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#L-1010

Memorandum 85-53

Subject: Study L-1010 - Estates and Trusts Code (Opening Estate Administration--draft of tentative recommendation)

Attached to this memorandum is a staff draft of a tentative recommendation relating to opening administration of a decedent's estate. The draft incorporates decisions made by the Commission at meetings in early 1985. The object of the present review is to make whatever further decisions or revisions are necessary to enable the complete draft to be sent out to interested persons for comment.

Particular policy issues the staff wishes to direct the Commission's attention to are raised in notes following the sections to which they relate. The following supplementary material is attached to this memorandum and is discussed in the notes.

§§ 8120-8126. Publication or posting. Exhibit 1 is an excerpt from the Bulletin of the California Newspaper Service Bureau (Vol. 16, No. 3, Ap.-Aug. 1985) that includes an account of the portion of the Commission's January 1985 meeting relating to publication of notice in probate.

§ 8200. Delivery of will by custodian. Exhibit 2 is a letter from Timothy C. Wright, of Menlo Park, suggesting that a named executor in possession of a will should be required to file the will with the court.

§ 8252. Trial; § 8273. Costs and attorney's fees. Exhibit 3 is a letter from Stephen I. Zetterberg expressing concern about elimination of jury trials in will contests and about awarding attorney's fees against an unsuccessful contestant.

§ 8254. Judgment. The Commission has asked the staff to investigate whether any studies are available on no-contest clauses in wills. The Commission also asked whether offering a later will for probate could constitute a contest within the meaning of a no-contest clause.

The staff has discovered a number of articles and studies on no-contest clauses dating from the late '50s and early '60s, including a report by the New York Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates. The most substantial recent work we have found appears in the Restatement of the Law (Second) of Property § 9.1, promulgated in 1981. Another fairly recent work directed exclusively to California law is Garb, The In Terrorem Clause: Challenging California Wills, 6 Orange Co. B.J. 259 (1979); a copy of this article is attached as Exhibit 4.

The Restatement indicates that California law recognizes no-contest clauses but, in the event of a will contest based on an alleged forgery or a subsequent revocation of the will, invalidates the no-contest clause if there was probable cause for the will contest. The courts follow the reasoning that challenges on the basis of forgery or subsequent revocation are not "contests": the challenger is actually seeking to ascertain the true intent of the testator as expressed in a properly executed, unrevoked will. In re Estate of Lewy, 39 Cal.App.3d 729, 113 Cal.Rptr. 674 (1974) (probable cause for challenge of allegedly altered will; no-contest condition invalid); In re Bergland's Estate, 180 Cal. 629, 182 P. 277 (1919) (good faith attempt to probate alleged subsequent will not violation of condition in previous will although subsequent will held forgery).

The Garb article does not believe California law is that clear. Garb believes the California cases are inconsistent and unpredictable on construction of no-contest clauses. He takes the position that "courts should adhere more consistently to the policy of strict interpretation of such clauses. Only conduct which is necessarily embraced within the scope of an in terrorem clause should be permitted to result in a forfeiture." 6 Orange Co. B.J. at 270.

Is the Commission inclined either to make changes in existing law in this area, or to attempt a codification?

§ 8401. Qualifications. Exhibit 5 is a letter from the Legislative Subcommittee on Estate Planning, Trusts and Probate of the San Diego County Bar Association, relating to the concept of not appointing a named executor who has a conflict of interest.

§ [8488]. Limitation as to sureties on bond. Exhibit 6 is a letter from a representative of several surety companies suggesting a statute of limitation for recovery on the bond of a personal representative.

§ 8572. Secretary of State as attorney. Exhibit 7 is a letter from the Secretary of State's office responding to the staff's inquiry pursuant to Commission directive concerning the operation of the statute for service of process on a nonresident personal representative through the Secretary of State. The letter indicates that the Secretary of State receives service of process about once a month under this section, that the section seems to function properly, and that the section appears to have a useful purpose in allowing service of process on a nonresident executor in a case where there is no basis for either jurisdiction or service of process under the long arm statute.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Notice of Death and Probate

California's Probate Code is undergoing a major overhaul by the California Law Revision Commission. The Commission will submit its handiwork to the legislature in two takes: the first in 1986 and the second in 1987.

The Bureau has closely followed the Commission's work in this area, and twice this year the Commission has focused on the Probate Code's public notice requirements.

In January, the Commission's agenda called for discussion of the Notice of Death (a combined notice of petition to administer an estate and notice to creditors). This issue of BUREAU BULLETIN details the Commission's deliberations.

The commission staff had recommended that the present Notice of Death localization requirement be abandoned and that other changes be made which would tend to consolidate all such notices for a county in a few small-circulation newspapers.

Opposition to this scheme was presented at the Commission's January meeting by National Newspaper Association Director Robert E. Work, Publisher of the LOS ANGELES DAILY JOURNAL, by Attorney Lawrence Widdis also of the Daily Journal, and by this writer representing the Bureau. The Commission's executive secretary reported that he had contacted the California Newspaper Publishers Association by phone and that he had been told that the association would also oppose the proposed changes.

Arguing in favor of the proposal was Attorney Charles Collier of the California Bar Association.

Following the presentations of arguments, pro and con, the Commission engaged in extended discussion of this public notice issue. During their discussion, the commissioners frequently directed questions to the four individuals who had appeared before them. The Commission structures its deliberations to encourage a free flow of ideas. Formal procedure is frequently shunted in favor of give and take--an encouraging practice.

It was good to hear the commissioners stress the importance of meaningful public notice and identify the erroneous assumptions which undergirded the recommendation that public notice be curtailed.

The Commission voted to retain the present Notice of Death publication requirement.

It would be naive, however, to conclude that opponents of this public notice requirement will quietly acquiesce to the Commission's recommendation when the matter reaches the legislature.

We'll keep you posted as this legislation runs the capital's gauntlet.

The Notice of Death in the New Probate Code

In 1980 the California Law Revision Commission was charged by the state legislature to review the Probate Code and determine "Whether the California Probate Code should be revised, including, but not limited to, whether California should adopt, in whole or in part, the Uniform Probate Code." The commission now has a major revision of the Probate Code in progress.

The "Notice of Death" is a code notice designed to notify unknown heirs, beneficiaries and creditors of the death of a person in whose estate they may have an interest. The notice, and its predecessors, have long been subject to criticism.

The commission, reconsidering decisions with regard to the Notice of Death made in 1983, placed it on its agenda for a Friday, Jan. 25 meeting at the State Capitol. Seeking information from newspapers it invited newspaper representation. Mr. Robert Work and Mr. Larry Widdis of the LOS ANGELES DAILY JOURNAL, and Mr. Michael Smith of the California Newspaper Service Bureau attended. The editor of BUREAU BULLETIN accompanied Mr. Smith.

The Notice of Death was created in 1979 by amendment to the Probate Code consolidating two notices. The "Notice of Petition to Probate a Will", when there was a will, was combined with the "Notice to Creditors". The first was published three times, the second, four times. Both were the lineal descendants of notices adopted in the first California statutes in 1851.

A Notice of Death is published three times, for ten days, in a newspaper of general circulation published at least weekly, with at least five days between publications. The newspaper is to be one published in the city where the deceased resided at time of death, or his property is located if jurisdiction in probate is based on that (Probate Code 301(3)). If there is no such newspaper, or residence, or property in a city, then publication shall be in a newspaper published in the county that circulates where the deceased resided, or his property is located. Body type of the notice must be at least 7-point, the caption in at least 8-point, and the notice follow the form in the statute, Probate Code Sec. 333. (Ref. Bur. Bull. April 1980).

The Law Revision Commission

The Law Revision Commission, created in 1953, is the lineal successor to the duties of the Code Commission. Its office is in Palo Alto, and its staff is headed by Mr. John J. DeMoully, executive secretary.

Members of the commission are Edwin K. Marzec, Santa Monica, chairman; James H. Davis, Los Angeles, vice-chairman; David Rosenberg, Sacramento; John B. Emerson, Arthur K. Marshall, and Ann E. Stodden of Los Angeles; and Roger Arnebergh of Van Nuys. Marzec, Marshall, Stodden and Arnebergh, appointees of Gov. Deukmejian, took office in 1984. Each has extensive experience in probate law.

Ex-officio members are Legislative Counsel Bion M. Gregory, Senator Barry Keene and Assemblyman Alister McAlister.

The commission's study of the Probate Code will lead to a new code, with new numbering of sections and arrangement of material, all planned for presentation in a bill to the legislature in 1987.

Changes Proposed To the Notice of Death

Commission membership had changed materially between 1983 when proposed changes to the Notice of Death were put in the record, and 1984.

In outline the proposed changes were:--

1. The notice of death should be published one time.

2. It should be published in one newspaper of general circulation in the county.

3. Specification of type sizes should be removed from the Probate Code.

4. When a newspaper had two or more notices to publish it should be authorized to print the common language (the "boilerplate") only once.

The Meeting

On meeting day all commissioners were present with the exception of the legislator members.

For the convenience of the newspaper representatives the agenda item was set for 2:30 p.m.

The commission staff opened with a review of the 1983 proposals. These had been previously sent to all parties in study papers. (Detailed study papers are prepared on all matters under Commission study, and are available to interested persons.)

Mr. DeMoully stated that he had been informed by Mr. Michael Dorais of the California Newspaper Publishers Association that it would oppose changes to the Notice of Death.

Chairman Marzec invited a response and Mr. Smith and Mr. Widdis made statements on the issues. The Chairman then conducted a general discussion. Mr. Charles Collier, Esq. appeared for the Estate Planning, Trust and Probate Law Section of the State Bar.

Proposal--One Publication

"The main purpose of the notice is to inform creditors and to give the proceeding in rem effect, and for these purposes one publication is sufficient; a single publication will also expedite probate."--Commission Minutes, June 1983.

The intent is to give notice, said Mr. Smith. One time is insufficient in any case; and good argument can be made for four publications. "Like any advertising, repetition enhances effect," he said.

Mr. Work said that historically two notices, Notice of Petition to Probate a Will, and Notice to Creditors, requiring seven publications over a period of six weeks had already been reduced to one notice, the Notice of Death, published three times within a maximum period of two weeks. Wearing his hat as a director of the National Newspaper Association Mr. Work said that Californa law of public notice was considered a model. It gives notice as required by "due process of law," and according to meaningful advertising principles.; and finally, there is the good rule: "If it isn't broke, don't fix it!"

Mr. DeMoully asked for specific comment on using public notice when the California Constitution required notice to heirs as a part of due process of law; and therefore heirs were always notified. Smith said that should there be, however, an heir who did not get notice, for any reason, public notice was the only feasible means of advising him of his rights.

Proposal - Publish in One Newspaper of General Circulation In the County

Publication in the county, rather than in the city "will expedite probate since many times the newspaper in the city is only published

weekly; it will also help reduce probate costs by enabling competition among publishers; and it will help avoid jurisdictional problems caused by confusion over boundaries of adjacent suburban cities." --Commission Minutes, June 1983.

There should be no confusion about boundaries, said Mr. Smith. Each adjudicated newspaper has a court decision giving the city for which it is adjudicated; and a newspaper can be adjudicated for only one city. There are good maps, in Los Angeles County Thomas directories are used, that will accurately locate addresses and city boundaries. Mr. Widdis stated that the DAILY JOURNAL used Thomas directories to settle questions of where to publish.

Publication in a newspaper with a county adjudication would, in a county like Los Angeles, permit publication of a notice for a San Gabriel Valley resident in a newspaper on Catalina Island, Mr. Smith told the Commission.

This problem was addressed, said the staff, by provision that the newspaper selected should be one circulated where the deceased resided or his property was located. Mr. Smith stated that what constituted "circulation" was open to question, and would not provide the certainty that publication in the city now provides.

Commissioner Ann Stodden asked what one did about newspapers that accepted probate notices for more than one city, like the LONG BEACH RECORDER. Publication for a city for which a newspaper is not adjudicated, said Mr. Smith, is not lawful.

Mr. Collier said attorneys liked to leave the matter of where a notice should be published to the newspapers.

Mr. Marzec asked Mr. Collier how the bar's support of publication in one newspaper in the county took care of the situation where a dscedent who resided in Pomona had his death notice published in the EASY READER of Manhattan Beach. He asked if that was not avoiding the purpose of publication, to give notice in the deceased's community?

(There was apparent misunderstanding by some about the meaning of "newspaper of general circulation"; that it did not describe a newspaper generally circulated in a county, or a city, or other jurisdiction, but described a newspaper with an adjudication decree.)

Proposal - Do Not Specify Type Size

The size of type to be used in the notice should not be specified by statute but should be left to the discretion of the publishers--"this will encourage competition and will avoid jurisdictional problems where the wrong type size is inadvertently used." --Commission Minutes, June 1983.

Because legibility is important in public notices, the law requires all notices to be in at least six point type, said Mr. Smith, or larger where the statute requires it, as in the caption of the Notice of Death.

Mr. Work noted that type sizes had long been legislated. Ballot propositions in Los Angeles had to be printed in 12 point type, he said.

Mr. Collier said attorneys wanted assurance that notices be readable.

Proposal - Consolidate Notices of Death

To reduce the length of published notices the staff reported a suggestion by Professor of Law Lowell Turrentine of Stanford Law School in the 1956 edition of West's Annotated California Codes. Mr. Turrentine wrote "The present system of individual publication of notices of probate and notice to creditors should be abolished as unduly expensive and

unsatisfactory..." (page 39). The staff noted: "Professor Turrentine has suggested that published notices be consolidated and published once weekly, consisting of a listing of estates, addresses, and times. The county clerk would supervise this publication scheme, for which an increased probate filing fee would be required. The increased fee would be more than offset by the elimination of individual publication costs."

The staff suggested that "a publisher would be authorized, but not required, to consolidate all notices of probate, publishing the detailed information of each estate, and to print the boiler plate general information to heirs, beneficiaries, and creditors only once following all notices. The statute would not require this, but would leave it to competitive forces to implement." This the staff thought would probably be more politically acceptable than Professor Turrentine's scheme.

Mr. Work said that grouping the notices with changes in the list each day, and the varied advertising charges that would result, would create an "administrative nightmare."

The Commission Decides

Discussion completed, Chairman Marzec asked for a vote on the issues. We report the results from the Commission Minutes of the meeting.

The Commission decided:--

"(1)...that the number of publications...should remain at three...

"(2)...not to make any change in the existing law governing the place of publication of notice of opening probate.

"(3)...to recommend in place of the existing type size requirements for notice of opening probate that the type be 'readable.' The statute should provide that a caption in 8-point type and text in 7-point type or larger is deemed readable.

"(4)...the notice should be in the same form as existing law, i.e. the publisher should not be authorized to consolidate notices of opening probate and publish the boilerplate text of the notice only once."

Bureau Comment

"Modernizing" the California Probate Code and making it conform to the Uniform Probate Code was in issue in 1973. Then, as now, the Uniform Probate Code favors fast administration of estates and minimum public notice. California courts and the legal profession have resisted application of these provisions of the uniform code to California.

The Uniform Probate Code

The Uniform Probate Code is an authoritative source of suggestions for changes to state statutes in the interest of making them uniform and easier to administer across state lines. Major areas of American law have suggested uniform codes, some of which are enacted in total, or almost so, by individual states. The National Conference of Commissioners of Uniform State Laws maintains and revises the uniform codes.

Cost vs. Public Policy

The studies before the commission emphasized the cost of the Notice of Death, and measures to reduce it.

Chairman Marzec noted, in summing up his own position, that "Cost is not an issue."

In a memorandum by Mr. Earl Sawyer of the Bureau to Bureau management in October 1973, he reported:--

"A recent study clearly demonstrated how really negligible the publication costs are. Twenty estate files with distribution decrees entered on the sale date were taken. The grand total valuations of these estates was $1,196,800 or an average value of about $60,000. Total administration costs including expenses for attorney, executor, appraisals, bonds and newspaper publication were about $66,000 or about 5.5 percent of the total estate values. In relations to the $66,000 of administrative cost, the grand total for required publications was only $840.00 or 1.2 percent of administrative costs. The $840 figure represents only about 0.05 percent of total estate values." (On the figures given "about 0.05 percent" is more closely calculated at 0.07 percent-Editor).

Mr. Widdis told the commission that he had studied ten recent and randomly selected estates in Los Angeles County, and that newspaper publication cost as a percentage of the total estate was an average 0.05%. His study, which he did not present, showed an average estate value of $180,731; of which administrative costs took $10,000 or 5.53% of the average estate value; and an average publication fee of $95.30 which was 0.807% of the administrative costs and 0.044% of the estate value. The average length of time from death to distribution for the ten estates was 45.5 weeks.

Confirmation about the time an estate would be in probate came in Chairman Marzec's statement that the average time is 44 weeks.

As often in public notice matters as it appears that cost is the issue, this is not the case. Public policy is the issue. Should notice in the instance include public notice, or not? Certainly the work performed by a newspaper to publish the notice required by policy is worth a proper price. The laborer is worthy of his hire.

The American principle that notice must be given, and not stinting in the effort, is far and away the most important issue. When a person's rights are involved he must know it. He is entitled to an opportunity to protect his interests, as he sees fit. Not as someone else sees fit, but as he sees fit.

Publishers Must Attend

When commissions and other state agencies are holding meetings and hearings about matters in which newspapers have a direct interest either as businesses, or as representatives of the public interest, publishers risk a great deal by not being in attendance, in person.

Newspapers are an institution that have equal standing with the executive, the legislative and the judicial--they are the "fourth estate." This independence of the other government institutions of American life is a constant challenge to them. Legislative and executive do not mind if newspapers fail to protect their business interests, or the public interest.

And commission and agency members are entitled to the presence of the "lords of the press" at meetings and hearings. They are entitled to the best information about newspapers available--and publishers have that information. The confusion about the meaning of "newspaper of general circulation" was confirmation that even persons whose profession is the law may misunderstand a phrase in the statutes with a special meaning for newspapers. Type sizes are a mystery. And no opportunity occurred at this meeting to explain how they got into the statutes, or how the legal square fits in the picture.

Finally, if the decisions of 1983 had stood, unchallenged by newspapers, the issues concerning the Notice of Death would have been decided, as they had been, against the principles of adequate public notice.

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WRITER'S DIRECT DIAL #
324-

December 9, 1985

John DeMoully, Esq.
California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Revision of Probate Code

Dear Mr. DeMoully:

It is my understanding that your commission is presently revising many sections of the California Probate Code. I had planned to submit the enclosed resolution to the State Bar Conference of Delegates, asking the Conference to approve the adoption of an amendment to Probate Code Section 320. Enclosed is a copy of the proposed amendment together with a Statement of Reasons.

On reflection, I thought a more efficient way of having this resolution considered would be to submit it to your commission.

Thank you very much for your courtesy and consideration of the enclosed.

Sincerely,

Timothy C. Wright

TIMOTHY C. WRIGHT

TCW:bbs
enclosure

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend Probate Code Sections 320 to read as follows:

§320.
The custodian of a will, within thirty days after being informed that the maker thereof is dead, must deliver the same to the Clerk of the Superior Court having jurisdiction of the estate, or to the executor named therein, who shall then file the same with the Clerk of the Superior Court having jurisdiction of the estate within five days from receipt. Failure to do so makes such person responsible for all damages sustained by anyone injured thereby.

(Proposed new language underlined.)

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS
The present code section does not require the executor named in the will to deliver the will to the Clerk of the Court having jurisdiction of the estate. Beneficiaries under the will or heirs at law have a right to know the contents of the will. If the executor refuses to deliver the will to the Clerk of the Superior Court, the heir or beneficiary must then file a petition for letters of administration and engage in formal discovery in order to obtain a copy of the will. After the will is produced, the petition for letters of administration would have to be dismissed. This is an unnecessary, burdensome process which can be eliminated by amending Probate Code Section 320 as requested.

This proposed amendment does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Timothy C. Wright (415) 324-0622

RESPONSIBLE FLOOR DELEGATE: Timothy C. Wright

EXHIBIT 3

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November 1, 1985

Mr. John H. DeMoully
Executive Secretary
The California Law Review
Commission
4000 Middlefield Road, Ste. D
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

Your colleague, Court Commissioner Ann Stodden of Los Angeles County, gave an excellent address to the Los Angeles County Bar Association, Probate Section, of which I am a member, on Friday, October 31, 1985, about the work of the commission.

