

Memorandum 82-26

Subject: Study L-611 - Probate Law (Missing Persons)

Probate Code Sections 260-272 provide a procedure for appointing a trustee to protect the property of a person missing over 90 days. (A copy of Probate Code §§ 260-272 is attached hereto as Exhibit 2.) The staff proposes replacing the existing procedure with a statute permitting the appointment of a conservator for the estate of a missing person. The staff draft is attached to this memorandum as Exhibit 1. The statute pertaining to estates of persons missing seven years will be considered in a separate memorandum.

The remainder of this memorandum discusses the differences and similarities between existing law and the staff draft.

Purpose

Probate Code Sections 260-272 appear as a chapter in Division 2a entitled "Administration of Estates of Missing Persons." However, this procedure does not involve the probate administration and distribution of the missing person's estate based on any presumption of death. Probate Code Sections 260-272 fall into the class of statutes where management of the missing persons property is based on the assumption of the continued life of the missing person. See Jalet, Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees, 54 Iowa L. Rev. 177, 226-27, 231-36 (1968). Such statutes have been upheld against constitutional challenges on the basis of the need to preserve the missing person's property during his or her absence and to protect the interests of the missing person's dependents. See Day v. Metropolitan Life Ins. Co., 11 Cal. App. 681, 54 P.2d 502 (1936). This aspect of the missing person statute provides support for the approach recommended by the staff. A missing person, like an incompetent person, is unable to manage his or her property and support those entitled to support. If a conservatorship, with all its detailed safeguards, is appropriate in the case of a person who is here but "substantially unable to manage his or her own financial resources" (Probate Code § 1801), it seems just as appropriate if not more so in a case where the conservatee is missing.

Grounds for Invoking Statute

Residence. Probate Code Section 260 provides that a trustee for the estate of a missing person may be appointed whenever any "resident of this state, who owns or is entitled to the possession of any real or personal property situate in this state" is missing. The staff draft eliminates the residency requirement because the need for the conservatorship appears if property is in this state. Other statutes with a related purpose are not limited in their application to residents. See Prob. Code §§ 280 (administration of estates of persons missing over seven years), 295.1 (use of property of absentee federal personnel), 1803 (conservator of estate of absentee federal personnel), 2202 (venue for conservatorship proceedings for estate of nonresident). It has been reported that more than one-third of state statutes in this area limit their procedure to residents. Jalet, supra at 231 n. 239.

Ninety-day period. The 90-day period in existing Section 260 is arbitrary. The court in Day v. Metropolitan Life Insurance Co., supra at 683, recognized that

under certain circumstances, an absence of three months might be an unreasonable time to permit a proceeding under the statute. On the other hand, circumstances might arise which would justify a proceeding earlier than that. If a husband and father openly abandons his wife and children and openly declares his intention to disappear and leaves behind him sufficient property to support those dependent upon him but leaves it in a way that they cannot use it, no court would be justified in holding that they must wait seven years before the property could become available for their support. . . . In the last analysis these questions are purely legislative, and the courts will not substitute their opinions for that of the legislature unless the unconstitutionality of the statute is so apparent on the face that no circumstances can be assumed under which it might have a constitutional operation.

It is the practice in this state to appoint a temporary conservator in a case where the person has not yet been missing 90 days or where the missing person is a nonresident. See 3 J. Goddard, Probate Court Practice § 1921 (3d ed. 1977); S. Ross, L. Pruett, M. Levine, California Conservatorships Supplement § 3.24, at 46 (Cal. Cont. Ed. Bar 1981). The staff draft recognizes existing practice and specifically authorizes appointment of a temporary conservator if the person has not been missing 90 days. The powers of a temporary conservator are more limited than those of a conservator. Compare Prob. Code § 2252 (powers and duties of

temporary conservator) with §§ 2400-2595 (powers and duties of conservator). The time periods in other states vary in length from one month to three years, and about half of the jurisdictions with this sort of legislation prescribe no specific time limit. See Jalet, supra at 214-15.

