

Memorandum 87-1

Subject: Study L-1027 - Estate and Trust Code (Accounts—draft of tentative recommendation)

Attached to this memorandum is a draft of the tentative recommendation relating to accounts. The draft incorporates Commission decisions made at previous Commission meetings where this material was first considered.

The Commission has received a few letters relating to accounts in probate. See Exhibits 1-3. The points made in these letters are raised in Notes following the sections of the draft to which they relate.

Our objective is to review the draft to make whatever changes appear necessary in order to prepare the tentative recommendation for distribution for comment.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

MARDER & MARDER

ATTORNEYS AT LAW

500 SOUTH SEPULVEDA BOULEVARD

SUITE 409

LOS ANGELES, CALIFORNIA 90049

MUNCIE D. MARDER
KENNETH A. MARDERTELEPHONES:
(213) 476-6265
(213) 879-5430

December 19, 1984

John Demouilly, Esq.
California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, California 94306

Re: Attorney's fees on Motion to Surcharge Personal
Representative

Dear Mr. Demouilly:

I have recently been involved in two cases representing beneficiaries in a motion to surcharge corporate executors. These brought to my attention certain inequities in the law that bother me. I spoke to Commissioner Ann Stodden about them, and she suggested I write directly to you.

In the ordinary course of events, beneficiaries who are dissatisfied with the accounting or other actions of the personal representative of a decedent's estate retain other counsel to file objections to the accounting and to surcharge the executor and/or its attorneys. Sometimes the issues are extensive and complex, and the hearing may take several days or more. Ordinarily the Court will order distribution of the remainder of the estate but withhold a certain portion from distribution to cover attorney's fees and costs should the personal representative prevail. If the beneficiary prevails, he must pay his own attorney's fees.

Although it is not glaringly obvious, the end result is that the beneficiaries pay their attorney's fees and the executor's attorney's fees if the beneficiaries lose, and the beneficiaries pay their own attorney's fees if they win.

It seems to me that this is contrary to the general public policy that attorney's fee statutes are reciprocal in nature except in those cases where a public benefit is conferred.

John Demouilly, Esq.

-2-

December 19, 1984

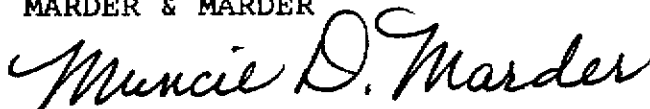
In the surcharge cases the opposite occurs. The personal representative has to pay only its own attorney's fees when it does not prevail. The beneficiaries, on the other hand, must pay their own attorney's fees win or lose, and the estate distribution is lessened by the personal representative's attorney's fees when the beneficiaries do not prevail.

I have had to explain this inequity to several of my clients, and have found that it has a very chilling effect on their willingness to challenge what they and I perceive to be a wrongful or negligent act of the personal representative. I believe this is something that could be remedied by appropriate legislation clarifying the source and extent of attorney's fees to be awarded in such cases.

I, along with many other probate attorneys I have spoken to, would appreciate your Committee's consideration of these issues.

Sincerely yours,

MARDER & MARDER

A handwritten signature in cursive script that reads "Muncie D. Marder".

Muncie D. Marder

MDM/wrr

cc: Commissioner Ann Stodden, LASC

LAW OFFICES OF
HOWELL & HALLGRIMSON
 A PROFESSIONAL CORPORATION
 ONE THOUSAND COMMERCIAL BUILDING
 28 NORTH FIRST STREET
 SAN JOSE, CALIFORNIA 95113
 (408) 275-6300

PLEASANTON OFFICE:
 4637 CHABOT DRIVE
 SUITE 112
 PLEASANTON, CA 94566
 (415) 463-9430

STEVEN L. HALLGRIMSON
 DIXON R. HOWELL
 JOSEPH P. DICICUCCIO
 ERIC WONG
 ROGER R. BRANDON
 DAVID A. MARION
 HOWARD S. MILLER
 LINDA M. LYONS
 JANE R. RELYEA
 PATRICIA D. LIVELY
 RONALD I. RAINEY
 DAVID C. BURGESS

LAWRENCE L. LOPARDO
 JAMES J. ROWAN
 CARLA HOLT
 STEPHEN G. STWORA
 DONNA BECKER
 MARY E. ARAND
 TERESA L. LAI
 ELLEN A. STALEY
 KATHRYN J. GUTIERREZ
 MARK L. HIRSCH
 KEVIN J. SHANNON

April 3, 1985

FILE NO.

