tentative recommendation on technical corrections to the Probate Code. The tentative recommendation would correct erroneous section references, and also clarify the operation of the pretermitted spouse and child statutes. A bill — AB 167 (Harman) — has been introduced in anticipation of the Commission approving a final recommendation after reviewing comments.

We have received the following comments on the tentative recommendation:

	<i>Exhibit p.</i>
1. Prof. Paul J. Goda, Santa Clara Law School	1
2. Gregory Wilcox, Berkeley	2
3. Court Staff, Los Angeles Superior Court	6

Please note that the comments of Los Angeles Superior Court staff are individual and do not necessarily represent the position of the court.

Our objective at the meeting, after considering comments and making any necessary changes, is to approve a final recommendation for submission to the Governor and Legislature.

Correction of Erroneous Section References

Commenters generally agreed with the proposed correction of erroneous section references. As Harlean Carroll of the Los Angeles Superior Court points out, “The technical corrections dealing with defects in the numbering in the Probate Code are needed to clarify the existing confusion created by such defects.” Exhibit p. 8.

Harlean Carroll suggests an additional correction:

Prob. Code § 2356.5 (amended). Conservatee with dementia

2356.5. (a) The Legislature hereby finds and declares:

(1) That people with dementia, as defined in the last published edition of the “Diagnostic and Statistical Manual of Mental Disorders,” should have a conservatorship to serve their unique and special needs .

(2) That, by adding powers to the probate conservatorship for people with dementia, their unique and special needs can be met. This will reduce costs to the conservatee and the family of the conservatee, reduce costly administration by state and county government, and safeguard the basic dignity and rights of the conservatee.

(3) That it is the intent of the Legislature to recognize that the administration of psychotropic medications has been, and can be, abused by caregivers and, therefore, granting powers to a conservator to authorize these medications for the treatment of dementia requires the protections specified in this section.

(b) Notwithstanding any other provision of law, a conservator may authorize the placement of a conservatee in a secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code, or a locked and secured nursing facility which specializes in the care and treatment of people with dementia pursuant to subdivision (c) of Section 1569.691 of the Health and Safety Code, and which has a care plan that meets the requirements of Section 87724 of Title 22 of the California Code of Regulations, upon a court's finding, by clear and convincing evidence, of all of the following:

(1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."

(2) The conservatee lacks the capacity to give informed consent to this placement and has at least one mental function deficit pursuant to subdivision (a) of ~~Section 812~~ Section 811, and this deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of ~~Section 812~~ Section 811.

(3) The conservatee needs or would benefit from a restricted and secure environment, as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

(4) The court finds that the proposed placement in a locked facility is the least restrictive placement appropriate to the needs of the conservatee.

(c) Notwithstanding any other provision of law, a conservator of a person may authorize the administration of medications appropriate for the care and treatment of dementia, upon a court's finding, by clear and convincing evidence, of all of the following:

(1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."

(2) The conservatee lacks the capacity to give informed consent to the administration of medications appropriate to the care of

dementia, and has at least one mental function deficit pursuant to subdivision (a) of ~~Section 812~~ Section 811, and this deficit or deficits significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of ~~Section 812~~ Section 811.

(3) The conservatee needs or would benefit from appropriate medication as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

...

Comment. Section 2356.5 is amended to correct incorrect section references.

The staff agrees that **these revisions are appropriate** and should be made.

Harlean Carroll also suggests that the entire code should be reviewed for defects of this type. That is an interesting suggestion, but the staff believes **we do not have the resources** to do this at present.

Clarification or Repeal of "Date of Death Valuation"

Comment on the proposed clarification of the pretermitted spouse and child statutes was limited. Most commentators approved the tentative recommendation without elaboration.

The tentative recommendation suggests the following clarification of the pretermitted spouse and child statutes:

Prob. Code § 21612 (amended). Share of omitted spouse

21612. (a) Except as provided in subdivision (b), in satisfying a share provided by this chapter:

(1) The share will first be taken from the decedent's estate not disposed of by will or trust, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all beneficiaries of decedent's testamentary instruments in proportion to the value they may respectively receive. ~~This value~~ The proportion of each beneficiary's share that may be taken pursuant to this subdivision shall be determined as of the date of the decedent's death.

(b) If the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by the application of subdivision (a), the specific devise or gift or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the decedent, may be adopted.

