#L-1010 ns12
01/20/87

Memorandum 86-201

Subject: Study L-1010 - Opening Estate Administration (Comments on Tentative Recommendation)

The Commission distributed its tentative recommendation relating to opening estate administration for comment in March, with a request for responses by June. We have received 36 letters commenting on the tentative recommendation, attached to this memorandum as Exhibits 1-36.

General Approval

The following persons indicated general approval of the tentative recommendation: Julia Kingsbury and Robert H. Faust of Arcadia (Exhibit 12), John G. Lyons of San Francisco (Exhibit 15), Robert H. Morgan of San Jose (Exhibit 20), Charles E. Ogle of Morro Bay (Exhibit 23), and Harold Weinstock of Los Angeles (Exhibit 29).

A number of persons were more effusive in their general approval. "A welcome restatement of California law." (George F. Montgomery, II, and Dena Burnham Kreider of San Francisco--Exhibit 21). "An excellent job in terms of consolidating and revising portions of the Code to make it better organized and more succinct." (Milton Berry Scott of Walnut Creek--Exhibit 26). "I think these drafts are excellent." (Robert H. Willard, Judge of the Superior Court, Ventura--Exhibit 31).

And a number of persons were less effusive. "I can see in [the tentative recommendation] nothing objectionable." (Robert Kingsley, Associate Justice of the Court of Appeal, Los Angeles--Exhibit 13). "We do not find any of the provisions in the tentative recommendations that would now cause any difficulty with the conveyance of title or the issuance of title insurance." (J. Earle Norris, Subcommittee Chairman, California Land Title Association--Exhibit 22). "I certainly can live with" the proposals. (Jerome Sapiro of San Francisco--Exhibit 24).

The lack of a general comment on this tentative recommendation from Henry Angerbauer is somewhat puzzling.

General Approach of Tentative Recommendation

There were a few expressions of general philosophy concerning the tentative recommendation. Douglas Butler of Torrance (Exhibit 4)

notes that he practices estate planning and probate and related tax law exclusively, and that "I am in favor of liberalization and simplification of the Probate Code." Professor Joel C. Dobris of Davis (Exhibit 8) is also "very much in favor of any simplification of the estate administration system in this state. The current system is too complex." Neither of these commentators indicates whether he believes the tentative recommendation improves or worsens the situation.

Two commentators do believe the tentative recommendation incorporates an undesirable bias. Michael Patiky Miller of Palo Alto (Exhibit 19) states "I would like to share with you my particular concern regarding what I feel is a disturbing development in the attitude of the Commission. This has to deal with the role of the judiciary in our democracy." His specific concerns are changes proposed by the Commission concerning waiver of bond and elimination of jury trial. These are presumably also among the concerns of Charles G. Schulz of Palo Alto (Exhibit 25), who notices that the tentative recommendation "places more discretion in the court. Unfortunately, in some counties, there are very few judges with probate experience, and the calendars also are crowded. The combination is bad for the exercise of intelligent discretion."

Specific Comments

Most of the letters are addressed to specific points in the tentative recommendation. A number deal with the issue of actual notice to creditors. Comments on this issue have been previously dealt with in connection with Memorandum 86-202.

The remaining comments are analyzed following each section of the tentative recommendation to which they relate. A revised tentative recommendation is attached to this memorandum and incorporates the analyses.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

CARR, MCCLELLAN, INGERSOLL, THOMPSON & HORN
ATTORNEYS AT LAW
SECURITY PACIFIC BUILDING
216 PARK ROAD, POST OFFICE BOX 513
BURLINGAME, CALIFORNIA 94011 - 0513
(415) 342-9600

May 30, 1986

ROBERT R. THOMPSON
ALBERT J. HORN
DAVID C. CARR
ARTHUR H. BREDENBECK
NORMAN I. BOOK, JR.
QUENTIN L. COOK
ROBERT A. NEBRIG
RICHARD C. BERRA
L. MICHAEL TELLEEN
LAGE E. ANDERSEN
KEITH P. BARTEL
MARK A. CASSANEGO
LAURENCE M. MAY
PENELOPE C. GREENBERG
KRISTI COTTON SPENCE
ROBERT W. PAYNE
JAMES R. CODY
GWENDOLYN V. MITCHELL
PAUL M. KAWAKAMI
MARK D. HUDAK
DAVID M. McKIM
JORDAN W. CLEMENTS
EDWARD J. WILLIG III

LUTHER M. CARR
FRANK B. INGERSOLL, JR.
CYRUS J. McMILLAN
OF COUNSEL

E. H. COSGRIFF
(1880-1947)
J. ED McCLELLAN
(1895-1995)

SAN FRANCISCO
(415) 434-4800

PALO ALTO
(415) 595-5440

TELECOPIER
(415) 342-7685

California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Ladies and Gentlemen:

Re: Comments on studies L-1010 and L-1028

A subcommittee of the San Mateo County Bar Association's Probate Section met in order to review and discuss the above-referenced studies and their recommendations. The subcommittee consisted of the following: William Penaluna, Esq., Phillip M. Lev, Esq., Michael P. Miller, Esq., and Keith P. Bartel, Esq.

The following represent the group's consensus.

With respect to study L-1010:

1. As to the issue of the time for probate of a will, the proposed law, to insure some finality in probate proceedings, precludes probate of a will after "close of administration." We believe the term "close of administration" to be vague and we would recommend that "close of administration" be defined with greater specificity; we believe that the final discharge of the executor should not be the event triggering "close of administration."

2. We believe that the minimum ten days notice required before a petition for administration of a decedent's estate should not be changed to require fifteen days notice. It may be appropriate, however, to permit upon request of an interested person, one mandatory continuance of such a hearing in order to allow interested persons additional time to prepare for the hearing and to raise objections, if appropriate.

3. We suggest that section 700 et seq. of the Probate Code dealing with creditors and creditor's claims be kept as is. We believe the proposed recommendations put an entirely unnecessary burden on the personal representative.

4. With respect to the issue of bond of a personal representative, the proposed law enables the court in its discretion to require a bond in any case, whether or not good cause is demonstrated. We do not believe it is appropriate for a court to require a bond unless good cause it demonstrated and recommend that current Probate Code §541(b) be kept as is.