In reviewing pending matters being considered by the commission, she mentioned that you would be glad to have input from members of the bar who practice in the probate field. She mentioned a proposal that unsuccessful contestants of wills be charged with attorney's fees and costs of the proponents.

Would such a penalty provision discourage lawyers from taking contests in meritorious situations? Would the incidence of "death-bed wills" be increased if unscrupulous persons were aware that contestants might be penalized? We have been on both sides of will contests, and have seen situations where a will contest alone was able to arrive at the true wishes of a decedent.

I realize successful contests run only about 3% to 5% of contests filed; but is it fair to penalize the meritorious case? The remedy is too harsh. There are already procedural safeguards. These include the solemnity of the will itself and the technical requirements for execution and witnessing; the demurrer; the motion for summary judgment. And, to speed things up, a will contest may by-pass the long waiting periods often attendant on civil litigation. These thoughts came to mind as we returned from Ann Stodden's lecture.

Also, she mentioned that there was consideration of taking the will contest away from the jury and making the judge the fact finder. In human matters, the jury is still the best trier of fact. I would hate to see the jury eliminated.

These comments are obviously without our having seen the text of your drafts. Perhaps our remarks are inapposite. Could we see a draft of your proposal on will contests?

Thanking you I remain,

Very truly yours,

ZETTERBERG, ZETTERBERG
& PERSIMMON

Stephen I. Zetterberg

SIZ:lrk

cc: Ms. Ann Stodden

EXHIBIT 4

THE IN TERROREM CLAUSE: CHALLENGING CALIFORNIA WILLS

by
Andrew S. Garb, Esq.

IT IS NO SURPRISE that an unsuccessful contest of a California will which contains the usual in terrorem (no-contest) clause will result in disinheritance to the losing contestant. However, acts short of contesting a will have caused the forfeiture of a beneficiary's interest much to the surprise, no doubt, of the unsuccessful beneficiary.

None of the clauses regularly included in California wills has created quite the degree of difficulty in judicial construction as the in terrorem clause. The far-reaching and harsh effects of the clause have been exacerbated because of the inability or unwillingness of California courts to develop a consistent and predictable approach in construing and applying it.

Thus, the in terrorem clause presents a potential trap for the unwary beneficiary and his lawyer. Even for the alert and cautious, however, the uncertainty caused by the courts' difficulty in coming to grips with the no-contest clause can create a fear of possible disinheritance and a resulting "chilling effect" which deters potential action.

Mr. Andrew S. Garb is a partner, Loeb and Loeb; received his J.D. from Harvard Law School, 1967 and his LL.M. from USC Law School, 1968. He is a member of Executive Committee Probate and Trust Law Section of the Los Angeles County Bar Association. This article was the subject of a presentation by Mr. Garb at the 1979 Probate Symposium sponsored by the Probate and Trust Law Section of the Los Angeles County Bar Association on May 12, 1979.

The no-contest clause most often used in modern California wills is contained in California Will Forms Manual ¶ 2.16 (CEB 1966):

> If any beneficiary under this Will in any manner, directly or indirectly, contests or attacks this Will or any of its provisions, any share or interest in my estate given to that contesting beneficiary under this Will is revoked and shall be disposed of in the same manner provided herein as if that contesting beneficiary had predeceased me without issue.

It is the purpose of this article to discuss the admissibility of evidence which may be introduced to aid in the construction of the no-contest clause; to explore the apparently inconsistent attitudes of our courts toward the enforcement of such clauses; and to offer a comprehensive summary of the type of conduct which has been claimed to violate the no-contest clause.

I. BACKGROUND OF THE CLAUSE

The enforceability of the no-contest clause has long been justified in California on the theory that a testator has the power to impose any condition he may desire upon the beneficiary's right to receive a legacy. The only limitation upon such testamentary power is that the courts will not enforce a condition which violates public policy. However, California courts have held that an in terrorem clause is not violative of the public policy of the State. *See Estate of Hite*, 155 Cal. 436 (1909). One commentator has suggested that the Civil Code policy against forfeitures (Section 3369) ought to apply with respect to no-contest clauses. Selvin, *Comment: Terror in Probate*, 16 Stan. L. Rev. 355 (1964). But no such use of Civil Code Section 3369 has been made by our courts, and the enforcement of the clause continues undeterred.

Many of the reported cases involve more comprehensive – and frequently more convoluted – versions of the in terrorem clause than that provided in the CEB Will Forms Manual. Each such clause, like any other will provision, is to be construed and enforced according to the intent of the testator. However, the typical language used in the clause is susceptible of either a strict or a broad construction, and courts have been anything but consistent in utilizing one or the other approach.

The conduct most commonly sought to be prohibited is the "contest" or "attack" upon a will or any of its provisions. Even these ostensibly straightforward words have been the cause of much litiga-

tion. Does "contest" mean only a will contest in the technical sense as described in Probate Code Sections 370-385? Can it include conduct intended to obtain property independent of a will context? Can conduct which affects the nature and amount of property passing under a will, although not questioning the validity of the will itself, constitute an attack? Since substantially similar language contained in different wills can receive different judicial constructions, the essential starting point is a discussion of the admissibility of evidence to aid in construing a decedent's will.

II. ADMISSIBILITY OF EVIDENCE TO HELP CONSTRUE WILL

The primary source of authority on the admissibility of evidence to assist in construing a will is the Probate Code itself. Section 105 provides, in substance, that uncertainties on the face of a will are resolved by ascertaining the testator's intent from the words used in the will, taking into account the circumstances under which the will was made. However, the statute anomalously makes inadmissible the testator's own oral declarations as to his intentions. Notwithstanding the limitations of Probate Code Section 105, California courts have been exceedingly liberal in admitting extrinsic evidence which sheds light on the testator's actual intent – even where such evidence would appear to be barred by the statute.

Perhaps the threshold issue determined by the courts was whether extrinsic evidence would be admissible even if the words of the will were clear, but it was contended that they could be construed in more than one way. In *Estate of Torregano*, 54 Cal.2d 234 (1960), such evidence was permitted. In *Estate of Russell*, 69 Cal.2d 200 (1968), the California Supreme Court removed any barrier to the admissibility of extrinsic evidence under such circumstances, holding that surrounding circumstances should always be examined by the trial court. The Court of Appeal had gone even further in *Estate of Balyeat*, 268 Cal.App.2d 556 (1968). There, parol evidence and evidence of the surrounding circumstances were held to be properly admitted though the terms of the will appeared clear and unambiguous. The extrinsic evidence was introduced to ascertain *whether* the terms of the will were in fact unambiguous.

In dealing with the prohibition against admissibility of the testator's oral declarations of intent, the *Russell* court limited the restriction of Section 105 so as to exclude mere incidental declarations, but

not to preclude admissibility of the testator's specific instructions as to disposition of his property. Thus, the court overcame the potential barrier created by the legislature and allowed evidence to be introduced for the purpose of proving that the clause in question was intended to protect the contestant. Oral and written statements of a decedent were also admitted in a recent case involving construction of the residuary clause. *See Estate of Taff*, 63 Cal.App.3d 319 (1976), which discussed the *Russell* case.

The extent to which courts have been willing to ignore the apparent restrictions of Section 105 in favor of admitting *any* oral or written statements which could aid in construing a will was illustrated in *Estate of Webb*, 76 Cal.App.3d 169 (1977). There, in an expression of judicial candor, the court stated that "unusual creativity" has overcome the harshness of Section 105's prohibition on admissibility of the oral declarations of a testator's intent. Thus, if it is relevant to the clause in question, virtually all evidence of the circumstances surrounding the will's execution may well be admissible to show the existence of an ambiguity and to help construe it.

III. CALIFORNIA COURTS' INCONSISTENT ATTITUDE TOWARD ENFORCEMENT OF THE IN TERROREM CLAUSE

A. *A Narrow or Broad Interpretation?*

Although numerous cases state that a no-contest clause should be strictly construed and should be limited in scope so as to include no conduct other than that which the language plainly requires, some recent cases have construed such clauses so broadly as to bring into question the validity of the rule of strict construction. The effect has been to create even more uncertainty. While some inconsistencies among cases can be explained in part by the differing language contained in the clauses involved, the following discussion will demonstrate that our courts have simply not developed a coherent or predictable approach to the problem of construing the in terrorem clause.

Among the leading cases cited for the proposition that the no-contest clause should be strictly construed and limited in scope to acts strictly within its terms are the following:

1. *Lobb v. Brown*, 208 Cal. 476 (1929) (financial support of contestant who lacked standing was not a violation);

2. *Estate of Kitchen*, 192 Cal. 384 (1923) (assertion of oral contract held not a violation);
3. *Estate of Bergland*, 180 Cal. 629 (1919) (good faith attempt to probate wrong will not a violation);
4. *Estate of Basore*, 19 Cal.App.3d 623 (1971) (petition to determine heirship based upon claim that charitable bequests exceeded amount permitted by statute held no violation of a narrowly drawn clause);
5. *Estate of Zappettini*, 223 Cal.App.2d 424 (1963) (action to construe will and declare part invalid held not a violation).

Despite the apparently consistent strain running throughout the foregoing decisions, the pattern of other cases which have construed the word "contest" has been a paradigm of inconsistency. An early case, *Estate of Hite*, 155 Cal. 436 (1909) held that contest should be given its definitive legal meaning and not a "popular" meaning. More recently, *Estate of Miller*, 212 Cal.App.2d 284 (1963) limited the reach of the clause only to a technical attack on the competency of the testator, fraud, or undue influence.

On the other hand, some cases depart from such a concept to the extent of defining a contest as any justiciable controversy (*Estate of Poisl*, 153 Cal.App.2d 661 (1957)) or any legal proceeding which thwarts a decedent's wishes (*Estate of Holtermann*, 206 Cal.App.2d 460 (1962) and *Estate of Howard*, 68 Cal.App.2d 9 (1945)).

In fact, the most recent decision in this area unequivocally rejected the notion that a contest is limited to its technical meaning under the Probate Code. In *Estate of Kazian*, 59 Cal.App.3d 797 (1976), a will provision declared all of decedent's estate to be separate property. An action to establish a community property interest in the estate was held to violate the no-contest clause. The issue as the court viewed it was whether or not the action thwarted the decedent's intent – not whether it was a contest in the technical sense. Such an approach may signal a departure from the earlier cases requiring a strict interpretation of the clause.

However, other cases tread a middle ground, utilizing a "functional approach" to construing the clause. The emphasis is not so much on the language of the clause or the label of the attack, but rather on the intent and effect of the beneficiary's actions. A good example is *Estate of Lewy*, 39 Cal.App.3d 729 (1974) where a pleading was held

not to be a contest despite the seemingly conclusive fact that it called itself "Contest of Will." The pleading in question challenged the executor's capacity to act as such and alleged that two pages of the purported will were altered and not part of the original will. Finding that the intent was to establish the testator's real intent – not to frustrate it – the court found the self-styled contest was not a contest at all for purposes of the in terrorem clause.

In *Estate of Markham*, 46 Cal.App.2d 307 (1941), invalidity of the will was alleged in various legal proceedings including actions filed in state and federal courts. In construing a very broad and lengthy no-contest clause, the court's analysis turned not so much on the language used by the testator, or on the label of the attack made upon the will, but rather upon whether there was a *purpose* to defeat the provisions of the will. Finding such a purpose, the court held that the no-contest clause was violated.

The cases discussed above show beyond question that it is simply not possible to draw a meaningful inference as to the attitude of California courts toward the enforcement of no-contest clauses. Some cases appear to go further than necessary to enforce the clause, while others have narrowly restricted the scope of the clause. That the in terrorem clause has not been repugnant to our courts, however, appears to be demonstrated by the judicial treatment of the defense of good faith and the defense of abandonment.

B. *Is Good Faith a Defense?*

In many jurisdictions, a contest alone will not produce forfeiture under an in terrorem clause. Bad faith must also be shown. *See* Anno., 125 A.L.R. 1135, 1136 (1940). Such an approach would, of course, have the effect of limiting and restricting the impact of the no-contest clause. Although there have been a few references to a "good faith" element in the California cases, no decision has gone so far as to avoid a forfeiture solely because a will contest was instituted in good faith or with probable cause.

The defense of probable cause or good faith was rejected long ago in *Estate of Miller*, 156 Cal. 119 (1909), a case involving a direct will contest. In *Estate of Markham, supra*, 46 Cal.App.2d 307 (1941), a broad-based attack was claimed not to violate the no-contest clause because there was probable cause and no bad faith. The court rejected the claim and held that any attempt to challenge the validity

of the will constituted a violation irrespective of the moving party's good faith or bad.

However, in *Estate of Crisler*, 97 Cal.App.2d 198 (1950), a beneficiary moved to dismiss probate proceedings on the ground that the decedent was not a California resident at the time of her death. The court held the motion was not an attack, and then noted that the trial court correctly found no bad faith in the bringing of the motion. The opinion gave no hint as to whether the result would have been different had there been no finding of an absence of bad faith. Likewise, in *Estate of Dow*, 149 Cal.App.2d 47 (1957), a widow's attempts to claim that certain property was community property were found not to violate the no-contest clause. Although not necessary to the decision in the case, the court noted that the widow's claims were made in good faith.

Yet another case in which good faith appears to have been a factor in the court's finding no violation of an in terrorem clause was *Estate of Bergland, supra*, 180 Cal. 629 (1919). There, a party in good faith probated a spurious will which was believed to be genuine. The conduct was held not to violate the in terrorem clause since no bad faith was demonstrated.

Finally, in *Estate of Lewy, supra*, 39 Cal.App.3d 729 (1974), an heir filed a purported contest, alleging that the named executor was not competent to act as such and alleging that two pages of decedent's will had been substituted after signature. The court held that the no-contest clause had not been violated. Although no finding of fact was made on the issue of good faith, the court viewed the acts as having been taken in good faith. Moreover, the court suggested that some conduct which could violate a no-contest clause, if taken in bad faith, might not be a violation if taken in good faith. However, this was a dictum and the court did not list or describe the conduct to which it was referring.

Thus, although a few cases have discussed good faith as an issue, none has held that good faith or probable cause will keep a will contest under Probate Code Sections 370 to 385 from being held to be a violation of an in terrorem clause. As to conduct falling short of being a "technical contest," the cases discussed immediately above provide a basis – although somewhat tenuous – for arguing that good faith should be sufficient to prevent a forfeiture.

C. *The Effect of Abandonment*

Another opportunity for California courts to restrict the effect of the in terrorem clause would be to refuse to apply it to attacks that are withdrawn or abandoned and thus have no actual effect upon the testator's dispositive plan or the validity of his will. However, the courts have rejected this approach and have enforced forfeitures even where the offending action is voluntarily aborted.

Estate of Hite, supra, 155 Cal. 436, 444 (1909) seemed to open the door to the defense of abandonment. There, the court stated in a dictum that the mere filing of a so-called "paper contest," which was abandoned without action by the contestant and was not employed to thwart the testator's intent, need not be declared a contest in violation of the in terrorem clause. Later, in *Estate of Fuller*, 143 Cal.App.2d 820 (1956), a contest based upon several grounds was dismissed before answer and before trial and was claimed to be a "mere paper contest" in reliance on *Hite*. However, the court in *Fuller* held that the clause was violated. The decision was based in part upon the serious charges contained in the contest, and the court held that *commencement* of the action constituted violation of the no-contest clause despite the later withdrawal. The court refused to make "artificial distinctions" or to engage in "quibbling" to avoid the forfeiture. Thus, the suggestion contained in the *Hite* decision has not been followed, and dismissal or withdrawal of the charges is not likely to be an adequate basis upon which to avoid a forfeiture.

IV. WHAT ACTS WILL BE HELD TO VIOLATE THE IN TERROREM CLAUSE?

In view of the drastic consequences flowing from the violation of an in terrorem clause, it would be highly desirable to know – prior to initiating contemplated action – whether it may be violative of such a clause. (For a successful effort to request an advance ruling from the Probate Court as to whether prospective conduct will violate a no-contest clause, *see Estate of Bullock*, 264 Cal.App.2d 197 (1968). In *Colden v. Costello*, 50 Cal.App.2d 363, 367-68 (1942), there is a suggestion that jurisdiction exists in Superior Court to grant declaratory relief to determine whether prospective action will violate a no-contest clause. *See also, McCaughna v. Bilhorn*, 10 Cal.App.2d 674 (1935), which upheld jurisdiction in Superior Court, not sitting

in probate, to construe a will under certain circumstances.) However, because of the differences in language used in no-contest clauses and because of the inconsistent approaches taken by our courts in construing these clauses, predictability is somewhat difficult. What follows is a summary of significant California cases which have determined whether or not particular conduct constituted a violation of a no-contest clause. In each instance, the precise language of the clause involved (to the extent it is disclosed in the court's opinion) should be considered in determining the precedential value and applicability of the case.

1. *Unsuccessful Will Contest Under Probate Code Sections 370-385* (Universally held in all cases to violate the usual in terrorem clause).

2. *Proceeding to Establish Community Property Interest in Estate*

   (a) *Estate of Kazian, supra,* 59 Cal.App.3d 797 (1976) held a violation;
   (b) *Estate of Harvey,* 164 Cal.App.2d 330 (1958) held a violation (will required spouse to elect either will or community interest);
   (c) *Estate of Howard, supra,* 68 Cal.App.2d 9 (1945) cross-complaint asserting spouse's interest in property in opposition to executor's quiet title action which claimed all of decedent's property was separate property, held a violation;
   (d) *Estate of Dow, supra,* 149 Cal.App.2d 47 (1957) community property action and action to have inter vivos gifts declared community property, held no violation (first action brought assets into estate as well as to surviving spouse).

3. *Action to Impose Constructive Trust on Estate Assets*
   (a) *Estate of Miller, supra,* 212 Cal.App.2d 284 (1963) based on alleged oral agreement to leave property, held no violation (clause prohibited "contests");
   (b) *Estate of Kitchen, supra,* 192 Cal. 384 (1923) oral agreement to pay daughter, held a violation (very broad clause).

4. *Objection to or Removal of Personal Representative*
   (a) *Estate of Blackburn*, 115 Cal.App. 571 (1931) objection to executor, held no violation;
   (b) *Estate of Bullock*, 264 Cal.App.2d 197 (1968) action to remove testamentary trustee should not be a violation;
   (c) *Estate of Lewy, supra*, 39 Cal.App.3d 729 (1974) challenge to executor's capacity to act, held no violation.
5. *Proceeding to Establish Interest in Joint Tenancy Property*
   Estate of Schreck, 47 Cal.App.3d 693 (1975) held no violation.
6. *Proceeding to Set Aside Exempt Property Under Probate Code Section 660*
   Estate of Schreck, supra, 47 Cal.App.3d 693 (1975) held no violation.
7. *Pretermitted Heir Claim*
   Estate of Price, 56 Cal.App.2d 335 (1942) successful Section 90 claim of grandchildren, held no violation.
8. *Probate of Spurious Will*
   (a) *Estate of Bergland, supra*, 180 Cal. 629 (1919) wrong will offered unknowingly and in good faith, held no violation;
   (b) *Estate of Mathie*, 64 Cal.App.2d 767 (1944) fraudulent destruction of will and probate of revoked will, held a violation (although beneficiary received intestate share since no provision in will for disposition of ineffective gifts).
9. *Challenge to Probate Court's Jurisdiction*
   Estate of Crisler, supra, 97 Cal.App.2d 198 (1950) held no violation (based on claim that decedent did not reside in California).
10. *Petition to Compel Filing of Inventory and Appraisement*
    Estate of Seipel, 130 Cal.App. 273 (1933) held no violation.
11. *Proceeding to Construe or Interpret Will*
    (a) *Estate of Zappettini, supra*, 223 Cal.App.2d 424 (1963), heirship petition alleging provisions of will uncertain and others invalid, held no violation of "ordinary" no-contest clause;

(b) *Estate of Kline,* 138 Cal.App. 514 (1934) construction proceeding to determine invalidity of certain charitable trusts, held attack on legality of provision rather than on capacity of testator or lack of proper execution of will and therefore no violation;

(c) *Estate of Basore, supra,* 19 Cal.App.3d 623 (1971) petition to determine heirship alleging charitable bequest greater than permitted by statute, held no violation of a narrowly drawn in terrorem clause;

(d) *Estate of Goyette,* 258 Cal.App.2d 768 (1968) objections to distribution alleging charitable bequests exceeded statutory limits, held to violate clause prohibiting contest of will or objection to its provisions (case was distinguished in *Estate of Basore, supra).*

12. *Action to Compel an Accounting*
Estate of Kruse, 7 Cal.App.3d 471 (1970) action by charitable remainderman under testamentary trust for accounting by executrix, held no violation.