"Missing" standard. Section 260 permits appointment of a trustee if a person is "missing, or the whereabouts of such a person is unknown." A multitude of formulations of this type of standard appear in state statutes and in the cases. Evidence Code Section 667 provides that a person "not heard from" for seven years is presumed dead. Probate Code Section 280 refers to a person who has been "absent from his last known place of residence" for seven years "with his whereabouts for such period unknown to the persons most likely to know thereof." Statutes of some states require a diligent inquiry or even specify the type of search to be undertaken. See statutes cited in Jalet, supra at 187-88, 231-32. The staff draft continues the language of existing law in this regard because we are not aware of any problems with this relatively vague standard. However, the Commission may wish to consider the following provision from North Carolina law (N.C. Gen. Stat. § 28C-9 (1976)):

The judge shall by order direct the receiver to make a search for the absentee. The order shall specify the manner in which the search is to be conducted in order to insure that, in the light of the circumstances of the particular case, a diligent and reasonable effort be made to locate the absentee. The order may prescribe any methods of search deemed advisable by the judge, but must require, as a minimum, the following:

- (1) Inquiry of persons at the absentee's home, his last known residence, the place where he was last known to have been, and other places where information would likely be obtained or where the absentee would likely have gone;
- (2) Inquiry of relatives, friends and associates of the absentee, or other persons who should be most likely to hear from or of him;
- (3) Insertion of a notice in one or more appropriate papers, periodicals or other news media, requesting information from any person having knowledge of the absentee's whereabouts; and
- (4) Notification of local, state and national offices which should be most likely to know or learn of the absentee's whereabouts.

Persons Authorized to Petition

Probate Code Section 260 permits the spouse, family, or friends of the missing person to petition for appointment of a trustee. Under the staff draft, a petition may be filed by the spouse, a relative, an interested public entity or official, or any other interested person or friend. Prob. Code § 1820.

Preference in Appointment

Probate Code Section 263 provides that in appointing a trustee the court is to apply the following order of preference: the spouse, the nominee of the spouse, or some person entitled to participate in the distribution of the missing person's estate if he or she were dead. The conservatorship provisions applicable under the staff draft permits the proposed conservatee to nominate a conservator (Section 1810) which would possibly occur where a conservator is nominated in writing by a person who later disappears. Otherwise, the court has discretion to select a conservator under Section 1812, although if persons are equally qualified, the court is to give preference in the following order: the spouse or a nominee of the spouse, an adult child or a nominee of an adult child, a parent or a nominee of the parent, a brother or sister or a nominee of the brother or sister, any other eligible person. Proposed Section 1848 in Exhibit 1 makes a modification of the normal scheme applicable to conservatorships by permitting potential heirs to be conservators or to nominate conservators.

Powers and Duties of Trustee or Conservator

Probate Code Sections 262, 265, and 267-269 provide for the trustee's duties to manage the property, pay family expenses, and sell and encumber property. These provisions are fairly sketchy and the staff believes that it is preferable to adopt the much broader and more detailed provisions of the law applicable to conservatorships of estates. For more detail, see the Comments to Sections 262, 265, and 267-269 in Exhibit 2.

Accounting to Court

Probate Code Section 266 provides that the trustee is to account to the court when directed. The staff draft is subject to the normal accounting provisions applicable to conservatorships. Section 1850 provides for a review one year after appointment and biennially thereafter except, in the case of a conservatorship of the estate of a nonresident, where the conservatee is not present in this state. Section 2620 provides for presentation of the conservator's account at the same time.

Other details are continued or superseded as noted in the Comments to Sections 260-272 in Exhibit 2.

Respectfully submitted,

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EXHIBIT 1

STAFF DRAFT

Proposed Conservator for Estate of Missing Person - Prob. Code §§ 1804, 1845-1849

24846

Probate Code § 1804 (added). Conservator of estate of missing person

SEC. . Section 1804 is added to the Probate Code, to read:

1804. A conservator of the estate of a missing person may be appointed as provided in Article 5 (commencing with Section 1845). Notwithstanding Section 1800, a conservator of the estate of a missing person may be appointed where the missing person is a minor.

Comment. Section 1804 is a new provision that supersedes the former procedure for appointing a trustee for the property of a missing person. See former Sections 260-272 and the Comments thereto. The last sentence makes clear that the age of the missing person is not a relevant consideration; hence, a guardian need not be appointed for a missing unmarried minor.