5. The proposal to eliminate jury trials in will contests is opposed by our group. The parties should have a right to have the matters resolved by a jury; after all, Probate Code §1080 allows jury trials for heirship determination proceedings. The fact that there is a high rate of appellate reversals of jury determinations of will contests is not sufficiently compelling to abandon the jury system in this respect.

One miscellaneous matter which was discussed at our group would require a proponent of a will or any party petitioning for letters of administration to disclose knowledge of the existence of a later will, or of any will, as the case may be. This could be accomplished by an appropriate revision to the Judicial Council form.

Your attention and consideration of the above is appreciated and any of the members of our group would be pleased to respond to any inquiries which you may have.

Very truly yours,

Keith P. Bartel,
Chairman, San Mateo County Bar Association
Probate Section

KPB:sh
enclosure
cc: Honorable Harlan K. Veal
William Penaluna, Esq.
Phillip M. Lev, Esq.
Michael P. Miller, Esq.

CARR, MCCLELLAN, INGERSOLL, THOMPSON & HORN
ATTORNEYS AT LAW
SECURITY PACIFIC BUILDING
216 PARK ROAD, POST OFFICE BOX 513
BURLINGAME, CALIFORNIA 94011-0513
(415) 342-9600

ROBERT R. THOMPSON
ALBERT J. HORN
DAVID C. CARR
ARTHUR H. BREDENBECK
NORMAN I. BOOK, JR.
QUENTIN L. COOK
ROBERT A. NEBRIG
RICHARD C. BERRA
L. MICHAEL TELLEEN
LAGE E. ANDERSEN
KEITH P. BARTEL
MARK A. CASSANEGO
LAURENCE M. MAY
PENELOPE C. GREENBERG
KRISTI COTTON SPENCE
ROBERT W. PAYNE
JAMES R. CODY
GWENDOLYN V. MITCHELL
PAUL M. KAWAKAMI
MARK D. HUDAK
DAVID M. McKIM
JORDAN W. CLEMENTS
EDWARD J. WILLIG III

LUTHER M. CARR
FRANK B. INGERSOLL, JR.
CYRUS J. McMILLAN
OF COUNSEL

E. H. COSGRIFF
(1880-1947)
J. ED McCLELLAN
(1895-1985)

SAN FRANCISCO
(415) 434-4800

PALO ALTO
(415) 595-5440

TELECOPIER
(415) 342-7685

June 4, 1986

Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Ladies and Gentlemen:

On May 30, 1986, I sent you a letter discussing certain aspects of the matters raised in your studies L-1010 and L-1028.

One of the matters discussed dealt with creditor's claims and with my belief that the proposed changes to the creditor's claims statute ought not to be made and the creditor's claims provisions retained as they presently stand.

I have recently had an opportunity to discuss this matter with the Honorable Harlan K. Veal, the Superior Court Judge in San Mateo County who has been handling probate matters for the past 18 months.

Judge Veal pointed out to me the considerable frustration faced by a probate judge in dealing with the massive numbers of creditor's claims submitted to the Judge for approval after approval by the personal representative. This requirement is curious since almost always the Judge has no independent basis on which to do anything other than approve the claim.

While it is certainly appropriate that claims of personal representatives and perhaps the estate beneficiaries be submitted to the court for approval, the Commission should consider recommending the abolition of creditor's claims submission for judicial approval when such claims are the claims of third parties.

Very truly yours,

Keith P. Bartel,
Chairman, San Mateo County Bar Association
Probate Section

KPB:sh

cc: Honorable Harlan K. Veal

Matthew Bender

Matthew Bender
& Company, Inc.
2101 Webster Street
Post Office Box 2077
Oakland, CA 94604
(415) 446-7100

May 7, 1986

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations Relating to Probate: Independent Administration of Estates and Initiating Administration

Gentlemen:

Thank you for copies of the above-referenced proposals.

With respect to the proposal affecting initiation of administration:

§ 8100. I am pleased to see the consolidation of the notices in one form, but for security and convenience of the courts, I suggest that the notice specify an alternative to examining the will in the court's file--perhaps a new requirement that the petitioner mail a copy of the will within five days of receipt of a written request for same from a person entitled to receive notice under § 8110.

§§ 8100 and 10451(c). Presumably one objective is to have more estates administered under Independent Administration. To that end the new notices would make independent administration sound less ominous if there were added after the second sentence of the required statement something like: "Nevertheless, if your interest in the estate would be affected by the proposed action, the personal representative would still be required to notify you of more significant proposed actions, such as sales of property, and you would be entitled to object to the action about to be undertaken. A personal representative is required to seek court approval of, or instructions regarding, any proposed action to which timely objection is made."

Notice to creditors. Personally, I agree with the dissent in Mennonite Board of Missions v Adams (1983) 462 US 791, 77 L Ed2d 180, 103 S Ct 2706, especially for commercial creditors who normally have search services checking legal notices. Nevertheless, since the majority opinion is now

the law, it seems imprudent not to change the notice requirements to reflect it. I do not think there is any justification for imposing a shorter claim period limitation on creditors receiving actual notice than on other creditors. Most companies are on 30 day billing cycles and having to take a special balance to submit the claim seems onerous. Also some creditors would not be able to ascertain the balance owing within 30 days; a 30 day limit would be unfair to them. For instance, hospitals often must await bills from staff physicians or do await insurance reimbursement before they make up their own bills; airlines are notoriously slow in forwarding charges to credit card issuers.

§ 8252. I like the change reflecting case law and dropping the right to jury trial. Also it parallels the burden on a party seeking rescission of or defending an action to enforce any other document for those reasons.

§§ 21.3, 72, 8401(a)(1)-(3), 10551(h); and in AB 2625 § 21, 1406. As former counsel for a savings and loan association, I am discouraged to see such a proliferation of definitions and distinctions. To the extent possible, the Estate and Trust Code should adopt the definitions in the Finance Code. That would let the Estate and Trust Code keep current with changes in financial institution regulation without the need of continual (and often lagging) amendments. "Insured associations" and "insured credit unions" are not accurate terms and do not ensure that the estate funds are protected. The protection comes from the insurance of the account(s), in which connection the type of account [see, e.g., 12 CFR 563.3-10, 563.8-4(b)(1) (uninsured money fund type accounts)] or the aggregate amount in the personal representative's estate account(s) vis the insurance limit is controlling (see, e.g., 12 CFR 564.5). The three (banks, savings and loans, and credit unions) should be treated equally, and on the same basis as banks are in Section 8401 (a)(1), by authorizing an insured or collateralized account in any of the three types of institutions.