13. *Presentation of Disallowed Creditor's Claim*
Estate of Madansky, 29 Cal.App.2d 685 (1938) held no violation.

14. *Furnishing Financial Support and Evidence to Contestant*
Lobb v. Brown, supra, 208 Cal. 476 (1929) held no violation where contestant lacked standing to contest will and clause prohibited instituting a proceeding.

15. *Claim of Alteration of Pages of Purported Will*
Estate of Lewy, supra, 39 Cal.App.3d 729 (1974) held no violation since attempt was to establish, rather than frustrate, decedent's intent.

V. CONCLUSION

The policy favoring enforcement of the in terrorem clause and the possibility of forfeiture created thereby are deeply rooted in California caselaw. However, courts should adhere more consistently to the policy of strict interpretation of such clauses. Only conduct which is necessarily embraced within the scope of an in terrorem clause should be permitted to result in a forfeiture. Good faith and probable cause may preclude application of the clause as to conduct short of a direct will contest but apparently is no defense to the enforcement of the clause where a direct contest is filed. The courts should remove the uncertainty created by prior cases dealing with these defenses. A more consistent and predictable approach to judicial construction of the in terrorem clause is needed.

GRACE K. BANOFF
Attorney at Law
733 Kline Street #304
La Jolla, CA 92037

May 13, 1985

Re: First Supplement to Memorandum 85-12
Law Revision Commission Study L-1010
Grounds for Refusal to Appoint Named Executor

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

Dear Mr. DeMoully:

These comments are submitted on behalf of the Legislative Subcommittee on Estate Planning, Trusts and Probate of the San Diego County Bar Association.

The Subcommittee recognizes the advisability of legislation authorizing the Probate Court to deny appointment to an executor named in the will if there is a conflict of interest between the named executor and the estate or persons interested therein. The Subcommittee proposes, however, that the purpose be accomplished by more direct wording.

Proposed §7311 (a)(5) would disqualify a person for appointment as personal representative (which is defined to include executor) if he "would be removed from office pursuant to Section 7382." This provision presents three problems:

1-To authorize disqualification by reason of conflict of interest the staff relies on proposed §7382 (d) which provides for removal of a personal representative if "[r]emoval is otherwise necessary for protection of the estate." This would not cover all conflict situations since it would not include a conflict between the personal representative and persons interested in the estate, as distinguished from a conflict between the representative and the estate as an entity.

2-Proposed §7382 (e) provides for removal of a personal representative "[f]or other cause provided by statute." Thus incorporating proposed §7382 by reference into proposed §7311 would be incorporating a section which already incorporates by reference other unidentified sections and may lead to ambiguity and litigation.

3-The staff proposal doesn't expressly provide for an evidentiary hearing at the option of the named executor.

The Subcommittee suggests consideration of an Ohio statute as a starting point in rephrasing the instant proposal. Ohio Revised Code §2113.18 provides for removal of an executor or administrator "if there are unsettled claims existing between him and the estate, which the court thinks may be the subject of controversy or litigation between him and the estate or persons interested therein."

That criterion would be applicable to disqualification as well as removal; it covers disputes as to both corpus and distribution of the estate and gives the Probate Court some discretion in appraising the conflict of interest.

However the proposal is redrafted, the Subcommittee recommends (1) that it be specific regarding its application to conflicts of interest, (2) that the section dealing with disqualification or some other section expressly provide for an evidentiary hearing at the option of the person whose disqualification is sought on grounds of conflict of interest.

Respectfully submitted,

Grace K. Banoff

Grace K. Banoff
For the Subcommittee

cc: Daniel B. Crabtree, Esq.
Subcommittee Chair

EXHIBIT 6

April 19, 1985

Mr. Edwin K. Marzec
Chairman,
California Law Revision Commission
4000 Middlefield Road, Suite E-2
Palo Alto, CA 94303

Dear Mr. Marzec:

It has come to the attention of our clients, Western Surety Company and Northwestern National Insurance Company, that the current Probate Code is silent as to any application of a statute of limitations for actions against sureties on the bond of an administrator or executor. This oversight has led to the prejudicial and unfair result whereby State claims are commenced over twenty years after a fiduciary's removal or discharge. In this letter, we will suggest that such a law is needed and necessary.

The Probate Code does provide a good example of the needed statute, but unfortunately, and for unknown reasons, it only applies to guardians and conservators. Probate Code Section 2333(b) provides that an action against the sureties of a guardian or conservator must be commenced within three years of discharge or removal or within three years from the date an order of surcharge becomes final, whichever is later. By revising this statute to include executors and administrators, or by providing a similar statute that substitutes executors and administrators for guardians and conservators, the policy of encouraging valid claims to be commenced timely and the policy of fairness to save a defendant from defending a stale claim will be furthered. Also, for clarity of reasons, death should be included with discharge and removal to commence the running of the limitation period. There are early cases apparently applying former limitations of action statutes that did not distinguish between guardians, executors, administrators or conservators. In Elkins v. Bryson, a cause of action against an administrator and the sureties on his bond was deemed barred where the action arose five years after the decree of distribution became final. 16 Cal.App.2d 173, 60 P.2d 301 (1936).

Further, in Rafferty v. Mitchell the plaintiff brought an action against a surety company on the bond of an executor. 4 Cal.App.2d 491, 41 P.2d 563 (1935). The court by way of dictum stated the general rule that the statute of limitations does not begin to run against a trustee until he

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repudiates his trust. Id. at 564. The court noted in the case of a continuing trust, the accrual of the cause of action which starts the running of the limitation period would never begin. The court held that as the action against the executor's surety was commenced thirteen years after the decree of partial distribution, and nine years after the decree of final distribution, was time barred.

Finally, it has been held that an action against the sureties on an executor's bond cannot be maintained where the action is brought more than four years after the executor's death. Hewlett v. Beede, 2 Cal.App. 561, 83 P. 1086, 1089 (1905). But an action is not time barred by any statute of limitations against a surety on an administrator's bond where the action was commenced within four years from the time the former administrator died. Crumrine v. Dizdar, 59 Cal.App.2d 783, 140 P.2d 101, 106 (1943).

While the current statutory scheme is silent as to the limitations period applying to suits brought against executors and administrators, two current statutes may possibly apply. Code of Civil Procedure Section 337 provides that an action upon any contract, obligation, or liability founded upon an instrument in writing, must be brought within four years. Since an action on a surety bond is maintained upon a written instrument, this statute may apply. Also, a surety bond may fall within the catch-all provision of Code of Civil Procedure Section 343 which provides that an action for relief not otherwise provided for, must be commenced within four years after the cause of action shall have accrued. Of course, either statute leaves open the issue of the time of the accrual of the cause of action. The current statutory scheme therefore result in a confusing array of possibly applicable statutes and wide judicial discretion in determining the date the limitations period begins to run. This, in turn, leads to conflicting decisions; requires a case-by-case determination and creates uncertainty.

Because of the probability of conflicting and ambiguous decisions, and because fairness to the sureties dictates that valid claims should be brought in a timely manner, the need for a statute defining the accrual of a cause of action for suits against sureties on executors and administrators bonds is a necessary addition to the current Probate Code. This is particularly true as such a statute exists with respect to suits on similar guardian and conservator bonds. Both sureties and claimants should be clearly apprised of the applicable statute of limitations.

I hope the Law Revision Committee will consider this proposal and promulgate a statute similar to the one suggested.

Please do not hesitate to contact me if we can be of any further assistance.

Sincerely,

Hannah L. Byron

HLB/tm

Enclosure

cc: John DeMouely, Executive Secretary

Library References

Probate Court Practice, Goddard, §§ 21, 2047, 2125, 2185, 2186, 2299, 2400 et seq.

§ 2332. Filing and preservation of bond

Every bond given by a guardian or conservator shall be filed and preserved in the office of the clerk of the court.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

Law Revision Commission Comment
1979 Addition

Section 2332 is the same in substance as a portion of former Sections 1486 and 1805. For requirements as to entries in register of actions and presumptive effect of such entries, see Section 545, incorporated by the general reference provisions of Section 2100.

Historical Note

Derivation: Former § 1486, enacted by Stats.1931, c. 281, p. 674, § 1486. C.C.P. § 1804, amended by Code Am.1880, c. 74, p. 72, § 35. Stats.1850, c. 115, p. 272, § 40; Stats.1861, c. 530, p. 607, § 15.

Former § 1805, added by Stats.1957, c. 1902, p. 3310, § 1.

Cross References

Additional bond when required, see § 2330.
Clerk's entry of bond in register of actions, see § 545.
Cost of bond, see § 2623.

Library References

Probate Court Practice, Goddard, §§ 21, 2183, 2400 et seq.

§ 2333. Suit against sureties on bond; limitation period

(a) In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate.

(b) Except as provided in subdivision (c), no action may be maintained against the sureties on the bond unless commenced within three years from the discharge or removal of the guardian or conservator or within three years from the date the order surcharging the guardian or conservator becomes final, whichever is later.

(c) If at the time of the discharge or removal of the guardian or conservator or when the order of surcharge becomes final any person

entitled to bring the action is under any legal disability to sue, such person may commence the action within three years after the disability is removed.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

Law Revision Commission Comment
1979 Addition

Subdivision (a) of Section 2333 continues a portion of former Sections 1486 and 1805. Subdivisions (b) and (c) are based on former Section 1487 with the addition of wording as to "surcharge" from former Section 1806. Subdivision (b) adopts the three-year period under former Section 1487 rather than the two-year period under former Section 1806. Subdivision (c) adopts the three-year period under former Section 1487 rather than the one-year period under former Section 1806.

Historical Note

Derivation: Former § 1486: C.C.P. § 1804; Stats.1850, c. 115; Stats.1861, c. 530 (see Derivation under § 2332).

Former § 1487, enacted by Stats.1931, c. 281, p. 674, § 1487. C.C.P. § 1805; Stats.1850, c. 115, p. 272, § 41.

Former § 1805 (see Derivation under § 2332).

Former § 1806, added by Stats.1957, c. 1902, p. 3310, § 1.

Cross References

Effect on liability of court authorization or approval, see § 2103.
Guardian or conservator, liability not limited to amount of bond, see § 554.
Nature of surety's liability, see § 554.
Maintenance of actions on bonds, see §§ 554, 576.
Periods of limitation, generally, see Code of Civil Procedure § 335 et seq.
Removal of guardian or conservator, see § 2650 et seq.
Suit to recover property sold, limitation period, see § 2548.

Library References

Probate Court Practice, Goddard, §§ 21, 2219, 2230, 2299, 2400 et seq.

§ 2334. Insufficiency of surety; order for further security or new bond

(a) The ward or conservatee, or the spouse or any relative or friend of the ward or conservatee, or any interested person may apply to the court for an order that the guardian or conservator be required to furnish further security. The application shall be made by a petition showing that the sureties on the bond furnished by the guardian or conservator have become, or are becoming, insolvent, or that they have removed or are about to remove from the state, or that from any other cause the bond is insufficient.

(b) If it comes to the knowledge of the court that the bond of a guardian or conservator is from any cause insufficient, the court may

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Executive Office
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November 19, 1985

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

Dear Mr. Sterling:

Re: Probate Code Section 405.3

In response to your letter of October 23, 1985, we do receive service of process pursuant to Probate Code Section 405.3. It seems to function properly. We do not maintain statistics for the different categories of service of process which we receive, however, our document examiner who handles most of the services of process estimates that we receive roughly one such service a month.

Section 405.3 would appear to have a purpose because it would allow service of process on a non-resident executor in a situation where there would perhaps be no basis for either jurisdiction or service of process under the typical "long arm" statute.

If we can provide you additional information, please do not hesitate to call.

JERRY W. HILL
Assistant Secretary of State

JWH:sp

0040b/56b
11/6/85

STAFF DRAFT

TENTATIVE RECOMMENDATION
Relating To
OPENING ESTATE ADMINISTRATION

The provisions of the proposed law governing the opening of estate administration generally follow both the organization and substance of existing law. There is some reorganization,[1] together with many simplifications and technical and clarifying changes.[2] Of the substantive changes made by the proposed law, minor changes are noted in the Comments to the specific provisions of the proposed law and major changes are described below.

Time for probate of will. Under existing law a will may be admitted to probate at any time after the death of the decedent.[3]

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[1]For example, existing law provides two parallel though not identical procedures for probating a will and appointing a personal representative. The proposed law reorganizes these procedures in a single uniform proceeding for opening estate administration. This is consistent with current practice through consolidated Judicial Council forms.

[2]Included is simplification of terminology. The proposed law replaces existing references to executors, administrators, administrators with the will annexed, and special administrators, with a single reference to "personal representative," unless a special reference to one particular type is called for. Existing references to granting of letters, granting of administration, admission as executor, and other varieties of terminology intended to refer to court appointment of a personal representative have been standardized to refer to "appointment of a personal representative." References to the "trust" of the personal representative have been replaced by references to the office of the personal representative. Removal from office is the standardized phrase for such variants as revocation or annulment of letters.

[3]Prob. Code § 323. Admission of a will to probate and failure to contest a will do not preclude probate of a subsequent will. Prob. Code § 385; Estate of Moore, 180 Cal. 570, 182 Pac. 285 (1919).

To assure some finality in probate proceedings, the proposed law precludes probate of a will after close of administration.

Setting petition for hearing. Existing law provides a minimum 10 days before a petition for administration of a decedent's estate may be heard.[4] The proposed law increases the minimum hearing time to 15 days in recognition of the fact that interested persons may require some additional time to prepare for the initial hearing in the administration of the estate.[5]

Notice of hearing. In the interest of simplicity and economy, the proposed law consolidates in a single form the various notices of hearing to open probate administration, whether served or published. The consolidated form of notice includes important information for interested persons that is not required by existing law to be included: (1) The notice must refer to the availability in the court file of any will to be probated. (2) The notice must inform the recipients that if independent administration authority is granted, the personal representative may administer the estate without supervision.

In addition to the persons on whom notice is required to be served,[6] the proposed law requires such additional notice as the court may authorize. This requirement may be important in situations where there are other interested parties who might not otherwise receive actual notice, such as trust beneficiaries or creditors. THE LAW REVISION COMMISSION IS CURRENTLY STUDYING WHETHER ACTUAL, AS OPPOSED TO PUBLISHED, NOTICE TO KNOWN OR REASONABLY ASCERTAINABLE CREDITORS SHOULD BE REQUIRED, IN LIGHT OF RECENT DUE PROCESS OF LAW DEVELOPMENTS. THE COMMISSION SOLICITS COMMENTS AND SUGGESTIONS CONCERNING IMPLEMENTATION OF SUCH AN ACTUAL NOTICE REQUIREMENT.

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[4]Prob. Code § 327.

[5]Likewise, the proposed law requires that interested persons receive 10 days actual notice, allowing for mailing time, etc., in order to allow sufficient time for preparation for the hearing.

[6]Heirs of the decedent (so far as known to the petitioner) and devisees and executors named in the decedent's will. Prob. Code § 328.

Will contest. Existing statutes appear to put the burden of proof on a will contestant rather than on a will proponent,[7] but lack detail on the specific burdens and order of proof in will contests.[8] The proposed law provides useful detail in this area.[9]

In a will contest a jury determination may be had of a number of issues involving the validity of the will.[10] The jury trial scheme has been criticized not only because it is erratic in the issues it leaves to the jury,[11] but also because jury verdicts upholding a contest are reversed on appeal in the great majority of cases.[12] Jury trial in probate matters is not constitutionally required,[13] and there is a substantial waste of time and resources in going through the jury trial, appeal, and reversal process. Moreover, the

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[7]Prob. Code § 371. This seems to conflict with the general rule that, "The party affirming is plaintiff and the one denying or avoiding is defendant." Prob. Code § 1230.

[8]The cases have resolved this statutory ambiguity by imposing the burden of proof of due execution on the proponent of the will, and the burden of proof of lack of testamentary capacity or undue influence on the contestant.

[9]The detail is drawn from Uniform Probate Code Section 3-407.

[10]Probate Code Section 371 provides for a jury trial of the following issues:

(1) Competency of the decedent to make a will.

(2) Freedom of the decedent from duress, menace, fraud, and undue influence.

(3) Due execution and attestation of the will.

(4) Any other question substantially affecting the validity of the will.

[11]Evans, Comments on the Probate Code of California, 19 Calif.L.Rev. 602, 616 (1931).

[12]See, e.g., Note, Will Contests on Trial, 6 Stan.L.Rev. 91 (1953); Breidenbach, Will Contests, in 2 California Decedent Estate Administration §§ 21.139-.141 (Cal.Cont.Ed.Bar 1975).

[13]See, e.g., Estate of Beach, 15 Cal.3d 623, 542 P.2d 994, 125 Cal.Rptr. 570 (1975).

whole process has the effect of postponing enjoyment of the estate for several years, which gives unmeritorious contestants leverage to obtain compromise settlements to which they should not be entitled. For these reasons, the proposed law leaves questions of fact in will contests to the judge rather than the jury.

In the case of a will contest after probate (i.e., a proceeding to revoke the probate of a will), existing law requires an award of costs against an unsuccessful contestant and, if the contest is successful, gives the court discretion to award costs either against the person who resisted the contest or against the estate.[14] The proposed law removes the court discretion and requires the award to be made against the estate; the personal representative or other interested person has the duty to defend a will admitted to probate.

The proposed law also adds attorney's fees to the award of costs. This addition is intended to encourage a potential contestant to make the challenge at the initial probate hearing rather than waiting to see the outcome of any will contest and then commencing a second proceeding to revoke probate. The award of attorney's fees is also intended to discourage delaying and other obstructive tactics after a will has already been admitted to probate.

Competence of person appointed personal representative. Existing law requires that a person appointed as personal representative be an adult, resident of the United States, and have sufficient understanding and integrity, among other qualifications.[15] The governing statutes do not, however, include a conflict of interest among the disqualifications of a personal representative even though the conflict of interest would require removal of the personal

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[14]Prob. Code § 383.

[15]Prob. Code §§ 401, 420. The United States residency requirement applies to administrators but not executors. The proposed law eliminates some of the existing grounds for disqualification such as "drunkenness," "improvidence," and conviction of an "infamous crime", in favor of the general ground that the person is incapable of executing or is otherwise unfit to execute the duties of the office.

representative from office upon appointment.[16] The proposed law cures this problem by adding as a ground for disqualification that the person would be removed from office if appointed. This will save needless court proceedings, as well as substantial amounts of time, and will avoid unnecessary problems and complications in the administration of the estate.

Priority for appointment as administrator. The priority of persons for appointment as administrator of the estate of a decedent corresponds to their priority for inheriting the estate of the decedent under the laws governing intestate succession.[17] Recent changes in the law governing intestate succession[18] have rendered the appointment priority scheme inconsistent. The proposed law conforms the priority for appointment as administrator to the current law governing intestate succession.

Appointment of disinterested person as personal representative. If two persons of equal rank seek appointment as personal representative and are unable to agree, the court is faced with the difficult choice of appointing a person whose interests are antagonistic to those of another person equally entitled to appointment. In this situation, appointment of a disinterested person would be beneficial. The proposed law authorizes the court to make such an appointment; a similar technique is used where two creditors are unable to agree (see discussion immediately below).

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[16]See, e.g., Estate of Backer, 164 Cal.App.3d 1159, 211 Cal.Rptr. 163 (1985).

[17]Cf. Prob. Code § 422.

[18]See Prob. Code §§ 6400-14.

If no person entitled to higher priority seeks appointment as personal representative, a creditor may be appointed personal representative, but if another creditor objects, the court may appoint a third person instead.[19] The proposed law broadens court discretion to allow appointment of a neutral party whether or not a creditor objects. This may be important for the protection of the estate or other interested parties, as well as for the protection of creditors who may not have received notice of the pendency of the administration proceedings.

Administrator with the will annexed. Because an administrator with the will annexed (c.t.a.) was not selected by the testator to execute the testator's will, the law does not permit the administrator c.t.a. to exercise discretionary powers granted to an executor by the will.[20] In some circumstances exercise of a discretionary power would be desirable and beneficial for the estate and persons interested in the estate. For this reason the proposed law enables the court in its discretion to authorize exercise of discretionary powers by the administrator c.t.a.

