#L-601 12/11/80

Memorandum 81-2

Subject: Study L-601 - Non-Probate Transfers

At the June 1980 meeting, the Commission approved Article VI of the Uniform Probate Code for distribution for comment. Article VI would make it easier to dispose of property on death other than by will through the use of a joint deposit account, Totten trust account, or pay-on-death account, or through a pay-on-death provision in a contract, deed or other instrument. We sent the UPC article to approximately 500 persons and organizations for review and comment. We have received responses from nine people, including attorney Ronald E. Gother writing on behalf of the Uniform Probate Code Subcommittee of the Estate Planning, Trust and Probate Law Section of the State Bar. Mr. Gother's letter is attached as Exhibit 1. The other comments are attached as Exhibits 2 through 9.

The staff has made a number of revisions to Article VI as a result of these comments. A staff draft of a Recommendation Relating to Non-Probate Transfers which contains the staff revisions is attached to this memorandum. Sections 6101 through 6113 (less Section 6106.5) of the draft are generally the same as Sections 6-101 through 6-113 of the Uniform Probate Code, except that (1) the financial institution and the depositor are permitted by agreement to vary the statutory procedure for changing the form of the account or stopping or varying payment under the account (Section 6105), and (2) the financial institution's right under existing law to set-off against the account of a debtor-depositor has been continued but not expanded as the UPC would do (Section 6113, discussed infra).

Several significant new provisions (Sections 6106.5, 6114-6117) have been added to the UPC provisions: (1) A provision is added that account funds of co-depositors who are married to each other are presumed to be their community property with certain exceptions (Section 6106.5, discussed infra); (2) a provision for a 30-day delay in payout (with exceptions) by the financial institution after a depositor's death is added (Section 6115, discussed infra); (3) the existing Financial Code provision authorizing direct payment to a minor beneficiary on the death

of the trustee is repealed and replaced by the general rules of Probate Code Sections 3400-3413 relating to payment of minors' funds (Section 6116); (4) it is made clear that the Revenue and Taxation Code provision concerning the consent to transfer given by the Controller's Office after a depositor's death is not limited by the new statute (Section 6117).

The issues raised by the comments and the staff-proposed solutions to these issues are discussed below.

OVERALL REACTION

Five of the nine commentators support adoption of Article VI in whole or in part, four appear essentially neutral, and none opposed its adoption. Of the five in support, one enthusiastically supports the adoption of Article VI in its entirety (Professor Jesse Dukeminier, Exhibit 7), three support its adoption with revisions (Exhibits 1, 2, and 5), and one supports the adoption of the provisions relating to multiple-party accounts but not the provisions relating to pay-on-death clauses in written instruments (Exhibit 6).

The State Bar said, "In general, we believe that the non-probate transfer section is well drafted and its adoption in California would be an improvement in California laws." (Exhibit 1.) Professor Dukeminier said, "I thoroughly approve of the adoption of Article VI of the Uniform Probate Code," and makes persuasive arguments in favor of the written instrument provisions as well as the deposit account provisions. (Exhibit 7.) Other general comments were as follows. "The adoption of Article VI of the Uniform Probate Code in California would be a significant advantage to the very liquid if not small estate, allowing for the disposition of cash very simply and with little or no interference from the county or state." (Exhibit 2.) "The proposed sections on multiple-party accounts appear to be workable and useful." (Exhibit 6.) The provisions relating to multiple-party accounts "will certainly have far-reaching effects . . . and should be well considered and publicized before adoption." (Exhibit 4.) "I believe Part 2, 'Provisions Relating to Effect of Death,' is a welcome addition to the law." (Exhibit 5.)

And finally, in a letter advocating the need for a review of the entire Probate Code, "Article VI is a pimple on a gnat." (Exhibit 8.)

MULTIPLE-PARTY DEPOSIT ACCOUNTS

Effect of Article VI on Community Property Rights

Three letters (Exhibits 1, 3, and 4) raise various problems created by the silence of Article VI with respect to community property rights. The interrelationship of Article VI and community property law appears to be the major problem in adapting Article VI for use in California. Article VI has a provision making a multiple-party account subject to the surviving spouse's statutory nonbarrable share used in common law states. See Uniform Probate Code § 6-106. However, these provisions were not drafted for use in community property states; the community property states were left to work out their own solutions to this problem. See Comment to Part 2 of Article II of the Uniform Probate Code.

Under existing California law, if a husband and wife deposit community funds into their joint tenancy account, a rebuttable presumption arises that they thereby intended to convert the funds from community property to joint tenancy. See, e.g., In re McCoin, 9 Cal. App.2d 480, 50 P.2d 114 (1935). The legal effect of this is that the spouses lose their power of testamentary disposition over one-half of the funds (see Prob. Code § 201) and the funds are no longer divisible on divorce. Walker v. Walker, 108 Cal. App.2d 605, 239 P.2d 106 (1952). There may also be disadvantageous tax consequences.

It has been persuasively argued that by placing their community funds into a joint account the spouses generally do not intend to change the character of the property and that the law therefore produces unintended results. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 90, 95, 106-09 (1961). This could be rectified by reversing the presumption: Rather than presuming transmutation from the form of the deposit, additional proof of an intent to transmute could be required. Id. at 105-09. The staff finds this suggestion attractive. The staff therefore recommends adding proposed Section 6106.5 as a new section to Article VI. Section 6106.5 provides that, notwithstanding the form of the account, if two co-depositors are married to each other

their funds will be presumed to be community property, subject to being rebutted by evidence of their agreement, separate from the deposit agreement, that the funds were not to be community property or a showing that the property deposited in the account can be traced from separate property (absent an agreement to transmute).

A different problem is raised where the community funds are deposited by one spouse into a joint account between that spouse and a third person. Under existing law, there is no presumption of transmutation by the unilateral act of the depositor spouse, and on death of the depositor spouse, the surviving spouse may recover half the community funds notwithstanding the survivorship provisions of the account. See Prob. Code § 201; Mazman v. Brown, 12 Cal. App.2d 272, 55 P.2d 539 (1936) (life insurance). This is noted in the Comment to Section 6104 (right of survivorship).

Subjecting Multiple-Party Account to Death Taxes and Decedent's Debts If Estate Is Insufficient

The State Bar Subcommittee (Exhibit 1) opposes the provision in Section 6-107 of the Uniform Probate Code which subjects a multiple-party account to death taxes and claims of the decedent's creditors if other assets of the estate are insufficient. This is based on their view that such a right does not now exist. However, Totten trust accounts are subject to claims of the decedent's creditors under existing California law. See 7 B. Witkin, Summary of California Law Trusts § 17, at 5380 (8th ed. 1974). The rationale for this rule is that the deceased depositor had such extensive powers over the funds while living that the depositor may fairly be treated as the unrestricted owner. Restatement (Second) of Trusts § 58, Comment d (1959). Pay-on-death accounts are not currently recognized under California law, but, if they are to be validated as the Uniform Probate Code proposes, they should be subject to such claims by the same reasoning.

As the State Bar Subcommittee points out, joint tenancy accounts are not now subject to the claims of the decedent's creditors. See Kilfoy v. Fritz, 125 Cal. App.2d 291, 294, 270 P.2d 579 (1954); cf. Zeigler v. Bonnell, 52 Cal. App. 2d 217, 126 P.2d 118 (1942) (real property). The reasons for this are historical and highly theoretical: The surviving joint tenant takes the property not by descent from the

deceased joint tenant, but rather from the instrument by which the joint tenancy was created. Id. The practical reality is that in most cases the deceased joint tenant had unrestricted access to the funds on deposit during his or her lifetime. It is therefore equitable to subject to claims of creditors (if other assets of the estate are insufficient) that portion which the decedent owned benefically (not presumed to be one-half under the Uniform Probate Code as it is under Section 852 of the Financial Code). Such a rule is analogous to the rule which permits creditors of a donee of a general power of appointment to reach the appointive property where other property of the donee is insufficient to satisfy such claims. Civil Code § 1390.3. Such a rule also results in treating joint accounts, Totten trust accounts, and P.O.D. accounts alike vis a vis creditors when it makes no real sense to treat them differently.

The State Bar Subcommittee (Exhibit 1) also opposes the provision of Section 6-107 that permits the decedent's personal representative to reach multiple-party account funds for estate taxes in an amount greater than the taxes attributable to the account. However, the section permits this only if "other assets of the estate are insufficient." If other assets of the estate are insufficient to pay death taxes, then the estate beneficiaries will receive nothing. In these circumstances, it is equitable to pursue the decedent's beneficial interest in the multiple-party account funds to the full extent of unpaid taxes.

For these reasons, the staff recommends against insulating multiple-party accounts from death taxes and claims of the decedent's creditors.

Permissibility of Creating Tenancy in Common Accounts and Accounts in Other Forms

Three letters (Exhibits 1, 3, and 4) raise the question of whether Article VI would prevent depositors from creating a tenancy in common account. Under existing California law, a tenancy in common account does not carry with it a right of survivorship; the co-tenant's interest is subject to testamentary disposition and, in the case of intestacy, passes to his or her heirs at law. The existing statutory presumption of joint tenancy only applies when the account expressly mentions survivorship (see Fin. Code §§ 852, 7602, 11204), and so the existing presumption does not affect a tenancy in common account.