Comment. Subdivision (a)(2) of Section 21612 is amended to make clear that it is the proportionate obligation of each beneficiary, rather than the total amount of the obligation, that is determined based on the date of death valuation. Thus for example if there are two beneficiaries entitled to receive property valued equally as of the date of death, the proportionate amount that will be taken from each is one-half the value of property distributed to each, regardless of the relative value of the property on the date of the distribution.

In a case where the share of the omitted spouse is partially satisfied pursuant to subdivision (a)(1), the obligation of the beneficiaries for the remainder abates proportionately. Thus if half the share of the omitted spouse is satisfied pursuant to subdivision (a)(1), the amount for which each of the beneficiaries is otherwise responsible pursuant to subdivision (a)(2) is reduced by half.

We solicited comment on whether this clarification is appropriate, or whether the date of death valuation provision should be repealed, returning to a date of distribution valuation scheme.

Sandy Riley of the Los Angeles Superior Court believes the preferable method is to use date of death values for determining the proportion of each beneficiary's share. "Dates of distribution can be manipulated." Exhibit p. 9.

Harlean Carroll believes that the proposed clarification of the date of death valuation statute is an improvement, but determining proportionate shares based on valuations on date of distribution "is even more equitable & more factually sound." Exhibit p. 8.

The staff is hopeful **we will receive additional input on this issue from the State Bar Probate Section** at or before the meeting to help us resolve the matter.

Harlean Carroll would also broaden the operation of the omitted spouse and omitted child statutes so that they cover not only a share of the estate but the right to a support allowance and other Probate Code family protections — they "should be considered in the total context of the estate, with the rights & needs of all affected parties being considered and balanced." Exhibit p. 8.

This suggestion would take us far **beyond the limited scope of the current project**, and the staff recommends against it. There are certainly many problems in the existing family protection statutes, including their limited application to probate proceedings (or in the case of the omitted spouse and child statutes, to probate and trust proceedings). However, this would be a more significant project than the technical corrections we are currently embarked upon. If the Commission has an interest in pursuing this matter, the staff would bring it back

in the fall, with other new topics and priority suggestions, so that the Commission can decide whether to devote resources to it.

Community Property Transaction Involving Separate Property Interest

Probate Code Section 3100 et seq. provides a procedure by which the spouse or conservator of an incompetent person may obtain a court order authorizing a transaction involving the community property interest of the incompetent spouse. This procedure may be useful where the consent of the incompetent spouse would otherwise be required for the community property transaction.

The Section 3100 procedure was expanded in 1996 to cover transactions in which a spouse also has a separate property interest. This expansion was made because community property assets often have separate property commingled. Section 3100(b) provides:

Prob. Code § 3100. “Transaction” defined

3100. (a) As used in this chapter, “transaction” means a transaction that involves community real or personal property, tangible or intangible, or an interest therein or a lien or encumbrance thereon, including, but not limited to, those transactions with respect thereto as are listed in Section 3102.

(b) However, if a proposed transaction involves property in which a spouse also has a separate property interest, for good cause the court may include that separate property in the transaction.

The 1996 amendment failed to make conforming changes in other provisions of the Section 3100 procedure to effectuate this expansion of the law. Gregory Wilcox suggests that the conforming changes be made now:

Prob. Code § 3121 (amended). Petition

3121. The petition shall set forth all of the following information:

(a) The name, age, and residence of each spouse.

(b) If one or both spouses is alleged to lack legal capacity for the proposed transaction, a statement that the spouse has a conservator or a statement of the facts upon which the allegation is based.

(c) If there is a conservator of a spouse, the name and address of the conservator, the county in which the conservatorship proceeding is pending, and the court number of the proceeding.

(d) If a spouse alleged to lack legal capacity for the proposed transaction is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the name and address of the institution.

- (e) The names and addresses of all of the following persons:
- (1) Relatives within the second degree of each spouse alleged to lack legal capacity for the proposed transaction.
 - (2) If the petition is to provide gifts or otherwise affect estate planning of the spouse who is alleged to lack capacity, as would be properly the subject of a petition under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 (substituted judgment) in the case of a conservatorship, the names and addresses of the persons identified in Section 2581.
- (f) A sufficient description of the property that is the subject of the proposed transaction.
- (g) An allegation that the property is community property and, if the proposed transaction involves property in which a spouse also has a separate property interest, an allegation of good cause to include that separate property in the transaction.
- (h) The estimated value of the property.
- (i) The terms and conditions of the proposed transaction, including the names of all parties thereto.
- (j) The relief requested.