§ 8404. Except when the petitioner is in pro per, the petitioner's attorney instead of the clerk should be charged with the duty to supply the form.

§ 8463. To provide more fairly for the surviving spouse in relatively amicable dissolutions, instead of the automatic reduction in priority, perhaps the surviving spouse should simply be disqualified on the same basis as anyone else in a potential conflict [e.g. § 8502(d) (removal for protection of the estate or interested persons)]. Another possibility would be to limit the drop in priority entitlement to situations in which the dissolution is contested. Besides the potential unfairness in relatively amicable dissolutions, if the surviving spouse knows more about the decedent's affairs than anyone else, added delay and expense could be avoided by an alternative to the automatic drop in priority.

Sincerely,

Beryl A. Bertucio
Senior Legal Writer

BAB/mec

HITCHCOCK, BOWMAN, SCHACHTER & BEVERLY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 1030 DEL AMO FINANCIAL CENTER
21515 HAWTHORNE BOULEVARD
TORRANCE, CALIFORNIA 90503-6579

LARRY BOWMAN
ROBERT B. SCHACHTER
WILLIAM J. BEVERLY
DOUGLAS A BUTLER
HEIDI MARIA HUSNAK

DONALD J. HITCHCOCK
(1922-1983)

TELEPHONES
AREA CODE (213)
540-2202
772-2143

May 13, 1986

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, California 94303-4739

Re: Tentative recommendations relating to proposed Estate and Trust Code opening an estate to administration

Gentlemen:

I received a copy of the proposed new Estate and Trust Code, Study L-1010.

I practice estate planning and probate and related tax laws exclusively. I am in favor of liberalization and simplification of the Probate Code.

I believe that the proposal to increase the notice of time for establishing a probate from 10 to 15 days is ill-advised, and that the notice period should remain at 10 days.

While additional time for a notice of hearing is desirable, there are many instances where undue harm to the estate occurs through the delay. In many estates, it is difficult to locate persons who are entitled to notice but have no beneficial interest in the estate. The 15-day notice will cause undue delays. As long as a court can retain the jurisdiction to continue the matter upon the objection of any beneficiary or on its own motion, there should be no reason that the notice should be increased to 15 days.

While I do not know whether it would be appropriate for this study, I think it is essential that the Commission study the matter of creditors' claims as to living trusts. There should be a method to cut off creditor liability. Perhaps there should be a method of notification as there is for a probate in which the trustee may publish a "notice of death" which causes a cut off of creditors' claims.

Very truly yours,

HITCHCOCK, BOWMAN, SCHACHTER
& BEVERLY

Douglas Butler

Douglas Butler

DAB/kk

RAWLINS COFFMAN
ATTORNEY AT LAW
RED BLUFF, CALIFORNIA 96080

POST OFFICE BOX 158

TELEPHONE 527-2021
AREA CODE 916

April 25, 1986

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303=4739

Gentlemen:

Thank you for your March 31, 1986 transmittal. I am leaving for the east coast in the immediate future and may not have an opportunity to write in greater detail.

Second, with respect to the Commission's tentative recordation that notice must be served on creditors known to the personal representative, etc., I would suggest that such notice not be required (a) to public utilities serving the decedent's home, (b) for debts less than $20, (c) for unliquidated claims, and (d) to secured creditors.

Third, I find section 8226, subdivision (c), reading:

"(c) After the close of administration, no other will may be admitted to probate"

somewhat difficult to accept.

For example, twenty-odd years ago I went into the probate court and secured an order terminating joint tenancy vesting. Some twenty years later I was asked by a Pennsylvania probate counsel whether the decedent had left a will. The answer was, "Yes, it is on file with the clerk of the court." He asked that it be admitted to probate and letters testamentary issued. On the basis of the issuance of the letters testamentary, under probate law he could distribute the

estate of the decedent's mother to the decedent's widow who lived here in California. I complied with his wishes. The will was admitted to probate. The Pennsylvania estate was distributed to the widow in California.

As you know, we are setting aside community property to the surviving spouse without probating the will. We add a copy of the will to the petition in an attempt to influence the probate judge in our favor. The title companies will not accept that as evidence the will was valid. What happens if twenty years down the road the title companies require a probate of that will to clear title to some real property located in California?

Do the foregoing two illustrations constitute "the close of administration", thus precluding probate of the will twenty years down the road?

If possible, I will write to you further before the June 1st deadline. In any event, please keep me on your mailing list.

Very truly yours,

Rawlins Coffman

RAWLINS COFFMAN

RC:mb

CRABTREE & GOODWIN
ATTORNEYS AT LAW
SUITE 402, CRABTREE BUILDING
303 "A" STREET
SAN DIEGO, CALIFORNIA 92101

BROOKS CRABTREE
JAMES GOODWIN
DANIEL B. CRABTREE

AREA CODE 619
TELEPHONE 239-6161

May 7, 1986

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

Re: Tentative Recommendation Relating to
a) Independent Administration of Estates
b) Opening Estate Administration

Dear Mr. DeMoully:

On May 5, 1986, the San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation met to consider among other documents, the tentative recommendation in the new Estate and Trust Code regarding a) Independent Administration of Estates and b) Opening Estate Administration.

Regarding the tentative recommendation relating to Opening Estate Administration, the Subcommittee has discovered a number of potential problem areas:

a. Regarding the discussion between actual and constructive notice of a Notice of Death, it is our recommendation that the Notice of Death and Petition to Administer Estate be revised so that each beneficiary is instructed to notify the personal representative of any change of address. Many times during administration, heirs, beneficiaries, creditors, or other people interested in the estate change their address and thereafter may or may not receive any notice filed.

b. I personally feel that it should be mandatory in all Notices of Hearing, including the Notice of Death and of Petition to Administer Estate, to send the entire petition with its attachments to each and every person receiving notice. My experience has been that heirs, beneficiaries and other people receiving notice appreciate having the actual papers before them rather than being told in the notice that they may examine the file at the Court. The added expense of this procedure would be offset by fewer queries about filed petitions.

