

Memorandum 87-77

Subject: Study L-940 - Substitution and Delegation of Powers of
Fiduciaries (Staff Draft)

The Fiduciaries' Wartime Substitution Law was first enacted as an urgency measure in 1943 and was codified as Code of Civil Procedure Sections 1700-1706 in 1953. The law provides for appointment of a substitute fiduciary (including a trustee, personal representative, and guardian or conservator), or for delegation of powers to another fiduciary, where the original fiduciary is unable to act because of engagement in war service. The law provides for resumption of authority by the original fiduciary after war service ends.

The urgency that led to enactment of this measure was declared to be:

In numerous court and private trusts which are being administered by fiduciaries in war service, the interests of the persons beneficially interested therein are being jeopardized through the consequent total or partial inability of the fiduciary, or of a cofiduciary or consultant, to perform his duties. These trusts involve a sufficient number of persons and amount of property as to constitute a matter of public concern. The public is likewise interested in freeing property from the incidental restraint on the power of alienation which results from the inability of fiduciaries and consultants to perform their customary or required functions.

The "court and private trusts" mentioned in this statement include trusts, probate estates, guardianships and conservatorships, assignments, receiverships, depositaries, and "every other trust, agency, fiduciary relationship, or representative capacity." Fin. Code § 1581.

The Commission should decide whether this statute serves a useful purpose any longer and, if so, in what form it should be preserved. It is clear that as presently drafted the statute has little or no relevance to anyone, since it relates primarily to fiduciaries absent during wartime. Arguably, even during wartime the statute would not be necessary, since the main fiduciary statutes (trust law, probate

law, guardianship and conservatorship law) provide for appointment of temporary fiduciaries where necessary, and the court's general authority to provide equitable relief in other types of fiduciary arrangements may be adequate. However, the authority to appoint a temporary fiduciary is generally conceived in terms of an interim appointment before rather than during the fiduciary relationship. Appointment of a temporary fiduciary was evidently not felt to be an adequate remedy in the 1940's.

The wartime substitution law does provide a fairly comprehensive substitution and delegation procedure, with clear jurisdictional provisions, notices, immunities, etc. Such a statutory scheme could be useful and could clarify points that might otherwise be the subject of litigation.

For purposes of Commission review, the staff has redrafted the Fiduciaries' Wartime Substitution Law as a general statute governing substitution and delegation of powers of fiduciaries, to be located among the general provisions of the Probate Code. It would apply to all fiduciaries at any time, and would not be limited to wartime. The Commission should review this draft before making a determination as to the disposition of the wartime substitution law.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Staff Draft

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- Prob. Code § 45 (added). "Instrument" defined
- Prob. Code § 81 (added). "Transferor" defined
- Prob. Code § 21100 (repealed). Definitions

REPEALER

- Code Civ. Proc. §§ 1700-1706 (repealed). Fiduciaries' Wartime Substitution Law

Probate Code §§ 350-388 (added). Substitution and Delegation of Powers of Fiduciaries

SEC. . Part 11 (commencing with Section 350) is added to Division 2 of the Probate Code, to read:

PART 11. SUBSTITUTION AND DELEGATION OF POWERS OF FIDUCIARIES

CHAPTER 1. GENERAL PROVISIONS

Article 1. Scope of Part

§ 350. Application of part

350. This part applies to all fiduciaries, whether appointed or acting before, on, or after July 1, 1989.

Comment. Section 350 supersedes former Code of Civil Procedure Section 1706 (Fiduciaries' Wartime Substitution Law). This part applies to personal representatives, trustees, guardians, conservators, and other legal representatives. See Section 39 ("fiduciary" defined).

CROSS-REFERENCES

Definitions

Fiduciary § 39

Note. *Since this statute envisions the temporary inability of a fiduciary to act, it might make sense to limit it to natural persons.*

§ 351. Provision in instrument controls

351. This part does not apply to the extent an otherwise valid provision in an instrument provides a different or contrary rule or is otherwise inconsistent with this part.

Comment. Section 351 supersedes former Code of Civil Procedure Section 1705 (Fiduciaries' Wartime Substitution Law).

