

#L-1041

ns12
10/30/86

First Supplement to Memorandum 86-91

**Subject: Study L-1041 - Estate and Trust Code (Rules of Procedure--
Comments on Draft)**

Enclosed are comments of State Bar Team 2 on the draft statute relating to rules of procedure for estate administration attached to Memorandum 86-91. We will discuss these comments orally as the Commission reviews the draft at the meeting.

Respectfully submitted,

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TO: LRC LIAISON

FROM: TEAM TWO

DATE: October 7, 1986

RE: Re: LRC Memo 86-91; Study L-1041-Estate and Trust Code
(Rules of Procedure)

PRELIMINARY NOTE:

The proposed statute is an effort to develop a general body of procedural rules applicable to estate administration, with the ultimate intention to subsequently broaden these rules to Guardianship/Conservatorship and Trust proceedings. Appropriate specific exceptions to the general rules would be considered as needed.

GENERAL PROVISIONS:

Sec. 7200:

The four team members who participated in the conference call all generally favored a more liberal relaxation of rules of procedure in estate administration, including allowing the attorney to sign Petitions, as indicated in the Comment to the Section. We believe that the Attorney should also be able to sign other documents in probate, such as Verifications. This is now allowed in civil matters where the client resides outside the County.

Consistent with this more liberal philosophy it is suggested that the Commission consider making these applicable to the entire code, rather than only to divisions six and seven.

Sec. 7201:

The Team disagrees with the staff's effort to "attempt to limit proliferation of local rules". Local rules are a legitimate method whereby the respective Counties can adapt procedures to more efficiently accommodate the economic and social makeup of the particular region. A procedure deemed necessary for the large Los Angeles metropolitan area might not be appropriate for the more rural areas such as Humboldt County, and visa versa. The second sentence of subdivision (a) adequately provides safeguards to assure that local rules will not preempt general rules by requiring that the local Courts coordinate with the Judicial Counsel for any special practice or procedures.

Sec. 7203:

We see no reason why the discretionary awarding of costs ought not to be generalized in the Estate and Trust Code.

PETITIONS AND OTHER PAPERS:

Sec. 7251:

In those situations which require verification it should be clarified that the attorney can verify documents for the client in those situations authorized by this Code (i.e. the suggested expansion of Section 7200 above) and the Code of Civil Procedure.

We likewise do not understand the context of the State Bar's language quoted by the staff in its "query", but believe that the staff's interpretation of the language seems quite logical.

Sec. 7252:

We concur with the staff's thought that this section allowing the use of an Affidavit or verified Petition as evidence when offered in uncontested proceedings, ought to be generalized; but without knowing specifically where the staff would otherwise relocate this section believe that its current placement seems appropriate.

Sec. 7253:

Is this section necessary, as it seems to duplicate existing law under the Code of Civil Procedure authorizing the recording of Notice of the pendency of the proceeding if the proceeding effects real property?

HEARINGS:

Sec. 7302:

Absent specific knowledge on this topic the Team believes that the preferable rule should be that hearings are noticed unless the statute provides for an ex-parte hearing.

We note that the comment here and under several succeeding sections utilizes language that "It generalizes a number of provisions formerly found in the Probate Code." The Team feels that those sections should be specifically referenced to assist with a more accurate review and understanding of the proposed section; can the staff expand in situations where this type of general comment appears?

Sec. 7305:

Should there be a cross reference to other statutes, presumably Code of Civil Procedure sections, that govern travel and other costs when compelling attendance at hearings; and shouldn't there be distinctions between compelling attendance by individuals or parties to the proceeding rather than individuals who are nonparties to the proceeding?

Sec. 7206:

Again, if the proposed Section generalizes a number of former provisions of the Probate Code, should they not be specified in order to better understand the proposed change in law or the proposed consolidation of provisions?

Sec. 7307:

We generally favor not expanding those situations permitting new trials.

We do not specifically understand the second sentence of the comment or the reference in the sentence to Section 7306; is that Section reference accurate?

Sec. 7351:

Although the proposed Section apparently restates provisions of former Probate Code, is this Section actually necessary in the Estate and Trust Code?

Sec. 7352:

Because this briefly worded Section is new and because it effects the doctrine of finality of judgments in probate proceedings, perhaps this Section (together with the following Section 7353) should be reviewed by the Executive Committee because of significant policy issues. Specifically with regard to Section 7352, are there not some definite time limitations prescribed by the Code of Civil Procedure after which no Orders can be modified? Again, the comment references generalizations to former provisions, without specifically setting them forth. We are also troubled by the terms "renew", "modified", and "terminate", since as used in their present context the finality of an Order could never be guaranteed.

Sec. 7353:

We believe the Section should be redrafted to provide specific guidelines when challenging orders which are otherwise final, pursuant to subparagraph (b). Perhaps case law including Estate of Anderson, 149 Cal.App.3d 336, (1983), can help provide statutory definitions for what constitutes "any material fact".

We concur with the general thrust of subsection (b) that the misrepresentation of the material fact would have to effect the substance of the Order, but prefer to see clarification of a very ridged standard in order to prevent a perceived fear that the Section could be widely abused.

Does the word "directly" as utilized in subparagraph (a) intend to add a limiting feature to the proposed provisions?

Sec. 7356:

Inasmuch as the mandatory recording requirements prescribed by subdivision (c) do not apply to a lease of property, why not merely delete in (a)(1) a "lease" from an includable definition of "transaction". On the other hand, if certain leases beyond a prescribed time are to be included in the definition, and hence require these orders to be recorded, then the term "lease" perhaps should be further defined.

The Team questioned the impact caused by failure of the personal representative to follow the recitation and recording requirements of subdivision (c) upon an innocent third party. The staff's note also questions the effect of non-compliance upon the validity of the transaction. Should the Section therefore be redrafted to help clarify these concerns?

Apparently some practitioners question whether a Deed Upon Distribution is necessary to transfer title to real property distributed pursuant to a Decree of Distribution. Perhaps to help eliminate the necessity of this practice, the last sentence in the second paragraph of the Comment could be reworded to state that "recordation of an Order for Distribution of Real Property transfers title to the recipient thereof and has the effect of a receipt by the distributee."

If there are additional questions or comments, please feel free to contact me.

cc: All members of Team 2
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