Special administrator. Existing statutes provide for appointment of a special administrator where there are problems of delay in appointing a general personal representative, where there is a vacancy in the office of the personal representative, or for a number of other causes.[21] The statutory listing of grounds is unduly restrictive, since there may be other situations where temporary appointment of a special administrator would be beneficial to the estate and interested parties. For example, it may be desirable to liquidate some of the estate assets immediately for tax purposes or to prevent foreclosure,

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[19]Prob. Code §§ 422(a)(11) and 425.

[20]Prob. Code § 409.

[21]Prob. Code § 460.

even though a general personal representative will eventually be appointed in due course. The proposed law permits the court to appoint a special administrator to exercise such powers as may be appropriate under the circumstances for the preservation of the estate, if immediate appointment appears necessary. Likewise, the proposed law makes clear that a special administrator may be appointed for a specific purpose or with specific powers and duties,[22] or may be granted general powers of a personal representative where it appears to the court proper to grant such powers.[23]

Upon termination of the special administrator's appointment, the special administrator must deliver the estate assets immediately to the general personal representative and render an account.[24] In some cases it may be desirable for the special administrator to retain control during the transitional period, for example to complete a transaction, and the proposed law enables the court to authorize this. It may also be wasteful for the special administrator to render a separate account where the same person is appointed general personal representative. In this situation, the proposed law permits the special account to be combined with the first general account of the general personal representative.[25]

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[22]This provision is drawn from Uniform Probate Code Section 3-617.

[23]Existing statutes are unduly rigid in this respect, listing limited situations where a general grant of authority is proper and requiring, rather than permitting, a general grant of authority in these situations. See Prob. Code § 465.

[24]Prob. Code §§ 466-7.

[25]The fees of the special administrator would not be allowed until the final account (unless agreed to by the general personal representative); this would conform the law to statewide practice. The proposed law also conforms the award of attorney's fees for extraordinary services to the general rules on such awards, and recognizes agreements among interested persons on splitting fees between special and general administrations.

Nonresident personal representative. A nonresident personal representative remains subject to the jurisdiction of the probate court and must maintain a current address with the Secretary of State for service of process.[26] Nonetheless, for practical purposes a nonresident may be effectively beyond the reach of the court and interested persons. As a partial remedy for this problem, the proposed law adds express authority for the court to require a bond where appropriate.

Bond of personal representative. Existing law gives the court discretion to fix the amount of the bond of the personal representative based on the estimated value of personal property in the estate and the probable annual gross income of the estate.[27] The proposed law makes clear that the court has authority to prescribe a minimum bond regardless of the value of property and the income of the estate, but that the bond should be based on the value and income if they are higher than the prescribed minimum. This approach will provide greater guidance to the court, will be simpler to administer, and will more adequately protect persons interested in the estate.

Existing law allows the personal representative the cost of the bond, not exceeding one half of one percent of the amount of the bond.[28] The Commission is informed that although bond costs vary around the state, the cost of a personal representative's bond is generally less than the statutory allowance. If bond costs were to exceed the statutory allowance, it would be appropriate to allow the excess cost if reasonable. Surety bond premiums are controlled by the marketplace, not by the statutory allowance. For these reasons, the proposed law eliminates the specific statutory allowance in favor or a general provision allowing recovery of the reasonable cost of the bond.

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[26]Prob. Code §§ 405.1-.6.

[27]Prob. Code § 541(a).

[28]Prob. Code § 541.5. In the case of a bond in an amount less than $4,000 the amount allowed is $50.

Informing personal representative of duties. The proposed law includes a requirement that a statement of duties and liabilities be delivered to the personal representative by the clerk at the time the personal representative files the oath of office. The statement of duties and liabilities is a general statement, derived from comparable statements used in a number of probate courts around the state.[29] The statement should be helpful in giving the personal representative a basic understanding of the responsibilities involved in the office.

Suspension of powers of personal representative. Existing law enables the court to restrain the personal representative from taking actions adverse to the interests of interested persons in limited situations, such as where probate of a lost or destroyed will is pending.[30] This provision is useful, but is unduly restricted.[31] The proposed law includes a general provision to enable the court to suspend the powers of the personal representative either generally or as to specific property or duties.[32] In order to protect against abuse, the proposed law also authorizes the court to award attorney's fees where a petition to suspend powers is brought unnecessarily.

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[29]See, e.g., Los Angeles County Superior Court, Probate Department, General Instructions to Estate Representatives (PR 042/R 5-80); Santa Clara County Superior Court, General Instructions to Personal Representatives (Post-Record Catalog #527/New 3-08-85).

[30]Prob. Code § 352; see also Prob. Code § 550.

[31]See, e.g., Evans, Comments on the Probate Code of California, 19 Cal.L.Rev. 602, 616 (1931).

[32]This provision is drawn from Uniform Probate Code Section 3-607.

Removal of personal representative. The existing statute specifies a number of grounds for removal of a personal representative, including such causes as embezzlement, mismanagement, and removal from the state.[33] This statutory statement is obsolete in two respects--(1) nonresidents may now serve as personal representatives; and (2) other grounds developed by the cases such as having an adverse interest or engaging in hostile acts are not reflected in the statute. The proposed law restates the grounds for removal consistent with existing law.

Removal of a personal representative may be ordered without cause upon petition of a person having higher priority.[34] Automatic removal may be inappropriate in some cases, however, as where administration is nearly complete at the time of the petition. For this reason the proposed law gives the court discretion to deny the petition for removal where to grant the petition would be contrary to the sound administration of the estate.

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[33]Prob. Code §§ 521, 524.

[34]Prob. Code §§ 450, 452.

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DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 2. OPENING ESTATE ADMINISTRATION

CHAPTER 1. COMMENCEMENT OF PROCEEDINGS

§ 8000. Petition

8000. (a) Any interested person may, at any time after the death of the decedent, commence proceedings for administration of the estate of the decedent by a petition to the court for an order determining the date and place of the decedent's death and either or both of the following:

(1) Probate of the decedent's will.

(2) Appointment of a personal representative.

(b) A petition for probate of the decedent's will may be made regardless whether the will is in the petitioner's possession or is lost, destroyed, or beyond the jurisdiction of the state.

Comment. Section 8000 restates former law without substantive change. See, e.g., former Section 323 (petition for probate of will). The court having jurisdiction is the superior court of the proper county. Sections 7050 (jurisdiction in superior court), 7051 (venue), and 7070-7072 (transfer of proceedings).

CROSS-REFERENCES

Definitions
Court § 30
Interested person § 48
Personal representative § 59

Note. The interrelation of this provision with the various limitation periods and protection of BFPs, as well as the evidentiary effect of an unprobated will, is under study.

0002b/NS
Min. 3/85

§ 8001. Failure of person named executor to petition

8001. Unless good cause for delay is shown, if a person named in a will as executor fails to petition the court for administration of

the estate within 30 days after the person has knowledge of the death of the decedent and that the person is named as executor, the person may be held to have waived the right to appointment as personal representative.

Comment. Section 8001 restates former Section 324 without substantive change. If the person named as executor is held to have waived the right to appointment, the court may appoint another competent person as personal representative. See Section 8440 (administrators with the will annexed).

0003b/NS
Min. 3/85

§ 8002. Contents of petition

8002. (a) The petition shall be in writing, signed by the petitioner, and filed with the clerk of the court.

(b) The petition shall contain all of the following information:

(1) The jurisdictional facts, including the date and place of the decedent's death.

(2) The street number, street, city, and county of the decedent's residence at the time of death.

(3) The name, age, address, and relation to the decedent of each heir and devisee of the decedent, so far as known to or reasonably ascertainable by the petitioner.

[(4) The character and estimated value of the property of the estate.]

(5) The name of the person for whom appointment as personal representative is petitioned.

(c) A copy of the decedent's will, if any, shall be attached to the petition and the petition shall state whether the person named as executor in the will consents to act or waives the right to appointment.

Comment. Subdivision (a) of Section 8002 is drawn from former Section 440 (application for letters of administration). Subdivisions (b) and (c) restate portions of former Sections 326 (petition for probate of will) and 440 (petition for letters of administration), but substitutes the address for the residence of heirs and devisees, adds an express requirement that a copy of the will be attached, and provides for notice to heirs and devisees reasonably ascertainable by the petitioner. The provision of former Section 440 for signature by counsel for the petitioner is not continued.

CROSS-REFERENCES

Definitions
Court § 30
Devisee § 34
Executor § 37
Heirs § 44
Personal representative § 59

Note. Subdivision (b)(4) will be reviewed after completion of all administrative provisions, including inventory and appraisal and appointment of a probate referee, and setting the amount of the bond.

0002b/NS
Min. 3/85

§ 8003. Setting and notice of hearing

8003. When the petition is filed:

(a) The hearing on the petition shall be set for a day not less than 15 nor more than 30 days after the petition is filed. At the request of the petitioner made at the time the petition is filed, the hearing upon the petition shall be set for a day not less than 30 nor more than 45 days after the petition is filed.

(b) The petitioner shall serve and publish or post notice of the hearing in the manner prescribed in Chapter 2 (commencing with Section 8100).

Comment. Section 8003 restates former Sections 327 (probate of will) and 441 (application for letters), except that the 10 day minimum period is increased to 15 days and the petitioner rather than the clerk has the duty of giving notice.

CROSS-REFERENCES

Clerk to set matters for hearing § 7202
Definitions
Clerk § 29

0002b/NS
Min. 3/85

§ 8004. Opposition

8004. (a) Any interested person may contest the petition by filing objections setting forth written grounds of opposition or by oral objections made at the hearing.

(b) If the contest is of the appointment of the personal representative, the grounds of opposition may include a challenge to the competency of the personal representative or the right to appointment. If the contest asserts the right of another person to appointment as personal representative, the contestant shall also file a petition and serve notice in the manner prescribed in Article 2 (commencing with Section 8130) of Chapter 2, and the court shall hear the two petitions together.

(c) If the contest is of the will, the procedure is that prescribed in Chapter 3 (commencing with Section 8200).

Comment. Subdivisions (a) and (b) of Section 8004 restate the first portion of the first sentence of former Section 370, former Section 442, and a portion of the first sentence of former Section 407, without substantive change. Subdivision (c) is included as a cross-reference.

CROSS-REFERENCES

Definitions
  Court § 30
  Interested person § 48
  Personal representative § 59
Verification required § 7103

0002b/NS
Min. 3/85

§ 8005. Hearing

8005. (a) At the hearing on the petition, the court shall hear and determine any objections.

(b) The court may examine, and compel any person to attend as a witness, concerning any of the following matters:

(1) The time, place, and manner of the decedent's death.

(2) The place of the decedent's domicile and residence at the time of death.

[(3) The character and value of the decedent's property.]

(4) Whether or not the decedent left a will.

(c) The following matters shall be established:

(1) The jurisdictional facts, including the time and place of the decedent's death and whether the decedent was domiciled in this state at the time of death.

(2) The existence or nonexistence of the decedent's will.

(3) That notice of the hearing was given as required by statute.

Comment. Section 8005 restates former Section 443 and a portion of the first sentence of former Section 407 without substantive change.

Note. Retention of subdivision (b)(3) depends in part upon treatment of Section 8002(b)(4) (contents of petition).

0002b/NS
Min. 3/85

§ 8006. Court order

8006. (a) If the court finds the necessary jurisdictional facts exist, the court shall make an order determining the time and place of the decedent's death and the jurisdiction of the court. Where appropriate and upon satisfactory proof, the court order shall admit the decedent's will to probate and appoint a personal representative.

(b) If through defect of form or error the jurisdictional facts are incorrectly stated in the petition but actually exist, the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error makes an order admitting the will to probate or appointing a personal representative or any subsequent proceeding void.

Comment. Subdivision (a) of Section 8006 is new. Subdivision (b) restates the last paragraph of former Sections 326 and 440 without substantive change.

0002b/NS
Min. 3/85

§ 8007. Determination of jurisdiction conclusive

8007. (a) Except as provided in subdivision (b), an order of the court admitting a will to probate or appointing a personal representative, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked.

(b) Subdivision (a) does not apply in any of the following cases:

(1) The presence of fraud in the procurement of the court order.

(2) The court order is based upon the erroneous determination of the decedent's death.

Comment. Section 8007 restates former Section 302 without substantive change.

CROSS-REFERENCES

Definition
Court § 30

Note. General provisions governing appeals and finality of orders have not yet been drafted.

0002b/NS
Min. 3/85

CHAPTER 2. NOTICE OF HEARING

Article 1. Contents

§ 8100. Form of notice

8100. The notice of hearing of a petition for administration of a decedent's estate, whether served pursuant to Article 2 (commencing with Section 8110) or published or posted pursuant to Article 3 (commencing with Section 8120), shall state substantially as follows:

"NOTICE OF PETITION TO ADMINISTER

ESTATE OF _____

To all heirs, beneficiaries, creditors, and contingent creditors of _____ and persons who may be otherwise interested in the will and/or estate:

A petition has been filed by _____ in the Superior Court of _____ County requesting that _____ be appointed as personal representative to administer the estate of _____ [under the Independent Administration of Estates Act] [and for probate of the decedent's will, which is available for examination in the court file]. [If independent administration of estates authority is granted, the personal representative may administer the estate without supervision.]

The petition in Estate No. _____ is set for hearing in Dept. No. _____ at _____
(Address)

on _____ at _____.
(Date of hearing) (Time of hearing)

IF YOU OBJECT to the granting of the petition, you should either appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney.

IF YOU ARE A CREDITOR or a contingent creditor of the deceased, you must file your claim with the court or present it to the personal representative appointed by the court within four months from the date of first issuance of letters as provided in [Section 700] of the

California Estates and Trusts Code. The time for filing claims will not expire before four months from the date of the hearing noticed above.

YOU MAY EXAMINE the file kept by the court. If you are interested in the estate, you may serve upon the personal representative, or upon the attorney for the personal representative, and file with the court with proof of service, a written request stating that you desire special notice of the filing of an inventory and appraisal of estate assets or of the petitions or accounts mentioned in [Sections 1200 and 1200.5] of the California Estates and Trusts Code.

_____
(Name and address of petitioner,
or petitioner's attorney)"

Comment. Section 8100 restates the second sentence of former Section 328 and continues former Section 333(b), except that reference to notice of the decedent's death is eliminated from the caption, the type size is not specified, and a reference to the decedent's will is added. Cf. Section 8124 (type size). Section 8100 also restates the last sentence of Section 441 without substantive change. Section 8100 consolidates the published or posted notice with the general notice served on heirs or beneficiaries, so that there is a single form of notice.

0002b/NS
Min. 3/85

Article 2. Service of Notice

§ 8110. Persons on whom notice served

8110. (a) At least 10 days before the hearing of a petition for administration of a decedent's estate, the petitioner shall serve notice of the hearing on all of the following persons:

(1) Each heir of the decedent, so far as known to or reasonably ascertainable by the petitioner.

(2) Each devisee and executor named in any will being offered for probate.

(b) The petitioner shall give such other notice as the court may prescribe.

Comment. Subdivision (a) of Section 8110 restates the first part of the first sentence of former Section 328 and a portion of the second sentence of former Section 441, with the addition to paragraph (1) of the provision limiting service to known heirs. Cf. §§ 7300-7302 (notices). Subdivision (b) is new. It should be noted that in case of service by mail, the time for service is extended by 5 days in the case of a place of address within California, by 10 days in the case of a place of address outside California, and by 20 days in the case of a place of address outside the United States. Code Civ. Proc. § 1013 (extension of time for service); Est. & Trusts Code § 7200 (general rules of practice govern).

Note. Whether actual notice to creditors should be required is under study. The Commission has decided to wait for a draft being prepared by the Uniform Laws Commission on this matter.

0002b/NS

App. 3/85

§ 8111. Service on Attorney General

8111. If the decedent's will involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee resident in this state, or involves or may involve a devise for charitable purposes without an identified devisee, notice of hearing accompanied by a copy of the petition and the will shall be served upon the Attorney General.

Comment. Section 8111 restates the second paragraph of former Section 328 without substantive change. See also Section 7305 (notice to state).

CROSS-REFERENCES

Definitions
  Devise § 32
  Devisee § 34

0002b/NS

Min. 3/85

§ 8112. Notice to Director of Health Services

8112. [This section is reserved for possible inclusion of existing Probate Code § 700.1, depending in part on treatment of notice to creditors generally.]

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Article 3. Publication or Posting

§ 8120. Publication or posting required

8120. In addition to service of the notice of hearing as provided in Article 2 (commencing with Section 8110), notice of hearing of a petition for administration of a decedent's estate shall also be published or posted before the hearing in the manner provided in this article.

Comment. Section 8120 is new. It is intended for organizational purposes only.

Note. Provisions relating to nondomiciliaries have not yet been reviewed.

0002b/NS
Min. 1/85

§ 8121. Publication of notice

8121. (a) Publication of notice shall be for at least 10 days. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient.

(b) Publication of notice shall be in a newspaper of general circulation in the city where the decedent resided at the time of death, or where the decedent's property is located if the court has jurisdiction pursuant to subdivision (b) of Section 7051. If there is no such newspaper, the decedent did not reside in a city, or the property is not located in a city, then notice shall be published in a newspaper of general circulation in the county which is circulated within the community in which the decedent resided or the property is located.

(c) For purposes of this section, "city" means a charter city as defined in Section 34101 of the Government Code or a general law city as defined in Section 34102 of the Government Code.

Comment. Section 8121 continues subdivision (a) of former Section 333 without substantive change, with the exception of the fifth sentence of former Section 333, which is continued in Section 8123 (posting of notice). If there is no newspaper described in this section, notice must be posted pursuant to Section 8123 (posting of notice).

§ 8122. Good faith compliance with publication requirement

8122. The Legislature finds and declares that to be most effective, notice of hearing should be published in compliance with Section 8121. However, the Legislature recognizes the possibility that in unusual cases due to confusion over jurisdictional boundaries or oversight such notice may inadvertently be published in a newspaper that does not satisfy Section 8121. Therefore, to prevent a minor error in publication from invalidating what would otherwise be a proper proceeding, the Legislature further finds and declares that notice published in a good faith attempt to comply with Section 8121 is sufficient to provide notice of hearing and to establish jurisdiction if the court expressly finds that the notice was published in a newspaper of general circulation published within the county and widely circulated within a true cross section of the community in which the decedent resided or the property was located in substantial compliance with Section 8121.

Comment. Section 8122 continues former Section 334 without substantive change.

§ 8123. Posting of notice

8123. If there is no newspaper described in Section 8121, notice of hearing shall be posted at least 10 days before the hearing at the courthouse of the county having jurisdiction and two of the most public places within the community in which the decedent resided or the property is located.

Comment. Section 8123 restates the fifth sentence of former Section 333 with the following changes: the 10-day posting requirement is clarified and the county courthouse is made one of the required three postings.

0002b/NS
Min. 1/85

§ 8124. Type size

8124. Whether published or posted, the notice of hearing shall be in readable type. For the purpose of this section, if the caption is in 8-point type or larger and the text of the notice is in 7-point type or larger, the notice is deemed readable .

Comment. Section 8124 supersedes the introductory portion of subdivision (b) of former Section 333. Nothing in Section 8124 precludes a smaller type size than referred to in the section, so long as the notice remains readable. See also Code Civ. Proc. § 1019 (type size variations).

0002b/NS
App. 1/85

§ 8125. Affidavit of publication or posting

8125. A petition for administration of a decedent's estate shall not be heard by the court unless an affidavit showing due publication or posting of the notice of hearing has been filed with the court. The affidavit shall contain a copy of the notice and state the date of its publication or posting.

Comment. Section 8125 continues subdivision (c) of former Section 333 without substantive change.

0002b/NS
App. 1/85

§ 8126. Contents of subsequent published or posted notice

8126. Notwithstanding Section 8100, after the notice of hearing is published or posted and an affidavit filed, any subsequent publication or posting of the notice may omit the information for creditors and contingent creditors.

Comment. Section 8126 restates former Section 333(d) without substantive change.

Note. This section will be reviewed in light of any other provisions relating to subsequent publication or posting of notice.

CHAPTER 3. PROBATE OF WILL

Article 1. Production of Will

§ 8200. Delivery of will by custodian

8200. (a) The custodian of a will shall, within 30 days after being informed that the testator is dead, deliver the will to one of the following persons:

(1) The clerk of the court.

(2) The person named in the will as executor.

(b) A custodian who fails to comply with the requirements of this section is liable for all damages sustained by any person injured by the failure.