c. The proposed section 8226 of the new Estate and Trust Code needs some revision such as in paragraph (b) to define the words "Close of Administration". That term could be defined a) at the time when the First and Final Account and Report is filed, b) when the Order is made by the Court, c) when the Order is signed by the Court, d) when distribution occurs, or e) when discharge (if any) of the personal representative occurs. And in Paragraph 8226(c), it would appear that the sentence should read "after the close of administration no Will may be admitted to probate" rather than "no other Will" because of the administratiion of an intestate Estate. It would appear the intent of Paragraph (c) is to preclude a Will being entered for Probate subsequent to the administration whether that be administration of a Will or an intestate situation.

d. Our Subcommittee, as a means of compromise, has suggested that a six person jury be available in Will Contests. The Subcommittee has faith in the jury process in Will contests despite the high reversal rate.

e. The proposal to add Attorneys' fees to the award of cost is an excellent move and possibly the discretion to award attorneys' fees to any victorious party should be part of the law in <u>all</u> litigation. Such a change would certainly help eliminate frivolous lawsuits as well as push litigants into negotiated settlements more frequently.

f. There appears to be a discrepancy in your last paragraph at page 10 of the synopsis dealing with a proposed four-year Statute of Limitations for recovery on bonds in Decedents, Guardianships, and Conservatorship Estates, as compared to the actual Section 8488 which clearly mentions only a three-year Statute of Limitations. Our subcommittee favors the shorter Statute Limitations.

g. Section 8401 regarding deposits in controlled accounts needs to be better defined in that all institutions defined in Section a(1), a(2), and a(3) should be insured by government agency as opposed to just insured, and it should be noted that amounts placed in such institutions should not exceed the maximum amount insured by those government agencies.

h. The Subcommittee approves of the changes to Probate Codes 450 and 452, making removal of a personal representative based on the petition of a person having a higher priority discretionary with the Court as opposed to mandatory for the reasons indicated in the tentative recommendation.

I hope these observations will be useful in the re-draft of the new legislation, and I look forward to future tentative recommendations. I might also add that everyone on the Subcommittee finds it very useful to have the opening five to ten pages of the tentative recommendations compare and contrast present law with proposed law. This background technique not only gives us all a quick idea of the changes to be made, but allows us to reflect on whether the proposal is a useful one in light of past experiences. It also makes voluminous materials much easier to digest.

Very truly yours,

Daniel B. Crabtree

Daniel B. Crabtree, Chair

DBC/mam

CEB
CALIFORNIA CONTINUING EDUCATION OF THE BAR
2300 Shattuck Avenue, Berkeley, CA 94704
(415) 642-3973; Direct Phone: (415) 642-8317

April 21, 1986

Nathaniel Sterling, Esq.
Asst. Executive Secretary
California Law Revision Commission
4000 Middlefield Road #D-2
Palo Alto, CA 94303-4739

Re: Study L-1010: Opening Estate Administration

Dear Nat:

I have the following thoughts in response to your request for comment:

A. If there is to be freedom in this society, it must include the freedom to be stupid in those instances where the good of the public is not involved. Second, it is the function of courts to apply the law to facts--not issue arbitrary fiats for the administration of the local fiefdom. For both reasons, I strongly object to a provision which allows courts in their whimsy to require a bond which has been waived. The "good cause" requirement should be retained--if there is really a problem (the court knows the executor or his attorney is a crook, alcoholic, etc.), the court will presumably have enough imagination to articulate something about concern for creditors).

B. Some further research might be appropriate before getting rid of the fee schedule for bonds. Many companies offer competitive rates, but the cheaper companies are also careful about the risks they select. Also, interest rates are dropping, so premiums may go up. Why not leave the schedule in, but add a provision authorizing the court to approve a higher premium if the representative shows he cannot obtain a bond at the statutory rate.

C. Probate 8404 should delete the provision requiring the clerk to deliver the statement of duties to the personal representative. Instead, the statute should merely require the filing of the signed document on or after the time the petition for probate is filed (and before letters are issued). Otherwise, we will end up with court clerks who take the position that the document cannot be executed in advance--a real pain in the neck when dealing with a court in another part of the state.

D. The 8404(b) provision for a social security number is more trouble than it is worth, and imposes costs on local government because of the paper work required to keep the number confidential. What good is it? If there is intentional fraud, you will get a false number. Also, not all people have driver's licenses.

E. Special Administrators: I would like to see a more specific and direct approach for dealing with the problem of the appointment of a special administrator to perform a single act. This would include express provision for combining the request for approval of the act in the petition, clarifying when the approval may be given ex parte, and making clear that such a special administrator does not incur any fiduciary duty to take other acts to protect the estate. Also, if this amount of authority is to be given the court, the court must also have comparable authority to undo mistakes (e.g., suspend the authority of a special administrator without hearing if the appointment was made without hearing.)

F. The outline suggests that the proposal will prevent probate of a subsequent will after the contest period expires. (It would be helpful if these discussions could identify the code section being discussed). This is not a suitable provision. It is rather unusual for a later will to be discovered while there is still undistributed property, but the need for finality is not so great that we should penalize the real beneficiaries when this occurs. The beauty of finality is in the eye of the beholder, and careful consideration must be given to the price that is paid for it.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

JAD-S:dp

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW DAVIS, CALIFORNIA 95616

April 22, 1986

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

Ladies and Gentlemen:

I am writing to comment on your Tentative Recommendation relating to the new estate and trust code.

I teach Wills and Trusts in the above University of California law school. I request that you send tentative recommendations regarding the code to me in the future. I think that is important in view of the fact that the people of the state have chosen to give me the job of teaching about such matters in the U.C. system.

Regarding OPENING ESTATE ADMINISTRATION, I am very much in favor of any simplification of the estate administration system in this state. The current system is too complex.

Thank you.

Sincerely,

Joel C. Dobris

Joel C. Dobris
Professor of Law

JCD:at

LAW OFFICES OF
LELAND, PARACHINI, STEINBERG,
FLINN, MATZGER & MELNICK
333 MARKET STREET-27TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2171
TELEPHONE: (415) 957-1800
TELEX: 278941
TELECOPIER: (415) 974-1520

DAVID B. FLINN

May 23, 1986

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

Gentlemen:

I have completed and enclose the questionnaire concerning probate practice which was sent to me. Earlier, I received for comment tentative recommendations regarding the independent administration of estates and opening of estate administration. I do have a few comments.