24847

Probate Code §§ 1845-1849 (added)

SEC. . Article 5 (commencing with Section 1845) is added to Chapter 1 of Part 3 of Division 4 of the Probate Code, to read:

Article 5. Conservator of Estate of Missing Person

26821

§ 1845. Showing required for appointment of conservator of missing person's estate

1845. (a) A conservator of the estate of a missing person may be appointed as provided in this chapter if the petitioner shows the following:

- (1) The proposed conservatee owns or is entitled to the possession of any real or personal property situated in this state.

(2) The proposed conservatee has been missing for at least 90 days and his or her whereabouts has been and is unknown.

(3) The estate of the proposed conservatee requires attention, supervision, and care.

(b) If the proposed conservatee has not yet been missing for 90 days, a temporary conservator of the estate may be appointed.

Comment. Subdivision (a) of Section 1845 supersedes former Section 260 (appointment of trustee of estate of missing person). The requirement of former Section 260 that the missing person be a resident of California is not continued. Paragraphs (1)-(3) continue the substance of the standard for appointment of a trustee under former Section 260. For the disposition of other provisions in former Section 260, see the Comment to former Section 260.

Subdivision (b) recognizes that there may be a need to protect the property of a person who has been missing less than 90 days. This subdivision codified the practice under former law of appointing a temporary conservator where a trustee was not available under former Section 260. See 3 J. Goddard, Probate Court Practice § 1921 (3d ed. 1977); S. Ross, L. Pruett, M. Levine, California Conservatorships Supplement § 3.24, at 46 (Cal. Cont. Ed. Bar 1981). See also Sections 2250 (petition for appointment of temporary conservator), 2252 (powers and duties of temporary conservator).

27931

§ 1846. Notice of hearing

1846. In addition to the persons and entities to whom notice of hearing is required under Section 1822, notice of the hearing on appointment of a conservator of the estate of a missing person shall be published pursuant to Section 6061 of the Government Code in a newspaper of general circulation in the county in which the hearing will be held. The court may direct further notice of the hearing to be given in such manner and to such persons as it deems proper.

Comment. Section 1846 supersedes former Section 261. The first sentence is drawn from the last sentence of Section 1842 (notice of hearing on appointment of conservator for "absentee").

27938

§ 1847. Applicability of provisions relating to person of proposed conservatee

1847. In a proceeding to appoint a conservator of the estate of a missing person, the following acts are not required:

(a) Issuance of a citation to the proposed conservatee pursuant to Section 1823.

(b) Service of a citation and petition pursuant to Section 1824.

(c) Production of the proposed conservatee at the hearing pursuant to Section 1825.

(d) Performance of the duties of the court investigator pursuant to Section 1826.

(e) Performance of any other acts that depend upon knowledge of the location of the proposed conservatee.

Comment. Section 1847 excuses performance of any duty under the general provisions that depend upon knowledge of the whereabouts of the missing person. This section is not intended to preclude an attempt to locate a missing person or to give notice by mail to the missing person's last known address or by publication. See Section 1846 (notice of hearing).

27942

§ 1848. Nomination and preference for appointment as conservator

1848. A person who would be entitled to participate in the distribution of the missing person's estate, if the missing person were dead, may:

(a) Nominate a conservator in the manner provided by Section 1811.

(b) Be appointed as conservator with the preference in appointment provided for persons under paragraph (5) of subdivision (b) of Section 1812 unless the person is one given a higher preference for appointment under Section 1812.

Comment. Section 1848 supersedes a portion of former Section 263.

28275

§ 1849. Consideration of interest of heirs; notice to heirs

1849. In any case where the court or the conservator is required under this division to consider the interests of persons legally entitled to support, maintenance, or education from the conservatee, the court or conservator shall also consider the interests of any persons who would be entitled to participate in the distribution of the missing person's estate if the missing person were dead and shall cause notice of the hearing on such matter to be served on persons who would be entitled to participate in the distribution of the missing person's estate.

Comment. Section 1849 continues the substance of portions of former Sections 267-269. See the Comments to former Sections 267-269.