Comment. Section 8200 restates former Section 320 without substantive change.

CROSS-REFERENCES

Defined terms
Clerk § 29
Court § 30

NOTE. We have received a suggestion from Timothy C. Wright, of Menlo Park, that a named executor to whom a will is delivered should be required to file the will with the court clerk within 5 days after receipt. Mr. Wright points out that absent such a requirement, interested persons have no way of knowing the contents of the will and in order to learn the contents must commence a probate proceeding and engage in formal discovery.

0002b/NS
App. 3/85

§ 8201. Order for production of will

8201. If, upon petition alleging that a person has possession of the will of a decedent, the court is satisfied that the allegation is true, the court shall order the person to produce the will.

Comment. Section 8201 restates a portion of former Section 321. The court or judge has general authority to enforce the production of wills and the attendance of witnesses. See Section 7060 (authority of court or judge).

CROSS-REFERENCES

Definition
Court § 30

Note. General notice and hearing procedures are not yet drafted.

§ 8202. Will detained outside jurisdiction

8202. If the will of a person who at the time of death was domiciled in this state is detained in a court of any other state or country and cannot be produced for probate in this state, a copy of the will duly authenticated may be admitted to probate in this state with the same force and effect as the original will. The same proof shall be required as if the original will were produced.

Comment. Section 8202 restates former Section 330 without substantive change. Proof of a duly authenticated copy may be made in the same manner as proof of an original will. Thus the court may authorize a copy to be presented to the witnesses and the witnesses may be asked the same questions with respect to the copy as if the original will were present. See Article 2 (commencing with Section 8220) (proof of will).

0002b/NS
App. 3/85

Article 2. Proof of Will

§ 8220. Evidence of subscribing witness

8220. Unless there is a contest of a will:

(a) The will may be proved on the evidence of one of the subscribing witnesses only, if the evidence shows that the will was executed in all particulars as prescribed by law.

(b) Evidence of execution of a will may be received by an affidavit of a subscribing witness to which there is attached a photographic copy of the will, or by an affidavit in the original will that includes or incorporates the attestation clause.

(c) If no subscribing witness resides in the county, but the deposition of a witness can be taken elsewhere, the court may direct the deposition to be taken. On the examination, the court may authorize a photographic copy of the will to be made and presented to the witness, and the witness may be asked the same questions with respect to the photographic copy as if the original will were present.

Comment. Section 8220 restates the first two sentences of former Section 329 and the last sentence of former Section 1233 without substantive change.

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§ 8221. Proof where no subscribing witness available

8221. If no subscribing witness is available as a witness within the meaning of Section 240 of the Evidence Code, the court may, if the will on its face conforms to all requirements of law, permit proof of the will by proof of the handwriting of the testator and one of the following:

(a) Proof of the handwriting of any one subscribing witness.

(b) Receipt in evidence of one of the following documents reciting facts showing due execution of the will:

(1) A writing in the will bearing the signatures of all subscribing witnesses.

(2) An affidavit of a person with personal knowledge of the circumstances of the execution.

Comment. Section 8221 restates the fourth sentence of former Section 329, except that the writing need not appear "at the end" of the will. The signatures of subscribing witnesses no longer must appear at the end. Section 6110 (execution). If the subscribing witnesses are competent at the time of attesting the execution, their subsequent incompetency, from whatever cause, will not prevent the probate of the will, if it is otherwise satisfactorily proved. Cf. Evidence Code § 240 ("unavailable as a witness").

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§ 8222. Proof of holographic will

8222. A holographic will may be proved in the same manner as other writings.

Comment. Section 8222 continues former Section 331 without substantive change. See Evid. Code §§ 1400-1454 (authentication and proof of writings).

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Min. 3/85

§ 8223. Proof of lost or destroyed will

8223. The petition for probate of a lost or destroyed will shall include or be accompanied by a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate.

Comment. Section 8223 restates the first two sentences of former Section 351 except that the requirement that the order admitting the will to probate be "set forth at length in the minutes" is omitted.

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§ 8224. Perpetuation of testimony

8224. The testimony of each witness concerning the execution or provisions of a will, the testamentary capacity of the decedent, and other issues of fact, may be reduced to writing, signed by the witness, and filed, whether or not the will is contested. The testimony so preserved, or an official reporter's transcript of the testimony, is admissible in evidence in any subsequent proceeding concerning the will if the witness has become unavailable as a witness within the meaning of Section 240 of the Evidence Code.

Comment. Section 8224 continues and broadens former Section 374 (will contests) and the last sentence of former Section 351 (proof of lost or destroyed will). The former provisions were treated as permissive rather than mandatory in practice and by case law.

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Min. 3/85

§ 8225. Admission of will to probate

8225. (a) When the court admits a will to probate, that fact shall be recorded in the minutes by the clerk and the will shall be filed.

(b) If the will is in a foreign language, the court shall certify to a correct translation into English, and the certified translation shall be filed with the will.

Comment. Section 8225 supersedes former Section 332.

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§ 8226. Effect of admission of will to probate

8226. (a) If no person contests the validity of a will or petitions for revocation of probate of the will within the time prescribed in this chapter, admission of the will to probate is conclusive.

(b) Admission of a will to probate does not preclude the subsequent probate of another will of the decedent, but no will shall be admitted to probate after the close of administration of the estate. The court may, but need not, determine how any provisions of a will are affected by another will.

Comment. Subdivision (a) of Section 8226 restates the first portion of former Section 384 without substantive change. The time within which a contest must be made is before or at the hearing (Section 8004), and the time within which revocation of probate may be sought is 120 days after the will is admitted or, in the case of a minor or incompetent person, before the close of estate administration (Section 8270).

Subdivision (b) restates former Section 385, but precludes probate of another will after close of administration. Cf. Estate of Moore, 180 Cal. 570, 182 Pac. 285 (1919). It is consistent with Section 6120 (revocation by subsequent will). If more than one will is admitted to probate, the court should determine what provisions, if any, control nomination of an executor.

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Article 3. Contest of Will

§ 8250. Summons

8250. When objection is made pursuant to Section 8004, the clerk shall issue a summons directed to the persons required by Section 8110 to be served with notice of hearing of a petition for administration of a decedent's estate. The summons shall contain a direction that the persons summoned file with the court a written pleading in response to the contest within 30 days after service of the summons.

Comment. Section 8250 restates the last portion of the first sentence of former Section 370 but replaces the citation with a summons. Service of the summons must be made in the manner provided by law for service of summons in a civil action. Section 7200 (general rules of practice govern). Section 8250 does not limit the persons to be notified, and thus requires notice to all affected persons wherever residing, including minors and incompetents.

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§ 8251. Responsive pleading

8251. (a) The petitioner or any other interested person may jointly or separately answer the objection or demur to the objection within the time prescribed in the summons.

(b) Demurrer may be made upon any of the grounds of demurrer available in a civil action. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 10 days, within which to amend the objection. If the demurrer is overruled, the petitioner or other interested persons may, within 10 days thereafter, answer the objection.

Comment. Section 8251 restates the second, third, and fourth sentences of former Section 370, but does not make receipt of written notice a condition for time to answer after a demurrer is overruled.

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Min. 3/85

§ 8252. Trial

8252. (a) At the trial, the proponents of the will have the burden of proof of due execution. The contestants of the will have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. If the will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later is entitled to probate.

(b) The court shall try and determine any contested issue of fact that affects the validity of the will.

Comment. Section 8252 supersedes former Section 371. Subdivision (a) is drawn from Uniform Probate Code Section 3-407. Subdivision (b) eliminates jury trial in will contests. Jury trial is not constitutionally required, there is a high percentage of reversals on appeal of jury verdicts, and the whole jury/appeal process serves mainly to postpone enjoyment of the estate with the result that contestants may as a practical matter force compromise settlements to which they would not otherwise be entitled. See Recommendation Proposing the Estates and Trusts Code, ___ Cal.L.Revision Comm'n Reports, Recommendations, and Studies ___ (1986).

Note. We have received a letter from Stephen I. Zetterberg of Claremont concerning the possibility of taking the will contest away from the jury and making the judge the fact finder. Mr. Zetterberg states, "In human matters, the jury is still the best trier of fact. I would hate to see the jury eliminated."

0002b/NS
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§ 8253. Evidence of execution

8253. At the trial, each subscribing witness shall be produced and examined. If no subscribing witness is available as a witness within the meaning of Section 240 of the Evidence Code, the court may admit the evidence of other witnesses to prove the due execution of the will.

Comment. Section 8253 restates former Section 372 but does not continue the limitation on production of witnesses outside the county. See Section 7200 (general rules of practice govern) and Code Civ. Proc. § 1989 (compelling attendance of witnesses). The court may admit proof of the handwriting of the testator and of any of the subscribing witnesses as evidence of the due execution of the will. Section 8221 (proof where no subscribing witness available).

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Min. 3/85

§ 8254. Judgment

8254. Upon the proof taken, the court may make such orders as may be appropriate, including orders sustaining or denying objections, and shall render judgment either admitting the will to probate or rejecting it, in whole or in part.

Comment. Section 8254 supersedes former Section 373.

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Min. 3/85

Article 4. Revocation of Probate

§ 8270. Petition for revocation

8270. (a) Within 120 days after a will is admitted to probate, any interested person, other than a party to a will contest and other than a person who had actual notice of a will contest in time to have joined in the contest, may petition the court to revoke the probate of the will. The petition shall include objections setting forth written grounds of opposition.

(b) Notwithstanding subdivision (a), a person who was a minor or who was incompetent at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before the close of administration of the estate.

Comment. Subdivision (a) of Section 8270 restates the first and second sentences of former Section 380 but omits reference to some of the specific grounds of opposition. A will is admitted to probate when it is recorded in the minutes by the clerk. Section 8225 (admission of will to probate).

Subdivision (b) supersedes the last portion of former Section 384.

CROSS-REFERENCES

Definitions
Court § 30
Interested person § 48

0002b/NS
Min. 3/85

§ 8271. Summons

8271. (a) Upon the filing of the petition, the clerk shall issue a summons directed to the personal representative and to the heirs and devisees of the decedent, so far as known to the petitioner. The summons shall contain a direction that the persons summoned file with the court a written pleading in response to the petition within 30 days after service of the summons.

(b) The summons shall be served and proceedings had as in the case of a contest of the will.

Comment. Subdivision (a) of Section 8271 supersedes former Section 381, substituting a summons for the citation. The requirement that the summons be issued within the time allowed for filing the petition is not continued. The summons must be directed to the devisees mentioned in the will as to which revocation of probate is sought, as well as to heirs and any personal representative appointed by the court. The summons may be directed to minors or incompetent persons, or to the personal representative of a deceased person.

Subdivision (b) continues the first sentence of former Section 382, except that the provision for a jury trial is not continued. See Section 7204 (trial by jury). For the burden of proof on proponents and contestants of the will, see Section 8252 (trial).

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§ 8272. Revocation

8272. (a) If the court determines upon satisfactory proof that the will should be denied probate, the court shall revoke the probate of the will.

(b) Revocation of probate of a will terminates the powers of the personal representative. The personal representative is not liable for any act done in good faith before the revocation, nor is any transaction void by reason of the revocation if entered into with a third person dealing in good faith and for value.

Comment. Section 8272 continues the second, third, and fourth sentences of former Section 382, except that the references to jury trial and invalidity of the will are not continued. See Section 7204 (trial by jury). Section 8272 also adds protection for bona fide purchasers and encumbrancers for value.

0002b/NS
Min. 3/85

§ 8273. Costs and attorney's fees

8273. If the probate is revoked, the costs and a reasonable attorney's fee incurred in the proceeding shall be paid by the estate of the decedent. If the probate is not revoked, the costs and a reasonable attorney's fee incurred in the proceeding shall be paid by the petitioner.

Comment. Section 8273 supersedes former Section 383.

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CHAPTER 4. APPOINTMENT OF PERSONAL REPRESENTATIVE

Article 1. General Provisions

§ 8400. Appointment necessary

8400. (a) A person has no power to administer the estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters.

(b) Subdivision (a) applies whether or not the person is named executor in the decedent's will, except that a person named executor in the decedent's will may, before the appointment is made or becomes effective, pay funeral expenses and take necessary measures for the maintenance and preservation of the estate.

Comment. Section 8400 restates former Probate Code Section 400 without substantive change. Letters may not be issued until the person appointed takes the oath of office and gives any required bond. See Section 8403 (oath) and Article 5 (commencing with Section 8480) (bond).

CROSS-REFERENCES

Definitions
Letters § 52

0003b/NS
Min. 4/85

§ 8401. Qualifications

8401. (a) Notwithstanding any other provision of this chapter, a person is not competent to act as personal representative in any of the following circumstances:

(1) The person is under the age of majority.

(2) The person is incapable of executing, or is otherwise unfit to execute, the duties of the office.

(3) There are grounds for removal of the person from office pursuant to Section 8502.

(4) The person is not a resident of the United States.

(5) The person is a surviving partner of the decedent and an interested person objects to the appointment.

(b) Paragraphs (4) and (5) of subdivision (a) do not apply to a person named as executor or successor executor in the decedent's will.

Comment. Paragraph (a)(1) of Section 8401 continues a provision of former Probate Code Section 401 without substantive change. Paragraph (a)(2) supersedes the remainder of former Probate Code Section 401.

Paragraph (a)(3) is new; it enables the court to deny appointment of a personal representative if the personal representative would be subject to removal, for example for a conflict of interest. This would reverse the result in cases such as Estate of Backer, 164 Cal.App.3d 1159, 211 Cal.Rptr. 163 (1985).

Paragraph (a)(4) and subdivision (b) restate former Probate Code Section 420 without substantive change. Paragraph (a)(5) and subdivision (b) continue former Probate Code Section 421 without substantive change.

For contest of appointment, see Section 8004.

CROSS-REFERENCES

Definitions
Interested person § 48
Personal representative § 59

Note. We have received a comment from the Legislative Subcommittee on Estate Planning, Trusts and Probate of the San Diego County Bar Association relating to subdivision (a)(3), relating to

disqualification of an executor who would have to be removed because of a conflict of interest. The Subcommittee agrees with the policy of this provision to deny appointment of a named executor if there is a conflict of interest with the estate or persons interested in the estate. However, the Subcommittee proposes this be done by more direct wording. Their concern is that the present draft would not cover all conflict situations (it is limited to conflict between the executor and the estate), it incorporates by reference a provision that incorporates other provisions (an unsatisfactory state of affairs), and fails to provide for an evidentiary hearing at the option of the named executor. They suggest the provision be redrafted so that it is specific regarding its application to conflicts of interest and that it deals with the problem of providing an evidentiary hearing. They offer language based on Ohio Revised Code § 2113.18, to the effect that the named executor could be disqualified or removed "if there are unsettled claims existing between him and the estate, which the court thinks may be the subject of controversy or litigation between him and the estate or persons interested therein."

The staff is only partly sympathetic with this position. The incorporation by reference is not open-ended and seems generally satisfactory, although we should revise the removal statute to provide as a ground for removal that removal is "necessary for protection of the estate or interested persons." As to the evidentiary hearing, that is available to the named executor at the time of the initial hearing for granting probate; we do not see the need to create a new additional procedure.

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Min. 4/85

§ 8402. Nominee of person entitled to appointment

8402. The court may appoint as personal representative a person nominated by a person otherwise entitled to appointment as personal representative, or by the guardian or conservator of the estate of such a person. The nomination shall be made in writing and filed in court.

Comment. Section 8402 generalizes provisions found in former Probate Code Sections 409 and 423. The nominee must be competent. Section 8401 (qualifications).

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Min. 4/85

§ 8403. Oath

8403. (a) Before letters are issued, the personal representative shall take and subscribe an oath to perform, according to law, the duties of the office. The oath may be taken and dated on or after the

time the petition for appointment as personal representative is filed, and may be filed with the court clerk at any time after the petition is granted.

(b) The oath constitutes an acceptance of the office and shall be attached to or endorsed upon the letters.

Comment. Section 8403 restates former Probate Code Section 540 without substantive change. The requirement of an oath may be satisfied by a written affirmation. Code Civ. Proc. § 2015.6.

CROSS-REFERENCES

Definitions
Letters § 52

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§ 8404. Statement of duties and liabilities

8404. At the time the personal representative files the oath of office, the clerk shall deliver to the personal representative a statement of some of the duties and liabilities of the office in substantially the following form:

DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVE

When you have been appointed a personal representative of an estate by this court, you become an officer of the court and assume certain duties and obligations. An attorney is best qualified to advise you regarding these matters. You should clearly understand the following:

1. You must manage the estate's assets with the care of a prudent person dealing with someone else's property. This means you must be cautious and you may not make any speculative investments.

2. You must keep the money and property of this estate separate from anyone else's, including your own. When you open a bank account for the estate, it must be in the name of the estate. All estate accounts must earn interest. Never deposit estate funds in your personal account or otherwise commingle them with anyone else's property. The securities of the estate must also be held in the name of the estate.

3. There are many restrictions on your authority to deal with the estate's property. You should not spend any of the estate's money until you have received either permission from the court or your attorney. You may reimburse yourself for official court costs paid by you to the County Clerk and for the premium on your bond. You may not pay fees to your attorney or to yourself without prior order of the court. If you do not obtain the court's permission when it is required, you may be removed as personal representative and/or you may be surcharged, i.e., you may have to reimburse the estate from your own personal funds. You should consult with your attorney concerning the legal requirements affecting sales, leases, mortgages, and investments of estate property.

4. You must attempt to locate and take possession of all the decedent's property. You must arrange to have a court-appointed referee determine the value of the property. (You, rather than the referee, must determine the value of certain "cash items" and your attorney will advise you as to this procedure.) Within ninety (90) days after your appointment as personal representative you must file a form entitled "Inventory and Appraisement" with the court. This form lists all the assets of the estate and the appraised values.

5. You should determine that there is appropriate and adequate insurance covering the assets and risks of the estate. Maintain the insurance in force during the entire period of the administration.

6. You must keep complete and accurate records of each financial transaction affecting the estate. You will have to prepare an accounting of all money and property you have received, what you have spent, and the date of each transaction. You must describe in detail what you have left after the payment of expenses ("balance on hand"). Your accounting will be reviewed by the court. Save your receipts because the court may ask to review them. If you do not file your accounts as required, the court will issue an order for you to do so. You will be removed as personal representative if you fail to comply.

You should cooperate with your attorney at all times. You and your attorney are responsible for completing the estate administration as promptly as possible. When in doubt, contact your attorney.

Comment. Section 8404 is new. It is drawn from general instructions given to personal representatives by a number of courts. The statement of duties and liabilities need not conform precisely to the listing in this section, and may be more inclusive. If the Judicial Council prescribes the form of the statement, the Judicial Council form supersedes the form provided in this section. See Section 7201 (Judicial Council authority).

Note. The contents of this section will be reviewed in connection with changes in the administration provisions and conformed where necessary.

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Min. 4/85

§ 8405. Form of letters

8405. Letters shall be signed by the clerk, under the seal of court, and shall include:

(a) The county from which the letters are issued.

(b) The name of the person appointed as personal representative, and whether the personal representative is an executor, administrator, administrator with the will annexed, or special administrator.

(c) Whether the personal representative is authorized to act under The Independent Administration of Estates Act, and whether the authority includes or excludes sale, exchange, or granting an option to purchase real property under the Act.

Comment. Section 8405 supersedes former Probate Code Sections 500, 501, and 502. The Judicial Council may prescribe the form of letters. Section 7201.

CROSS-REFERENCES

Definitions
Letters § 52

0003b/NS
Min. 4/85

§ 8406. Suspension of powers of personal representative

8406. (a) On petition of any interested person, the court may suspend the powers of the personal representative in whole or in part, for a time, as to specific property or circumstances or as to specific duties of the office, or may make any other order to secure proper performance of the duties of the personal representative, if it appears to the court that the personal representative otherwise may take some action that would jeopardize unreasonably the interest of the petitioner. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within 10 days unless the parties otherwise agree. Notice as the court directs shall be given to the personal representative and attorney of record, if any, and to any other parties named in the petition.

(c) The court may, in its discretion, if it determines that the petition was brought unreasonably and for the purpose of hindering the personal representative in the performance of the duties, assess attorney's fees against the petitioner and make the assessment a charge against the interest of the petitioner.