CROSS-REFERENCES

Definitions

Instrument § 45

Article 2. Definitions

§ 355. Application of definitions

355. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this part.

Comment. Section 355 supersedes former Code of Civil Procedure Section 1700.1 (Fiduciaries' Wartime Substitution Law).

§ 356. Consultant

356. "Consultant" means a person, other than a fiduciary, designated in an instrument to advise or direct the fiduciary concerning the estate, or whose consent or approval is required for a purchase, sale, exchange, or other transaction by the fiduciary, and includes a transferor who reserves such power.

Comment. Section 356 supersedes former Code of Civil Procedure Section 1700.6 (Fiduciaries' Wartime Substitution Law).

CROSS-REFERENCES

Definitions

Estate § 357
Fiduciary § 39
Instrument § 45
Transferor § 81

§ 357. Estate

357. "Estate" means a trust estate, a decedent's estate, a guardianship or conservatorship estate, or other property that is the subject of a donative transfer.

Comment. Section 357 is intended for drafting convenience.

CROSS-REFERENCES

Definitions

Property § 62

§ 358. Interested person

358. "Interested person" means, in addition to the meaning given that term in Section 48, a person having a property right in or claim against a guardianship or conservatorship estate or other estate that may be affected by the proceeding.

Comment. Section 358 is intended for drafting convenience.

GROSS-REFERENCES

Definitions

Estate § 357
Person § 56

§ 359. Original fiduciary

359. "Original fiduciary" means a fiduciary temporarily unable to act for whom another fiduciary is substituted or who makes a delegation of power under this part.

Comment. Section 359 is intended for drafting convenience.

GROSS-REFERENCES

Definitions

Fiduciary § 39

Article 3. Procedural Provisions

§ 360. Jurisdiction of proceedings

360. Proceedings under this part are in the court having jurisdiction over the estate or, if none, any court in which jurisdiction of the estate would be proper.

Comment. Section 360 supersedes the second sentence of former Section 1701 and the third sentence of former Code of Civil Procedure Section 1702 (Fiduciaries' Wartime Substitution Law). For the proper court in a trust estate, see Sections 17000-17005. For the proper court in a decedent's estate, see Section 301. For the proper court in a guardianship or conservatorship estate, see Sections 2200-2203.

GROSS-REFERENCES

Definitions

Estate § 357

§ 361. Notice of hearing

361. Notice of a hearing under this part shall be mailed at least 15 days before the hearing to each fiduciary and consultant and to all of the following persons:

(a) In the case of a trust estate, to each known beneficiary, subject to the provisions of Chapter 2 (commencing with Section 15800) of Part 3 of Division 9.

(b) In the case of a decedent's estate, as provided in Section 1220 to each known heir or devisee whose interest in the estate would be affected by the proceedings.

(c) In the case of a guardianship or conservatorship estate, as provided in Section 1460.

(d) In the case of other estates, to such additional interested persons as the court may require.

Comment. Section 361 supersedes former Code of Civil Procedure Section 1701.1, the second sentence of former Code of Civil Procedure Section 1702.1, the introductory portion of former Code of Civil Procedure Section 1703.1, the first sentence of former Code of Civil Procedure Section 1703.2, and former Code of Civil Procedure Section 1704 (Fiduciaries' Wartime Substitution Law). Notice under this part is subject to general provisions governing notice under this code. See, e.g., Sections 1201 (notice not required to be given to oneself or persons joining in petition), 1202 (additional notice on court order), 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1260-1265 (proof of giving notice).

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

Definitions

Beneficiary § 24

Consultant § 356

Devisee § 34

Estate § 357

Fiduciary § 39

Heirs § 44

Interested person § 358

Trust § 82

CHAPTER 2. APPOINTMENT OF SUBSTITUTE FIDUCIARY

§ 370. Appointment authorized

370. If a fiduciary is or will be temporarily unable to act, on petition of the fiduciary, a cofiduciary, or an interested person, the court may do any of the following:

(a) Appoint a substitute fiduciary.

(b) Order a suspension of the powers and duties of the original fiduciary for the period the original fiduciary is unable to act and until further order of the court.

(c) Order an account by the original fiduciary.