As to the opening of estate administration, the new provisions for setting the petition for hearing and giving notice are good ones. The requirement for giving of actual notice to creditors is not, in my opinion, a good idea. I have no problem with an optional provision, that is, one that provides that notice may be given by the personal representative if he desires to bring into effect the thirty-day bar proposed. In the vast majority of estates, however, the family is solvent, it is everyone's intention to pay all of the creditors, they do get paid, and the cost and confusion of sending a special notice of probate to them is totally unnecessary.

I am bothered by deleting a jury from will contests, as the jury trial is as much a part of that type of litigation as any other type of civil litigation; I have no qualms with the jury verdict being advisory to the probate judge rather than fully binding.

I am against awarding costs against the estate; there are a number of situations where it is solely the interested person who has brought about the defense of the will contest and not the other heirs or the estate as a whole. Attorneys' fees awards are a fine idea if they are added to all civil litigation, but there is simply no reason to carve out will contest litigation as something special.

As to priority of appointments of administrators, I would like to see the Public Administrator further down the list. If there is a genuine next-of-kin who is going to inherit the property, his or her interest in an efficient administration is certainly prior to that of a Public Administrator's office. I agree with the priority of surviving spouse provisions. The non-resident provisions on personal representatives seem okay as long as the testator has the right, by will, to waive the requirement and specifically appoint, if he desires, a non-resident. I do not see the purpose of your new bond provisions, however; if there is a showing of "good cause," I see no reason why an arbitrary judge should be able to require a bond. The result will be a probate judge in one or more counties who simply sets it upon himself that there is going to be a bond in every estate, even when the beneficiaries feel comfortable. I concur with the removal of a personal representative without cause where there is a person having a higher priority. There should, perhaps, be a time provision.

Sincerely,

David B. Flinn

DBF:js

Enclosure

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-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

The Surety Association of America

100 WOOD AVE. S., ISELIN, NEW JERSEY 08830 (201) 494-7600

LLOYD PROVOST
President

Fidelity Department
FRANCIS X. LeMUNYON
Vice President
ROBIN V. WELDY
Director - Legal

Actuarial Department
ROBERT G. HEPBURN, JR.
Vice President
GAETON SACCOCCIO
Senior Statistician

Surety Department
DENNIS E. WINE
Vice President

May 28, 1986

CALIFORNIA - ADMINISTRATOR BONDS

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

Dear Mr. DeMoully:

Thank you for your letter of May 20.

Although we do not have specific or detailed data on payments to individuals or estates, we do have some information on total surety bond premiums and losses in California which you may find helpful.

Attached for your ready reference are the latest available experience figures for Administrator Bonds in California for the years 1981, 1982, 1983 and 1984.

The figures are developed from Annual Statements of those companies that report their statistics to us. Premiums are on a Direct Earned Basis. Losses are on a Direct Incurred Basis. There are no expense factors in the Loss figures.

If we can be of further assistance, please let me know.

Sincerely,

William L. Kelly
Manager-Surety

WLK:poh
Enclosure

CALIFORNIA - ADMINISTRATOR'S BONDS

CLASS CODE 203

YEAR	DIRECT PREMIUMS EARNED	DIRECT LOSSES INCURRED	LOSS RATIO
1984	$2,591,681	$2,549,739	98.4
1983	2,394,463	689,349	28.8
1982	2,178,382	577,020	26.5
1981	1,335,070	433,038	32.4

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, SUITE D-2
PALO ALTO, CA 94303-4739
(415) 494-1335

June 2, 1986

William L. Kelly
Manager-Surety
The Surety Association of America
100 Wood Avenue S.
Iselin, New Jersey 08830

Dear Mr. Kelly:

We appreciate your prompt response to my letter of May 20 concerning total surety bond premiums and losses in California.

I regret that you do not have available the loss experience on individual decedent's estates. When this matter was discussed by the legislative committee, the view was expressed that one large loss could create a situation where the loss experience was not representative.

Are the loss figures you quote the actual losses paid out to injured persons or do they represent loss reserves. The legislative committee that discussed this did not believe that loss reserves are an accurate representation of what the actual losses might be.

Do the loss figures you quote, represent the actual losses paid out to injured persons or do they include, for example, the cost of defending claims. In other words, what is included in the loss figures?

Are the loss figures you quote limited to losses on decedents' estates or do they include bonds for guardians, conservators, trustees and others? If they include losses on other than decedents' estates, is it possible to provide information concerning the surety premiums and losses for decedents' estates only?

What does "Direct Earned Basis" mean? What does "Direct Incurred Basis" mean?

The reason I ask these questions is that there was a lot of confusion at the legislative hearings when these matters were last considered, and the legislative committee appeared to feel that the information provided by the surety companies was inadequate and confusing. We have already received comments from at least one local

bar association and individual lawyers who object to any change in the existing provisions relating to bonds for personal representatives. We need to have the most complete and clearly explained statistical information if we are to propose any change in existing law.

Thank you for the information you have already provided. I will appreciate your assistance in providing the clarification and information outlined above.

Sincerely,

John H. DeMoully
Executive Secretary

jd

The Surety Association of America

100 WOOD AVE. S., ISELIN, NEW JERSEY 08830 (201) 494-7600

(102) earlier

LLOYD PROVOST
President

Fidelity Department
FRANCIS X. LeMUNYON
Vice President
ROBIN V. WELDY
Director - Legal

Actuarial Department
ROBERT G. HEPBURN, JR.
Vice President
GAETON SACCOCCIO
Senior Statistician

Surety Department
DENNIS E. WINE
Vice President

June 9, 1986

CALIFORNIA - ADMINISTRATOR BONDS

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

Dear Mr. DeMoully:

Thank you for your letter of June 2. I shall answer your questions in the order they are posed.

The loss figures I gave you represent incurred losses on a calendar year basis. They consist of all the losses sureties have paid to injured persons during the respective year, plus reserves outstanding at the end of the year, minus reserves outstanding at the beginning of the year. This is a normal procedure for reporting losses in the insurance industry and it does provide an accurate picture of loss activity.

The loss figures are "pure loss" figures. They do not include claims expense. Neither do they represent the experience for bonds other than administrators, temporary and special administrators pendente lite or additional bonds for the sale of real estate.