EXHIBIT 2

TEXT OF PROBATE CODE SECTIONS 260-272 (TO BE REPEALED)

**CHAPTER 1. TRUSTEES OF ESTATES
OF PERSONS MISSING OVER
90 DAYS**

§ 260. Petition for appointment of trustee; petitioners; filing; date of hearing

Whenever any resident of this state, who owns or is entitled to the possession of any real or personal property situate in this state, is missing, or the whereabouts of such a person is unknown, for 90 days, and a verified petition is presented to the superior court of the county of which such person is a resident by the spouse of such person or any of the family or friends of such person, representing that the whereabouts of such person has been, for such time, and still is, unknown, and that such person's estate requires attention, supervision, and care of ownership, the court must order such petition to be filed, and appoint a day for its hearing, not less than 10 days from the date of the order.

Comment. Former Section 260 is superseded by Sections 1804 and 1845 (conservator for estate of missing person). The trusteeship procedure provided by former Sections 260-272 are replaced by the general conservatorship procedure, as modified by Sections 1845-1849. The requirement that the missing person be a resident of this state is not continued. See Section 2202 (venue where proposed conservatee is nonresident). For provisions continuing various aspects of former Section 260, see Sections 1450 (verification of petition), 1820 (persons authorized to petition), 2200 (jurisdiction of superior court), 2201 (venue where proposed conservatee is resident). See also Sections 1451 (clerk to set matters for hearing), 1822 (15 days' notice of hearing on petition).

§ 261. Publication of notice; additional notice

The clerk of the court must, prior to the day so appointed, publish notice pursuant to Section 6063a of the Government Code in some newspaper published in the county, stating that such petition will be heard at the courtroom of the court at the time appointed for the hearing. The court may direct further notice of the application to be given in such manner and to such persons as it may deem proper.

Comment. The first sentence of former Section 261 is superseded by the first sentence of Section 1846 (publication pursuant to Gov't Code § 6061). The substance of the last sentence is continued in the last sentence of Section 1846.

§ 262. Hearing; appointment of trustee

At the time so fixed for such hearing, or at any subsequent time to which the hearing may be postponed, the court must hear the petition and the evidence offered in support of or in opposition thereto, and, if satisfied that the allegations thereof are true, and that such person remains missing, and his whereabouts unknown, must appoint some suitable person to take charge and possession of such estate, and manage and control it under the direction of the court.

Comment. Former Section 262 is superseded by Sections 1804 (conservator for estate of missing person), 1827 (law and procedure applicable to hearing). See generally 2400-2595 (powers and duties of conservator of estate).

§ 263. Persons eligible to appointment; preference of wife or nominee

In appointing a trustee, the court must prefer the spouse of the missing person (if any such there is), or the nominee of the spouse of the missing person, and, in the absence of a spouse, some person, if such there is who is willing to act, entitled to participate in the distribution of the missing person's estate were the missing person dead.

Comment. Former Section 263 is superseded by Sections 1811 (nomination of conservator by spouse or relative), 1812 (order of preference for appointment as conservator), and 1848 (nomination and preference for appointment of heir).

§ 264. Trustee's bond

Every person appointed under the provisions of the preceding section must give bond in the amount and as provided for in section 541 of this code.

Comment. The substance of former Section 264 is continued in Section 2320.

§ 265. Trustee's duties; family allowance

The trustee must take possession of the real and personal estate in this State of such missing person, and collect and receive the rents, income, and proceeds thereof, collect all indebtedness owing to him, and pay the expenses thereof out of the trust funds, and pay such indebtedness of the missing person as may be authorized by the court. The court may direct the trustee to pay to the person or persons constituting the family of the missing person such sum or sums of money for family expenses and support from the income or principal of the estate as it may, from time to time, determine.

Comment. Former Section 265 is superseded generally by Sections 2400-2595 (powers and duties of conservator of estate). See, *e.g.*, Sections 2401 (management and control of estate), 2420-2423 (support and maintenance of dependents), 2430-2431 (payment of debts and expenses), 2451 (collection of debts). See also Section 1845(b) (appointment of temporary conservator), 2252 (powers and duties of temporary conservator).

§ 266. Trustee; accounting; removal; appointment of another

The trustee must, from time to time, when directed by the court, account to and with it for all his acts as trustee, and the court may, at any time, upon good cause shown, remove any trustee, and appoint another in his place.