Mr. Nathaniel Sterling
 Law Revision Commission
 4000 Middlefield Road
 Suite D-2
 Palo Alto, CA 94303

Re: Probate Notice Requirements

Dear Mr. Sterling:

It has come to the attention of the Estate Planning, Probate and Trust Section of the Santa Clara County Bar Association that there may be some ambiguities in the California Probate Code requirements for notice at the time of final distribution. Specifically, sections 1200.5(11) and (12) require notice of an account and a petition for distribution be provided to any personal representative who is not the petitioner and to anyone else who has filed Requests For Special Notice. On the other hand, sections 926 and 1020 require notice of hearing on an accounting or petition for final distribution be provided to those persons whose interest in the estate is affected by the matter being heard. It is the practice in Santa Clara County to require compliance with sections 926 and 1020, that is, to require notice to all distributees of the petition for final distribution. However, some confusion does exist because section 1200.5 appears not to require such notice.

We would appreciate your attention to this matter in connection with your current revision of the California Probate Code. Please do not hesitate to contact me should you need any further information or clarification.

Very truly yours,



 Carla Holt

CH:tlp

cc: Honorable Charles Gordon
 Mr. John DeMouly
 (List Con't on Next Page)

Mr. Nathaniel Sterling
April 3, 1985
Page 2

cc: State Bar Section Consultants:

Theodore J. Cranston
Charles A. Collier, Jr.
James A. Willett
H. Bruce Friedman
Lloyd W. Homer
John S. Hartwell
D. Keith Bilter

Richard Gorini

MEMORANDUM

Date: April 20, 1986

FROM: Irving Kellogg
821 Monte Leon Drive
Beverly Hills, CA 90210
213-551-9127

To: California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, Ca 94303-4739

Subject: Study L-1028, Independent Administration of Estates,
March 1986, and Study L-1010, Opening Estate Administration,
March 1986.

Comments:

Study L-1028.

1. Page 4. I commend the Commission's development of a Statutory Waiver of Advice of Proposed Action Form, and the expansion of exemptions to over the counter securities as stated.

The Commission should seek to insert more Statutory Forms into the Probate Code so that there will be uniformity by statute. This statutory uniformity should minimize lawyers' failures to comply accurately with requirements and recipients' challenges to carelessly prepared forms.

Statutory Form for Probate Accounting. The Commission should consider the development of a standard accounting format for probate accountings. The benefits of such a standard are inestimable:

(1). All probate courts or divisions could apply computerized review and court training could be simplified. Therefore, court administration would be expedited.

(2). Lawyers' would not be wildly creative or ignorantly deficient, thereby causing delays and costs in administration.

(3). Beneficiaries could refer to a standard or confer with their CPAs who would learn the statutory standard.

(4). CPAs could assist executors in accounting matters, reducing expenses of administration. The same benefit would apply to paralegals who would have a statutory form to rely on.

(5). Communication between probate court reviewers and attorneys would be expedited.

These benefits or advantages are similar to those derived from the Principal and Income Law that brought order out of chaos in that area. In proceeding, if the suggestion is considered to be worthwhile, the Commission should enlist the aid of experts in fiduciary accounting.

The danger is that corporate fiduciaries with computer designed programs would battle this suggestion vigorously. The Commission should bear in mind that very few beneficiaries or their CPAs understand those computer designed reports. For certain, very few lawyers understand them.

I have enclosed Chapter 32 - Fiduciary Accounting from my book, How To Find Negligence and Misrepresentations in Financial Statement. You may find the chapter valuable in considering my suggestion about uniform fiduciary accounting in California.

2. Page 33. The form for advice of proposed action.

This is excellent. It reflects current Plain English principles in every respect.