"Direct Earned Basis" means total written premiums allocated to a given year, prior to reinsurance transactions. "Direct Incurred Basis" means total losses incurred in a given year as above described, prior to reinsurance transactions.

Also, it should not be overlooked that the expense ratio for these bonds is something on the order of 70% of direct premiums earned. By adding this ratio to the loss ratio, one can determine how much profit (or loss) has been derived during a given period.

If I can be of further assistance, please feel free to drop me a line.

Sincerely,

William Kelly

William L. Kelly
Manager-Surety

WLK:poh

LAW OFFICES OF
ANDERSON, HOWARD, FAUST & RIOS

ROBERT H. FAUST
EDWARD E. RIOS

LEROY ANDERSON, DECEASED
FRANK WEISS, DECEASED
JOHN W. HOWARD, DECEASED

RICHARD JOHNSON

GREAT WESTERN SAVING BUILDING
700 WEST HUNTINGTON DRIVE
SUITE 200
ARCADIA, CALIFORNIA 91006
TELEPHONE: (818) 447-2169

June 13, 1986

California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303 4739

Re: QUESTIONAIRE CONCERNING PROBATE PRACTICE
Study L 1028 and L 1010

Gentlemen:

The undersigned, as Legislative Chairman for the San Gabriel Valley Legal Secretaries Association, has been receiving Tentative Recommendations from the Commission. I am also a Probate Paralegal for the law firm noted above.

Mr. Robert H. Faust and I have reviewed the above referenced study packets. Generally we approve the tentative recommendations. Mr. Faust's only suggestion is that if an estate is fully protected by bond, an estate representative should be given unlimited power of administration.

Enclosed is the completed Questionnaire Concerning Probate Practice. Mr. Faust has provided the details set forth therein.

We would appreciate your continued mailing of tentative recommendations related to new Estate and Trust Codes. You may change my mailing address from 2020 Amherst Drive, South Pasadena, California, to my office address which is noted above.

Very truly yours,

Julia Kingsbury

Julia Kingsbury
/jk
Encl.

Memo 86-201 EXHIBIT 13 Study L-1010

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

April 16, 1986

California Law Revision Commission
State of California
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Gentlemen:

This will acknowledge receipt of your first two tentative recommendations relating to probate law. I can see in them nothing objectionable; they merely fill in necessary gaps left by the 1984 legislation.

Sincerely,

Robert Kingsley

Western Surety Company

Office of General Counsel

April 29, 1986

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

Gentlemen:

Re: Studies L-1010 and L-1028 - Tentative Recommendations Relating to the New Estate and Trust Code (Opening Estate Administration and Independent Administration of Estates)
Our File No. CA-4372-B

I am writing in support of these recently distributed tentative recommendations relating to the proposed new Estate and Trust Code, especially those relating specifically to bonds of personal representatives. Western Surety Company writes bonds of this sort in all 50 states. We believe we write more such bonds than any other company.

We are especially supportive of proposed section 8481(b) which returns to the court the discretion whether to excuse bond in the case of a waiver by will or by the beneficiaries. The conclusion that such a waiver should not be given effect in all cases is supported by "The UPC: Analysis and Critique", a comprehensive 240-page study published in 1973 by the State Bar of California. Unfortunately, I have but one copy of that report; I trust you will be able to obtain a copy from the State Bar. This study agreed with your conclusion that the bond is inexpensive insurance the court should be permitted to require, and specifically endorsed the then existing system of permitting the court to require bond regardless of purported waivers. At pages 98 and 99, it states: "The California provisions are preferable. In many instances, the presence of a bond has resulted in the beneficiaries receiving something from an estate where otherwise they would not have received anything".

The State Bar study also criticizes the contrary approach of excusing bond unless it has been demanded by an interested party. At page xxv, it stated: "This protection... depends upon a vigilant and knowledgeable person who is willing to request that a bond be given. In the usual case in which the personal representative is a family member, the interested

person without knowledge of actual fraud may refrain from risking hurt feelings and family tension by not asking for the bond even though some questions may exist as to the competency of the personal representative to deal with the estate in question".

We also support the balance of your recommendations with regard to bonds, including proposed section 8482(a) making explicit the authority of the court to fix a minimum bond and proposed section 8486 leaving the reasonableness of the bond's cost to the normal market forces. Bonds of this type currently cost approximately 1/2 of 1% of their face amount in every state in the country, and we do not believe competition would permit any substantial upward movement in that regard in California.

Thank you for the opportunity to comment on these tentative recommendations. Please keep us on the mailing list regarding these and related estate and trust recommendations.

Yours very truly,

Dan L. Kirby

DAN L. KIRBY

DLK:n
cc: Donald L. Bowen
William Kelly
Joe P. Kirby

LAW OFFICES OF
VAUGHAN, PAUL & LYONS
1418 MILLS TOWER
220 BUSH STREET
SAN FRANCISCO 94104
(415) 392-1423

May 22, 1986

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

Re: Study L-1010
(Opening Estate Administration)

Gentlemen:

Thank you for sending me the above study.

I generally approve the proposals included in the study.

Proposed Section 8481 giving the Court the option of requiring a bond in spite of waivers is very desirable. A waiver may be given under pressure in some cases.

The time periods in proposal Section 8003 appear to be desirable changes.

Referring to the tentative recommendation on page 3 that actual notice be given to known creditors, I would be inclined to do nothing. The Mennonite case involved a tax sale where the mortgage was recorded with the name of the mortgagee visible on the record. My hunch is the Supreme Court would distinguish our situation.

Sincerely,

John Lyons

JGL:mr

JOHN G. LYONS

IAN D. McPHAIL
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW
331 SOQUEL AVENUE
SANTA CRUZ, CALIFORNIA 95062-2398
TELEPHONE (408) 427-2363

IAN D. McPHAIL
[redacted]

April 23, 1986

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

Re: Proposed New Estate and Trust Code

1. Opening Probate Administration
Proposed Section 8110.
I strongly recommend that the new proposed rules not require that creditors receive actual notice. The premise of any new probate rules should be that the whole probate process should be streamlined and simplified and made less mysterious and less expensive. Creditors are already too well protected under probate rules. I suggest that they do not need any added protection which makes even more difficult and more time consuming the work of the attorney and executor.