Under Article VI, when two or more co-depositors open an account a right of survivorship is presumed whether or not mention is made of any right of survivorship unless there is clear and convincing evidence of a different intention at the time the account is created. Uniform Probate Code § 6-104. Thus under Article VI the parties may negate survivorship if they take sufficient care to do so. If the parties' deposit agreement executed at the time the tenancy in common account is opened indicates that there is no right of survivorship, that would constitute the "clear and convincing" evidence necessary to overcome the UPC presumption. However, it is doubtful that the mere opening of a tenancy in common account without any reference to survivorship and without any other agreement would suffice to overcome the UPC presumption of survivorship.

The "underlying assumption" of the UPC presumption is that "most persons who use joint accounts want the survivor or survivors to have all balances remaining at death." Comment to Uniform Probate Code § 6-104. The staff thinks that this is a reasonable assumption where the account funds are not community property. Accordingly, the staff recommends that the proposed legislation not specify the legal effect of opening a tenancy in common account, and that the question of whether the opening of a tenancy in common account without more is a sufficient expression of the depositors' intent not to have survivorship be left to case law development in the states which have enacted Article VI of the Uniform Probate Code.

Financial Institution's Right to Set-Off Against Multiple-Party Account

Under existing California law, banks and savings and loan associations have a right of set-off against the account of a depositor who is indebted to the institution, subject to certain limitations when the debt is primarily for personal, family, or household purposes. See Fin. Code §§ 864 (bank), 7609.5 (savings and loan association). Section 6-113 of the Uniform Probate Code gives an unrestricted right of set-off in favor of a "financial institution," defined to include banks, savings and loan associations, and credit unions. It is not clear whether credit unions have such a right under existing California law, although it appears they may since the right of set-off is not statutory but is

grounded in general principles of equity. Kruger v. Wells Fargo Bank, 11 Cal.3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974).

The State Bar Subcommittee (Exhibit 1) objects to Section 6-113 to the extent it creates new set-off rights, and the staff is inclined to agree with the State Bar Subcommittee. If Section 6-113 is to be enacted in California, we must consider whether a section should be added to the Financial Code limiting the right of set-off for family debts in the case of a credit union in the same manner as is provided in Financial Code Sections 864 and 7609.5 for banks and savings and loan associations. It would seem preferable to leave the resolution of such matters to the financial institutions concerned and the Legislature. Accordingly, the staff recommends that Section 6-113 be revised to incorporate existing law with respect to set-off in favor of financial institutions, and not to create new set-off rights, and Section 6113 as drafted reflects this recommendation.

Effect of Article VI on Oral Trusts

One letter (Exhibit 3) suggests that express recognition be given to the situation where an elderly person establishes a joint account with one of several children in return for a promise that on the parent's death the child will share the proceeds equally with siblings. The court enforced such a promise in Jarkieh v. Badagliacco, 75 Cal. App.2d 505, 170 P.2d 994 (1946). The staff recommends that reference be made to this case in one of the Comments, and the staff has done this in the last paragraph of the Comment to proposed Section 6104.

Delay in Distributing Multiple-Party Account Proceeds to Survivors

One letter (Exhibit 2) points out that although the estate of the deceased depositor may have a claim against account funds to pay debts, taxes, and expenses of administration (Uniform Probate Code § 6-107), this may be an illusory right if account funds are paid over immediately to the survivor and dissipated. The letter suggests a 30-day delay in payment to the survivor (unless the survivor is a spouse, minor or dependent child, executor, or trustee of the decedent) to give the executor time to assert a claim against the account funds. This suggestion seems sound.

The staff recommends that a section be added to Article VI to provide for a 30-day delay in payment by a financial institution to

surviving beneficiaries upon the death of the depositor in the case of a pay-on-death account or tentative trust account. (In the case of a joint account, the account continues because there is a surviving co-depositor.) The staff has added proposed Section 6115 to reflect this recommendation.

Unpaid Inheritance Taxes on Multiple-Party Account Proceeds

One letter (Exhibit 2) points out the problem created when California inheritance taxes due from the surviving beneficiary of a multiple-party account have not been paid and as a result the court administering the probate estate (which does not include the multiple-party account funds) will not order final distribution. This issue was considered in the case of Estate of Yush, 8 Cal. App.3d 251, 87 Cal. Rptr. 222 (1970) (U.S. series E bonds held in joint tenancy). The court held that it was improper to delay distribution when the estate owed no taxes, although a beneficiary outside probate owed taxes. It thus appears that this matter is adequately covered under present California law. The staff recommends that reference be made to the Yush case in one of the Comments, and the staff has done this in the Comment to proposed Section 6107.

Interrelationship of Article VI and Provisions Concerning Family Allowance and Small Estate Set-Aside

Section 6-107 (rights of creditors) of the Uniform Probate Code permits funds in a multiple-party account to be reached in order to pay "statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient." The UPC Comment to Section 6-107 indicates that "statutory allowances" includes the family support allowance payable out of the estate during its administration. California has similar family allowance provisions in Sections 680-684 of the Probate Code. The staff has substituted a specific reference to these sections of the Probate Code for the UPC reference to "statutory allowances."

In a conforming revision to Section 647 of the Probate Code, the staff has made it clear that funds in a multiple-party account are not subject to Sections 640-646 of the Probate Code, pursuant to which a decedent's estate of $20,000 or less may be summarily set aside to the

surviving spouse or minor children. This is consistent with the existing provisions of Section 647 which make the small estate set-aside provisions inapplicable to joint tenancy property or life or other estates terminable on the decedent's death.

The State Bar Subcommittee (Exhibit 1) is concerned about a different aspect of the small estate set-aside provisions. Their concern is that if the estate is summarily set aside, the argument may then be made that because of the set-aside the estate is "insufficient" to pay debts, taxes, and expenses of administration, requiring resort to the multiple-party account funds in the hands of the surviving party to pay such obligations. However, this problem would seem to be adequately dealt with by the requirement that expenses of the last illness, funeral charges, and expenses of administration must be paid before the estate may be set aside. Prob. Code § 645. Moreover, after these expenses are paid and the estate is set aside, the surviving spouse or minor children for whom the estate is set aside take the property subject to liens and encumbrances which existed at the date of the decedent's death (Broll, supra § 3.30, at 133), and are made personally liable for the unsecured debts of the decedent (Prob. Code § 645.3). Thus, if the value of the estate set aside exceeds the taxes and secured and unsecured debts, the estate will be sufficient so that resort to the multiple-party account funds is unnecessary. If debts and taxes exceed the value of the estate, there will be nothing to set aside.

MISCELLANEOUS TECHNICAL COMMENTS

Exhibit 1 (State Bar Subcommittee) suggests that the reference in Section 6-106 to Sections 2-201 through 2-207 of the Uniform Probate Code be deleted. Sections 2-201 through 2-207 relate to the elective share for a surviving spouse and were designed for common law states, not community property states. See the Comment to Part 2 of Article II of the Uniform Probate Code. The staff agrees that the reference to these sections should be deleted, and the staff has done this in Section 6106.

Exhibit 5 suggests that the language in Section 6-201 which validates provisions in various written instruments designed to pass property on death be changed from "is deemed to be nontestamentary" to "is

deemed to be legally operative." The staff agrees that the language should be changed, but prefers to say that the provision "is not invalid because the instrument is not executed with the formalities of a witnessed will." The staff has revised Section 6201 accordingly.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Memo ~~80-86~~ 81-2

Exhibit 1

GIBSON, DUNN & CRUTCHER
LAWYERS

515 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071

(213) 488-7000
TELEX: 67-4930
CABLE ADDRESS: GIBTRASK LSA

JAS. A. GIBSON 1852-1922
W. E. DUNN 1861-1925
ALBERT CRUTCHER 1860-1931

BERT A. LEWIS
SHERMAN S. WELPTON, JR.
RICHARD H. WOLFORD
MAX EDDY UTT
GEORGE H. WHITNEY
OF COUNSEL

WILLIAM FRENCH SMITH
JULIAN O. VON KALINOWSKI
F. DANIEL FROST
PAUL ZIFFREN
SHARP WHITMORE
SAMUEL O. PRUITT, JR.
FRANCIS M. WHEAT
ARTHUR W. SCHMUTZ
NORMAN B. BARKER
WILLIAM F. SPALDING
JAMES R. HUTTER
ROBERT D. BURCH
JOHN L. ENDICOTT
JOHN J. HANSON
FRANK L. MALLORY
JOHN T. PIGOTT
JEROME C. BYRNE
J. ROBERT POST, JR.
WILLARD Z. CARR, JR.
RAYMOND L. CURRAN
GEORGE W. BERMANT
DEAN C. DUNLAVEY
G. EDWARD FITZGERALD
ROY D. MILLER
GUY R. CLAIRE
RUSSELL L. JOHNSON
ROBERT S. WARREN
HERBERT KRAUS
RONALD E. GOTHER
JEROME F. PREWOZNIK
IRWIN F. WOODLAND
JOHN M. SHARER
JAMES M. MURPHY
CHARLES S. BATTLES, JR.
STEPHEN E. TALLENT
ROBERT T. GELBER

PAUL G. BOWER
ROBERT E. COOPER
JOHN F. OLSON
ROBERT K. MONTGOMERY
KENNETH E. RISTAU, JR.
RONALD S. BEARD
MARSHA McLEAN-UTLEY
DEAN STERN
*GERALD L. PARSKY
LEO ZIFFREN
WESLEY G. HOWELL, JR.
THEODORE B. OLSON
JACK H. HALGREN
THOMAS B. PITCHER
ANDREW E. BOGEN
JOHN P. ANDERSON
ROY J. SCHMIDT, JR.
WILFORD D. GODBOLD, JR.
RICHARD G. DUNCAN, JR.
JOHN A. RUSKEY
FREDERICK F. GREGORY
KENNETH W. ANDERSON
JOHN J. SWENSON
BRUCE A. TOOR
STEPHEN M. BLITZ
RALPH C. WINTRODE
CHARLES K. MARQUIS
VINCENT A. NARCISI
JAMES G. PHILLIPP
DAVID A. CATHCART
STEVEN A. MEIERS
ARTHUR L. SHERWOOD
JOHN C. WELLS
JAMES R. MARTIN
LESTER ZIFFREN
RICHARD A. STRONG