Comment. Subdivision (a) of Section 370 supersedes the first sentence of former Code of Civil Procedure Section 1701 (Fiduciaries' Wartime Substitution Law). Subdivisions (b) and (c) supersede the first sentence of former Code of Civil Procedure 1701.2 (Fiduciaries' Wartime Substitution Law). Appointment of a substitute fiduciary is authorized under this chapter where the original fiduciary is temporarily unable to act for any reason, and is not limited to cases where the original fiduciary is engaged in war service. Where there is a cofiduciary, appointment of a substitute fiduciary may be unnecessary, since the cofiduciary may be authorized to act. See, e.g., Sections 2105 (authority of joint guardian or conservator to act), 9630 (authority of joint personal representative to act), 15622 (temporary incapacity of cotrustee). This section does not apply to the extent the will, trust, or other instrument provides a different rule. Section 351 (provision in instrument controls).

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

Definitions

Fiduciary § 39

Interested person § 358

Original fiduciary § 359

Jurisdiction of proceedings § 360

Notice of hearing § 361

§ 371. Powers of substitute

371. A substitute fiduciary has all the powers, including discretionary powers, that the original fiduciary might have exercised, except powers that the court determines are purely personal to the original fiduciary.

Comment. Section 371 supersedes former Code of Civil Procedure Section 1701.4 (Fiduciaries' Wartime Substitution Law).

CROSS-REFERENCES

Definitions

Fiduciary § 39

Original fiduciary § 359

Note. *The Fiduciaries' Wartime Substitution Law speaks in terms of the powers of the substitute fiduciary, but is silent as to duties. Presumably the substitute is subject to the same duties as the original fiduciary. This might be worth stating expressly.*

§ 372. Bond of substitute

372. Except as otherwise ordered by the court, a substitute fiduciary shall give a bond in the manner and to the extent provided by law for the original fiduciary.

Comment. Section 372 restates former Code of Civil Procedure Section 1701.6 (Fiduciaries' Wartime Substitution Law), with the addition of court authority to vary the bond requirement with the circumstances of the particular case. For example, the instrument may have waived the bond for the original fiduciary but this would be inappropriate for the substitute fiduciary.

CROSS-REFERENCES

Definitions

Fiduciary § 39

Original fiduciary § 359

§ 373. Reinstatement of original fiduciary

373. When the original fiduciary is again able to act, if the estate has not been closed, the original fiduciary, on petition, is entitled to reinstatement. On reinstatement, the substitute fiduciary shall be removed and may be discharged on conditions prescribed by the court.

Comment. Section 373 supersedes the second and third sentences of former Code of Civil Procedure Section 1701.2 (Fiduciaries' Wartime Substitution Law).

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

Definitions

Estate § 357

Fiduciary § 39

Original fiduciary § 359

Jurisdiction of proceedings § 360

Notice of hearing § 361

§ 374. Immunity of fiduciary for acts of predecessor

374. A substitute fiduciary or an original fiduciary reinstated under Section 373 does not have any responsibility for nor, unless expressly directed by the court, any duty to inquire into, the acts or omissions of the predecessor fiduciary.

Comment. Section 374 supersedes former Code of Civil Procedure Section 1701.7 (Fiduciaries' Wartime Substitution Law).

CROSS-REFERENCES

Definitions

Fiduciary § 39

Original fiduciary § 359

CHAPTER 3. DELEGATION OF POWERS

Article 1. Delegation by Fiduciary

§ 380. Delegation authorized

380. (a) A fiduciary who is or will be temporarily unable to act may delegate the fiduciary's powers, including discretionary powers, to a fiduciary who is able to act. Delegation may be made for the period during which the original fiduciary is unable to act and not to exceed six months following the expiration of that period.

(b) Approval of the court, on petition of the original fiduciary, the delegate, or an interested person, is required for delegation.

Comment. Section 370 supersedes former Code of Civil Procedure Section 1702 and the first sentence of former Section 1702.1 (Fiduciaries' Wartime Substitution Law). Delegation of power is authorized under this article where the original fiduciary is temporarily unable to act for any reason, and is not limited to cases where the original fiduciary is engaged in war service. Where there is a cofiduciary, delegation of power and authority may be unnecessary, since the cofiduciary may be authorized to act. See, e.g., Sections 15622 (temporary incapacity of cotrustee), 9630 (authority of joint personal representative to act), 2105 (authority of joint guardian or conservator to act). This section does not apply to the extent the will, trust, or other instrument provides a different rule. Section 351 (provision in instrument controls).