Section 8481. Waiver of Bond.
I strongly disapprove of the proposed new rule that the Court be given the discretion to require a bond when either all beneficiaries have waived the requirement of the bond or the will waives the requirement of the bond. To give the Court discretion to require a bond in these cases is legislative and judicial arrogance, overriding the wishes of the testator and/or all beneficiaries of the estate. In the case when all beneficiaries waive the bond, the only justification for permitting the Court to require a bond is to protect possible creditors. I do not believe that creditors need this added protection under the probate rules. They are already protected to a far to great an extent as it is. If a beneficiary requests a bond where the will waives the bond, the Court should only be given discretion to require a bond if the beneficiary agrees that the premium or premiums will be charged against that beneficiary's share of the estate.

Very truly yours,

IAN D. McPHAIL

IDM:lb

MICHAEL P. MEARS
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW
2001-22ND STREET, SUITE 210
BAKERSFIELD, CALIFORNIA 93301

(805) 323-1816

May 29, 1986

John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middle Field Road, Suite D2
Palo Alto, CA 94303

Dear Mr. DeMoully:

I have been asked to send you the comments of the Probate and Estate Planning Section of the Kern County Bar Association on the tentative recommendations of the Commission relating to the provisions of the proposed Estate and Trust Code on opening estate administration and independent administration of estates. A number of the recommendations did not generate significant comment or were acceptable as written. Accordingly, this letter refers specifically only to those recommendations which were objectionable or generated significant comment.

It should be sufficient that the objecting party establishes by a preponderance of the evidence that a breach of fiduciary duty has occurred.

OPENING ESTATE ADMINISTRATION

1. We generally approved of the recommendation that actual notice be given to known creditors, as long as it is clear that a known creditor is one who becomes known to the personal representative and does not include one that only the decedent had knowledge of. There should also be clarification of the effect of knowledge on the statute of limitations on claims. Presumably, the four month period will be continued, but may be extended where the personal representative learns of a claim prior to filing the inventory and gives actual notice to the creditor, whereupon the creditor has 30 days in which to file a claim.

We also discussed that certain classes of creditors (for example, trade creditors) might be excluded from the requirement of actual notice, because they are those for whom notice by publication is likely to constitute sufficient notice. In Mennonite, the Supreme Court held that personal service or mailed notice was required to a mortgagee of property to be sold for delinquent property taxes, even though some mortgagees would be considered sophisticated creditors. Trade creditors, however, might well be considered to constitute a class entirely composed of sophisticated creditors, for whom published notice might be sufficient.

2. We disagreed with the recommendation authorizing the court to appoint a disinterested person where two persons of equal rank seek appointment as a personal representative. Admittedly, it may be a difficult decision for the court to choose one of two competitors who are of equal priority under the statute, particularly when the ability to administer is approximately equal. However, that should not be a reason for the appointment of a disinterested person, which would be a result unlikely to have been favored by the decedent. This is an area in which the appointment of a disinterested person could become the routine solution in some courts.

3. The recommendation that there be authority for the court to require a bond of a nonresident personal representative, where appropriate, should be limited to situations in which there is some specific reason for the bond. Our committee again felt that, in some courts, this might lead to a situation in which the court would decide that a bond was appropriate in every such case. Our committee objected to the recommendation that the court be permitted to require a bond in any case, not withstanding that the will waives bond or that all of the beneficiaries have waived bond. The decedent should continue to be permitted to save the estate the expense of a bond and the beneficiaries should be able to save themselves that expense if the will does not waive bond.

4. We thought that the requirement that the personal representative sign and file a statement of duties and liabilities before letters are issued was a good provision and that the proposed statement was well written. However, we would delete the requirement that the statement include the driver's license number and social security number of the personal representative. It is unclear why that information should be considered necessary and it is unlikely that it can be kept confidential in all cases.

Thank you for the opportunity to share our comments with you and we hope that they will be useful.

PROBATE AND ESTATE PLANNING SECTION,
KERN COUNTY BAR ASSOCIATION

By _____
MICHAEL P. MEARS, Secretary

WHEREAS, reliability of notice is extremely important in probate matters; and

WHEREAS, our membership has found that newspapers generally circulated in only one city are more susceptible to publication delays and deadline variances; and

WHEREAS, newspapers of general circulation in a county may also be of general circulation in many cities of that county; be it

RESOLVED THAT the Marin County Bar Association Probate and Estate Planning Section urges the revision of Probate Code §333(a) to allow the use of any newspaper of general circulation in a city, whether based in that city or in the surrounding county.

ADOPTED BY VOTE OF THE MEMBERSHIP ON MAY 22, 1986.

Daniel R. Miller

Daniel R. Miller,
Section Co-chairman

bate: Translation of foreign language will: Certification of correctness. When the court admits a will to probate it must be recorded in the minutes by the clerk, with the notation "Admitted to probate (giving date)." If the will is in a foreign language, the court shall certify to a correct translation thereof into English, and such certified translation shall be recorded in lieu of the original. [1931.] *Cal Jur 3d Wills § 247; Witkin Summary (8th ed) p 5840.*

§ 333. Publication or posting of notice: Form and contents. (a) Publication of notice pursuant to this section shall be for at least 10 days. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting such publication dates, are sufficient. Notice shall be published in a newspaper of general circulation in the city where the decedent resided at time of death, or where the decedent's property is located if the court has jurisdiction over the estate pursuant to subdivision (3) of Section 301. If there is no such newspaper, the decedent did not reside in a city, or the property is not located in a city, then notice shall be published in a newspaper of general circulation in the county which is circulated within the community in which the decedent resided or the property is located. If there is no such newspaper, notice shall be given in written or printed form, posted at three of the most public places within such community. For purposes of this section, "city" means a charter city as defined in Section 34101 of the Government Code or a general law city as defined in Section 34102 of the Government Code.

(b) Whether published or posted, the caption of such notice and decedent's name shall be in at least 8-point type, the text of the notice shall be in at least 7-point type, and the notice shall state substantially as follows:

"NOTICE OF DEATH OF

_____

AND OF PETITION TO ADMINISTER ESTATE NO._____

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

A petition has been filed by _____ in the Superior Court of _____ County requesting that _____ be appointed as personal representative to administer the estate of _____ [under the Independent Administration of Estates Act]. The petition is set for hearing in Dept. No. ____ at _____. (Address) on _____ (Date of hearing) at _____ (Time of hearing).