RICHARD D. HALL
MICHAEL E. ALPERT
THOMAS E. GALLAGHER
ANA MARIE STERN
WILLIAM STINEHART, JR.
R. RANDALL HUFF
LAWRENCE CALOF
J. EDD STEPP, JR.
ROBERT FORGNONE
CHARLES C. IVIE
RICHARD CHERNICK
BRUCE D. MEYER
JOHN M. COCHRAN III
ALAN W. PETTIS
C. THOMAS LONG
C. RANSOM SAMUELSON II
J. ANTHONY SINCLITICO III
J. MICHAEL BRENNAN
DON PARRIS
MARC R. ISAACSON
MICHAEL D. RYAN
JAMES C. OPEL
FREDERICK R. WIRTZ
MARTIN C. WASHTON
SCOTT A. ARUSE
WAYNE W. SMITH
PETER L. BAUMBUSCH
BRUCE A. TESTER
PETER J. THURSTON
RICHARD P. LEVY
DON HOWARTH
DENNIS A. GLADWELL
S. DAVID BUNN

*ADMITTED TO D.C. & N.Y. BARS ONLY

WASHINGTON
818 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006
(202) 862-5500

CENTURY CITY
2029 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067
(213) 552-8500

EUROPE
104, AVENUE RAYMOND POINCARÉ
75116 PARIS, FRANCE
704-5292
CABLE ADDRESS: GIBTRASK PARIS
TELEX: 613092

NEWPORT CENTER
660 NEWPORT CENTER DRIVE
NEWPORT BEACH, CALIFORNIA 92660
(714) 759-3800

LONDON
28-29 DOVER STREET
LONDON, W1X 3PA
01-629-9502
CABLE ADDRESS: GIBTRASK LONDON W1
TELEX: 27734

SAN DIEGO
600 B STREET
SAN DIEGO, CALIFORNIA 92101
(714) 231-1100

SAN JOSE
100 PARK CENTER PLAZA
SAN JOSE, CALIFORNIA 95113
(408) 998-2000

WRITER'S DIRECT DIAL NUMBER
(213) 488-7322

OUR FILE NUMBER
8207-9-4

September 16, 1980

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMoully:

The Uniform Probate Code Subcommittee of the Estate Planning, Trust and Probate Law Section of the California State Bar divided itself into two sub-subcommittees for the purpose of responding to the Law Revision Commission's request for comments concerning the two sections of the Uniform Probate Code presently under consideration by the Commission. These sections deal with non-probate transfers and the durable power of attorney. The purpose of this letter is to pass on to the Commission the comments concerning the non-probate transfer section. In a separate letter you will receive comments concerning the durable power of attorney section.

In general, we believe that the non-probate transfer section is well drafted and its adoption in California would be an improvement in California laws. We do have the following specific recommendations:

(1) We do not favor inclusion of Section 6-107 to the extent that such section gives a creditor the ability

to reach the balance in a multiple-party account. We are of the opinion that such right does not now exist and do not favor the creation of such right.

(2) We do not favor the provision in Section 6-107 which would give a personal representative the ability to reach the balance in a multiple-party account for the payment of death taxes if such death taxes exceed the amount attributable to such multiple-party account. Thus, Section 6-107 as drafted purports to give the personal representative of an estate the right to utilize the balance in a multiple-party account for any taxes. Under current California law a personal representative has the right to obtain contribution towards a death tax payment from the recipient of a multiple-party account to the extent of the death taxes attributable to such account. This right in our opinion seems sufficient and need not be expanded.

(3) If Section 6-107 is to remain as part of the legislation, it will be necessary to coordinate such section with the various small estates set aside provisions of the existing Probate Code in order to make sure that the assets of the estate are not "insufficient" within the meaning of Section 6-107 by reason of the fact that the assets in the estate had been set aside under the set aside provisions of the Probate Code.

(4) In keeping with the general comment expressed above of not desiring to expand creditor's rights, we would not favor Section 6-113 to the extent that it creates a set-off right in the financial institution which does not exist at this time. No member of the subcommittee purported to be an expert on set-off rights of financial institutions and we therefore, do not know whether Section 6-113 would in fact create a set-off right which does not now exist.

(5) We would favor a revision of Section 6-104 to make it clear that a tenancy in common or community property account does not carry with it the automatic right of survivorship.

(6) Section 6-106 conveys a reference to Section 2-201 thru 2-207. These sections provide for an elective

share for a surviving spouse. The drafters of the Uniform Probate Code did not propose that such elective share concept be adopted in community property estates. As a result, the reference in Section 6-106 to Section 2-201 thru 2-207 should be eliminated.

As a final and general comment we note that there is a need to coordinate these new sections dealing with non-probate transfers with other statutory provisions which now exist which pertain to bank and savings and loan accounts. We have not made any attempt to isolate these other statutory provisions for the reason that we have great confidence that the California Law Review Commission will do so in due course.

I would be pleased to amplify on or clarify any of the matters set forth in this letter.

With best regards,

Ronald E. Gother

REG/vef
cc:Colleen M. Claire
Joyce Parsons
Mary Flett
All Members of Uniform
Probate Code Subcommittee

Exhibit 2

LAW OFFICES OF

ALLEN, IVEY, CORNELL, MASON & CASTELLUCCI

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION

650 WEST 19TH STREET
POST OFFICE BOX 2184
MERCED, CALIFORNIA 95340
(209) 723-4372

TERRY L. ALLEN
A PROFESSIONAL CORPORATION
WILLIAM T. IVEY, JR.
DENNIS A. CORNELL
MICHAEL L. MASON
PHILIP R. CASTELLUCCI
GARY B. POLGAR
DONALD J. PROIETTI
KENNETH M. ROBBINS

LOS BANOS OFFICE:
840 6TH STREET
POST OFFICE BOX 471
LOS BANOS, CALIFORNIA 93635
(209) 826-1584

REPLY TO: MERCED

August 8, 1980

California Law Revision Commission
400 Middlefield Rd., Room D-2
Palo Alto, California 94306

RE: Your letter of June 20, 1980
Requesting Comments Concerning Enactment
in California of Article VI of the
Uniform Probate Code

Dear Sir:

The adoption of article VI of the Uniform Probate Code in California would be a significant advantage to the very liquid if not small estate, allowing for the disposition of cash very simply and with little or no interference from the county or state.

However, I have a few concerns which must be voiced. Since Section 6-104 conferrs immediate ownership of these accounts without apparent amount limitations, how will the inheritance taxes be accounted for on large amounts released? Since no probate court will grant a petition for distribution without the inheritance taxes having been paid in full, what provisions will be made for collecting the inheritance tax from such a beneficiary? Will remaining property be "frozen" or have a lien imposed to the possible detriment of other beneficiaries to satisfy the taxes owed by an insolvent (having squandered his fortune) or one who had abscondent with his or her account?

I suggest appropriate changes be made to the Probate and Revenue and Taxation codes to allow distribution on an estate when the taxable estate results in inheritance taxes due from a party receiving assets from such survivorship accounts who has no interest in the probate estate. Payment of inheritance taxes on the probate assets, or on other assets received from decedent by parties to the probate, would still be required

prior to distribution. The inheritance taxes would then follow the account proceeds and become a personal liability of the beneficiary without creating a defacto lien on decedent's other assets to the detriment of other participating beneficiaries Section 6-107 apparently tried to grapple with this problem in another form. These accounts could cutoff creditors, spouses, and minor or dependent children from funds which they look to for support or payment. The Section places a rather dubious lien of two years duration on the funds received from such accounts. This, however, makes the very troublesome assumption that such funds will not be exhausted and/or that the beneficiary will remain solvent for their potential recapture.

The Section imposes the very harsh burden upon the estate, creditors, spouses and children to instigate litigation (which could itself consume the proceeds) to recover funds to satisfy estate obligations or statutory support rights. The Section releases the financial institution from liability to the estate unless before payment to beneficiaries, the bank is served with process in a proceeding by the personal representative. Now, instead of a race to the courthouse, we shall have a race to the bank. The executor will almost always lose that race. By the time the funeral is over, petitions filed, appropriate publications made, a hearing is had, the executor appointed, the needs of the estate to support a spouse or children and to pay bills are ascertained, and appropriate notices and actions are filed and served on the financial institution, at least one month, and in almost every case several months, will have elapsed.

Essentially, the protections afforded various interests that our very long history of public policy dictates we protect, and to which Section 6-107 addresses itself, are nonexistent: unless, of course, one defines "served with process" as used in the final sentence of Section 6-107 as noticed by the petitioner for letters testamentary or administration. If defined as such, the section could work to nullify the remainder of the article.

I suggest that a section be added with appropriated amendments to Section 6-104, 6-106, 6-109, etc., which would delay for at least thirty days from the date of death the payment to survivors the proceeds of such an account, unless the survivor is a spouse, minor or dependent child, executor, or trustee of the decedent. Such a delay would enable executor to bring necessary actions in exercise of his or her responsibilities under Section 6-107. Protection for creditors and dependents would be assured with minimal interference with, or convenience to, the banking

contract.