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

Definitions

Estate § 357

Fiduciary § 39

Interested person § 358

Original fiduciary § 359

Jurisdiction of proceedings § 360

Notice of hearing § 361

§ 381. Limitations on delegation

381. The right of delegation does not exist to the extent the court determines that powers to be delegated are purely personal to the original fiduciary.

Comment. Section 381 supersedes former Code of Civil Procedure Section 1702.2 (Fiduciaries' Wartime Substitution Law). Where there is a cofiduciary, delegation of power may be unnecessary, since the cofiduciary may be authorized to act. See,

e.g., Sections 15622 (temporary incapacity of cotrustee), 9630 (authority of joint personal representative to act), 2105 (authority of joint guardian or conservator to act).

CROSS-REFERENCES

Definitions

Original fiduciary § 359

§ 382. Resumption of powers

382. On the expiration of the period the original fiduciary is unable to act, the court may, on petition of the original fiduciary, authorize the original fiduciary to resume the exercise of the fiduciary functions, and the delegated powers cease.

Comment. Section 382 supersedes the third sentence of former Code of Civil Procedure Section 1702.1 (Fiduciaries' Wartime Substitution Law).

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

Definitions

Fiduciary § 39

Original fiduciary § 359

Jurisdiction of proceedings § 360

Notice of hearing § 361

§ 383. Immunity of fiduciary for acts of delegate

383. The original fiduciary has no responsibility for the acts or omissions of the delegate.

Comment. Section 383 restates former Code of Civil Procedure Section 1702.4 (Fiduciaries' Wartime Substitution Law) without substantive change.

CROSS-REFERENCES

Definitions

Original fiduciary § 359

Article 2. Delegation by Consultant

§ 385. Delegation authorized

385. (a) A consultant who is or will be temporarily unable to act may delegate the powers of the consultant, including discretionary powers, to a coconsultant who is able to act, or to the fiduciary. The procedure for delegation by a fiduciary governs delegation by a consultant.

(b) The right of delegation does not exist to the extent the court determines that powers to be delegated are purely personal to the consultant. Such powers are suspended until their exercise is resumed pursuant to this article.

Comment. Section 385 supersedes former Code of Civil Procedure Section 1703 (Fiduciaries' Wartime Substitution Law). Delegation of power is authorized under this article where the original consultant is temporarily unable to act for any reason, and is not limited to cases where the original consultant is engaged in war service. This section does not apply to the extent the will, trust, or other instrument provides a different rule. Section 351 (provision in instrument controls).

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

Definitions

Consultant § 356

Fiduciary § 39

Jurisdiction of proceedings § 360

Notice of hearing § 361

§ 386. Suspension of consultant

386. If a consultant temporarily unable to act does not delegate the powers of the consultant, the court, on petition of the fiduciary or an interested person, may do either of the following:

(a) Suspend the consultant's powers for the period during which the consultant is unable to act and not to exceed six months following the expiration of that period.

(b) Confer the powers, except discretionary powers that the court determines are purely personal to the consultant, on a coconsultant who is able to act, or the fiduciary, or any other qualified person.

Comment. Section 386 supersedes former Code of Civil Procedure Section 1703.1 (Fiduciaries' Wartime Substitution Law). Suspension of power is authorized under this article where the original consultant is temporarily unable to act for any reason, and is not limited to cases where the original consultant is engaged in war service.

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

Definitions

Consultant § 356

Fiduciary § 39

Interested person § 358

Person § 56

Jurisdiction of proceedings § 360

Notice of hearing § 361

§ 387. Resumption of powers

387. If a consultant has delegated or the court has suspended the powers of the consultant, the court may, on petition by the consultant within six months following the expiration of the period during which the consultant is unable to act, authorize the consultant to resume the exercise of the consultant's functions. All powers delegated to or conferred on other persons thereupon ceases.

Comment. Section 387 supersedes former Code of Civil Procedure Section 1703.2 (Fiduciaries' Wartime Substitution Law).