3. Page 36. WAIVER OF ADVICE OF PROPOSED ACTION.

Having been the original draftperson of the Statutory Wills, and having struggled with my colleagues over the need to simplify the warning that appears on both of them, I am sensitive to this type of warning. The following is my suggestion about improvements in that warning. I have, in my corrections, switched some passive voice structures to active voice and inserted personal pronouns so that readers identify themselves in the warning.

WAIVER OF PROPOSED ACTION

WARNING. THE LAW REQUIRES THAT THE PERSONAL REPRESENTATIVE MUST GIVE YOU NOTICE OF CERTAIN ACTIONS THE PERSONAL REPRESENTATIVE PROPOSES TO TAKE WITH RESPECT TO PROPERTY OF THE ESTATE. THE PERSONAL REPRESENTATIVE MUST GIVE YOU THAT NOTICE BEFORE TAKING THAT ACTION.

YOU HAVE THE RIGHT (1) TO OBJECT TO A PROPOSED ACTION, AND (2) TO REQUIRE THAT THE COURT MUST SUPERVISE THAT PROPOSED ACTION. IF YOU DO NOT OBJECT BEFORE THE PERSONAL REPRESENTATIVE ACTS, THEN YOU LOSE THAT RIGHT

AND YOU CANNOT OBJECT LATER.

IF YOU SIGN THIS FORM, YOU GIVE UP YOUR RIGHT TO.....

IF YOU SIGN THIS FORM, YOU MUST ALSO CHECK ONE OF THE BOXES BELOW TO INDICATE WHETHER YOU GIVE UP:

- (1) YOUR RIGHT....
- (2) YOUR RIGHT....

YOU HAVE THE RIGHT TO CANCEL THIS WAIVER AT ANY TIME, BY NOTIFYING THE PERSONAL REPRESENTATIVE ORALLY OR IN WRITING THAT YOU CANCEL THIS WAIVER.

.....

3. BY SIGNING BELOW, I WAIVE MY RIGHT...(CHECK ONLY ONE BOX.....

(SIGNATURE OF PERSON SIGNING WAIVER)

Print your name: _____

Your address: _____

Study L-1010

1. Page 5. Competence of person appointed personal representative.

Has the problem of the inherent and latent conflict of interest between a spouse of a later marriage and the decedent's children of a former marriage been discussed or thought about. This is one of the more troublesome areas in both estate planning and decedents' administration.

Not directly related to the competence of the person appointed personal representative, but a problem indirectly related is the problem of a corporate fiduciary choosing the attorney who drafted the decedent's will to be the attorney to represent the corporate fiduciary. This occurs with disturbing regularity although there may be no relationship between that attorney and the natural objects of the decedent's bounty. A court case in San Diego within the past two years confirmed the fiduciary's right to choose its attorney. The facts, however, were egregious. The beneficiaries were, in my opinion, justifiably outraged by the fiduciary's blatant backscratching.

Query, then: Should there be some rule as to the requirement for the fiduciary to consider in its appointment of

an attorney the relationship of the attorney to the decedent,
considering the attorney's expertise in probate????

Thank you for sending these reports.

Sincerely yours,

Irving Kellogg
Irving Kellogg

12/08/86

Staff Draft

Tentative Recommendation
relating to
Estate and Trust Code:

ACCOUNTS

The provisions of existing law governing accounts¹ are generally restated in the new code without substantive change. There are a few specific changes worthy of note:

Contents of account. The existing probate account includes a number of items that are of limited value and fails to require some information that would make the account a more descriptive and useful document. The new code revises the account contents somewhat to make the probate account more analogous to a standard type of balance sheet.²

The account will include a summary statement of the significant aspects of the administration.³ The summary will be supported by schedules that break down each summary item into its component parts. For instance, the summary item of receipts might be broken down into the totals of interest income, dividend income, royalties received, and miscellaneous receipts. The exact breakdown will vary, depending on the nature of the estate. It will be unnecessary to show in the summary more than the total amount of each component part making up the total.⁴

1. Prob. Code §§ 920-933.

2. The concepts are derived from Craig, California Probate Accounting Procedures, 39 So. Cal. L. Rev. 316 (1966).

3. The summary includes, in addition to property in the estate and disposition of creditor claims, the amount of receipts and disbursements and the gains and losses on disposition of property.