Very truly yours,

ALLEN, IVEY, CORNELL, MASON,
& CASTELLUCCI

By KENNETH M. ROBBINS

KMR:kt

LAW OFFICES
Kaplan, Livingston, Goodwin, Berkowitz & Selvin

LEON KAPLAN
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HAROLD D. BERKOWITZ
EUGENE S. GOODWIN
HERMAN F. SELVIN
BAYARD F. BERMAN
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DANIEL H. WOLFF
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P. JOHN BURKE
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WENDY W. BENJAMIN
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ANSEL A. SLOME
ALLEN SHAPIRO
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NAN H. BLITMAN
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ALAN M. BRUNSWICK
GREGORY GELFAN
DANIEL C. ROSENBERG
ANNE B. ROBERTS
CAROL C. DANIELS

450 NORTH ROXBURY DRIVE
BEVERLY HILLS, CALIFORNIA 90210

OF COUNSEL
HAROLD A. LIPTON
MELVILLE B. NIMMER
JEROME EDWARDS
HARRY L. USHER

TELEPHONE (213) 274-8011
CABLE ADDRESS: KAPTON
TELEX: 674858
TELECOPIER (213) 278-4667

July 16, 1980

IN REPLY PLEASE REFER TO:

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Uniform Probate Code

Dear Mr. DeMoully:

I have received a copy of the tentative recommendation of the California Law Revision Commission regarding enactment of Article VI of the Uniform Probate Code.

I believe that the number of types of accounts contemplated by the legislation is insufficient. For example, express provision should be made for holding accounts as community property and as tenants in common.

Express recognition should also be given to the problem of elderly parents who, typically, will name one child as a joint tenant with regard to a bank account so as to allow that child to manage funds should the parents become incapacitated. Under such arrangements, the child usually promises the parents that upon the death of the surviving parent, he will divide the account proceeds equally with the other children. This form of oral trust has been widely accepted, on an informal basis, by the State Controller's office for California inheritance tax purposes.

Very truly yours,

Paul Gordon Hoffman

PGH:mz

California Superior Court

San Francisco

JOHN B. O'DONNELL
COURT COMMISSIONER
CITY HALL

August 14, 1980

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Rd, Room D-2
Palo Alto, California 94306

Re: Article Vl of Proposed Uniforn Probate Code

Dear Mr. DeMoully:

Our Probate Judge John A. Ertola has referred to me a copy of your memo of June 20 addressed to persons interested in probate law.

On a quick review I am struck by (1) the drastic impact that the proposal would have on joint tenancy accounts which are frequently used as formal or informal estate planning devises to avoid probate administration, and (2) the lack of specific reference to community property.

If community property is included in "Multiple-Party Accounts," then proposed Section 6-107 would seem to be in conflict with portions of the present Probate Code (See e.q., Secs 202, 650) whereby community property may not be subject to administration.

To make multiple party accounts, especially joint tenancies, subject to rights of creditors, etc. under 6-107, and to questions as to the degree or amount of ownership under 6-103, are of course matters of policy, but will certainly have far-reaching effects on present assumptions and rules, and should be well considered and publicized before adoption.

Sincerely yours,

JOHN B. O'DONNELL
Probate Commissioner

Memo 80-86 Exhibit 5

JAMES R. BANCROFT
A PROFESSIONAL CORPORATION
JAMES H. McALISTER
LUTHER J. AVERY
ALAN D. BONAPART
HENRY L. GLASSER
NORMAN A. ZILBER
EDMOND G. THIEDE
ROBERT L. DUNN
JAMES WISNER
SANDRA J. SHAPIRO
GEORGE R. DIRKES
BOYD A. BLACKBURN, JR.
MICHELE D. ROBERTSON
JANET FRIEDMAN
ROBERT C. SCHUBERT
JOHN R. BANCROFT
DENNIS O. LEUER
DAVID M. LEVY
BARBARA L. STEINER

LAW OFFICES OF
BANCROFT, AVERY & McALISTER
601 MONTGOMERY STREET, SUITE 900
SAN FRANCISCO, CALIFORNIA 94111

TELEPHONE
AREA CODE 415
788-8855
CABLE ADDRESS BAM

July 24, 1980

OUR FILE NUMBER

John H. Demoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

PROBATE LAW

Dear Mr. Demoully:

I would support the enactment of the substance of Article VI (Non-Probate Transfers) of the Uniform Probate Code (UPC) with the necessary technical revisions. I do not have the time to go through the law seeking all inconsistent provisions of existing California law. I would be happy to review such an analysis if one is prepared.

Conceptually, I have no strong opinion favoring "Totten Trusts" or a P.O.D. account and I question the social wisdom of encouraging banks or other financial institutions to institute such plans in California. As a "legal matter" I have no problem with these two new types of accounts, but I imagine there will need to be extensive change in the Financial Code and in the regulations of financial institutions. I question the value of such new laws if the banking industry is not strongly advocating such change.

An interesting aspect of the multiple-party accounts is the effect upon unmarried cohabitors. I wonder whether the multiple-party accounts will further confuse an already confused area. Also, I believe the multiple-party account will need review by family law practitioners to see if it creates added problems at the time of marital dissolution.

I believe Part 2 "Provision Relating to Effect of Death" is a welcome addition to the law. I assume there will be need for revision of the Insurance Code and regulations and possibly other general statutes. The operative language ". . .a contract, gift, conveyance or trust is deemed to be nontestamentary,. . ." seems wrong. Usually it is intended that the relevant provisions operate at death. Therefore, the provisions are "testamentary." I believe the language "deemed to be nontestamentary. . ." should be ". . .deemed to be legally operative. . .".

Yours sincerely,

Luther J. Avery

LJA:ble

Exhibit 6

LAW OFFICES OF
WILLIAM C. KUHS
1213 SEVENTEENTH STREET
BAKERSFIELD, CALIFORNIA
(805) 322-4004

WILLIAM C. KUHS
JAMES R. PARKER, JR.
KENNETH C. TWISSELMAN II

PLEASE REPLY TO
P. O. BOX 2205
BAKERSFIELD, CA. 93303

OUR FILE NO.

July 30, 1980

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

Re: Article VI of the Uniform Probate Code - Recommendations

Dear Sirs:

My comments are in response to your letter of June 20, 1980, concerning the enactment of Article VI of the Uniform Probate Code in California.

The proposed sections on multiple-party accounts appear to be workable and useful.

The proposed section 6-201, provisions for payment or transfer at death, would seem to be inviting substantial litigation as to the formalities required for an instrument with testamentary effect. Conservative estate planning would require a careful review of all such "non-testamentary" documents, and it is likely that many such documents would be inconsistent with the recommended estate plan. Amendments to such "non-testamentary" documents may not be possible, and the cost of carrying out such amendments where possible might be substantial. In short, in the interest of economy and flexibility, it would seem preferable to retain the will as the principal testamentary instrument. The formalities required for a will tend to promote informed estate planning and tend to discourage ignorant error, undue influence, and fraud.

Very truly yours,

Kenneth C. Twisselman II

KCT:mc

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO SANTA BARBARA · SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

June 11, 1980

Mr. John H. DeMoully
Executive Secretary
Calif. Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. DeMoully:

I thoroughly approve of the adoption of Article VI of the Uniform Probate Code. There is simply no convincing reason why payable-on-death designations on a bank account are not permitted while Totten Trusts and joint bank accounts are. The possibility of fraud is exactly the same in all three cases, as the bank records are equally reliable, or not reliable, in all three cases. It makes mischief, with unwanted consequences, for bankers to have to force people artificially into either Totten Trusts or joint bank accounts when what they really want is a p-o-d account. Why can't the depositor have what he wants?

As for payable-on-death designations on other written contracts, there is no convincing reason why these should not be valid. Death designees are valid on life insurance contracts, on pension plans, and on government bonds. The appropriate analysis is that these are third party beneficiary contracts, and the fact that economic benefits pass at death rather than during the life of a contracting party does not bring the contracts within the statute of wills, just as the fact that economic benefits shift at the death of a trust beneficiary does not bring the trust within the statute of wills. The real issues are whether the acts of the contracting parties indicate a firm intent to be bound and whether the evidence is reliable. The UPC believes binding written contracts are reliable, and so do I.

Sincerely,

Jesse Dukeminier
Professor of Law

JD:bd

LAW OFFICES

GENDEL, RASKOFF, SHAPIRO & QUITTNER

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

6TH FLOOR - CENTURY PARK PLAZA

1801 CENTURY PARK EAST

LOS ANGELES, CALIFORNIA 90067

(213) 277-5400

CABLE ADDRESS: GENRAS

TELEX: 69-6133

TELECOPIER (213) 556-3631

MARTIN GENDEL*
H. MILES RASKOFF*
BERNARD SHAPIRO*
ARNOLD M. QUITTNER
EARL A. GLICK
FRANK C. CHRISTL
RICHARD S. BERGER
BERNARD P. SIMONS
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LAWRENCE BASS
ELMER DEAN MARTIN III
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JOHN A. MOE, II
NEIL H. MILLER
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DENNIS L. LIVINGSTON
JOHN R. TATE
GARY P. LONG
MICHAEL A. MORRIS
LOUIS E. KEMPINSKY
HOWARD J. STEINBERG
KENNETH A. KRAMARZ
*A PROFESSIONAL CORPORATION

LEONARD G. LEIBOW
(1937-1975)

IN REPLY REFER TO:

July 17, 1980

John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: June 20, 1980 memorandum regarding
Article VI of the Uniform Probate Code

Dear Mr. DeMoully:

I am not current on what the Commission is doing to revise California probate law. I did receive the June 20, 1980 memo referred to above and couldn't help but write to comment on California probate law.