Comment. Section 3121 is amended to implement Section 3100(b) (transaction involving separate property interest).

Prob. Code § 3144 (amended). Court order

3144. (a) The court may authorize the proposed transaction if the court determines all of the following:

(1) The property that is the subject of the proposed transaction is community property of the spouses and, if the proposed transaction involves property in which a spouse also has a separate property interest, that there is good cause to include that separate property in the transaction.

(2) One of the spouses then has a conservator or otherwise lacks legal capacity for the proposed transaction.

(3) The other spouse either has legal capacity for the proposed transaction or has a conservator.

(4) Each of the spouses either (i) joins in or consents to the proposed transaction, (ii) has a conservator, or (iii) is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved by isolated incidents of negligence or improvidence.

(5) The proposed transaction is one that should be authorized under this chapter.

(b) If the proposed transaction is to provide gifts or otherwise affect estate planning of the spouse who is alleged to lack capacity, as would be properly the subject of a petition under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 (substituted judgment) in the case of a conservatorship, the court may authorize

the transaction under this chapter only if the transaction is one that the court would authorize under that article.

(c) If the court determines under subdivision (a) that the transaction should be authorized, the court shall so order and may authorize the petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order.

(d) In an order authorizing a transaction, the court may prescribe such terms and conditions as the court in its discretion determines appropriate, including, but not limited to, requiring joinder or consent of another person.

Comment. Section 3144 is amended to implement Section 3100(b) (transaction involving separate property interest).

Mr. Wilcox argues that, “It may seem farfetched to fear that this discrepancy might cause mischief. However, I have received reports of intervening attorneys objecting to inclusion of separate property interests in 3100 transactions (apparently with a straight face) on the theory that the statute requires the court to find that the property is all community.” Exhibit p. 2. The staff agrees that **these conforming revisions are appropriate.**

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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SANTA CLARA UNIVERSITY

SCHOOL OF LAW
500 EL CAMINO REAL
SANTA CLARA CA 95053-0421

December 21, 2002

Law Revision Commission
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JAN - 2 2002

File: _____

California Law Revision Commission
4000 Middlefield Rd., Room D-1
Palo Alto, CA 94303-4739

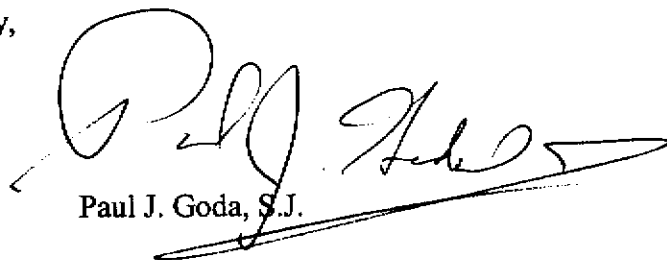
To whom it may concern:

I am writing in response to the request for comments about study #L-2011, Probatge Code
Technical Corrections.

I may have missed the change but PrC 21401 also has references to the old sections for omitted spouse and omitted children (6562 and 6573 respectively) that should be changed to 21612 and 21623 respectively.

With thanks for your work,

Sincerely,



Paul J. Goda, S.J.

LAW OFFICE OF
GREGORY WILCOX

Certified as an Elder Law Attorney by the
NATIONAL ELDER LAW FOUNDATION

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Law Revision Commission
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2140 SHATTUCK AVENUE, SUITE 1201
BERKELEY, CALIFORNIA 94704

JAN 20 2002

File: _____

January 17, 2003

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Probate Code Technical Corrections
Probate Code §§3100, 3121, and 3144

Dear Mr. Sterling:

I recently received your December 19, 2002, Request for Public Comment on proposed technical corrections to the Probate Code. I have had a chance to look at the proposals and have no concerns about them.

However, the proposed technical corrections do not address a Probate Code flaw that has bothered me for years: inconsistent language in Probate Code §§3100(b), 3121(g), and 3144(a)(1). In 1996 the legislature amended §3100 to extend its reach beyond community property. Specifically, it provided that "if a proposed transaction involves property in which a spouse also has a separate property interest, for good cause the court may include that separate property in the transaction" approved.

