

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

### LEG16-02

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Title	Action Requested
Court Records: Retention of Original Wills and Codicils and of Court Records in Gun Violence Cases	Review and submit comments by June 14, 2016
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Prob. Code, § 12250 and Gov. Code, §§ 26810, 68150, 68151, and 68152	January 1, 2018
Proposed by	Contact
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### Executive Summary and Origin

The Court Executives Advisory Committee recommends amending various statutes governing records retention in the Government Code. This legislative proposal would amend Government Code sections 26810, 68150, 68151, and 68152 to clarify that original wills and codicils must be retained until there is a final order of discharge in a probate proceeding. This proposal would also amend Probate Code section 12250 to provide a process whereby the personal representative may request delivery of the original wills and codicils in the ex parte petition for discharge. Lastly, this proposal would provide the retention period for court records in gun violence cases and would make technical amendments to the records retention statutes.

### Background

In 2012, the Court Executives Advisory Committee led a collaborative effort with other advisory committees to modernize and improve the records retention statutes in the Government Code. This effort culminated in the enactment of Assembly Bill 1352 (Stats. 2013, ch. 274), which amended the Government Code to reduce the record retention periods for certain court records, to establish retention periods for new types of records that were not dealt with under existing law, and to eliminate ambiguities in the law relating to records retention.

### The Proposal

This legislative proposal would amend the records retention statutes in the Government Code to clarify that original wills and codicils may not be scanned and destroyed until there is a final

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

order of discharge in a probate proceeding. It would also provide a process in the Probate Code for the personal representative to request delivery of the original wills and codicils after final disposition. Lastly, it would provide the retention period for court records in gun violence cases and would make technical amendments.

This proposal was developed in consultation with the Probate and Mental Health Advisory Committee.

**Retain all original wills and codicils until final order of distribution**

The statutes governing records retention arguably could be interpreted as allowing courts to scan and destroy original wills and codicils, even if a probate proceeding is pending or has never been initiated. This proposal would amend Government Code sections 26810, 68150(b)(2), and 68152(a)(11) to clarify that courts must retain all original wills and codicils unless and until there is a final disposition of the case, which would occur upon final order of distribution that concerns all remaining testators named in the will.

***Proposed amendments to Government Code section 26810.*** Government Code section 26810 addresses probate documents,<sup>1</sup> including original wills and codicils, that are delivered to the court when an attorney has terminated a deposit under Probate Code section 732 or when the custodian of a will has died under Probate Code section 8200.

This statute authorizes scanning and destroying original wills if more than 10 years have passed since they were delivered to the court under Probate Code section 8200. (See Gov. Code, § 26810(a)(2), (e).) It also might be interpreted as allowing courts to scan and destroy original wills and codicils immediately if they are delivered to the court under Probate Code section 732. (See Gov. Code, § 26810(a)(1), (e).) These wills and codicils could be scanned and destroyed regardless of whether the testator is deceased and whether the will has ever been probated.

This proposal would amend Government Code section 26810(a)(2) and (e) to clarify that all original wills and codicils that are delivered to the court—whether they are delivered under Probate Code sections 732, 734, 8200, or 8203—may not be destroyed unless and until there is a “final disposition of the case” as defined in Government Code section 68151(c).

***Proposed amendments to Government Code section 68150.*** Government Code section 68150(a) authorizes trial courts to maintain “court records” solely in electronic form. The term “court record” is defined broadly as including “[a]ll filed papers and documents in the case folder, but if no case folder is created by the court, all filed papers and documents that would have been in the case folder if one had been created.” (Gov. Code, § 68151(a).) Applying this broad definition to Government Code section 68150(a) suggests that upon filing original wills and codicils with the

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<sup>1</sup> Probate Code section 704 defines *document* as including, inter alia, (a) a signed original will, declaration of trust, trust amendment, or other document modifying a will or trust; (b) a signed original power of attorney; and (c) a signed original nomination of conservator.

court,<sup>2</sup> they qualify as “court records” and trial courts would arguably be authorized to scan and destroy the originals.

There is a limited exception to Government Code section 68150(a) in section 68150(b)(2) for original wills and codicils that are delivered to the court under Probate Code section 8200. These originals may not be immediately scanned and destroyed; however, they are to be retained as provided in Government Code section 26810, which currently states that they may be scanned and destroyed 10 years after delivery to the court, regardless of whether the testator is deceased and whether the will has ever been probated.

The proposal would amend Government Code section 68150(b)(2) to expand the exception to include all original wills and codicils. The proposed language would require courts to retain the originals—regardless of how they come into the court’s possession—unless and until there is a final disposition of the case as defined in Government Code section 68151(c). If an original will or codicil never becomes associated with a probate proceeding, the court would have to retain the original will or codicil permanently.