I practiced in Wisconsin for six years and lived through that state's revision of its probate and inheritance tax laws. Compared with Wisconsin's probate and inheritance tax laws, California's laws, as former Ninth Circuit Chief Judge Chambers would say, "are downright crummy."

I hope that the Commission is going to do more than tentatively recommend adoption of Article VI. Article VI is a pimple on a gnat.

Best regards,

ELMER DEAN MARTIN III

EDM/aw

Memo 80-86 Exhibit 9

NATIONAL RETIRED TEACHERS ASSOCIATION

AMERICAN ASSOCIATION OF RETIRED PERSONS

CALIFORNIA JOINT STATE LEGISLATIVE COMMITTEE

CHAIRMAN
Mr. Everett V. O'Rourke
518 Messina Drive
Sacramento, CA 95819
(916) 454-3809

VICE CHAIRMAN
Mr. Gene Wheeler
758 Cameo Avenue
Hemet, CA 92343
(714) 925-2475

SECRETARY
Mrs. Margaret F. Helton
162 Mankato
Chula Vista, CA 92010
(714) 422-5234

Frank Freeland, Member & Chairman, Taxation Subcommittee
429 Dunster Dr. #2 Campbell, Ca. 95008

Aug. 7, 1980

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Rd. Room D-2
Palo Alto, Ca. 94306

Dear Mr. DeMoully:

This is in response to your June 20 & June 26, 1980 transmittals and to your inviting of comments pertaining to your Commission's publications titled:

ANALYSIS OF ARTICLE VI OF UNIFORM PROBATE CODE
Copy of ARTICLE VI NON-PROBATE TRANSFERS
TENTATIVE RECOMMENDATION relating to LIABILITY OF MARITAL PROPERTY FOR DEBTS

Not being an attorney, and commenting from a layman's point of view, it seems that the contents of those papers are very complicated and involved. However, I feel that we should appreciate your efforts and attentions in composing the details which we should be aware of, and we are pleased to see that your study is in progress. I did note a number of comments by the Joint Editorial Board in the copy of ARTICLE VI, and am also pleased in knowing that its input is being considered in the work which your Commission is doing.

Sincerely,

Frank Freeland

Frank Freeland

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

STAFF DRAFT

RECOMMENDATION

Relating to

NON-PROBATE TRANSFERS

December 1980

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

December 18, 1980

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

By Resolution Chapter 37 of the Statutes of 1980, the Legislature directed the Law Revision Commission to study the California Probate Code and to consider whether any provisions of the Uniform Probate Code should be enacted in California.

The Commission recommends that California enact the substance of Article VI of the Uniform Probate Code with some substantive and technical revisions. Conforming revisions in existing California statutes also are recommended.

Article VI relates to multiple-party bank accounts and to "pay-on-death" provisions in contracts, deeds, and other written instruments. The enactment of Article VI in California 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,

Beatrice P. Lawson
Chairperson

#L-601

STAFF DRAFT

RECOMMENDATION

relating to

NON-PROBATE TRANSFERS

INTRODUCTION

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.[1] Pursuant to this directive, the Commission has studied Article VI of the Uniform Probate Code.[2] This article, entitled "Non-Probate Transfers," adds new methods and codifies a number of methods presently used for transferring property on death without a will.

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

---

1. 1980 Cal. Stats. res. ch. 37.

2. The fifth edition of the official 1977 text of the Uniform Probate Code with official comments is published by the West Publishing Company (February 1978). The Uniform Probate Code has been adopted in fourteen states: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. 8 Uniform Laws Annotated 99 (Supp. 1980).

evidence of a contrary intention at the time the account is created. This is comparable to the familiar joint tenancy account used in California.[3]

(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.[4]

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.[5]

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

---

3. See Fin. Code §§ 852 (banks), 7602 (savings and loan associations), 11204 (federal savings and loan associations). See also Fin. Code § 14800 (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).

4. State Bar of California, The Uniform Probate Code: Analysis and Critique 184 (1973).

5. 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.

(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.

(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 parties 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.[6] 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.[7] 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 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.[8]

(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.

Rights of creditors and dependents of deceased depositor. The UPC provides that no multiple-party account is effective against an estate

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6. 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.

7. 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.

8. 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.

of a deceased person to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration (including the statutory allowances to the surviving spouse, minor children, and dependent children) if other assets of the estate are insufficient. This is accomplished by giving the personal representative of the deceased depositor the right to trace the proceeds of the account into the hands of the recipient. To facilitate the transfer by the financial institution of the funds after the death of the depositor, the UPC makes clear that this is a personal liability of the recipient to the executor or administrator of the estate of the deceased depositor; the bank or other financial institution is free to release the multiple-party account in accordance with its deposit agreement unless before payment the institution has been served with process in a proceeding by the personal representative to enforce the liability to the estate.

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 Revision Commission recommends that the substance of Article VI of the Uniform Probate Code be enacted in California with some substantive and technical 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.[9] 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.[10] 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.[11] 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.

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9. Wallace v. Riley, 23 Cal. App.2d 654, 667, 74 P.2d 807 (1937).

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

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

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 at the time the account was created. This 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.[12] Most persons who use joint accounts want the survivor or survivors to have all balances remaining at death,[13] and the UPC presumption of survivorship for joint accounts gives effect to this intent.

Rights of creditors of deceased joint account holder. The UPC permits creditors of a deceased joint account holder to reach that person's share of the account if the other assets of the estate are insufficient. This would change the anachronistic California common law rule that a surviving joint tenant takes the joint tenancy funds free of the claims of the deceased joint tenant's creditors,[14] and would make the rule with respect to joint accounts consistent with existing law

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12. 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).

    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).

13. Comment to Uniform Probate Code § 6-104.

14. See Kilfoy v. Fritz, 125 Cal. App.2d 291, 294, 270 P.2d 579 (1954); cf. People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858 (1958) (real property); Zeigler v. Bonnell, 52 Cal. App.2d 217, 126 P.2d 118 (1942) (real property).

applicable to tentative trusts[15] and general powers of appointment.[16] The existing rule gives the surviving joint tenant an unjustified windfall at the expense of the creditors of the deceased joint tenant. It would be fairer to creditors of the deceased joint tenant to permit them to reach the latter's share of the joint account funds, particularly in view of the modern and widespread use of credit cards and charge accounts.[17]

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,[18] and will permit depositors to create

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15. See 7 B. Witkin, Summary of California Law Trusts § 17, at 5380 (8th ed. 1974).

16. See Civil Code § 1390.3(b) ("Upon the death of the donee, to the extent that his estate is inadequate to satisfy the claims of creditors of the estate and the expenses of administration of the estate, property subject to a general testamentary power of appointment or to a general power of appointment that was presently exercisable at the time of his death is subject to such claims and expenses to the same extent that it would be subject to the claims and expenses if the property had been owned by the donee"). See also Civil Code § 1390.4 (property subject to unexercised general power of appointment created by the donor in favor of himself subject to claims of creditors and to expenses of administration, whether or not presently exercisable).

17. See Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 96-97 (1961).

18. 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).

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.[19]

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 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.[20] 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.[21] If the presumption is overcome, the funds

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

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

21. 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).

be 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.[22]

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.[23] The law should carry out this intent since it generally produces desirable results. Since half of community property in joint tenancy form is disposable by will,[24] the spouses have the opportunity to benefit the desired objects of their bounty. Those who should benefit from a thoughtful will are protected in contrast to the inflexible and harsh treatment of heirs under a true joint tenancy.

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22. 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.

23. Id. at 90, 95, 106-09.

24. See Prob. Code § 201; Sandrini v. Ambrosetti, 111 Cal. App.2d 439, 244 P.2d 742 (1952); Chase v. Leiter, 96 Cal. App.2d 439, 215 P.2d 756 (1950); Estate of Jameson, 93 Cal. App.2d 35, 208 P.2d 54 (1949).

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.[25] The survivorship feature of community property in joint tenancy form is particularly advantageous 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.[26] Creditors are not prejudiced since they may petition for probate[27] 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[28] presumption that funds of married persons on deposit in an account to which they are both parties is presumed to be their community property, whether or not they are described in the deposit agreement as husband and wife.[29]

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25. Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 96 (1961).

26. See id.

27. Prob. Code § 422.

28. 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 5126-28 (8th ed. 1974).

29. 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).

This will preserve the testamentary power of each spouse to the extent of half of the funds,[30] and will permit division of the funds on dissolution of their marriage.[31]

Delay in payout by financial institution. A new provision should be added to the UPC article to apply to a P.O.D. account or Totten trust account.[32] In the case of such an account, on the death of the depositor, the new provision would require that the financial institution wait at least 30 days before paying the funds over to the P.O.D. payee or trust beneficiary unless the beneficiary is a spouse, minor or dependent child, executor, administrator, guardian, conservator, or trustee of the depositor. This will give the personal representative of the deceased depositor time to assert any claims against the account for payment of estate debts, taxes, and expenses of administration where the estate is otherwise insufficient.

Conforming revisions. The provisions of the Financial Code and Civil Code relating to joint tenancy account in financial institutions[33] 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,[34] savings and loan associations,[35] federal savings and loan associations,[36] and credit

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30. See Prob. Code § 201.