4. For illustrative material, see American College of Probate Counsel, National Fiduciary Accounting Standards (1980).

This scheme encourages the use of sound bookkeeping practices. It will also save the time and expense of a narrative report of the details of each transaction. In case greater detail is required by a beneficiary or other interested person, the court is authorized by the new code to require the personal representative to submit documents supporting the account for inspection and audit.

Contest of account. In a contest of an account an interested person may except to settlement of an allowed claim; existing law permits a jury trial on issues of fact in the contest.⁵ The new code eliminates the jury trial provision. A jury trial on such a matter is an unnecessary imposition on the parties, the courts, and the persons required to served as jurors, as well as an unwarranted expense.

The new code also makes clear the right of an interested person to obtain court review of actions by the personal representative through a contest of an account, in the interest of procedural efficiency.

5. Prob. Code § 928.

OUTLINE OF STATUTE

PART 8. ACCOUNTS

CHAPTER 1. GENERAL PROVISIONS

- § 10900. Duty to account
- § 10901. Contents of account
- § 10902. Production of supporting documents

CHAPTER 2. WHEN ACCOUNT REQUIRED

- § 10950. Court ordered account
- § 10951. Final account
- § 10952. Account after authority terminated
- § 10953. Account where personal representative dies or becomes incompetent
- § 10954. Waiver of account

CHAPTER 3. SETTLEMENT OF ACCOUNT

- § 11000. Setting account for settlement
- § 11001. Notice of hearing
- § 11002. Contest of account
- § 11003. Hearing on account
- § 11004. Settlement of claim not properly made or allowed
- § 11005. Effect of order settling account

CHAPTER 4. COMPELLING ACCOUNT

- § 11050. Sanction for failure to account
- § 11051. Citation
- § 11052. Punishment for contempt

PART 8. ACCOUNTS

CHAPTER 1. GENERAL PROVISIONS

§ 10900. Duty to account

10900. The personal representative shall account for all of the property in the decedent's estate that comes into the personal representative's possession and for all the income, issues, and profits of the property.

Comment. Section 10900 restates the first portion of the first sentence of former Probate Code Section 920 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62

§ 10901. Contents of account

10901. An account shall be verified, shall include a report of the administration, and shall show all of the following:

(a) A summary statement, together with supporting schedules, of:

(1) The property in the inventory, including property in any supplemental inventory.

(2) The amount of receipts, excluding capital items.

(3) Gains on sales, or other disposition of property.

(5) The amount of disbursements.

(6) Losses on sales, or other disposition of property.

(7) The amount of property remaining.

(b) Creditor claims, including the name of each claimant, the nature and due date of the claim, and the action of the personal representative on the claim. If the personal representative pays a claim for less than its full amount, the personal representative may have credit only for the amount actually paid.

(c) All other matters necessary to show the condition of the estate.

[(d) That during the period covered by the account the personal representative has kept all cash in the possession or control of the personal representative invested in interest-bearing accounts or investments authorized by law, except such amounts of cash as are reasonably necessary for the orderly administration of the estate unless otherwise provided by will.]

Comment. [Subdivisions (a)-(c) of] Section 10901 supersede[s] the first sentence of former Probate Code Section 921.

Subdivision (a) is based on concepts developed in Craig, California Probate Accounting Procedures, 39 So. Cal. L. Rev. 316 (1966). In the accounting, each schedule should contain a breakdown of the summary item into its component parts. For instance, the summary item of receipts might be broken down into the totals of interest income, dividend income, royalties received, and miscellaneous receipts. The exact breakdown would vary, depending on the nature of the estate. It would be unnecessary to show in the summary more than the total amount of each component part making up the total. For illustrative material, see American College of Probate Counsel, National Fiduciary Accounting Standards (1980).

The last sentence of subdivision (b) continues the last portion of the first sentence of former Probate Code Section 583 without substantive change.

[Subdivision (d) continues former Probate Code Section 920.3 without substantive change.]