***Proposed amendments to Government Code section 68151.*** The phrase “final disposition of the case” is defined in Government Code section 68151(c) to mean that “an acquittal, dismissal, or order of judgment has been entered in the case or proceeding, the judgment has become final, and no postjudgment motions or appeals are pending in the case or for the reviewing court upon the mailing of notice of the issuance of the remittitur.” To clarify its application to probate proceedings for decedent estates, the term “order of judgment” would be defined for these proceedings as the order of distribution. Applying this new definition to the other proposed amendments would require courts to retain the original wills and codicils until there is a final order of discharge concerning all remaining testators.

***Proposed amendments to Government Code section 68152.*** This proposal would make amendments to Government Code section 68152(a)(11)(B), which provides the retention period for wills and codicils transferred or delivered to the court under Probate Code sections 732, 734, 8200, or 8203. It would clarify that if there is no underlying case, the court must retain the originals permanently.

### **Provide a process for requesting delivery of the original wills and codicils**

This proposal would amend Probate Code section 12250 and Government Code sections 26810(e), 68150(b)(2), and 68152(a)(11)(A) to provide a process for the delivery of original wills and codicils upon request by the personal representative.

Probate Code section 12250(b) would be amended to recognize that the personal representative may request in the ex parte petition for discharge the delivery of all original wills and codicils in the possession of the court under Government Code section 68150(b)(2). Government Code

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<sup>2</sup> See Prob. Code, § 8225 (“When court admits a will to probate, . . . the will shall be filed”).

section 68150(b)(2), in turn, would be amended to provide that, if such a request has been made, the clerk must deliver the original wills and codicils to the personal representative or to the person identified in the order of discharge, subject to certain conditions.

One condition would be that there must be a “final disposition in the case,” which would be defined for probate decedent estate proceedings as the final order of discharge concerning all remaining testators named in the will. Another condition would be that the clerk must maintain the record in a form authorized by Government Code section 68150(a), which provides that trial court records may be maintained “in any form or forms of communication or representation, including paper, optical, electronic, magnetic, micrographic, or photographic media or other technology, if the form or forms of representation or communication satisfy the rules adopted by the Judicial Council.” The clerk could satisfy this condition, for example, by scanning and maintaining the wills and codicils as electronic records.

This process would allow for the personal representative to obtain the originals before they are scanned and destroyed by the clerk. At the same time, it would ensure that the originals are available to the court during the pendency of the probate proceeding and that they are maintained permanently as court records in an authorized form.

Parallel amendments would be introduced in Government Code sections 26810(e) and 68152(a)(11) to provide for consistency in the statutes addressing the retention of original wills and codicils.

### **Gun violence cases**

This proposal would also amend Government Code section 68152(a)(6) to provide the retention period for court records in gun violence cases. The proposed amendment would require that the court records for gun violence cases be retained for the same period as those for civil harassment, domestic violence, elder and dependent adult abuse, private postsecondary school violence, and workplace violence cases. Superior courts must retain these cases “for the same period of time as the duration of the restraining or other orders and any renewals thereof, then retain the restraining or other orders permanently as a judgment.” (Gov. Code, § 68152(a)(6).)

### **Technical amendments**

This proposal would also amend Government Code section 68150(a) to recognize that the Judicial Council has already adopted a rule and implementing standards and guidelines for creating, maintaining, reproducing, or preserving court records, as required by subdivision (c).<sup>3</sup> It would remove the references to national standards that applied while the rule and implementing standards and guidelines were in development.

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<sup>3</sup> The standards and guidelines for electronic court records are stated in the *Trial Court Records Manual*. (Cal. Rules of Court, rule 10.854; Judicial Council of Cal., *Trial Court Records Manual* (rev. Jan. 1, 2016), pp. 35–45.)

In addition, the proposed amendment would make Government Code section 26810(b) consistent with Government Code section 68150(c). It would remove the reference to the national standards. Instead, it would provide that photographs, micrographs, photocopies, or electronic images of wills and codicils must be made in a manner that satisfies the standards and guidelines adopted by the Judicial Council under Government Code section 68150(c). Because these standards and guidelines already address how to maintain court records, the additional instruction to indexing and storing the photographs, micrographs, photocopies, and electronic images would be removed. It would also remove an outdated reference to film reproductions in Government Code section 26810(a).

### **Alternatives Considered**

Because judges and litigants need access to original wills and codicils during the pendency of probate proceedings, the committee did not consider alternatives.