31. 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. There would be no restriction on payment to a surviving joint account holder.

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

34. Fin. Code § 852 (third sentence).

35. Fin. Code § 7603 (second sentence).

36. Fin. Code § 11204 (third sentence).

unions[37] 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[38] should be revised to make such payment subject to the general rules concerning payment to a minor,[39] and moved from the Financial Code to the new statute.

Pay-on-Death Provisions in Contracts and Instruments

The UPC would expressly validate 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,[40] and that an employment contract may provide for ownership of a business to pass to the employee-manager on the death of the owner.[41] The UPC may expand California law by validating a provision in a promissory note that on the payee's death

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37. Fin. Code § 14854 (second sentence).

38. Fin. Code § 853.

39. Prob. Code §§ 3400-3413.

40. Bergman v. Ornbaun, 33 Cal. App.2d 680, 92 P.2d 654 (1939).

41. 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).

the note shall be paid to another person.[42] 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.[43] Experience with insurance contracts, revocable living trusts, multiple-party bank accounts, and United States government bonds with "pay-on-death" provisions demonstrates that the evils envisioned if will statutes are not rigidly enforced simply do not materialize.[44]

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, 11203, 11206, and 11206.5 of, and to repeal Sections 852, 853, 7602, 7603, 7604, 11204, 11205, and 14854 of, the Financial Code, and to amend Section 647 of, and to add Division 5 (commencing with Section 6101) to, the Probate Code, relating to non-probate transfers.

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

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42. 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.

43. 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).

44. Comment to Uniform Probate Code § 6-201.

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 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 6101) 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 a joint account in a financial institution under newly-enacted provisions of the Probate Code (Sections 6101-6117). Such accounts are governed by the new Probate Code sections and various provisions of the Financial Code.

3303

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 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 852 are superseded by Sections 6103, 6104, 6108, 6109, and 6116 of the Probate Code. The third sentence of former Section 852 is continued in Section 6108 of the Probate Code. The fourth and fifth sentences of former Section 852 are superseded by Section 6112 of the Probate Code.

968/644

Financial Code § 853 (repealed). Trust accounts

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

~~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 6111, 6114, and 6116 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 6101) of Division 5 of the Probate Code relating to multiple-party accounts.

3304 N/Z

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 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 7603 is superseded by Sections 6103, 6104, 6108, 6109 and 6116 of the Probate Code. The second sentence of former Section 7603 is continued in Section 6108 of the Probate Code. The third and fourth sentences of former Section 7603 are superseded by Section 6112 of the Probate Code.

3306

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.

3307

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 6101) 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 6104 of the Probate Code: The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention at the time the account is created. Prob. Code § 6104. However, the financial institution is protected from liability if it pays the account to the survivor. See Prob. Code §§ 6109, 6112.

3310

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 conservatee and conservator 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 6114 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).

3311

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 6114 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.

3312

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 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first two sentences of former Section 11204 are superseded by Sections 6103, 6104, 6108, 6109, and 6116 of the Probate Code. The third sentence of former Section 11204 is continued in Section 6108 of the Probate Code. The fourth and fifth sentences of former Section 11204 are superseded by Section 6112 of the Probate Code.

3313

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 6101) 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 6104 of the Probate Code: The presumption of survivorship may be rebutted by clear and convincing evidence of a different intention at the time the account is created. Prob. Code § 6104. However, the financial institution is protected against liability if it pays the account to the survivor. See Prob. Code §§ 6109, 6112.

3314

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).

4645

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.

09032

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 6101) of Division 5 of the Probate Code relating to multiple-party accounts. The first sentence of former Section 14854 is superseded by Sections 6103, 6104, 6108, 6109, and 6116 of the Probate Code. The second sentence of former Section 14854 is continued in Section 6108 of the Probate Code. The third and fourth sentences of former Section 14854 are superseded by Section 6112 of the Probate Code.

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," and "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 6106.5 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, a community property interest which is given to someone else by the will of the decedent, or 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, _____ Cal. App.3d ____, ____ Cal. Rptr. _____ (1980).

2183

Probate Code §§ 6101-6201 (added). Non-probate transfers

SEC. 16. Division 5 (commencing with Section 6101) is added to the Probate Code, to read:

DIVISION 5. NON-PROBATE TRANSFERS

PART 1. MULTIPLE-PARTY ACCOUNTS

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

§ 6101. Definitions

6101. In this division, 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, less all withdrawals made by or for him 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 by reason of his 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 he 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) "Proof of death" includes 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.

(j) "P.O.D. account" means an account payable on request to one person during lifetime and on his 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.

(k) "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.

(l) "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.

(m) "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.

(n) "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; 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.

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

LAW REVISION COMMISSION COMMENT

Section 6101 is the same as Section 6-101 of the Uniform Probate Code with some technical modifications:

(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 (i) by a reference to the statutes of this state that make a death certificate or record or report prima facie evidence of death.

UNIFORM PROBATE CODE COMMENT

This and the sections which follow are designed to reduce certain questions concerning many forms of joint accounts and the so-called

Totten trust account. An account "payable on death" is also authorized.

As may be seen from examination of the sections that follow, "net contribution" as defined by subsection (f) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

Various signature requirements may be involved in order to meet the withdrawal requirements of the account. A "request" involves compliance with these requirements. A "party" is one to whom an account is presently payable without regard for whose signature may be required for a "request."

3436

§ 6102. Ownership as between parties and others; protection of financial institutions

6102. (a) The provisions of Chapter 2 (commencing with Section 6103) 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 3 (commencing with Section 6108) govern the liability of financial institutions who make payment pursuant to that chapter and their set-off rights.

LAW REVISION COMMISSION COMMENT

Section 6102 is the same in substance as Section 6-102 of the Uniform Probate Code.

UNIFORM PROBATE CODE COMMENT

This section organizes the sections which follow into those dealing with the relationship between parties to multiple-party accounts, on the one hand, and those relating to the financial institution-depositor (or party) relationship, on the other. By keeping these relationships separate, it is possible to achieve the degree of definiteness that financial institutions must have in order to be induced to offer multiple-party accounts for use by their customers, while preserving the opportunity for individuals involved in multiple-party accounts to show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter. The separation thus permits individuals using accounts of the type dealt with by these sections to avoid unconsidered and unwanted definiteness in regard to their relationship with each other. In a sense, the approach is to implement a layman's wish to "trust" a co-depositor by leaving questions that may arise between them essentially unaffected by the form of the account.

CHAPTER 2. OWNERSHIP BETWEEN PARTIES AND THEIR CREDITORS AND SUCCESSORS

§ 6103. Ownership during lifetime

6103. (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 lifetime and not to the P.O.D. payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a).

(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 lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a). If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

LAW REVISION COMMISSION COMMENT

Section 6103 is the same 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 judically-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 6106.5. Accordingly, unless the presumption is rebutted, during their lifetimes their interests are present, existing, and equal. See Civil Code § 5105.

UNIFORM PROBATE CODE COMMENT

This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership. The assumption may be disproved by proof that a gift was intended. Read with Section 6-101[(f)] which defines "net contributions," the section permits parties to certain kinds of multiple-party accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them. It is important to note that the section is limited to describe ownership of an account while original parties are alive. Section 6-104 prescribes what happens to beneficial ownership on the death of a party. The section does not undertake to describe the situation between parties if one withdraws more than he is then entitled to as against the other party. Sections 6-108 and 6-112 protect a financial institution in such circumstances without reference to whether a withdrawing party may be entitled to less than he withdraws as against another party. Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as a debtor or trustee. Of course, evidence of intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective.

The final Code contains no provision dealing with division of the account when the parties fail to prove net contributions. The omission is deliberate. Undoubtedly a court would divide the account equally among the parties to the extent that net contributions cannot be proven; but a statutory section explicitly embodying the rule might undesirably narrow the possibility of proof of partial contributions and might suggest that gift tax consequences applicable to creation of a joint tenancy should attach to a joint account. The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

100/950

§ 6104. Right of survivorship

6104. (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 at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 6103 augmented by an equal share for each survivor of any inter-

est the decedent may have owned in the account immediately before his 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, 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; 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, 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 evidence of a contrary intent; 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 his 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.

LAW REVISION COMMISSION COMMENT

Section 6104 is the same as Section 6-104 of the Uniform Probate Code. Subdivision (a) 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 at the time the account was created. 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).

If parties to a joint account are married to each other, the account funds are presumed to be their community property. See Section 6106.5. If the presumption is not rebutted, upon the death of one of the spouses without a will, the surviving spouse takes the community property funds by intestate succession. The will of the deceased spouse may dispose of one-half of the community funds. Section 201. If the deceased spouse purports to dispose of more than one-half of the community funds by the will, the surviving spouse may have the disposition set aside to the extent of his or her one-half interest in the funds. 7 B. Witkin, Summary of California Law Community Property § 60, at 5150-51 (8th ed. 1974). If the surviving spouse is required by the decedent's will to forego his or her statutory community property rights in order to receive benefits under the will, he or she will be put to an election. See Brawerman, Handling Surviving Spouse's Share of Marital Property, in California Will Drafting § 8.7, at 229 (Cal. Cont. Ed. Bar 1965); Brown, The Widow's Election, in Estate Planning for the General Practitioner § 6.2, at 227-29 (Cal. Cont. Ed. Bar 1979). If the surviving spouse elects against the will, he or she is entitled to one-half of the community funds; the other half is subject to the testamentary disposition of the deceased spouse. See Section 201.

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 non-probate transfers with testamentary effect such as life insurance).