Comment. Section 8406 continues and broadens former Sections 352 and 550. It is drawn from Section 3-607 of the Uniform Probate Code. The provision for assessment of attorney's fees is new. Section 8406 includes but is not limited to the situations where the personal representative is appointed before or pending probate of a will, or pursuant to a previous will, or where there is litigation over the bond of the personal representative and it is alleged that the estate is being wasted.

CROSS-REFERENCES

Definitions
Interested person § 48
Personal representative § 59

Note. This section may be relocated to powers and duties.

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Article 2. Executors

§ 8420. Right to appointment as personal representative

8420. The person named as executor in the decedent's will has the right to appointment as personal representative.

Comment. Section 8420 is an express statement of the concept that the named executor has first priority for appointment as personal representative. Cf. former Section 407. Section 8420 does not apply if the person named is not qualified for appointment under Section 8401 (qualifications) or has waived the right to appointment.

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§ 8421. Executor not specifically named

8421. If a person is not named as executor in a will but it appears by the terms of the will that the testator intended to commit the execution of the will and the administration of the estate to the person, the person is entitled to appointment as personal representative in the same manner as if named as executor.

Comment. Section 8421 restates former Probate Code Section 402 without substantive change.

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§ 8422. Power to designate executor

8422. (a) The testator may by will confer upon a person the power to designate an executor or coexecutor, or successor executor or coexecutor. The will may provide that the persons so designated may serve without bond.

(b) A designation shall be in writing and filed with the court. Unless the will provides otherwise, if there are two or more holders of the power to designate, the designation shall be unanimous, unless one of the holders of the power is unable or unwilling to act, in which case the remaining holder or holders may exercise the power.

(c) Except as provided in this section, an executor does not have authority to name a coexecutor, or a successor executor or coexecutor.

Comment. Section 8422 restates former Probate Code Section 403 without substantive change. Cf. Section 10 (singular and plural). An executor designated pursuant to this section must be appointed by the court. See Section 8400 (appointment necessary).

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§ 8423. Successor trust company as executor

8423. If the executor named in the will is a trust company that has sold its business and assets to, has consolidated or merged with, or is in any manner provided by law succeeded by, another trust company, the court may, and to the extent required by the Banking Law (Division 1 (commencing with Section 99) of the Financial Code) shall, appoint the successor trust company as executor.

Comment. Section 8423 restates former Section 404 without substantive change. A trust company is a corporation or association that is authorized to conduct the business of a trust company in this state. A trust company may act as an executor. See Sections 83 and 300; Fin. Code § 1580.

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§ 8424. Minor named as executor

8424. If a person named as executor is under the age of majority:

(a) If there is another person named as executor, the other person may be appointed and administer the estate until the majority of the minor, who may then be appointed as coexecutor.

(b) If there is no other person named as executor, another person may be appointed as personal representative, but the court may, in its discretion, revoke the appointment on the majority of the minor, who may then be appointed as executor.

Comment. Section 8424 restates without substantive change the portion of former Section 405 that related to a minor named as executor.

Note. At the April meeting the question arose whether an emancipated minor may serve as an executor, and whether a minor (whether or not emancipated) might not be qualified as an executor under the law of agency.

Our research indicates that under the common law of agency a minor may serve as an executor. The effect of Section 8424 (former

Section 405), which has been the statute law of California since 1851, is to limit the ability of a minor to serve as executor when there is a coexecutor named. The emancipation of a minor is not sufficient to qualify the minor to serve as executor.

Does the Commission wish to recommend any changes in the law on this point?

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§ 8425. When fewer than all executors appointed

8425. If the court does not appoint all the persons named in the will as executors, those appointed have the same authority to act in every respect as all would have if appointed.

Comment. Section 8425 restates former Section 408 without substantive change.

Note. This provision will be reviewed in connection with powers and duties of personal representatives.

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App. 4/85

Article 3. Administrators With the Will Annexed

§ 8440. Appointment

8440. An administrator with the will annexed shall be appointed as personal representative if no executor is named in the will or if the sole executor or all the executors named in the will have waived the right to appointment or are for any reason unwilling or unable to act.

Comment. Section 8440 supersedes former Section 406. A person named as an executor may be unwilling or unable to act because the person is dead or incompetent, renounces or fails to petition for appointment, fails to appear and qualify, or dies after appointment and before the completion of the administration.

No executor of a deceased executor is, as such, authorized to administer the estate of the first testator. Section 8522 (vacancy where no personal representatives remain). However, the deceased executor may have the power to designate an executor. See Section 8422 (power to designate executor). And the executor of the deceased executor may qualify independently for appointment as an administrator with the will annexed pursuant to this section.

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§ 8441. Priority for appointment

8441. (a) Except as provided in subdivision (b), persons are entitled to appointment as administrator with the will annexed in the same order of priority as for appointment of an administrator.

(b) A person who takes under the will has priority over a person who does not, and a person who takes more than 50 percent of the value of the estate under the will has priority over other persons who take under the will.

Comment. Section 8441 restates without substantive change the second sentence and supersedes the third sentence of former Section 409. Subdivision (b) gives priority to devisees, who need not be entitled to succeed to all or part of the estate under the law of succession in order to have priority. For appointment of the nominee of a person entitled to priority, see Section 8402.

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§ 8442. Authority of administrator with will annexed

8442. (a) Subject to subdivision (b), an administrator with the will annexed has the same authority over the decedent's estate as an executor named in the will would have.

(b) If the will confers a discretionary power or authority upon an executor that is not conferred by law, the power or authority shall not be deemed to be conferred upon an administrator with the will annexed, but the court in its discretion may authorize the exercise of the power or authority.

Comment. Section 8442 restates the first sentence of former Section 409, with the addition of court discretion to permit exercise of a discretionary power or authority. The acts of the administrator with the will annexed are as effectual for all purposes as the acts of an executor would be.

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App. 4/85

Article 4. Administrators

§ 8460. Appointment of administrator

8460. If the decedent dies intestate, the court shall appoint one or more administrators as personal representative.

Comment. Section 8460 restates the introductory portion of former Probate Code Section 422(a) without substantive change.

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§ 8461. Priority for appointment

8461. Subject to the provisions of this article, the following persons are entitled to appointment as administrator in the following order of priority:

(a) Surviving spouse.

(b) Children.

(c) Grandchildren.

(d) Issue

(e) Parents

(f) Brothers and sisters.

(g) Grandparents.

(h) Children of a predeceased spouse.

(i) Next of kin.

(j) Relatives of a predeceased spouse.

(k) Conservator or guardian of the estate of the decedent acting in that capacity at the time of death.

(l) Public administrator.

(m) Creditors.

(n) Any other person.

Comment. Section 8461 restates subdivision (a) of former Probate Code Section 422, with the addition of subdivisions (d), (g), and (h) to reflect changes in the law governing intestate succession. See Section 6402. The general order of priority prescribed in Section 8461 is subject to limitation in the succeeding sections of this article. See, e.g., Sections 8462 (priority of relatives), 8463 (estranged spouse). A person appointed must be legally competent. Section 8401 (qualifications).

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§ 8462. Priority of relatives

8462. A relative of the decedent or of a predeceased spouse has priority under Section 8461 only if one of the following conditions is satisfied:

(a) The relative is entitled to succeed to all or part of the estate.

(b) The relative is an ancestor or descendant of the decedent and either takes under the will of, or is entitled to succeed to all or part of the estate of, another deceased person who is entitled to succeed to all or part of the estate of the decedent.

Comment. Section 8462 restates former Probate Code Section 422 with the addition of language recognizing the priority of relatives of a predeceased spouse and the expansion of subdivision (b) to include any lineal relative of the decedent who satisfies the prescribed conditions.

Note. The Commission requested the staff for further research on the purpose of subdivision (b). The provision was added to the law in 1974, and was supported by the State Bar. A note in the Review of Selected 1974 California Legislation, 6 Pac.L.J. 125, 150-151 (1975), states that before enactment of the provision, "if a husband died intestate and his wife died before administration of his estate had closed, the public administrator had priority over a surviving child, grandchild, parent, or grandparent of the deceased husband because such relative did not succeed directly to the husband's estate [Estate of Stephens, 70 Cal.2d 820, 452 P.2d 684, 76 Cal.Rptr. 468 (1969)]. [The new provision] eliminates this problem by allowing family administration in situations where a close relative of the decedent succeeds to, or takes under the will of, a second decedent who would have qualified as an administrator."

Given this history, the reference to "ancestor or descendant" seems either too broad or too narrow. Too broad in that it goes beyond the immediate generation of the decedent's relatives. Too narrow in that it fails to apply to other close relatives such as brothers and sisters. In either case, should the statute be limited to close relatives? The staff would revise the statute to apply to any relative of the decedent who is entitled to succeed to all or part of the decedent's estate or to the estate of another who is entitled to succeed to all or part of the decedent's estate.

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§ 8463. Estranged spouse

8463. If the surviving spouse is a party to an action in any court for separate maintenance, annulment, or dissolution of the marriage of the decedent and the surviving spouse, and was living apart from the decedent on the date of the decedent's death, the surviving spouse has the following priority for appointment as administrator:

(a) If the surviving spouse has waived the right to file a petition under Section [650] for an order determining that all or part of the estate is property passing to the surviving spouse, the surviving spouse has the priority provided in Section 8461.

(b) If the surviving spouse has not waived the right to file a petition under Section [650] for an order determining that all or part of the estate is property passing to the surviving spouse, the surviving spouse has priority next after brothers and sisters.

Comment. Section 8463 restates subdivision (a)(6) and the second paragraph of subdivision (a)(1) of former Probate Code Section 422 without substantive change.

Note. The staff is conducting research on this and other problems relating to the estranged spouse, including the reason for tying this section to Section 650 and the possibility of giving the court discretion in this area.

0003b/NS
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§ 8464. Minors and incompetent persons

8464. If a person otherwise entitled to appointment as administrator is a person under the age of majority or a person for whom a guardian or conservator of the estate has been appointed, the court in its discretion may appoint the guardian or conservator or another person entitled to appointment.

Comment. Section 8464 restates former Probate Code Section 426 without substantive change.

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§ 8465. Priority of nominee

8465. (a) If a person making a request for appointment of a nominee as administrator is the surviving spouse, child, grandchild, issue, parent, brother or sister, or grandparent of the decedent, the nominee has priority next after those in the class of the person making the request.

(b) If a person making a request for appointment of a nominee as administrator is other than a person described in subdivision (a), the

court in its discretion may appoint either the nominee or a person of a class lower in priority to that of the person making the request, but other persons of the class of the person making the request have priority over the nominee.

Comment. Section 8465 restates without substantive change former Probate Code Section 423 and a portion of subdivision (a)(1) of former Probate Code Section 422. See also Section 8402 (nominee of person entitled to appointment). "Grandparent" and "issue" have been added to subdivision (a) consistent with Section 8461. The nominee is not entitled to appointment unless legally competent. Section 8401 (qualifications).

0003b/NS
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§ 8466. Priority of creditor

8466. If a creditor is claiming appointment as administrator, the court in its discretion may appoint another person.

Comment. Section 8466 restates the last portion of former Probate Code Section 425 but omits the requirement that there be a request of another creditor before the court may appoint another person. Any person appointed pursuant to this section must be legally competent. Section 8401 (qualifications).

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§ 8467. Equal priority

8467. If several persons have equal priority for appointment as administrator, the court may appoint one or more of them, or if such persons are unable to agree, the court may appoint a disinterested person.

Comment. Section 8467 restates the first portion of former Probate Code Section 425, with the addition of authority to appoint a disinterested person where there is a conflict between persons of equal priority. The public administrator is a disinterested person within the meaning of this section.

0003b/NS
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§ 8468. Administration by any competent person

8468. If persons having priority fail to claim appointment as administrator, any person claiming appointment is entitled to appointment.

Comment. Section 8468 restates former Probate Code Section 427 without substantive change. A person appointed pursuant to this section must be legally competent. Section 8401 (qualifications).

0003b/NS
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Article 5. Bond

§ 8480. Bond required

8480. (a) Except as otherwise provided by statute, every person appointed as personal representative shall, before letters are issued, give a bond approved by the court. If two or more persons are appointed, the court may require either a separate bond from each or a joint and several bond.

(b) The bond shall be for the benefit of interested persons and shall be conditioned that the person appointed as personal representative shall faithfully execute the duties of the office according to law.

(c) If the person appointed as personal representative fails to give the required bond, letters shall not be issued. If the person appointed as personal representative fails to give a new, additional, or supplemental bond, or to substitute a sufficient surety, pursuant to court order, the person may be removed from office.

Comment. Subdivisions (a) and (b) of Section 8480 restate without substantive change former Probate Code Section 410, the first sentence of subdivision (a) of former Probate Code Section 541, and former Probate Code Section 544. Subdivision (c) continues the effect of a portion of former Probate Code Section 549; it is a special application of Code of Civil Procedure Section 996.010. For statutory exceptions to the bond requirement, see Sections 301 (bond of trust company) and 8481 (waiver of bond).

CROSS-REFERENCES

Definitions
  Court § 30
  Interested person § 48
  Letters § 52
  Personal representative § 59
Judge in chambers may approve bond § 7061

§ 8481. Waiver of bond

8481. (a) The will may waive the requirement of a bond.

(b) If a verified petition for appointment of a personal representative alleges that all beneficiaries have waived in writing the requirement of a bond and the written waivers are attached to the petition, the court shall direct that no bond be given, unless the will requires a bond.

(c) Notwithstanding the waiver of a bond by a will or by all the beneficiaries, the court on its own motion or on petition of any interested person may for good cause require that a bond be given, either before or after issuance of letters. If a beneficiary requests a bond, the request is in itself good cause to require a bond in an amount not less than the amount the court determines is sufficient to secure the interest of the beneficiary.

Comment. Subdivision (a) of Section 8481 restates without substantive change portions of former Probate Code Section 462(c) and former Probate Code Section 541(a). Subdivision (b) restates subdivision (b) of former Section 541 without substantive change. Subdivision (c) restates former Probate Code Section 543 without substantive change. For provisions on reduction or increase of the amount of the bond, see Code Civ. Proc. §§ 996.010-996.030 (insufficient and excessive bonds).

CROSS-REFERENCES

Definitions
Beneficiary § 24

0003b/NS
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§ 8482. Amount of bond

8482. (a) The court in its discretion may fix the amount of the bond, including a fixed minimum amount, but the amount of the bond shall be not less than the estimated value of the personal property and the probable annual gross income of the estate or, if the bond is given by personal sureties, not less than twice that amount.

(b) Before confirming a sale of real property the court shall require such additional bond as may be necessary to satisfy the minimum requirements of this section, treating the expected proceeds of the sale as personal property.

Comment. Subdivision (a) of Section 8482 restates the last sentence of former Probate Code Section 541(a), making explicit the authority of the court to impose a fixed minimum bond. Subdivision (b) continues former Probate Code Section 542 without substantive change.

Note. Coordination of subdivision (b) with sale procedures under independent administration is under review.

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§ 8483. Reduction of bond by deposit of assets

8483. (a) In any proceeding to determine the amount of the bond of the personal representative (whether at the time of appointment or subsequently), if the estate includes money, securities, or personal property which has been or will be deposited in a bank in this state or in a trust company, or money which has been or will be invested in an account in an insured savings and loan association, upon condition that the money, securities, or other property, including any earnings thereon, will not be withdrawn except on authorization of the court, the court, in its discretion, with or without notice, may so order and may do either of the following:

(1) Exclude such money, securities, and other property in determining the amount of the required bond or reduce the amount of the bond to be required in respect of such money, securities, or other property to such an amount as the court determines is reasonable.

(2) If a bond has already been given or the amount fixed, reduce the amount to such an amount as the court determines is reasonable.

(b) The petitioner for appointment as personal representative may do any one or more of the following:

(1) Deliver to a bank in this state or a trust company, money, securities, or personal property in the petitioner's possession.

(2) Deliver to an insured savings and loan association money in the petitioner's possession.

(3) Allow a bank in this state or a trust company to retain the money, securities, and personal property already in its possession.

(4) Allow an insured savings and loan association to retain money already invested with it.

(c) In the cases described in subdivision (b), the petitioner shall obtain and file with the court a written receipt including the agreement of the bank, trust company, or insured savings and loan association that the money, securities, or other property, including any earnings thereon, shall not be allowed to be withdrawn except upon authorization of the court.

(d) In receiving and retaining money, securities, or other property under subdivisions (b) and (c), the bank, trust company, or insured savings and loan association is protected to the same extent as though it had received the money, securities, or other property from a person to whom letters had been issued.

Comment. Section 8483 restates former Probate Code Section 541.1 without substantive change. See also Section 2328 (guardianship/conservatorship).

CROSS-REFERENCES

Definitions
Account in an insured savings and loan association § 21.3
Trust company § 83

Note. The staff is investigating with the California Bankers Association the handling of the situation where a loss occurs before estate property is placed in a controlled account.

The Commission asked why this section does not apply to deposits in credit unions as well as desposits in banks and savings and loans. As nearly as the staff can tell, there were three factors that may have contributed to the omission of credit unions when the section was first enacted in 1945: (1) There were inadequate insurance or other security requirements for deposits. (2) Credit unions were not mainline financial institutions. (3) The ability of nonmembers to make deposits was quite limited.

Since that time, the law requires adequate insurance or other security, credit unions have become important depositories, and the ability of nonmembers to make deposits has been expanded. Most credit unions in California are insured under the Federal Credit Union Act, which provides insurance comparable to that provided by FDIC and FSLC, and backed by the full faith and credit of the federal government. A handful participate in the California Credit Union Share Guaranty Corporation or in other state approved security.

If the Commission is inclined to add insured credit unions to this section, the staff suggests the Commission consider limiting it to federally insured credit unions, for security reasons (the deposit

is, after all, replacing the bond of the personal representative). A sample of a broad definition of a share in an insured credit union is:

> "Shares of an insured credit union" means shares issued by a credit union, either federally chartered or state licensed, which are insured under Title II of the Federal Credit Union Act or participation in the California Credit Union Share Guaranty Corporation or such other form of insurance or guaranty as approved pursuant to Section 14858 of the Financial Code.
>
> Comment. This section is drawn from Section 1443 of the Probate Code (guardianship/conservatorship law).

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§ 8484. Excessive bond

8484. If a personal representative petitions to have the amount of the bond reduced, the petition shall include an affidavit setting forth the condition of the estate [and notice of hearing shall be given in the manner required by Section 1200.5].

Comment. Section 8484 restates former Probate Code Section 553.3 without substantive change.

Note. Notice provisions will be reviewed later.

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§ 8485. Substitution or release of sureties

8485. A personal representative who petitions for substitution or release of a surety shall file with the petition an accounting as required by Section [921]. The court shall not order a substitution or release unless the accounting is approved.

Comment. Section 8485 restates former Probate Code Section 553.5 without substantive change.

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§ 8486. Cost of bond

8486. The personal representative shall be allowed the reasonable cost of the bond for every year it remains in force.

Comment. Section 8486 supersedes former Probate Code Section 541.5. Unlike the former provision, Section 8486 does not prescribe a fixed or maximum amount, but leaves the reasonableness of the amount to be determined by market forces.

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§ 8487. Law governing bond

8487. The provisions of the Bond and Undertaking Law (Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure) apply to a bond given pursuant to this division, except to the extent this division is inconsistent.

Comment. Section 8487 is a specific application of existing law. See Code Civ. Proc. § 995.020 (application of Bond and Undertaking Law).

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§ [8488]. Limitation as to sureties on bond

[8488]. No action may be maintained against the sureties on the bond of the personal representative unless commenced within three years after the settlement of the accounts of the personal representative or the discharge of the personal representative, whichever occurs later.

Comment. Section [8488] is new. It is comparable to Section 2333 (guardianship/conservatorship law).

Note. This section may be relocated to the end of the administration provisions with other provisions relating to statutes of limitation and the effect of discharge. This section was suggested by several surety companies, who point out that the law governing limitations on suits on personal representative bonds is unclear, whereas the guardianship/conservatorship law contains a clear provision on the point. This staff draft uses the 3-year guardianship/conservatorship period. The draft does not tie the limitation period to death, resignation, or removal from office of the personal representative, as suggested by the surety companies, because the administration statutes have clear and accessible procedures for settling accounts and discharging the personal representative, and the staff believes these procedures should be used before relieving the personal representative or sureties from liability. This draft also does not extend the statute of limitations for minors and incompetent persons, as does the guardianship/conservatorship statute, consistent with our general approach to assure finality in probate proceedings, relying instead on guardians ad litem where necessary. If the Commission approves this approach, conforming changes in the guardianship/conservatorship statute should be considered.