CROSS-REFERENCES

Definitions

[Account § 21]
Personal representative § 58
Property § 62
[Will § 88]

Note. A conforming change will be made in the provisions governing the account in a guardianship or conservatorship proceeding. The staff is investigating whether this provision may also appropriately be applied to trusts.

Subdivision (d) continues Probate Code Section 920.3, which is phrased as an accounting requirement. However, it is really a substantive provision and should be located among the duties of the personal representative rather than among items to be included in the account.

Irving Kellogg has written to the Commission urging the Commission to consider the development of a standard format for probate accounts. "The benefits of such a standard are inestimable:

"(1). All probate courts or divisions could apply computerized review and court training could be simplified. Therefore, court administration would be expedited.

"(2). Lawyers would not be wildly creative or ignorantly deficient, thereby causing delays and costs in administration.

"(3). Beneficiaries could refer to a standard or confer with their CPAs who would learn the statutory standard.

"(4). CPAs could assist executors in accounting matters, reducing expenses of administration. The same benefit would apply to paralegals who would have a statutory form to rely on.

"(5). Communication between probate court reviewers and attorneys would be expedited."

Mr. Kellogg analogizes the benefits or advantages to those derived from the Principal and Income Law, which "brought order out of chaos in that area " He suggests that if the Commission proceeds in this area, it should seek the aid of experts in fiduciary accounting. To help evaluate his suggestion for uniform fiduciary accounting in California, he sends the chapter entitled "Fiduciary Accounting" from his book on financial statements.

The staff notes that the Commission has already decided to go part way down the road suggested by Mr. Kellogg in the current draft of the accounting provisions. The Commission draft incorporates more standard general accounting requirements, and in the Comment refers to the National Fiduciary Accounting Standards that are elaborated in Mr. Kellogg's book. Does the Commission wish to go farther in this direction? One possibility, without actually writing accounting standards into law, is to direct or encourage the Judicial Council to develop forms, including detailed instructions.

§ 10902. Production of supporting documents

10902. Upon court order, or upon request by an interested person, the personal representative shall submit the documents supporting an account for inspection and audit by the court or the interested person.

Comment. Section 10902 is new.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

CHAPTER 2. WHEN ACCOUNT REQUIRED

§ 10950. Court ordered account

10950. (a) The personal representative shall file an account whenever ordered by the court.

(b) The court may order an account at any time upon its own motion or upon petition of an interested person.

(c) The court shall order an account upon petition of an interested person made more than one year after the last account was filed or, if no previous account has been filed, made more than one year after issuance of letters to the personal representative.

Comment. Section 10950 supersedes portions of the first sentences of former Probate Code Sections 921 and 922.

CROSS-REFERENCES

Actions in chambers § 7061
Defined terms
Interested person § 48
Letters § 52
Personal representative § 58

§ 10951. Final account

10951. The personal representative shall file a final account and petition for an order for final distribution of the estate when the estate is in a condition to be closed.

Comment. Section 10951 supersedes the second sentence of former Probate Code Section 922; it is consistent with Section 11640 (petition and order for final distribution).

CROSS-REFERENCES

Definitions
Personal representative § 58

§ 10952. Account after authority terminated

10952. A personal representative who resigns, is removed from office, or whose authority is otherwise terminated, shall file an account when ordered by the court upon petition of a successor personal representative. The account shall be made within 90 days after the court order unless the time is extended by the court. If the personal representative fails to so file the account, the court may compel the account pursuant to Chapter 4 (commencing with Section 11050).

Comment. Section 10952 supersedes former Probate Code Section 923. For an account where the personal representative dies or becomes incompetent, see Section 10953.

CROSS-REFERENCES

Definitions
Personal representative § 58

§ 10953. Account where personal representative dies or becomes incompetent

10953. (a) As used in this section, "legal representative" means the personal representative of a deceased personal representative or the conservator of the estate of an incompetent personal representative.

(b) If the personal representative dies or becomes incompetent, the account shall be filed by the legal representative. Upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the legal representative to file an account of the administration of the personal representative, and shall settle the account as in other cases.