### **Implementation Requirements, Costs, and Operational Impacts**

To implement this proposal, the Judicial Council would need to make changes to the forms for ex parte order of discharge to allow personal representatives to request delivery of the original will and codicil. It would also need to make changes to the form order of discharge to indicate to whom the original wills and codicils should be delivered if a request is made by the personal representative in the ex parte petition. Making these changes would require expending staffing time and resources. Superior courts would have to implement processes for clerks to deliver original wills and codicils after the final order of discharge, if there has been a request. Once the new forms and processes are in place, the courts would be relieved of the burden of retaining original wills and codicils after a case involving decedent estates is final.

## Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- Should the references in Government Code section 68152(a)(11)(A) to “final disposition of the estate proceeding” be changed to “final disposition of the case” to be consistent with section 68152 generally?
- Should the references to “codicils” in Probate Code section 12250 and Government Code sections 26810, 68150, and 68152 be replaced with “documents modifying a will”?
- The reference to “all remaining testators named in the will” in the proposed amendment to Government Code section 68151(c) is intended to refer to joint wills of more than one person. Is this clear from the proposed language?
- Is the reference to Government Code section 68151(c) in the proposed amendment to Government Code section 26810(e) sufficiently clear to demonstrate that clerks would be required to preserve all original wills that are deposited with the court that have not been and may never be probated?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would one year from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### Attachments and Links

1. Proposed amendments to Probate Code section 12250 and Government Code sections 26810 and 68150–68152, at pages 7–9

Section 1013b of the Code of Civil Procedure would be enacted and sections 664.5, 1010.6, and 1011 would be amended, effective January 1, 2018, to read:

**1 Probate Code section 12250**

2 (a) When the personal representative has complied with the terms of the order for final  
3 distribution and has filed the appropriate receipts or the court has excused the filing of a receipt  
4 as provided in Section 11753, the court shall, on ex parte petition, make an order discharging the  
5 personal representative from all liability incurred thereafter.

6 (b) The personal representative's ex parte petition for discharge may request the delivery of all  
7 original wills and codicils in the possession of the court under Government Code section  
8 68150(b)(2).

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

**13 Government Code section 26810**

14 (a) The clerk of the superior court may cause the following documents to be photographed,  
15 microphotographed, photocopied, or electronically imaged, ~~or otherwise reproduced on film~~ and  
16 stored in that form:

17 (1) A document transferred to the clerk under Section 732 of the Probate Code.

18 (2) A will or codicil delivered to the clerk of the superior court under Section 732, 734, 8200, or  
19 8203 of the Probate Code ~~if the clerk has held the will for at least 10 years; however, the~~  
20 originals may not be destroyed except as provided under subdivision (e).

21 (b) The photograph, microphotograph, photocopy, or electronic image shall be made in a manner  
22 that meets the ~~minimum standards or guidelines recommended by the American National~~  
23 ~~Standards Institute or the Association for Information and Image Management~~ standards and  
24 guidelines adopted by the Judicial Council of California under Section 68150(c). ~~All these~~  
25 ~~photographs, microphotographs, photocopies, and electronic images shall be indexed, and shall~~  
26 ~~be stored in a manner and place that reasonably assures their preservation indefinitely against~~  
27 ~~loss, theft, defacement, or destruction.~~

28 (c) Before proof of death of the maker of a document or will referred to in subdivision (a), the  
29 photographs, microphotographs, photocopies, and electronic images shall be confidential, and  
30 shall be made available only to the maker. After proof of death of the maker of the document or  
31 will by a certified copy of the death certificate, the photographs, microphotographs, photocopies,  
32 and electronic images shall be public records.

33 (d) Section 26809 does not apply to a will or other document referred to in subdivision (a), or to  
34 the reproduction authorized by this section.

35 (e) Upon making the reproduction authorized by this section, the clerk of the superior court may  
36 destroy the original document, except that the clerk shall not destroy an original will or codicil  
37 until there is a final disposition of the case as defined in Section 68151(c) in a probate  
38 proceeding. If requested by the personal representative under Section 12250(b) of the Probate  
39 Code, the clerk shall provide the originals to the personal representative or other person  
40 identified in the order of discharge, but only after final disposition of the case and only if the  
41 clerk maintains the records in a form authorized by Section 68150(a).

1 **Government Code section 68150**

2 (a) Trial court records may be created, maintained, and preserved in any form or forms of  
3 communication or representation, including paper, optical, electronic, magnetic, micrographic, or  
4 photographic media or other technology, if the form or forms of representation or  
5 communication satisfy the rules adopted by the Judicial Council pursuant to subdivision (c), ~~once~~  
6 ~~those rules have been adopted. Until those rules are adopted, the court may continue to create,~~  
7 ~~maintain, and preserve records according to the minimum standards or guidelines for the~~  
8 ~~preservation and reproduction of the medium adopted by the American National Standards~~  
9 ~~Institute or the Association for Information and Image Management.~~

10 (b)(1) This section shall not apply to court reporters' transcripts or to specifications for electronic  
11 recordings made as the official record of oral proceedings. These records shall be governed by  
12 the California Rules of Court.