Article 6. Removal from Office

§ 8500. Procedure for removal

8500. (a) Any interested person may apply by petition for removal of the personal representative from office. A petition for removal may be combined with a petition for appointment of a successor personal representative pursuant to Article 7 (commencing with Section 8520). The petition shall state facts showing cause for removal.

(b) Upon a petition for removal, or if the court otherwise has reason to believe from the judge's own knowledge or from other credible information, whether upon the settlement of an account or otherwise, that there are grounds for removal, the court shall issue a citation to the personal representative to appear and show cause why the personal representative should not be removed. The court may suspend the powers of the personal representative and may make such orders as are necessary to deal with the property pending the hearing.

(c) Any interested person may appear at the hearing and file written allegations showing that the personal representative should be removed or retained. The personal representative may demur to or answer the allegations. The court may compel the attendance of the personal representative and may compel the personal representative to answer questions, on oath, concerning the administration of the estate. Failure to attend and answer is cause for removal of the personal representative from office.

(d) The issues shall be heard and determined by the court. If the court is satisfied from the evidence that the citation has been duly served and cause for removal exists, the court shall remove the personal representative from office.

Comment. Section 8500 supersedes portions of former Section 451. Subdivision (b) restates portions of the first sentence of former Section 521 without substantive change. Subdivision (c) restates former Sections 522 and 523 without substantive change. The court may enforce its orders by any proper means, including contempt. Section 7060 (authority of court or judge).

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§ 8501. Revocation of letters

8501. Upon removal of a personal representative from office, any letters issued to the personal representative shall be revoked and the authority of the personal representative ceases.

Comment. Section 8501 generalizes a provision found in former Section 549.

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§ 8502. Grounds for removal

8502. A personal representative may be removed from office for any of the following causes:

(a) The personal representative has wasted, embezzled, mismanaged, or committed a fraud upon the estate, or is about to do so.

(b) The personal representative is incapable of properly executing the duties of the office or is otherwise not qualified for appointment as personal representative.

(c) The personal representative has wrongfully neglected the estate, or has long neglected to perform any act as personal representative.

(d) Removal is otherwise necessary for protection of the estate.

(e) Any other cause provided by statute.

Comment. Section 8502 restates former Section 524 and portions of the first sentence of former Section 521, except that permanent removal from the state is not continued as a ground for dismissal. See Article 9 (commencing with Section 8570) (nonresident personal representative). Other causes for removal are provided in this article and elsewhere by statute. See, e.g., Sections 8480 (bond required), 8577 (failure of nonresident personal representative to comply with Section 8573), 8500 (failure to attend and answer).

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§ 8503. Removal at request of person with higher priority

8503. (a) Subject to subdivision (b), an administrator may be removed from office, upon the petition of the surviving spouse or a

relative of the decedent entitled to succeed to all or part of the estate, or the nominee of the surviving spouse or relative, if such person is higher in priority than the administrator.

(b) The court in its discretion may refuse to grant the petition:

(1) Where the petition is of a person or the nominee of a person who had actual notice of the proceeding in which the administrator was appointed and an opportunity to contest the appointment.

(2) Where to do so would be contrary to the sound administration of the estate.

Comment. Subdivision (a) of Section 8503 supersedes former Sections 450 and 452. Subdivision (b)(1) restates former Section 453 without substantive change. Subdivision (b)(2) is new; it is intended to cover the situation, for example, where administration is nearly complete and replacement of the administrator inappropriate. A petition pursuant to this section should be accompanied by a petition for appointment of a successor who has higher priority than the existing personal representative.

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§ 8504. Subsequent probate of will

8504. (a) After appointment of an administrator on the ground of intestacy, the personal representative shall be removed from office upon the later admission to probate of a will.

(b) After appointment of an executor or administrator with the will annexed, the personal representative shall be removed from office upon admission to probate of a later will.

Comment. Section 8504 restates the first portion of the first sentence of former Section 510 without substantive change. Cf. Section 8226 (effect of admission of will to probate).

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§ 8505. Contempt

8505. (a) A personal representative may be removed from office if the personal representative is found in contempt for disobeying an order of the court.

(b) Notwithstanding any other provision of this article, a personal representative may be removed from office pursuant to this section by court order reciting the facts and without further showing or notice.

Comment. Section 8505 restates former Section 526, omitting the requirement of 30 days custody. See also Sections 8501 (revocation of letters) and 8524 (successor personal representative).

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Article 7. Changes in Administration

§ 8520. Vacancy in office

8520. A vacancy occurs in the office of a personal representative who resigns, dies, or is removed from office pursuant to Article 6 (commencing with Section 8500), or whose authority is otherwise terminated.

Comment. Section 8520 generalizes provisions found in various parts of former law. A personal representative who resigns is not excused from liability until accounts are settled and property delivered to the successor. Section 8525(b) (effect of vacancy).

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§ 8521. Vacancy where other personal representatives remain

8521. (a) Unless the will provides otherwise or the court in its discretion orders otherwise, if a vacancy occurs in the office of fewer than all personal representatives, the remaining personal representatives shall complete the execution of the will or administration of the estate.

(b) The court, upon the filing of a petition alleging that a vacancy has occurred in the office of fewer than all personal representatives, may order the clerk to issue appropriate amended letters to the remaining personal representatives.

Comment. Section 8521 restates former Section 511 without substantive change.

CROSS-REFERENCES
Verification required § 7203

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§ 8522. Vacancy where no personal representatives remain

8522. (a) If a vacancy occurs in the office of a personal representative and there are no other personal representatives, the court shall appoint a successor personal representative.

(b) Appointment of a successor personal representative shall be upon petition and service of notice on interested persons in the manner provided in Article 2 (commencing with Section 8110) of Chapter 2, and shall be subject to the same priority as for an original appointment of a personal representative. The personal representative of a deceased personal representative is not, as such, entitled to appointment as successor personal representative.

Comment. Section 8522 restates former Section 512 and a portion of former Section 451 without substantive change, and generalizes the first sentence of former Section 406.

Note. This section will be reviewed in connection with the general notice provisions, particularly with respect to the adequacy of notice to creditors and late notices to interested persons.

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§ 8523. Interim protection of estate

8523. The court may make such orders as are necessary to deal with the property between the time a vacancy occurs in the office of personal representative and appointment of a successor. Such orders may include temporary appointment of a special administrator.

Comment. Section 8523 supersedes the second sentence of former Section 520.

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§ 8524. Successor personal representative

8524. (a) A successor personal representative is entitled to demand, sue for, recover and collect all the property of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the former personal representative before the vacancy.

(b) No notice, process, or claim given to or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative.

(c) Except as provided in subdivision (b) of Section 8442 (authority of administrator with will annexed) or as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had.

Comment. Subdivision (a) of Section 8524 continues and broadens the application of a portion of former Section 466 and the second sentence of former Section 510. Subdivisions (b) and (c) are drawn from Section 3-613 of the Uniform Probate Code.

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§ 8525. Effect of vacancy

8525. (a) The acts of the personal representative before a vacancy occurs are valid to the same extent as if no vacancy had later occurred.

(b) The liability of a personal representative whose office is vacant, or of the surety on the bond, is not discharged, released, or affected by the vacancy or by appointment of a successor, but continues until settlement of the accounts of the personal representative and delivery of all the property to the successor personal representative or other person appointed by the court to receive it. The personal representative shall render an account of the administration within such time as the court directs.

Comment. Subdivision (a) of Section 8525 restates former Section 525 without substantive change. The first sentence of subdivision (b) restates the third sentence of former Section 520 without substantive change. The second sentence of subdivision (b) continues the last portion of the first sentence of former Section 510 without substantive change.

Article 8. Special Administrators

§ 8540. Grounds for appointment

8540. (a) If the circumstances of the estate require the immediate appointment of a personal representative, the court may appoint a special administrator to exercise such powers as may be appropriate under the circumstances for the preservation of the estate.

(b) The appointment may be for a specified term, to perform particular acts, or on such other terms as the court may direct.

Comment. Subdivision (a) of Section 8540 supersedes the first clause of former Section 460 and generalizes provisions of former Sections 465 and 520. Under subdivision (a), grounds for appointment of a special administrator would include situations where (1) no application is made for appointment of a personal representative, (2) there is delay in appointment of a personal representative, (3) a sufficient bond is not given as required by statute or letters are otherwise granted irregularly, (4) the personal representative dies, resigns, or is suspended or removed from office, (5) an appeal is taken from an order revoking probate of a will, or where (6) for any other cause the personal representative is unable to act.

Subdivision (b) is drawn from Section 3-617 of the Uniform Probate Code. See also Section 8544 (special powers, duties, and obligations).

A judge may appoint a special administrator at chambers. Section 7061 (actions at chambers). The public administrator may serve as special administrator. Section 8541.

§ 8541. Procedure for appointment

8541. (a) Appointment of a special administrator may be made at any time without notice or upon such notice to interested persons as the court deems reasonable.

(b) In making the appointment, the court shall ordinarily give preference to the person entitled to appointment as personal representative. The court may appoint the public administrator.

(c) The appointment of a special administrator is not appealable.

Comment. Section 8541 restates former Section 461 and the last clause of former Section 460 without substantive change. The public administrator may no longer be directed by the court to "take charge" of the estate but may be appointed as special administrator. Appointment of a special administrator may be made by the judge at chambers. Section 7061 (actions at chambers).

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§ 8542. Issuance of letters

8542. (a) The clerk shall issue letters to the special administrator after both of the following conditions are satisfied:

(1) The special administrator gives such bond as may be required by the court pursuant to Section 8480.

(2) The special administrator takes the usual oath indorsed on the letters.

(b) This section does not apply to the public administrator.

Comment. Section 8542 restates subdivisions (a) and (b) of former Section 462 without substantive change. The bond must be conditioned that the special administrator will faithfully execute the duties of the office according to law. Section 8480 (bond required). The judge may approve the bond at chambers. Section 7061 (actions at chambers).

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§ 8543. Waiver of bond

8543. If the will waives the requirement of a bond for the executor and the person named as executor in the will is appointed special administrator, the court shall, subject to Section 8481, direct that no bond be given.

Comment. Section 8543 restates a portion of subdivision (c) of former Section 462 without substantive change. For additional provisions on waiver of the bond of a special administrator, see Section 8481 (waiver of bond).

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§ 8544. Special powers, duties, and obligations

8544. (a) Except to the extent the order appointing a special administrator prescribes terms, the special administrator has the power to:

(1) Take possession of all of the real and personal property of the decedent and preserve it from damage, waste, and injury.

(2) Collect all claims, rents, and other income belonging to the estate.

(3) Commence and maintain or defend suits and other legal proceedings.

(4) Sell perishable property.

(5) Borrow money, or lease, mortgage, or execute a deed of trust upon real property, in the same manner as an administrator. This power may be exercised only by court order.

(6) Pay the interest due or all or any part of an obligation secured by a mortgage, lien, or deed of trust on property in the estate, where there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation. This power may be exercised only by court order, made upon petition of the special administrator or any interested person, with such notice as the court deems proper, and shall remain in effect until appointment of a successor personal representative. The order may also direct that interest not yet accrued be paid as it becomes due, and the order shall remain in effect and cover the future interest unless and until for good cause set aside or modified by the court in the same manner as for the original order.

(7) Such other powers as are conferred by order of the court.

(b) Except where the powers, duties, and obligations of a general personal representative are granted pursuant to Section 8545, the special administrator is not liable to an action by a creditor on a claim against the decedent.

Comment. Section 8544 restates former Section 463 without substantive change and supersedes a portion of former Section 460. Subdivision (a)(6) restates former Section 464, with the addition of a provision that the order remains in effect until appointment of a successor.

Note. This section will be reviewed in connection with the general provisions on powers of personal representatives and on creditors claims. Whether the special administrator should be able to act under the Independent Administration of Estates Act will be considered in the context of that Act.

§ 8545. General powers, duties, and obligations

8545. (a) Notwithstanding Section 8544, the court may grant a special administrator the same powers, duties, and obligations as a general personal representative where to do so appears proper.

(b) The court may require as a condition of the grant that the special administrator give such additional bond as the court deems proper. From the time of approving and filing any required additional bond, the special administrator shall have the powers, duties, and obligations of a general personal representative.

(c) If a grant is made pursuant to this section, the letters shall recite that the special administrator has the powers, duties, and obligations of a general personal representative.

Comment. Section 8545 supersedes former Section 465. Instances where it might be proper to grant general powers, duties, and obligations include:

(1) The special administrator is appointed pending determination of a will contest or pending an appeal from an order appointing or removing the personal representative.

(2) After appointment of the special administrator a will contest is instituted.

(3) An appeal is taken from an order revoking probate of a will.

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§ 8546. Termination of authority

8546. (a) The powers of a special administrator cease upon issuance of letters to a general personal representative or as otherwise directed by the court.

(b) The special administrator shall forthwith deliver to the general personal representative:

(1) All property in the possession of the special administrator. The court may authorize the special administrator to complete a sale or other transaction affecting property in the possession of the special administrator.

(2) A listing of all creditors' claims of which the special administrator has knowledge. The listing shall show the name and

address of each creditor, the amount of the claim, and what action has been taken with respect to the claim. A copy of the listing shall be filed in the court.

(c) The special administrator shall render a verified account of the proceedings in the same manner as a general personal representative is required to do. If the same person acts as both special administrator and general personal representative, the account of the special administrator may be combined with the first account of the general personal representative.

Comment. Subdivisions (a) and (b) of Section 8546 restate former Section 466, with the addition of language expressly permitting court authorization of the special administrator to complete ongoing transactions. The personal representative may prosecute to final judgment any suit commenced by the special administrator. Section 8524 (successor personal representative). Subdivision (c) restates the first sentence of former Section 467, with the addition of language permitting a consolidated account where the special administrator and general personal representative are the same person.

CROSS-REFERENCES

Definitions
Court § 30
Personal representative § 59

0003b/NS
Min. 4/85

§ 8547. Fees and commissions

8547. (a) Subject to the limitations of this section, the court shall fix the commissions and allowances of the special administrator and the fees of the attorney of the special administrator.

(b) The commissions and allowances of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's commissions and allowances. The total commissions paid and extra allowances made to the special administrator and general personal representative shall not, together, exceed the sums provided in this division for commissions and extra allowances for the services of personal representatives. If the same person does not act as both special administrator and general personal representative, the commissions and allowances shall be divided in

such proportion as the court deems just or as may be agreed to by the special administrator and general personal representative.

(c) The total fees paid to the attorneys both of the special administrator and the general personal representative shall not, together, exceed the sums provided in this division as compensation for the ordinary and extraordinary services of attorneys for personal representatives. When the same attorney does not act for both the special administrator and general personal representative, the fees shall be divided between the attorneys in such proportion as the court deems just or as agreed to by the attorneys.

(d) Fees of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative, except that the award of fees to the attorney may be made upon settlement of the final account of the special administrator if settlement occurs within four months of the appointment of the special administrator.

Comment. Subdivisions (a)-(c) of Section 8547 restate former Sections 467-468, with the addition of provisions limiting payment of the special administrator until close of administration and

recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions. Subdivision (d) supersedes former Section 469. See Section ____ (extraordinary fees).

CROSS-REFERENCES

Definition

Personal representative § 59

Note. This section will be reviewed in connection with fees and commissions.

0003b/NS
App. 4/85

Article 9. Nonresident Personal Representative

§ 8570. "Nonresident personal representative" defined

8570. As used in this article, "nonresident personal representative" means a nonresident of the state appointed as personal representative, or a resident of the state appointed as personal representative who later removes from and resides without the state.

Comment. Section 8570 is new. It is intended as a drafting aid.

CROSS-REFERENCES

Definition
Personal representative § 59

0003b/NS
Min. 4/85

§ 8571. Bond of nonresident personal representative

8571. Notwithstanding any other provision of this chapter, the court in its discretion may require a nonresident personal representative to give a bond in such amount as the court determines is proper.

Comment. Section 8571 is new. It is a specific application of subdivision (c) of Section 8481 (waiver of bond).

CROSS-REFERENCES

Defined terms
Court § 30
Nonresident personal representative § 8570

0003b/NS
App. 4/85

§ 8572. Secretary of State as attorney

8572. (a) Acceptance of appointment by a nonresident personal representative is equivalent to and constitutes an irrevocable and binding appointment by the nonresident personal representative of the Secretary of State to be the attorney of the personal representative for the purpose of this article. Such appointment also applies to any personal representative of a deceased nonresident personal representative.

(b) All lawful processes, and notices of motion under Section 385 of the Code of Civil Procedure, in an action or proceeding against the nonresident personal representative with respect to the estate or founded upon or arising out of the acts or omissions of the nonresident personal representative in that capacity may be served upon the Secretary of State as the attorney of the nonresident personal representative.

Comment. Section 8572 restates former Section 405.1 without substantive change.

CROSS-REFERENCES

Definition
Nonresident personal representative § 8570

NOTE. The Commission asked the staff to check with the Secretary of State regarding the history, purpose, practical application, and experience under this section. The staff has done so. The Secretary of State's office indicates that they receive service of process about once a month under this section, that the section seems to function properly, and that the section appears to have a useful purpose in allowing service of process on a nonresident executor in a case where there is no basis for either jurisdiction or service of process under the long arm statute.

0003b/NS
Min. 4/85

§ 8573. Statement of address

8573. A nonresident personal representative shall sign and file with the court a statement of the permanent address of the nonresident personal representative. If the permanent address is changed, the nonresident personal representative shall forthwith file in the same manner a statement of the change of address.

Comment. Section 8573 restates former Section 405.2, with the omission of the acknowledgment requirement.

CROSS-REFERENCES

Definitions
Court § 30
Nonresident personal representative § 8570

0003b/NS
Min. 4/85

§ 8574. Manner of service

8574. (a) Service of process, or notice of a motion under Section 385 of the Code of Civil Procedure, in any action or proceeding against the nonresident personal representative shall be made by delivering to and leaving with the Secretary of State two copies of the summons and complaint or notice of motion and either of the following:

(1) A copy of the statement by the nonresident personal representative pursuant to Section 8573.

(2) If the nonresident personal representative has not filed a statement pursuant to Section 8573, a copy of the letters issued to the nonresident personal representative together with a written statement signed by the party or attorney of the party seeking service that sets forth an address for use by the Secretary of State.

(b) The Secretary of State shall forthwith mail by registered mail one copy of the summons and complaint or notice of motion to the nonresident personal representative at the address shown on the statement delivered to the Secretary of State.

(c) Personal service of process, or notice of motion, upon the nonresident personal representative wherever found shall be the equivalent of service as provided in this section.

Comment. Section 8574 restates former Section 405.3 without substantive change.

CROSS-REFERENCES

Definition
Nonresident personal representative § 8570

0003b/NS
App. 4/85

§ 8575. Proof of service

8575. Proof of compliance with Section 8574 shall be made in the following manner:

(a) In the event of service by mail, by certificate of the Secretary of State, under official seal, showing the mailing. The certificate shall be filed with the court from which process issued.

(b) In the event of personal service outside the state, by the return of any duly constituted public officer qualified to serve like process, or notice of motion, of and in the jurisdiction where the nonresident personal representative is found, showing the service to have been made. The return shall be attached to the original summons, or notice of motion, and filed with the court from which process issued.

Comment. Section 8575 restates former Section 405.4 without substantive change.

CROSS-REFERENCES

Definition
Nonresident personal representative § 8570

0003b/NS
App. 4/85

§ 8576. Effect of service

8576. (a) Except as provided in this section, service made pursuant to Section 8574 has the same legal force and validity as if made personally in this state.

(b) A nonresident personal representative served pursuant to Section 8574 may appear and answer the complaint within 30 days from the date of service.

(c) Notice of motion shall be served upon a nonresident personal representative pursuant to Section 8574 not less than 30 days before the date of the hearing on the motion.

Comment. Section 8576 restates former Section 405.5 without substantive change.

CROSS-REFERENCES

Definition
Nonresident personal representative § 8570

0003b/NS
Min. 4/85

§ 8577. Noncompliance

8577. (a) Failure of a nonresident personal representative to comply with Section 8573 is cause for removal from office.

(b) Nothing in this section limits the liability of, or the availability of any other remedy against, a nonresident personal representative who is removed from office pursuant to this section.

Comment. Subdivision (a) of Section 8577 restates former Section 405.6 without substantive change. Subdivision (b) is new.