Comment. Former Section 266 is superseded by Sections 2600-2633 (inventory and accounts of conservator) and 2650-2654 (removal of conservator).

§ 267. Sale or encumbrance of property; petition; order

The trustee may sell any or all of the personal or real property or mortgage or give a deed of trust upon any of the real property of the missing person when it is considered by the court as being to the best interest of the estate and all parties concerned including the heirs at law or legatees, and for that purpose shall file a petition with the court asking for an order directing and authorizing said sale, mortgage, or deed of trust.

Comment. Former Section 267 is superseded by Sections 1849 (consideration of interests of heirs), 2540-2548 (sales of property), and 2550-2552 (mortgage or deed of trust on real property).

§ 268. Sale or encumbrance of property; notice of hearing on petition

This petition shall be set for hearing not sooner than 10 days after the filing of the petition and notice thereof shall be given by the clerk of the court in the manner specified in Section 1200. Notice shall also be given by the petitioner by registered mail to each of the persons who would be heirs at law of the missing person, if he or she were dead, and if it appears that the missing person left a will, then like notice shall be given to each legatee mentioned therein, at his or her respective place of address, a return card being requested with each of the notices so registered in the mail. If the address of any person is unknown the notice shall be mailed as aforesaid to the person at the county seat of the county in which the court is held, and an affidavit of the trustee filed showing that the address is unknown, and stating what efforts he or she has made to determine the address.

Comment. Former Section 268 is superseded by Sections 1849 (notice to heirs), 2403 (instructions from or confirmation by court), 1460-1469 (general notice provisions).

§ 269. Sale or encumbrance of property; hearing; proof; order; minimum time for sale

On the day of hearing the petition proof shall be offered in behalf thereof showing the reasons for the making of said sale, mortgage, or deed of trust. If the court finds that it will be for the best interests of all persons concerned in the estate of said missing person to have said sale, mortgage, or deed of trust made, it shall order the trustee to sell any or all said property, real, personal or both, or to mortgage or give a deed of trust upon any of said real property, in the manner provided by this code for sales, mortgages, or deeds of trust of property of deceased persons, and all the provisions of law regarding such sale, mortgage or deed of trust shall govern the sale, mortgage or deed of trust of property of missing persons under this section, including the provisions concerning confirmation of the sales by the court; provided, however, that any such sale of real property shall not take place before the expiration of eight months from the date of the appointment and qualification of the trustee.

Comment. Former Section 269 is superseded by Sections 1849 (consideration of interest of potential heirs), 2403 (instructions from or confirmation by court), 2540-2548 (sale of property), 2550-2552 (mortgage or deed of trust). The eight-month limitation at the end of former Section 269 is not continued.

§ 270. Return of missing persons; accounting

In the event the missing person returns, the court, upon application of said person, or upon its own motion, shall require the trustee to render and file a verified account of the administration of the trust, and the provisions of Article 3 of Chapter 15 of Division 3 of this code¹ shall apply to such accounting.

Comment. Former Section 270 is superseded by Sections 1860 (termination of conservatorship), 1861 (petition for termination of conservatorship), 1863 (hearing and judgment), and 2630 (continuing jurisdiction of court). See also Section 1845 (grounds for appointment of conservator for estate of missing person).

§ 271. Return of missing person; delivery of property

Upon the settling of the account of the trustee the court shall order the property of the missing person remaining in the hands of such trustee to be delivered to the owner thereof.

Comment. Former Section 271 is superseded by Sections 1863 (judgment terminating conservatorship) and 2630 (continuing jurisdiction of court).

§ 272. Administration of estate of missing person; accounting; delivery to administrator or executor

If, during the existence of a trust provided for in this chapter, administration of the estate of such missing person is had, under the provisions of Chapter 2 of this division¹ the court shall require an accounting as provided in section 270 and shall order the property of the missing person remaining in the hands of the trustee to be delivered to the administrator or executor of such estate.

Comment. Former Section 272 is superseded by Sections 1860 (termination of conservatorship upon death of conservatee), 2467 (care of estate pending delivery to personal representative), 2630 (continuing jurisdiction of court), and 2631 (disposition of assets on death of conservatee). See also Section _____ (administration of estate of person missing seven years).