Nevertheless, Probate Code §3121(g) (describing the mandatory contents of the petition) still requires that the petition allege that "the property is community property". Further, Probate Code §3144(a)(1) (describing the required findings for an order) still requires that the court determine "that the property that is subject of the proposed transaction is community property of the spouses." In other words, §§3121 and 3144 on their face prohibit what the revision in §3100 specifically purports to authorize.

It may seem farfetched to fear that this discrepancy might cause mischief. However, I have received reports of intervening attorneys objecting to inclusion of separate property interests in 3100 transactions (apparently with a straight face) on the theory that the statute requires the court to find that the property is all community property.

Nathaniel Sterling
Jan. 17, 2003
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Finally, I am now in the process of rewriting the Medi-Cal planning chapters of the CEB book, California Elder Law. I have enclosed a copy of the existing pages that comment on this technical glitch. I would love to update this material to say that the CLRC has plans to propose a technical correction to make Probate Code §§3121 and 3144 consistent with the clear intention of the 1996 amendment of 3100.

Thank you for your attention. Please call if you have any questions.

Very truly yours,



GREGORY WILCOX

encl.

of a guardian ad litem actually can be very helpful in convincing a judge to approve a proposed property transfer. A judge with insufficient time to form a well-informed point of view on complicated points of Medi-Cal law may be reluctant to deny a petition when both the petitioner and the guardian ad litem are strongly supporting it in open court. This, of course, assumes that the guardian ad litem is, or will become, familiar with Medi-Cal planning and will take a position in favor of broad family interests.

C. Available Court Procedures

§9.50 1. Proceeding for Particular Transaction (Prob C §§3100–3154)

Probate Code §§3100–3154 authorize a proceeding for a particular transaction or set of transactions. This proceeding may be used if the anticipated transaction involves community property and if at least one spouse lacks legal capacity. Prob C §§3100–3101.

The petitioner must meet a number of procedural requirements before the order will be granted. Although somewhat burdensome, these are less trouble than those required to commence a conservatorship and obtain the appropriate order under the substituted judgment provisions of conservatorship law. See Prob C §§2580–2586. Further, a conservatorship proceeding is not available with regard to community property because community property is not part of the conservatorship estate. Prob C §3051(b)(2).

Previously, a Prob C §3101 proceeding could involve community property only. See Prob C §3100(a). Probate Code §3100 was amended effective January 1, 1997, to provide that if a proposed transaction involves property in which a spouse also has a separate property interest, the court may include that separate property in the transaction “for good cause.” See Prob C §3100(b).

NOTE ► Although Prob C §3100(b) authorizes the court to include separate property if there is “good cause,” Prob C §§3121(g) and 3144(a)(1), respectively, continue to require the allegation, and the court finding, that the subject prop-

erty is community property. This appears to be an oversight; presumably, these sections will be corrected to be consistent with Prob C §3100(b). See §9.33.

A Prob C §3101 transaction, moreover, must involve "property." Prob C §3100. Although Medi-Cal makes a distinction between "property" and "income," it seems clear that "property" for purposes of a §3101 proceeding comes under standard legal definitions and includes income. See Prob C §62. See also §9.58. As a result, the proceeding can be used to obtain an order increasing the community spouse's minimum monthly maintenance needs allowance (see §9.58) and to effect transfers necessary to fulfill and orders necessary to enlarge the community spouse resource allowance (see §§9.51-9.52).

Under the 1997 amendments, a Prob C §3101 proceeding has a number of potentially burdensome procedural requirements. Notice must be sent to the nonpetitioning spouse not alleged to lack legal capacity, and to those persons required to be named in the petition under Prob C §3121. Prob C §3131(c). Probate Code §3121(e)(1) requires the names of the relatives within the second degree (adult or minor) of each spouse alleged to lack legal capacity for the proposed transaction. (Prior to the 1997 amendment, the naming of relatives was limited to "adult" relatives.) If the petition is to provide gifts or otherwise affect estate planning of the incapacitated spouse (which is common in an elder law context), the notice provisions of Prob C §2581 (governing a petition authorizing proposed action by a conservator) also apply. Prob C §3121(e)(2). By reference to other Probate Code sections, Prob C §2581 requires notice to persons who would receive notice in a conservatorship proceeding, relatives of the second degree, all beneficiaries of the respondent's estate planning, and all persons who would be intestate heirs of the respondent on his or her immediate death, if known to the petitioner.