(c) If the personal representative dies or becomes incompetent and there is no legal representative appointed, or the personal representative absconds, the court may compel the attorney for the absconding, deceased, or incompetent personal representative or attorney of record in the estate proceeding to file an account of the administration of the absconding, deceased or incompetent personal representative to the extent that the attorney has information or records available for the purpose. The account of the attorney need not be verified. A fee shall be allowed to the attorney by the court for this extraordinary service.

Comment. Section 10953 continues former Probate Code Section 932 without substantive change. The court referred to in this section is the court in which the estate of the original decedent is being administered.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 10954. Waiver of account

10954. (a) The personal representative is not required to file an account when all persons entitled to distribution of the estate have executed and filed one of the following:

(1) A written waiver of account.

(2) A written acknowledgment that the person has received the share of the estate to which the person is entitled.

(b) The waiver or acknowledgment under subdivision (a) shall be executed by the following persons:

(1) If the distributee is an adult and competent, by the distributee.

(2) If the distributee is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver is executed by a guardian of the estate of the minor, the waiver may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

(3) If the distributee is a conservatee, by the conservator of the estate of the distributee. The waiver may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the distributee is a trust, by the trustee, but only if the named trustee's written acceptance of the trust has been filed with the court.

(5) If the distributee is an estate, by the personal representative of the estate.

(c) Notwithstanding waiver of the account, the personal representative shall file a report at the time the account would otherwise have been required that includes the amount of fees or commission paid or payable to the personal representative and to the attorney and setting forth the basis for determining the amount.

(d) If any distributees of the estate are unascertained, an accounting cannot be waived.

Comment. Section 10954 continues former Probate Code Section 933 without substantive change. The reference to a trustee's consent to act has been replaced by a reference to the trustee's written acceptance of the trust. See Section 15600 (acceptance of trust by trustee).

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Trust § 82

Trustee § 84

CHAPTER 3. SETTLEMENT OF ACCOUNT

§ 11000. Setting account for settlement

11000. When an account is filed, the clerk shall set the account for settlement by the court.

Comment. Section 11000 continues the first sentence of former Probate Code Section 926 without substantive change.

§ 11001. Notice of hearing

11001. (a) At least 10 days before the hearing of the account, the personal representative shall serve notice of the hearing upon all of the following persons:

(1) Devisees whose interest in the estate is affected by the account.

(2) Heirs of the decedent in an intestate estate.

(3) The State of California, if any portion of the estate is to escheat to it.

[(4) Persons who have filed a request for special notice pursuant to Section [1202].]

(b) If the account [includes] a request for fees, the notice of hearing shall so state.

(c) If the account is a final account and is filed together with a petition for an order for final distribution of the estate, the notice of hearing shall so state.

Comment. Subdivision (a) of Section 11001 continues the third sentence of former Probate Code Section 926 without substantive change. Subdivision (b) is new. Subdivision (c) restates the first portion of the second sentence without substantive change.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Person § 56

Personal representative § 58

Note. Whether subdivision (a)(4) should duplicate Section 1200.5(a)(11), and the difference in the manner of notice between the two provisions, is under review.

The Estate Planning, Probate and Trust Section of the Santa Clara County Bar Association has also pointed out to us that notice under Section 1200.5(a)(11) is more limited than notice under this section

(existing Probate Code Section 926), which requires notice to persons whose interest is affected. They note that the practice in Santa Clara County is to require the broader notice, and suggest that the confusion between the two statutes be clarified. The Commission's approach has been to require the broader notice. We will eliminate the conflict when we do the general notice provisions.

§ 11002. Contest of account

11002. (a) Any interested person may appear and contest an account by filing written exceptions to the account at or before the hearing.

(b) All matters may be contested for cause shown, including but not limited to:

(1) The validity of an allowed or approved claim not reported in a previous account and not established by judgment.

(2) The value of property in the inventory and appraisal.

(3) Actions taken by the personal representative not previously authorized or approved by the court.

(c) If, upon the hearing, the court determines the contest was made without reasonable cause and good faith, the court may order that the fees and costs of the personal representative and attorney incurred to defend the account are a charge against the contestant.