Even though the funds in a multiple-party account may be community funds under Section 6106.5, 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 3 (commencing with Section 6108), and is protected from liability in so doing. See Section 6112. 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 6102.

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 at the time the account was created. 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). Subdivision (e) does not take away testamentary power over account funds that are community property. See Section 201. See also Section 6106.5 (presumption of community property where joint account holders are married to each other).

Nothing in Section 6104 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).

UNIFORM PROBATE CODE COMMENT

The effect of (a) of this section, when read with the definition of "joint account" in 6-101[(d)], is to make an account payable to one or more of two or more parties a survivorship arrangement unless "clear and convincing evidence of a different intention" is offered.

The underlying assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death. This assumption may be questioned in states like Michigan where existing statutes and decisions do not provide any safe and wholly practical method of establishing a joint account which is not survivorship. See Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W.(2d) 140 (1962). But, use of a form negating survivorship would make (d) of this section applicable. Still, the financial institution which paid after the death of a party would be protected by 6-108 and 6-109. Thus, a safe nonsurvivorship account form is provided. Consequently, the presumption stated by this section should become increasingly defensible.

The section also is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn nonsurvivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of multiple name account would not want survivorship rights to attach. Secondly, the survivorship incidents described by this section may be shown to have been against the intention of the parties. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers advising them that review of their accounts may be desirable because of the legislation.

Subsection (c) accepts the New York view that an account opened by "A" in his name as "trustee for B" usually is intended by A to be an informal will of any balance remaining on deposit at his death. The section is framed so that accounts with more than one "trustee," or more than one "beneficiary" can be accommodated. Section 6-103(c) would apply to such an account during the lifetimes of "all parties." "Party" is defined by 6-101[(g)] so as to exclude a beneficiary who is not described by the account as having a present right of withdrawal.

In the case of a trust account for two or more beneficiaries, the section prescribes a presumption that all beneficiaries who survive the last "trustee" to die own equal and undivided interests in the account. This dovetails with Sections 6-111 and 6-112 which give the financial institution protection only if it pays to all beneficiaries who show a right to withdraw by presenting appropriate proof of death. No further survivorship between surviving beneficiaries of a trust account is presumed because these persons probably have had no control over the form of the account prior to the death of the trustee. The situation concerning further survivorship between two or more surviving parties to a joint account is different.

In 1975, the Joint Editorial Board recommended expansion of subsections (b) and (c) so that the subsections now deal explicitly with cases involving multiple original payees in P.O.D. accounts, and multiple trustees in trust accounts. These changes were conceived to clarify, rather than to change, the text.

101/140

§ 6105. Effect of written notice to financial institution

6105. The provisions of Section 6104 as to rights of survivorship are determined by the form of the account at the death of a party. Subject to the requirements, if any, under the terms of the account or the deposit agreement, this form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime.

LAW REVISION COMMISSION COMMENT

Section 6105 is the same as Section 6-105 of the Uniform Probate Code except that Section 6105 permits the financial institution and the depositor by agreement to determine the procedure for changing the form of the account or stopping or varying payment under the account. Section 6105 does not affect the presumption established by Section 6106.5 (funds of married persons who are parties to joint account presumed to be community property). See also Section 6112 (notice to financial

institution from party able to request present payment that withdrawals should not be permitted).

UNIFORM PROBATE CODE COMMENT

It is to be noted that only a "party" may issue an order blocking the provisions of Section 6-104. "Party" is defined by Section 6-101[(g)]. Thus if there is a trust account in the name of A or B in trust for C, C cannot change the right of survivorship because he has no present right of withdrawal and hence is not a party.

101/147

§ 6106. Accounts and transfers nontestamentary

6106. Any transfers resulting from the application of Section 6104 are effective by reason of the account contracts involved and this division and are not to be considered as testamentary or subject to probate administration, except that any such transfer is subject to the interests otherwise created by law in community property, and except as a consequence of, and to the extent directed by, Section 6107.

LAW REVISION COMMISSION COMMENT

Section 6106 is the same as Section 6-106 of the Uniform Probate Code, with two exceptions:

(1) The UPC provision that transfers resulting from the application of Section 6-104 are not "subject to Articles I through IV" has been revised to make them not "subject to probate administration"--a nonsubstantive change.

(2) The UPC provision that transfers resulting from the application of Section 6-104 are nontestamentary "except as provided in Sections 2-201 through 2-207" has been revised to make them "subject to the interests otherwise created by law in community property." See generally the discussion in the Comment to Sections 6104 and 6106.5. Sections 2-201 through 2-207 of the Uniform Probate Code relate to the elective share of a surviving spouse and were drafted with common law states in mind, not community property states. See "General Comment" to Part 2 of Article II of the Uniform Probate Code. See also Section 6106.5 (presumption of community property where two parties to an account are married to each other).

UNIFORM PROBATE CODE COMMENT

The purpose of classifying the transactions contemplated by Article VI as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers at death is not to be determined by the requirements for wills. The section is consistent with Part 2 of Article VI.

The closing reference to Article II, Part 2, and to 6-107 was added in 1975 at the recommendation of the Joint Editorial Board to clarify the intention of the original text.

§ 6106.5. Presumption that sums on deposit are community property

6106.5. (a) Notwithstanding Sections 6103 to 6105, 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.

LAW REVISION COMMISSION COMMENT

Section 6106.5 is a new provision; there is no comparable provision in the Uniform Probate Code.

Section 6106.5 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 6106.5 applies only to controversies between the parties to the account and those who stand in their shoes, such as a creditor or a person who takes under a party's will. The section does not affect or limit the right of the financial institution to make payments pursuant to Sections 6108-6116 and the deposit agreement. See Section 6102. For this reason, Section 6106.5 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 6106.5 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). 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, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87, 90, 95, 106-109 (1961). The presumption created by Section 6106.5 is consistent with this general belief.

The presumption created by Section 6106.5 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 6106.5 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 6106.5 does not affect the provisions of Sections 6104, 6109, and 6112 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 6106.5 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.

The deceased spouse may dispose of one-half of the community property in the joint account by will (Section 201), and this avoids the inflexible and harsh treatment of heirs under a true joint tenancy. Under a true joint tenancy, the property passes to the surviving joint tenant and may not be disposed of by the will of the deceased joint tenant. 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. Walker v. Walker, 108 Cal. App.2d 605, 608, 239 P.2d 106 (1952). 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).

During the lifetime of the spouses, the rights of creditors to reach the community property (see Civil Code §§ 5116, 5122) are not affected by the deposit of the community funds in the joint account. However, after the death of one of the spouses, the survivor has the right to sums in a multiple-party account unless the assets of the probate estate are insufficient to pay the debts. See Section 6107.

101/148

§ 6107. Rights of creditors

6107. (a) No multiple-party account is effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including allowances to the surviving spouse, minor children and dependent children under Article 2 (commencing with Section 680) of Chapter 11 of Division 3, if other assets of the estate are insufficient.

(b) A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party is liable to account to the personal representative of the deceased party for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned in subdivision (a) remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate.

(c) This section does not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party, unless before payment the institution has been served with process in a proceeding by the personal representative.

(d) If parties to a multiple-party account are married to each other and the sums on deposit are transferred to one spouse upon the death of the other under a right of survivorship under Section 6104, subdivisions (a), (b), and (c) of this section apply notwithstanding that the funds in the account were community property.

LAW REVISION COMMISSION COMMENT

Section 6107 is the same in substance as Section 6-107 of the Uniform Probate Code, except for two changes:

(1) Subdivision (d) has been added.

(2) The general reference in the UPC to "statutory" allowances to the surviving spouse, minor children and dependent children has been revised to refer specifically to the family allowance provisions of Sections 680-684. See generally Pigott, Family Allowance, in 1 California Decedent Estate Administration §§ 11.1-11.34, at 394-413 (Cal. Cont. Ed. Bar 1971). See also Section 647 (multiple-party account funds generally not subject to small estate set-aside provisions).

When the personal representatives of the deceased party obtains multiple-party account funds pursuant to this section, the funds are subject to the rules for priority of payment under Section 950 of the Probate Code and the various tax statutes relating to priorities. See DeMeo, Creditors' Claims, in 1 California Decedent Estate Administration § 13.40, at 485-86 (Cal. Cont. Ed. Bar 1971).

Section 6107 authorizes the invasion of multiple-party account funds needed by the estate to pay debts, taxes, and expenses of administration. This changes former law with respect to a true joint tenancy account. It was the former rule that the surviving joint tenant took the funds free of the claims of the deceased joint tenant's creditors. See Kilfoy v. Fritz, 125 Cal. App.2d 291, 294, 270 P.2d 579 (1954); cf. People v. Nogarr, 164 Cal. App.2d 591, 330 P.2d 858 (1958) (real property); Zeigler v. Bonnell, 52 Cal. App.2d 217, 126 P.2d 118 (1942) (real property).