13 (2) This section shall not apply to original wills and codicils ~~delivered to the clerk of the court~~  
14 ~~under Section 8200 of the Probate Code. Original wills and codicils shall be retained as provided~~  
15 ~~in Section 26810. The originals shall be retained until the final disposition of the case. If~~  
16 ~~requested by the personal representative under Section 12250(b) of the Probate Code, the clerk~~  
17 ~~shall provide the originals to the personal representative or other person identified in the order of~~  
18 ~~discharge, but only after final disposition of the case and only if the clerk maintains the records~~  
19 ~~in a form authorized by Section 68150(a).~~

20 (c) The Judicial Council shall adopt rules to establish the standards or guidelines for the creation,  
21 maintenance, reproduction, or preservation of court records, including records that must be  
22 preserved permanently. The standards or guidelines shall reflect industry standards for each  
23 medium used, if those standards exist. The standards or guidelines shall ensure that court records  
24 are created and maintained in a manner that ensures accuracy and preserves the integrity of the  
25 records throughout their maintenance. They shall also ensure that the records are stored and  
26 preserved in a manner that will protect them against loss and ensure preservation for the required  
27 period of time. Standards and guidelines for the electronic creation, maintenance, and  
28 preservation of court records shall ensure that the public can access and reproduce records with  
29 at least the same amount of convenience as paper records previously provided.

30 (d)-(l) \* \* \*

31  
32 **Government Code section 68151**

33 The following definitions apply to this chapter:

34 (a)-(b) \* \* \*

35 (c) "Final disposition of the case" means that an acquittal, dismissal, or order of judgment has  
36 been entered in the case or proceeding, the judgment has become final, and no postjudgment  
37 motions or appeals are pending in the case or for the reviewing court upon the mailing of notice  
38 of the issuance of the remittitur. In a criminal prosecution, the order of judgment shall mean  
39 imposition of sentence, entry of an appealable order, including, but not limited to, an order  
40 granting probation, commitment of a defendant for insanity, or commitment of a defendant as a  
41 narcotics addict appealable under Section 1237 of the Penal Code, or forfeiture of bail without  
42 issuance of a bench warrant or calendaring of other proceedings. In a probate decedent estate

1 proceeding, the order of judgment shall mean the order of final distribution concerning all  
2 remaining testators named in the will.

3 (d) “Retain permanently” means that the court records shall be maintained permanently  
4 according to the standards or guidelines established pursuant to subdivision (c) of Section 68150.

5  
6 **Government Code section 68152**

7 The trial court clerk may destroy court records under Section 68153 after notice of destruction,  
8 and if there is no request and order for transfer of the records, except the comprehensive  
9 historical and sample superior court records preserved for research under the California Rules of  
10 Court, when the following times have expired after the date of final disposition of the case in the  
11 categories listed:

12 (a) Civil actions and proceedings, as follows:

13 (1)–(5) \* \* \*

14 (6) Civil harassment, domestic violence, elder and dependent adult abuse, private postsecondary  
15 school violence, gun violence, and workplace violence cases: retain for the same period of time  
16 as the duration of the restraining or other orders and any renewals thereof, then retain the  
17 restraining or other orders permanently as a judgment; 60 days after expiration of the temporary  
18 restraining or other temporary orders; retain judgments establishing paternity under Section 6323  
19 of the Family Code permanently.

20 (7)–(10) \* \* \*

21 (11) Probate:

22 (A) Decedent estates: retain permanently all orders, judgments, and decrees of the court, all  
23 inventories and appraisals, and all wills and codicils of the decedent filed in the case, including  
24 those not admitted to probate. If requested by the personal representative under Section 12250(b)  
25 of the Probate Code, the clerk shall provide the original will or codicil to the personal  
26 representative or other person identified in the order of discharge, but only after final disposition  
27 of the case and only if the clerk maintains the records in a form authorized by Section 68150(a)  
28 of the Government Code. All other records: retain for five years after final disposition of the  
29 estate proceeding.

30 (B) Wills and codicils transferred or delivered to the court pursuant to Section 732, 734, 8200, or  
31 8203 of the Probate Code in which there is no underlying case: retain the original records  
32 permanently. ~~For wills and codicils delivered to the clerk of the court under Section 8200 of the~~  
33 ~~Probate Code, retain the original documents as provided in Section 26810.~~

34 (C)–(H) \* \* \*

35 (12)–(15) \* \* \*