CROSS-REFERENCES

Clerk to set matter for hearing § 1285
Definitions
 Consultant § 356
 Person § 56
Jurisdiction of proceedings § 360
Notice of hearing § 361

§ 388. Immunity of consultant for acts of delegate

388. A consultant delegating under this article has no responsibility for the acts or omissions of the delegate.

Comment. Section 378 restates former Code of Civil Procedure Section 1703.3 (Fiduciaries' Wartime Substitution Law) without substantive change.

CROSS-REFERENCES

Definitions
 Consultant § 356

CONFORMING CHANGES

Prob. Code § 39 (added). "Fiduciary" defined

SEC. . Section 39 is added to the Probate Code, to read:

39. "Fiduciary" means personal representative, trustee, guardian, conservator, or other legal representative.

Comment. Section 39 continues former Section 21100(a) [AB 708] without change and restates former Code of Civil Procedure Section 1700.3 (Fiduciaries' Wartime Substitution Law) without substantive change. The defined term is used in Sections 350-388 (substitution and delegation of powers of fiduciaries) as well as in Division 11 (commencing with Section 21101) (construction of wills, trusts, and other instruments).

CROSS-REFERENCES

Definitions

Personal representative § 58

Trustee § 84

Prob. Code § 45 (added). "Instrument" defined

SEC. . Section 45 is added to the Probate Code, to read:

45. "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.

Comment. Section 45 continues former Section 21100(b) [AB 708] without change. The defined term is used in Sections 350-388 (substitution and delegation of powers of fiduciaries) as well as in Division 11 (commencing with Section 21101) (construction of wills, trusts, and other instruments).

CROSS-REFERENCES

Definitions

Beneficiary § 24

Property § 62

Trust § 82

Will § 88

Prob. Code § 81 (added). "Transferor" defined

SEC. . Section 81 is added to the Probate Code, to read:

81. "Transferor" means the testator, settlor, grantor, owner, or other person who executes an instrument.

Comment. Section 81 continues former Section 21100(c) [AB 708] without change. The defined term is used in Sections 350-388 (substitution and delegation of powers of fiduciaries) as well as in Division 11 (commencing with Section 21101) (construction of wills, trusts, and other instruments).

CROSS-REFERENCES

Definitions

Instrument § 45

Prob. Code § 21100 (repealed). Definitions

SEC. . Section 21100 [AB 708] of the Probate Code is repealed.

~~21100. Unless the provision or context otherwise requires, as used in this division:~~

~~(a) "Fiduciary" personal representative, trustee, guardian, conservator, or other legal representative.~~

~~(b) "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.~~

~~(c) "Transferor" means the testator, settlor, grantor, owner, or other person who executes an instrument.~~

Comment. Subdivision (a) of former Section 21100 is continued in Section 39 without change. Subdivision (b) is continued in Section 45 without change. Subdivision (c) is continued in Section 81 without change.

Note. *Headings for Chapters 1 and 2 should also be repealed.*

REPEALER

Code of Civil Procedure §§ 1700-1706 (repealed). Fiduciaries' Wartime
Substitution Law

SEC. _____. Title 10b (commencing with Section 1700) of Part 3 of the Code of Civil Procedure is repealed.

Comment. The Fiduciaries' Wartime Substitution Law, former Sections 1700-1706, is superseded by Probate Code Sections 350-388 (substitution and delegation of powers of fiduciary). A disposition table is set out below:

<u>Code of Civil Procedure</u>	<u>Probate Code</u>
1700	Omitted
1700.1	355
1700.2	Omitted
1700.3	39
1700.4	82
1700.5	Omitted
1700.6	356
1700.7	Omitted
1700.8	Omitted
1701	370(a), 360
1701.1	361
1701.2	370(b)-(c), 373
1701.3	Omitted
1701.4	371
1701.5	Omitted
1701.6	372
1701.7	374
1702	380, 360
1702.1	380(b), 361, 382
1702.2	381
1702.3	Omitted
1702.4	383
1703	385
1703.1	386, 361
1703.2	387, 361
1703.3	388
1704	1041, 361
1704.1	1260-1265
1705	351
1706	350