Comment. Section 11002 restates the first, second, and fourth sentences of former Probate Code Section 927, with the addition of a provision making clear the right of an interested person to obtain court review of actions by the personal representative through a contest of an account.

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. The Commission has received a letter from Muncie D. Marder of Los Angeles pointing out that when a beneficiary challenges an accounting or actions of the personal representative and seeks a surcharge, the beneficiary in effect funds the litigation, win or lose. This is because if the beneficiary loses, the beneficiary not only pays his or her own attorney's fees but pays the personal representative's attorney's fees as well because the estate that would otherwise go to the beneficiary is reduced to cover this expense. If the beneficiary wins, the personal representative cannot recoup attorney's fees out of the estate, but the beneficiary must still bear his or her own attorney's fees.

Mr. Marder notes that this is contrary to the general public policy that attorney's fee statutes are reciprocal in nature except in those cases where a public benefit is conferred. "I have had to

explain this inequity to several of my clients, and have found that it has a very chilling effect on their willingness to challenge what they and I perceive to be a wrongful or negligent act of the personal representative. I believe this is something that could be remedied by appropriate legislation clarifying the source and extent of attorney's fees to be awarded in such cases. I, along with many other probate attorneys I have spoken to, would appreciate your Committee's consideration of these issues."

§ 11003. Hearing on account

11003. (a) At the hearing, the personal representative may be examined on oath concerning the account and the property in the estate of the decedent, and the disposition of the property.

(b) The court may appoint one or more referees to examine the account and make a report on the account, subject to confirmation by the court. The court may allow a reasonable compensation to the referees to be paid out of the estate.

(c) The court may make such orders as the court deems necessary to effectuate the provisions of this section.

Comment. Section 11003 restates the third and fifth sentences of former Probate Code Section 927 without substantive change. The provision of former Probate Code Section 928 for jury trial of a contest of an allowed claim is not continued. See Section 7202 (trial by jury).

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62

§ 11004. Settlement of claim not properly made or allowed

11004. If in an account it appears that a debt has been paid without a claim having been made and established in the manner prescribed by statute, the court in settling the account shall allow the amount paid if all of the following are proven:

- (a) The debt was justly due.
- (b) The debt was paid in good faith.
- (c) The amount paid was the true amount of the indebtedness over and above all payments and set-offs.
- (d) The estate is solvent.

Comment. Section 11004 continues former Probate Code Section 929 without substantive change.

§ 11005. Effect of order settling account

11005. (a) Except as provided in subdivision (b), the order settling an account is conclusive against all interested persons.

(b) A person under legal disability has the right, at any time before entry of an order for final distribution of the estate, to move for cause to reopen and examine the account or to proceed by action against the personal representative or the sureties on the bond. In the action the order settling the account is prima facie evidence of the correctness of the account.

Comment. Section 11005 restates former Probate Code Section 931 without substantive change. As to the effect of fraud on the conclusiveness of the order, cf. *Lazzarone v. Bank of America*, 181 Cal. App. 3d 581 (1986) (trust account), and *Bank of America v. Superior Court*, 181 Cal. App. 3d 705 (1986) (guardianship account).

CROSS-REFERENCES

Definitions

Interested person § 48

Note. There are also other provisions in the code making probate orders conclusive on all persons but protecting the rights of minors and incompetents until final distribution. These provisions may be generalized later.

CHAPTER 4. COMPELLING ACCOUNT

§ 11050. Sanction for failure to account

11050. Subject to the provisions of this chapter, if the personal representative does not file a required account, the court shall compel the account by punishment for contempt.

Comment. Section 11050 continues the third sentence of former Probate Code Section 922 without substantive change. This chapter may also be used to compel an account by a personal representative whose authority is terminated. Section 10952.

§ 11051. Citation

11051. (a) A citation shall be issued, served, and returned, requiring a personal representative who does not file a required account to appear and show cause why the personal representative should not be punished for contempt.

(b) If the personal representative purposefully evades personal service of the citation, the personal representative shall be removed from office.

Comment. Subdivision (a) of Section 11051 restates the last sentence of former Probate Code Section 922 without substantive change. Subdivision (b) restates a portion of former Probate Code Section 924 without substantive change.