CROSS-REFERENCES

Definition
Nonresident personal representative § 8570

COMMENTS TO REPEALED SECTIONS

ARTICLE 2. PROBATE OF WILLS

Probate Code § 320 (repealed)

Comment. Former Section 320 is restated in Section 8200 (delivery of will by custodian) without substantive change.

Probate Code § 321 (repealed)

Comment. Former Section 321 is restated in Sections 8201 (order for production of will), 7060 (authority of court or judge), and ____ (notice and hearing procedures)[not yet drafted].

Probate Code § 322 (repealed)

Comment. Former Section 322 is [to be disposed of].

Probate Code § 323 (repealed)

Comment. Former Section 323 is restated in Section 8000 (petition) without substantive change.

Probate Code § 324 (repealed)

Comment. Former Section 324 is restated in Section 8001 (failure of person named executor to petition) without substantive change.

Probate Code § 326 (repealed)

Comment. The first portion of former Section 326 is restated in Section 8002 (contents of petition), which substitutes the address for the residence of heirs and devisees and adds an express requirement that a copy of the will be attached. The last portion is restated in Section 8006(b) (court order) without substantive change.

Probate Code § 327 (repealed)

Comment. Former Section 327 is restated in Section 8003 (setting and notice of hearing), except that the 10 day minimum hearing period is increased to 15 days and the petitioner rather than the clerk has the duty of giving notice.

Probate Code § 328 (repealed)

Comment. The first sentence of the first paragraph of former Section 328 is restated in Sections 8110 (persons on whom notice served), 7300 (service), and 7302 (mailing), with the addition of a provision limiting service to known heirs. The second sentence is restated in Section 8100 (form of notice).

The second paragraph is restated in Sections 8111 (service on Attorney General) and 7302 (mailing) without substantive change. The third paragraph is generalized in Section 7302 (mailing).

Probate Code § 328.3 (repealed)

Comment. Former Section 328.3 is restated in Section 6103 (will or revocation procured by duress, menace, fraud, or undue influence) without substantive change.

Probate Code § 328.7 (repealed)

Comment. Former Section 328.7 is continued as Section 6132 (conditional will).

Probate Code § 329 (repealed)

Comment. The first two sentences of former Section 329 are restated in Section 8220 (evidence of subscribing witness) without substantive change. The third sentence is not continued because it is unnecessary. See Comment to Section 8221 (proof where no subscribing witness available). See also Evidence Code § 240 ("unavailable as witness"). The fourth sentence is restated in Section 8221 (proof where no subscribing witness available), with the exception of the language relating to a writing "at the end" of the will. The signatures of subscribing witnesses no longer must appear at the end. Section 6110 (execution).

Probate Code § 330 (repealed)

Comment. The first two sentences of former Section 330 are restated in Section 8202 (will detained outside jurisdiction) without substantive change. The last sentence is superseded by Section 8220 and provisions following governing proof of will.

Probate Code § 331 (repealed)

Comment. Former Section 331 is continued in Section 8222 (proof of holographic will) without substantive change.

Probate Code § 332 (repealed)

Comment. Former Section 332 is superseded by Section 8225 (admission of will to probate).

Probate Code § 333 (repealed)

Comment. Subdivision (a) of former Section 333 is continued in Section 8121 (publication of notice) without substantive change, with the exception of the fifth sentence, which is continued in Section 8123 (posting of notice).

The introductory portion of subdivision (b) is superseded by Section 8124 (type size). The remainder of subdivision (b) is continued in Section 8100 (form of notice), except that reference to notice of the decedent's death is eliminated from the caption and a reference to the decedent's will is added to the notice.

Subdivision (c) is continued in Section 8125 (affidavit of publication or posting) without substantive change.

Subdivision (d) is restated in Section 8126 (contents of subsequent published or posted notice) without substantive change.

Probate Code § 334 (repealed)

Comment. Former Section 334 is continued in Section 8122 (good faith compliance with publication requirement) without substantive change.

ARTICLE 3. LOST OR DESTROYED WILLS

Probate Code § 351 (repealed)

Comment. The first two sentences of former Section 351 are restated in Section 8223 (proof of lost or destroyed will), except that the requirement that the order admitting the will to probate be "set forth at length in the minutes" is omitted. The last sentence is continued and broadened in Section 8224 (perpetuation of testimony).

Probate Code § 352 (repealed)

Comment. Former Section 352 is continued and broadened in Section 8406 (suspension of powers of personal representative).

ARTICLE 4. FOREIGN WILLS

Probate Code § 360 (repealed)

Comment. [Not yet disposed of.]

Probate Code § 361 (repealed)

Comment. [Not yet disposed of.]

Probate Code § 362 (repealed)

Comment. [Not yet disposed of.]

CHAPTER 2. CONTESTS OF WILLS

ARTICLE 1. CONTESTS BEFORE PROBATE

Probate Code § 370 (repealed)

Comment. The first portion of the first sentence of former Section 370 is superseded by Section 8004 (opposition). The last portion of the first sentence is restated in Section 8250 (summons), except that the citation is replaced with a summons.

The second, third, and fourth sentences are restated in Section 8251 (responsive pleading), except that the time to answer after a demurrer is overruled is not conditioned on receipt of written notice.

Probate Code § 371 (repealed)

Comment. Former Section 371 is superseded by Section 8252 (trial), which does not continue the provision for jury trial.

Probate Code § 372 (repealed)

Comment. Former Section 372 is restated in Section 8253 (evidence of execution), except that the limitation on production of witnesses outside the county is not continued. See also Section 7200 (general rules of practice govern) and Code Civ. Proc. § 1989 (compelling attendance of witnesses).

Probate Code § 372.5 (repealed)

Comment. Former Section 372.5 is continued in Section 6112(d).

Probate Code § 373 (repealed)

Comment. Former Section 373 is superseded by Section 8254 (judgment). The provision for the special verdict of a jury is not continued because it is no longer necessary. See Section 8252 and Comment thereto (jury trial not continued).

Probate Code § 374 (repealed)

Comment. Former Section 374 is continued and broadened in Section 8224 (perpetuation of testimony).

ARTICLE 2. CONTESTS AFTER PROBATE

Probate Code § 380 (repealed)

Comment. Former Section 380 is restated in subdivision (a) of Section 8270 (petition for revocation), but reference to some of the specific grounds of opposition are omitted.

Probate Code § 381 (repealed)

Comment. Former Section 381 is superseded by Section 8271 (summons), which substitutes a summons for the citation.

Probate Code § 382 (repealed)

Comment. Former Section 382 is superseded by Section 8271(b) (summons) and 8272 (revocation). The provision for a jury trial is not continued. See Section 7204 (trial by jury).

Probate Code § 383 (repealed)

Comment. Former Section 383 is superseded by Section 8273 (costs and attorney's fees).

Probate Code § 384 (repealed)

Comment. The first portion of former Section 384 is restated in Section 8226(a) (effect of admission of will to probate) without substantive change. The last portion is superseded by Section 8270(b) (petition for revocation).

Probate Code § 385 (repealed)

Comment. Former Section 385 is restated in Section 8226(b) (effect of admission of will to probate), but Section 8226 precludes probate of another will after close of administration.

CHAPTER 3. APPOINTMENT OF EXECUTORS AND OF ADMINISTRATORS WITH THE WILL ANNEXED

Probate Code § 400 (repealed)

Comment. Former Section 400 is restated in Section 8400 (appointment necessary) without substantive change.

Probate Code § 401 (repealed)

Comment. Former Section 401 is superseded by Section 8401 (qualifications).

Probate Code § 402 (repealed)

Comment. Former Section 402 is restated in Section 8421 (executor not specifically named) without substantive change.

Probate Code § 403 (repealed)

Comment. Former Section 403 is restated in Section 8422 (power to designate executor) without substantive change.

Probate Code § 404 (repealed)

Comment. Former Section 404 is restated in Section 8423 (successor corporation as executor) without substantive change.

Probate Code § 405 (repealed)

Comment. The portion of former Section 405 that related to a minor named as executor is restated in Section 8424 (minor named as executor) without substantive change. The portion relating to a person absent from the state is not continued. See Section 8570 et seq. (nonresident personal representative).

Probate Code § 405.1 (repealed)

Comment. Former Section 405.1 is restated in Section 8572 (Secretary of State as attorney) without substantive change.

Probate Code § 405.2 (repealed)

Comment. Former Section 405.2 is restated in Section 8573 (statement of address) with the omission of the acknowledgment requirement.

Probate Code § 405.3 (repealed)

Comment. Former Section 405.3 is restated in Section 8574 (manner of service) without substantive change.

Probate Code § 405.4 (repealed)

Comment. Former Section 405.4 is restated in Section 8575 (proof of service) without substantive change.

Probate Code § 405.5 (repealed)

Comment. Former Section 405.5 is restated in Section 8576 (effect of service) without substantive change.

Probate Code § 405.6 (repealed)

Comment. Former Section 405.6 is restated in Section 8577 (noncompliance) without substantive change.

Probate Code § 406 (repealed)

Comment. The first sentence of former Section 406 is restated and generalized in Section 8522 (vacancy where no personal representatives remain). The second sentence is superseded by Section 8440 (appointment of administrator with will annexed).

Probate Code § 407 (repealed)

Comment. The first sentence of former Section 407 is restated in Sections 8004 (opposition) and 8005 (hearing) without substantive change. The second sentence is superseded by Section 8420 (right to appointment as personal representatives).

Probate Code § 408 (repealed)

Comment. Former Section 408 is restated in Section 8425 (when fewer than all executors appointed) without substantive change.

Probate Code § 409 (repealed)

Comment. The first sentence of former Section 409 is restated in Section 8442 (authority of administrator with will annexed), with the addition of court discretion to permit exercise of a discretionary power or authority. The second sentence is restated in Section 8441 (priority for appointment) without substantive change. The third sentence is superseded by Section 8441.

Probate Code § 410 (repealed)

Comment. Former Section 410 is restated in Section 8480 (bond required) without substantive change.

CHAPTER 4. APPOINTMENT OF ADMINISTRATORS

ARTICLE 1. COMPETENCY AND PRIORITY

Probate Code § 420 (repealed)

Comment. Former Section 420 is restated in Section 8401 (qualifications) without substantive change.

Probate Code § 421 (repealed)

Comment. Former Section 421 is restated in Section 8401 (qualifications) without substantive change.

Probate Code § 422 (repealed)

Comment. Former Section 422 is restated in Sections 8461 (priority for appointment), 8462 (priority of relatives), and 8463 (estranged spouse), with the addition of provisions to reflect changes in the law governing intestate succession and language recognizing the priority of relatives of a predeceased spouse, and expansion to include any lineal relative of the decedent who satisfies prescribed conditions.

Probate Code § 423 (repealed)

Comment. Former Section 423 is restated and generalized in Sections 8402 (nominee of person entitled to appointment) and 8465 (priority of nominee).

Probate Code § 424 (repealed)

Comment. Former Section 424 is not continued. Wholeblood relatives are no longer preferred over halfblood relatives. Section 6406.

Probate Code § 425 (repealed)

Comment. The first clause of former Section 425 is restated in Section 8467 (equal priority) with the addition of authority to appoint a disinterested person where there is a conflict between persons of equal priority. The second clause is restated in Section 8466 (priority of creditor) but the requirement that there be a request of another creditor before the court may appoint another person is omitted.

Probate Code § 426 (repealed)

Comment. Former Section 426 is restated in Section 8464 (minors and incompetent persons) without substantive change.

Probate Code § 427 (repealed)

Comment. Former Section 427 is restated in Section 8468 (administration by any competent person) without substantive change.

ARTICLE 2. APPLICATION FOR LETTERS

Probate Code § 440 (repealed)

Comment. The first portion of former Section 440 is restated in Section 8002 (contents of petition), with the exception of the provision for signature by counsel, which is not continued. The last paragraph is restated in Section 8006(b) (court order) without substantive change.

Probate Code § 441 (repealed)

Comment. The first two sentences of former Section 441 are restated in Sections 8003 (setting and notice of hearing), 8110 (persons on whom notice served), and 7202 (clerk to set matters for hearing), except that the 10 day minimum notice period is increased to 15 days and the petitioner rather than the clerk has the duty of giving notice. See also Sections 7300 (service), 7302 (mailing), 7304 (notice to persons whose address is unknown). The substance of the third sentence is continued in Section 8100 (form of notice).

Probate Code § 442 (repealed)

Comment. Former Section 442 is restated in Section 8004 (opposition) without substantive change.

Probate Code § 443 (repealed)

Comment. Former Section 443 is restated in Section 8005 (hearing) without substantive change.

ARTICLE 3. REVOCATION OF LETTERS

Probate Code § 450 (repealed)

Comment. Former Section 450 is superseded by Sections 8503(a) (removal at request of person with higher priority) and Article 7 (commencing with Section 8520) (changes in administration) of Chapter 4 of Part 2 of Division 7.

Probate Code § 451 (repealed)

Comment. Former Section 451 is superseded by Sections 8500 (procedure for removal) and Article 7 (commencing with Section 8520 (changes in administration) of Chapter 4 of Part 2 of Division 7.

Probate Code § 452 (repealed)

Comment. Former Section 452 is superseded by Section 8503(a) (removal at request of person with higher priority).

Probate Code § 453 (repealed)

Comment. Former Section 453 is restated in Section 8503(b) (removal at request of person with higher priority) without substantive change.

CHAPTER 5. SPECIAL ADMINISTRATORS

Probate Code § 460 (repealed)

Comment. The first clause of former Section 460 is superseded by Sections 8540 (grounds for appointment) and 8544 (special powers, duties, and obligations). The last clause is restated in Section 8541 (procedure for appointment) without substantive change.

Probate Code § 461 (repealed)

Comment. Former Section 461 is restated in Section 8541 (procedure for appointment) without substantive change.

Probate Code § 462 (repealed)

Comment. Subdivisions (a) and (b) of former Section 462 are restated in Section 8542 (issuance of letters) without substantive

change. Subdivision (a)(1) is restated in Section 8481 (waiver of bond) without substantive change. Subdivision (a)(2) is restated in Section 8543 (waiver of bond) without substantive change.

Probate Code § 463 (repealed)

Comment. Former Section 463 is restated in Section 8544 (special powers, duties, and obligations) without substantive change.

Probate Code § 464 (repealed)

Comment. Former Section 464 is restated in Section 8544(a)(6) (special powers, duties, and obligations) with the addition of a provision that the order remains in effect until appointment of a successor.

Probate Code § 465 (repealed)

Comment. Former Section 465 is superseded by Section 8545 (general powers, duties, and obligations).

Probate Code § 466 (repealed)

Comment. Former Section 466 is restated in Sections 8546(a)-(b) (termination of authority) and 8524 (successor personal representative), with the addition of language expressly permitting court authorization of the special administrator to complete ongoing transactions.

Probate Code § 467 (repealed)

Comment. The first sentence of former Section 467 is restated in Section 8546(c) (termination of authority), with the addition of language expressly permitting a consolidated account where the special administrator and general personal representative are the same person. The second sentence is restated in Section 8547(a)-(c) (fees and commissions), with the addition of provisions limiting payment of the special administrator until close of administration and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions.

Probate Code § 468 (repealed)

Comment. Former Section 468 is restated in Section 8547(b)-(c) (fees and commissions), with the addition of provisions limiting payment of the special administrator until close of administration and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions.

Probate Code § 469 (repealed)

Comment. Former Section 469 is superseded by Section 8547(d) (fees and commissions).

CHAPTER 6. LETTERS, GENERALLY, AND CHANGES IN ADMINISTRATION

ARTICLE 1. TRUST COMPANIES

Probate Code § 480 (repealed)

Comment. Former Section 480 is restated in Section 300 (appointment of trust company) with the exception of the reference to a trust company acting as trustee, which is governed by Section ____ (trust law).

Probate Code § 481 (repealed)

Comment. Former Section 481 is restated in Section 301 (oath and bond of trust company) with the exception of the reference to a trust company acting as trustee, which is governed by Section _____(trust law).

ARTICLE 2. FORM OF LETTERS

Probate Code § 500 (repealed)

Comment. Former Section 500 is superseded by Section 8405 (form of letters).

Probate Code § 501 (repealed)

Comment. Former Section 501 is superseded by Section 8405 (form of letters) and 7201 (Judicial Council to prescribe forms).

Probate Code § 502 (repealed)

Comment. Former Section 502 is superseded by Sections 8405 (form of letters) and 7201 (Judicial Council to prescribe forms).

ARTICLE 3. DISABILITY AND SUBSTITUTION

Probate Code § 510 (repealed)

Comment. The first sentence of former Section 510 is restated in Sections 8504 (subsequent probate of will) and 8525(b) (effect of vacancy) without substantive change. The second sentence is continued and broadened in Section 8524 (successor personal representative).

Probate Code § 511 (repealed)

Comment. Former Section 511 is restated in Section 8521 (vacancy where other personal representatives remain) without substantive change.

Probate Code § 512 (repealed)

Comment. Former Section 512 is restated in Section 8522 (vacancy where no personal representatives remain) without substantive change.

ARTICLE 4. RESIGNATION, SUSPENSION AND REMOVAL

Probate Code § 520 (repealed)

Comment. The first sentence of former Section 520 is restated in Sections 8520 (vacancy in office) and 8525(b) (effect of vacancy) without substantive change. The second sentence is superseded by Section 8523 (interim protection of estate). The third sentence is restated in Section 8525(b) (effect of vacancy) without substantive change.

Probate Code § 521 (repealed)

Comment. The substance of the first sentence of former Section 521 is restated in Section 8500(b) (procedure for removal) and 8502 (grounds for removal), with the exception of the provision relating to permanent removal from the state, which is not continued. See Section 8570 et seq. (nonresident personal representative). The second sentence is not continued; it was impliedly repealed by former Section 1207 (service of citation), which is continued as Section _____.

Probate Code § 522 (repealed)

Comment. Former Section 522 is restated in Section 8500(c) (procedure for removal) without substantive change.

Probate Code § 523 (repealed)

Comment. Former Section 523 is restated in Section 8500(c) (procedure for removal) without substantive change.

Probate Code § 524 (repealed)

Comment. Former Section 524 is restated in Section 8502 (grounds for removal) without substantive change. See also Section 8500 (procedure for removal).

Probate Code § 525 (repealed)

Comment. Former Section 525 is restated in Section 8525 (effect of vacancy) without substantive change.

Probate Code § 526 (repealed)

Comment. Former Section 526 is restated in Sections 8505 (contempt) and 8501 (revocation of letters), omitting the requirement of 30 days custody.

CHAPTER 7. OATHS AND BONDS

Probate Code § 540 (repealed)

Comment. Former Section 540 is restated in Section 8403 (oath) without substantive change.

Probate Code § 541 (repealed)

Comment. The first sentence of subdivision (a) of Section 541 is restated in Sections 8480 (bond required), 8481(a) (waiver of bond), and Section 7061(a)(5) (actions at chambers) without substantive change. The second sentence is restated in Section 8482(a) (amount of bond), which makes explicit the authority of the court to impose a fixed minimum bond.

Subdivision (b) is restated in Section 8481(b) (waiver of bond) without substantive change.

Probate Code § 541.1 (repealed)

Comment. Former Section 541.1 is restated in Section 8483 (reduction of bond by deposit of assets) without substantive change.

Probate Code § 541.5 (repealed)

Comment. Former Section 541.5 is superseded by Section 8486 (cost of bond).

Probate Code § 542 (repealed)

Comment. Former Section 542 is continued in Section 8482(b) (amount of bond) without substantive change.

Probate Code § 543 (repealed)

Comment. Former Section 543 is restated in Section 8481(c) (waiver of bond) without substantive change.

Probate Code § 544 (repealed)

Comment. Former Section 544 is restated in Section 8480 (bond required) without substantive change.

Probate Code § 549 (repealed)

Comment. The effect of former Section 549 is continued in Sections 8480 (bond required) and 8501 (revocation of letters). See also Sections 8520 et seq. (changes in administration).

Probate Code § 550 (repealed)

Comment. Former Section 550 is continued and broadened in Section 8406 (suspension of powers of personal representative).

Probate Code § 553.3 (repealed)

Comment. Former Section 553.3 is restated in Section 8484 (excessive bond) without substantive change.

Probate Code § 553.5 (repealed)

Comment. Former Section 553.5 is restated in Section 8485 (substitution or release of sureties) without substantive change.