When multiple-party account funds are community property (see Section 6106.5), subdivision (d) of Section 6107 requires that creditors of the deceased spouse look first to assets in the estate of the deceased spouse for satisfaction. If estate assets are insufficient for this purpose, creditors of the deceased spouse may pursue community funds in a multiple-party account. Under former law, when community property funds were deposited into a joint account, the result depended upon whether or not the account was a true joint tenancy account. If the funds were transmuted into joint tenancy property (see In re McCoin, 9

Cal. App.2d 480, 50 P.2d 114 (1935)), on the death of one spouse, creditors of that spouse could no longer reach the funds. See Kilfoy v. Fritz, supra; cf. People v. Nogarr, supra; Zeigler v. Bonnell, supra. On the other hand, if the funds were shown to be community property, then the rights of creditors were the same as in the other community property of the spouses. See generally Prob. Code §§ 205 (personal liability of surviving spouse for debts of deceased spouse chargeable against community property); 704.2 and 704.4 (claim of surviving spouse against estate for payment of debts of deceased spouse, and debts of surviving spouse for which community property is liable); 980 (petition in estate proceeding for allocation of responsibility for debts). Nothing in subdivision (d) affects the right of a creditor to recover from the property of the surviving spouse if the surviving spouse is personally liable to the debtor.

It should be noted that inheritance taxes (as distinguished from estate taxes) are the responsibility of the recipient of the account funds and not of the estate. See King, Death Tax Procedures, in 1 California Decedent Estate Administration §§ 15.1-15.2, at 562 (Cal. Cont. Ed. Bar 1971). See also Estate of Yush, 8 Cal. App.3d 251, 87 Cal. Rptr. 222 (1970) (improper to delay estate distribution when estate owes no taxes, although a beneficiary outside probate owes taxes).

If the personal representative of a deceased party brings a proceeding to assert liability under Section 6107 and the financial institution is served before it makes payment from the multiple-party account, then under subdivision (c) the financial institution may not thereafter make payment according to the terms of the account. This specific provision controls over the general provisions of Financial Code Sections 952, 7612, and 11211.

UNIFORM PROBATE CODE COMMENT

The sections of this Article authorize transfers at death which reduce the estate to which the surviving spouse, creditors and minor children normally must look for protection against a decedent's gifts by will. Accordingly, it seemed desirable to provide a remedy to these classes of persons which should assure them that multiple-party accounts cannot be used to reduce the essential protection they would be entitled to if such accounts were deemed a special form of specific devise. Under this Section a surviving spouse is automatically assured of some protection against a multiple-party account if the probate estate is insolvent; rights are limited, however, to sums needed for statutory allowances. The phrase "statutory allowances" includes the homestead allowance under Section 2-401, the family allowance under Section 2-403, and any allowance needed to make up the deficiency in exempt property under Section 2-402. In any case (including a solvent estate) the surviving spouse could proceed under Section 2-201 et seq. to claim an elective share in the account if the deposits by the decedent satisfy the requirements of Section 2-202 so that the account falls within the augmented net estate concept. In the latter situation the spouse is not proceeding as a creditor under this section.

CHAPTER 3. PROTECTION OF FINANCIAL INSTITUTION

§ 6108. Establishment of and payment from multiple-party accounts; inquiry not required to establish net contributions

6108. (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, to any one or more of the parties.

(b) By written instructions of all parties to a multiple-party account given to the financial institution, the parties may require the signatures of more than one of such parties 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 instructions, but no such instructions 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.

LAW REVISION COMMISSION COMMENT

Section 6108 is the same in substance as Section 6-108 of the Uniform Probate Code except for subdivision (b) which is not contained in the Uniform Probate Code. Subdivision (b) continues 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).

§ 6109. Payment of joint account

6109. Any sums in a joint account may be paid, on request, 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 6104.

LAW REVISION COMMISSION COMMENT

Section 6109 is the same in substance as Section 6-109 of the Uniform Probate Code. Payment pursuant to Section 6109 may in some cases be subject to Section 6115 (delay in payment after death). 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 6117.

101/161

§ 6110. Payment of P.O.D. account

6110. Any P.O.D. account may be paid, on request, 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 his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

LAW REVISION COMMISSION COMMENT

Section 6110 is the same as Section 6-110 of the Uniform Probate Code. Payment pursuant to Section 6110 is in some cases subject to Section 6115 (delay in payment after death). See also Section 6117 (inheritance tax law requirements must be satisfied if payment is to be made after death of a party).

101/162

§ 6111. Payment of trust account

6111. Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his 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 his decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

LAW REVISION COMMISSION COMMENT

Section 6111 is the same as Section 6-111 of the Uniform Probate Code. Payment pursuant to Section 6111 is in some cases subject to Section 6115 (delay in payment after death). See also Section 6117 (inheritance tax law requirements must be satisfied if payment is to be made after death of a party).

101/165

§ 6112. Payment as discharge

6112. (a) Subject to Section 6115, payment made pursuant to Section 6108, 6109, 6110, or 6111 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) The protection provided by subdivision (a) does not extend to payments made after the particular office or branch office of the financial insitution where the account is carried has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is be be protected under this section. 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 witten 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 and 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.

LAW REVISION COMMISSION COMMENT

Subdivisions (a), (b), and (d) of Section 6112 are the same in substance as Section 6-112 of the Uniform Probate Code with two additions: (1) A reference is added in subdivision (a) to Section 6115 (delay in payment in certain cases), and (2) the requirement is added in subdivision (b) that the notice be received by "the particular office or branch office of the financial institution where the account is carried." This requirement is drawn from former Financial Code Section 852 and is consistent with other provisions of the Financial Code.

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) makes clear that the section does not affect the rights under Chapter 2 (commencing with Section 6103). In connection with those rights, see Section 6105 (altering account to change form of account or to stop or vary payment under terms of account).

368/224

§ 6113. Set-off

6113. 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 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 death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

LAW REVISION COMMISSION COMMENT

Section 6113 is drawn from Section 6-113 of the Uniform Probate Code. Unlike the Uniform Probate Code provision, Section 6113 does not give a financial institution a right of set-off it did not have under prior law. Rather Section 6113 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").

Although the financial institution may not have a right of set-off in some cases under existing law, Section 6107 changes existing law to

give a creditor (including a financial institution which is a creditor of the deceased party) access to such funds if the estate of the deceased party is not sufficient to pay the debt. See the Comment to Section 6107.

404/802

§ 6114. Payment of account held in trust form where financial institution has no notice that account is not a "trust account"

6114. 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.

LAW REVISION COMMISSION COMMENT

Section 6114 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 6116.

Section 6114 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 6112. However, Section 6114 does not affect the rights as between the parties to the account, the beneficiary, or their successors. See Sections 6102, 6103(c), and 6104(c).

404/094

§ 6115. Delay in payment after death

6115. (a) Except as provided in subdivision (b), notwithstanding any other provision of this chapter, whenever payment is authorized to be made to a P.O.D. payee, the heirs of a deceased original payee, a beneficiary of a trust account, or the heirs of a deceased trustee, the payment shall not be made until 30 days has elapsed since the death of the original party to the P.O.D. account or the trustee.

(b) Subdivision (a) does not apply if the payment is made to a person who is a spouse, minor or dependent child, executor, administrator, guardian, conservator, or fiduciary of the deceased original party to the P.O.D. account or of the deceased trustee.

LAW REVISION COMMISSION COMMENT

Section 6115 is new and is to afford time for the personal representative of the decedent to assert any claim against the account funds arising pursuant to Section 6107. When payment is made to a minor, payment must be made as provided in Sections 3400-3413. Section 6116.

968/649

§ 6116. Payment to minor

6116. 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.

LAW REVISION COMMISSION COMMENT

Section 6116 is new; there is no comparable provision in Article VI of the Uniform Probate Code. Subdivision (a) of Section 6116 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.

968/704

§ 6117. Inheritance tax law requirement not affected

6117. Nothing in this division affects or limits Section 14345 of the Revenue and Taxation Code.

Comment. Section 6117 is included to make clear that payment of accounts under this division is subject to the requirements of Section 14345 of the Revenue and Taxation Code (inheritance tax).

968/715

PART 2. DISPOSITIVE PROVISIONS IN WRITTEN INSTRUMENTS

§ 6201. Dispositive provisions in written instruments

6201. (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension 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 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 the 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.

LAW REVISION COMMISSION COMMENT

Section 6201 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 §§ 21322-21335 (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).

UNIFORM PROBATE CODE COMMENT

This section authorizes a variety of contractual arrangements which have in the past been treated as testamentary. For example most courts treat as testamentary a provision in a promissory note that if the payee dies before payment is made the note shall be paid to another named person, or a provision in a land contract that if the seller dies before payment is completed the balance shall be cancelled and the property shall belong to the vendee. These provisions often occur in family arrangements. The result of holding the provisions testamentary is usually to invalidate them because not executed in accordance with the statute of wills. On the other hand the same courts have for years upheld beneficiary designations in life insurance contracts. Similar kinds of problems are arising in regard to beneficiary designations in pension funds and under annuity contracts. The analogy of the power of appointment provides some historical base for solving some of these problems aside from a validating statute. However, there appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts, as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing tends to eliminate the danger of "fraud."

Because the types of provisions described in the statute are characterized as nontestamentary, the instrument does not have to be executed in compliance with Section 2-502; nor does it have to be probated, nor does the personal representative have any power or duty with respect to the assets involved.

The sole purpose of this section is to eliminate the testamentary characterization from the arrangements falling within the terms of the section. It does not invalidate other arrangements by negative implication. Thus it is not intended by this section to embrace oral trusts to hold property at death for named persons; such arrangements are already generally enforceable under trust law.

968/984

Operative date

SEC. 17. This act shall become operative on January 1, 1983, and it shall apply to accounts in existence on that date and accounts thereafter established.

LAW REVISION COMMISSION COMMENT

Section 16 is drafted on the assumption that this act will become effective on January 1, 1982. The operative date is delayed until January 1, 1983, 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, 1982) will have time to make any changes in the deposit agreement that they believe are desirable in view of the enactment of this act.