§ 11052. Punishment for contempt

11052. If the personal representative does not appear and file a required account, after having been duly cited, the personal representative may be punished for contempt or removed from office, or both, in the discretion of the court.

Comment. Section 11052 continues the last sentence of former Probate Code Section 921 and restates a portion of former Probate Code Section 924 without substantive change. See also Section 8505 (removal from office for contempt).

Comments to Repealed Sections

ARTICLE 3. RENDERING OF EXHIBITS AND ACCOUNTS

Probate Code § 920 (repealed)

Comment. The first portion of the first sentence of former Section 920 is restated in Estate and Trust Code Section 10900 (duty to account) without substantive change. [The remainder of Section 920 will be disposed of in connection with the powers and duties of personal representatives.]

Probate Code § 920.3 (repealed)

Comment. [Section 920.3 will be disposed of in connection with the powers and duties of personal representatives.]

Probate Code § 920.5 (repealed)

Comment. [Section 920.5 will be disposed of in connection with the powers and duties of personal representatives.]

Probate Code § 921 (repealed)

Comment. The first sentence of former Section 921 is continued in Estate and Trust Code Sections 10950 (court ordered account), 7061 (actions in chambers), and 10901 (contents of account). The last sentence is continued in Estate and Trust Code Section 11052 (punishment for contempt) without substantive change.

Probate Code § 922 (repealed)

Comment. The first sentence of former Section 922 is continued in Estate and Trust Code Sections 10950 (court ordered account) and 10901 (contents of account). The second sentence is superseded by Estate and Trust Code Section 10951 (final account). The third sentence is continued in Estate and Trust Code Section 11050 (sanction for failure to account) without substantive change. The last sentence is restated in Estate and Trust Code Section 11051(a) (citation) without substantive change.

Probate Code § 923 (repealed)

Comment. Former Section 923 is superseded by Estate and Trust Code Section 10952 (account after authority terminated).

Probate Code § 924 (repealed)

Comment. Former Section 924 is restated in Estate and Trust Code Sections 11051(b) (citation) and 11052 (punishment for contempt) without substantive change.

Probate Code § 925 (repealed)

Comment. Former Section 925 is not continued. The voucher procedure was generally not used.

Probate Code § 926 (repealed)

Comment. The first sentence of former Section 926 is continued in Estate and Trust Code Section 11000 (setting account for settlement) without substantive change. The second sentence is restated in Sections 11001(c) (notice of hearing) and

(distribution after final account) [to be drafted] without substantive change. The third sentence is continued in Estate and Trust Code Sections 11001 (notice of hearing) and 34 ("devisee" defined) without substantive change. The substance of the last sentence is continued in Sections 7150 (service) and 7152 (mailing).

Probate Code § 927 (repealed)

Comment. The first and second sentences of former Section 927 are restated in Estate and Trust Code Section 11001 (contest of account) without substantive change. The third and fifth sentences are restated in Estate and Trust Code Section 11003(a) (hearing on account) without substantive change. The fourth sentence is restated in Estate and Trust Code Section 11002 (contest of account) without substantive change. The last sentence is not continued because it is no longer necessary.

Probate Code § 928 (repealed)

Comment. Section 928 is not continued. See Estate and Trust Code Section 7202 (trial by jury).

Probate Code § 929 (repealed)

Comment. Former Section 929 is continued in Estate and Trust Code Section 11004 (settlement of claim not properly made or allowed) without substantive change.

Probate Code § 930 (repealed)

Comment. Former Section 930 is not continued. The voucher procedure was generally not used.

Probate Code § 931 (repealed)

Comment. Former Section 931 is restated in Estate and Trust Code Section 11005 (effect of order settling account) without substantive change.

Probate Code § 932 (repealed)

Comment. Former Section 932 is continued in Estate and Trust Code Section 10953 (account where personal representative dies or becomes incompetent) without substantive change.

Probate Code § 933 (repealed)

Comment. Former Section 933 is continued in Estate and Trust Code Section 10954 (waiver of accounting) without substantive change.