A citation must be issued and served (Prob C §3130), and there must be an appearance at the hearing (or approved absence) by each spouse lacking both capacity and a conservator (Prob C §3141). Absences are frequently approved by the court.

Some courts, in addition, refer Prob C §3101 matters to the court investigator's office for a report as if they were ordinary conservatorship matters. Other courts (e.g., in Alameda County) require appointment of a guardian ad litem for the nonpetitioning, incapacitated spouse. See Prob C §3140. The guardian ad litem is usually an



JOHN A. CLARKE
EXECUTIVE OFFICER / CLERK

111 NORTH HILL STREET
LOS ANGELES, CA 90012-3014

Superior Court of California
County of Los Angeles

February 13, 2003

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: Probate Code Technical Corrections

Dear Mr. Sterling:

Please find enclosed the responses to the California Law Revision Commission, Tentative Recommendation on Probate Code prepared by court staff of the Superior Court of California, County of Los Angeles.

Please note these comments was submitted to me directly and therefore, if you have any questions in reference to the attached responses, you might contact the respondents directly at the listed phone numbers, or you may contact me at (213) 974-5106. Please be advised these are individual comments and do **not** necessarily reflect the position of the Los Angeles Superior Court. Your attention pertaining to these responses is greatly appreciated.

Thank you,

A handwritten signature in black ink, appearing to read "Larry Jackson".

Larry Jackson, Administrator
Intergovernmental Relations Office

Attachments

c: Robert A. Dukes, Presiding Judge
William A. MacLaughlin, Assistant Presiding Judge

COMMENTS ON PROPOSED CHANGES

RESPONDING COURT:

LOS ANGELES SUPERIOR COURT
111 North Hill Street, Room 546
Los Angeles, CA 90012

NAME:

Ren Inger

TEL No.:

213-974-5506

- Agree with proposed changes.
- Do not agree with proposed changes.
- Agree with proposed changes only if modified.

CALIFORNIA LAW REVISION COMMISSION Probate Code Technical Corrections

COMMENTS ON PROPOSED CHANGES**RESPONDING COURT:**

LOS ANGELES SUPERIOR COURT
111 North Hill Street, Room 105-E
Los Angeles, CA 90012
Attn: Larry Jackson

PROPOSAL NUMBER:

87

NAME: Harlean Carroll

TEL No.: _____

- Agree with proposed changes.
 Do not agree with proposed changes.
 Agree with proposed changes only if modified.

LAW REVISION COMMENTS

A. RE THE TECHNICAL CORRECTIONS: The technical corrections dealing with defects in the numbering in the Probate Code are needed to clarify the existing confusion created by such defects. However, I believe that some one should review the entire code for these defects. For instance, AB 1784, enacted into law in 2003 corrected many of the defects in references, but it appears that there are still some major defects appearing, i.e. PC 2356.5 refers to PC 812 a & b, when it would appear that PC 811 was intended.

B. CLARIFICATION OF DATE OF DEATH VALUATION IN PC 21612 & 21623: I believe that the proposed clarification to state that each beneficiary's proportionate share shall be determined as of the date of death is a step in the right direction, but determining proportionate shares based on valuations on date of distribution is even more equitable & more factually sound. However, I believe that the Family Protection sections of the Probate Code should be revamped, should cover not only support allowance but also rights relating to inheritance of property as currently covered in PC 21612 & 21623, & brought into today's world. These sections 21612 et seq. dealing with rights of inheritance to the estate should be considered in the total context of the estate, with the rights & needs of all affected parties being considered & balanced.

COMMENTS ON PROPOSED CHANGES

RESPONDING COURT:

LOS ANGELES SUPERIOR COURT
111 North Hill Street, Room 105-E
Los Angeles, CA 90012
Attn: Larry Jackson

PROPOSAL NUMBER:

NAME: Sandy Riley

TEL No.: (213) 974-5502

- Agree with proposed changes.
- Do not agree with proposed changes.
- Agree with proposed changes only if modified.

Probate Code Sections 21612 and 21613

Regarding clarification of the "date of death valuation" provision of Probate Code Sections 21612 (share of omitted spouse) and 21613 (share of omitted child): the preferable method is to use date of death values for determining the proportion of each beneficiary's share. Dates of distribution can be manipulated.