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

IF YOU ARE A CREDITOR or a contingent creditor of the deceased, you must file your claim with the court or present it to the personal representative appointed by the court within four months from the date of first issuance of letters as provided in Section 700 of the Probate Code of California. The time for filing claims will not expire prior to four months from the date of the hearing noticed above.

YOU MAY EXAMINE the file kept by the court. If you are interested in the estate, you may serve upon the executor or administrator, or upon the attorney for the executor or administrator, and file with the court with proof of service, a written request stating that you desire special notice of the filing of an inventory and appraisement of estate assets or of the petitions or accounts mentioned in Section 1200 and 1200.5 of the California Probate Code.

_____

(Name and address of petitioner, or his or her attorney)"

(c) No petition filed pursuant to Section 326 or 440 may be heard by the court unless an affidavit showing due publication of notice has been filed with the clerk upon completion of the publication. Such affidavit shall contain a copy of the notice, and state the date of its first publication.

(d) When, however, notice has been previously published and an affidavit showing due publication of notice, containing a copy of the notice, and stating the date of its first publication, has been filed with the clerk upon completion of the publication, then, whether published or posted, the caption of any subsequent notice and decedent's name shall be in at least 8-point type, the text of the notice shall be in at least 7-point type, and the notice shall state substantially as follows:

"NOTICE OF

_____

PETITION TO ADMINISTER ESTATE NO._____

To all heirs, beneficiaries, creditors and

contingent creditor
sons who may be
will and/or estate:
A petition has be
the Superior Court
requesting that
personal represent
estate of _____
Administration of
is set for hearing
_____ (Addre
of hearing) at _____
IF YOU OBJEC
petition, you shou
hearing and state
written objections
hearing. Your appe
or by your attorney.
YOU MAY EX
the court. If you ar
you may serve upon
istrator, or upon the
tor or administrator
ing that you desire s
of an inventory and
assets or of the pet
tioned in Sections
California Probate C

(Name a
or h

§ 350. [Repealed.]
§ 351. Petition for
§ 352. Restraining a

Cal Jur 3d Wills § 25

§ 350. [Repealed
§ 28, operative Janua

§ 351. Petition fo
ten testimony of witn
the probate of a lost
state, or be accompan
ment of, the testam
substance thereof. If
the provisions of the
the order admitting
the order shall be en
minutes. The testim
whose testimony is
provisions of the wi
writing, signed by the
shall be admissible in

WEINBERG, ZIFF & MILLER
ATTORNEYS AT LAW

DAVID C. WEINBERG
HARVEY L. ZIFF
MICHAEL PATIKY MILLER

400 Cambridge Avenue, Suite A
P.O. Box 60700
Palo Alto, California 94306-0700
(415) 329-0851

OF COUNSEL
DAN MUHLFELDER
DAVID B. PALLEY
THOMAS E. DEREMIGIO

May 30, 1986

Nathaniel Sterling, Esq.
Associate Director
California Law Revision Commission
4000 Middlefied Road, Suite D-210
Palo Alto, California 94303-4739

Re: Probate Law Revisions

Dear Nat:

I have been recently placed on the mailing list for the revisions relating to probate, tax, related proposed revisions. In connection with this, I have reviewed Proposals L-1028 and L-1010 in connection with my involvement with both the Santa Clara County and San Mateo County Bar Associations. You should be receiving comments from the chairs of these two Sections regarding the overall consensus of the Sections regarding the referenced proposals. However, I would like to share with you my particular concern regarding what I feel is a disturbing development in the attitude of the Commission. This has to deal with the role of the judiciary in our democracy. In particular, the proposed recommendations to change the provision regarding the requirement for a probate bond, which would allow a court to order that a bond be obtained even if the will waives bond, or even when all the beneficiaries waive bond, whether there is "good cause" or not, really strikes me as an unusual change in terms of due process. I simply cannot see how a court should be permitting to act when there is no "good cause" for its decisions. We should do all that we can to prevent arbitrary and capricious decisions from occurring, and giving them legislative sanction is not wise.

In a similar vein, I feel that the viewpoint of the Commission in doing away with the right to trial by jury in will contests before probate is misplaced. It is true that jury verdicts are often upset on appeal. However, this is true for personal injury suits, product liability suits, antitrust suits, et al. and not merely will contests. The best way to reduce the chance of jury upset is to have better instructions from the bench. Certainly, the jury system has been a bulwark of our democracy since the days of the Magna Carta, and I don't think that we should be tinkering with that right at this time.

I enjoyed reviewing the proposed recommendations, and I look forward to continue receiving them from your office. As ever, if you would like further details from me please do not hesitate to contact me.

Sincerely yours,

Mike

Michael Patiky Miller

MPM:tmf

MORGAN, MORGAN, TOWERY,
MORGAN & SPECTOR
ATTORNEYS AT LAW
FIFTH FLOOR PASEO BUILDING
210 SOUTH FIRST STREET
SAN JOSE, CALIFORNIA 95113
(408) 295-7677

June 26, 1986

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

RE: The New Estate and Trust Code

Dear Sir or Madam:

I approve of the tentative recommendation relating to the New Estate & Trust Code.

Very Truly Yours,

Robert H. Morgan

Robert H. Morgan

RHM/clw

LAW OFFICES OF
PILLSBURY, MADISON & SUTRO
225 BUSH STREET
POST OFFICE BOX 7880
SAN FRANCISCO, CALIFORNIA 94120
TELEPHONE (415) 983-1000

LOS ANGELES
700 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 629-9500

CABLE ADDRESS "EVANS"
TELEX 34743
TELECOPIER (415) 398-2096

WRITER'S DIRECT DIAL NUMBER
(415) 983-1948

WASHINGTON, D.C.
1667 K STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE (202) 887-0300

SAN JOSE
333 WEST SANTA CLARA STREET
SAN JOSE, CALIFORNIA 95113
TELEPHONE (408) 947-4000

June 10, 1986

Tentative Recommendation Relating to Proposed New Estate and Trust Code (Opening Estate Administration)--Study L-1010

Tentative Recommendation Relating to Proposed New Estate and Trust Code (Independent Administration of Estates)--Study L-1028

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Ladies and Gentlemen:

We have read with interest your two recently published tentative recommendations described above, and we have the following comments:

1. Proposed section 8002 deletes without explanation the provision of current section 440 authorizing a petitioner's lawyer to sign the petition for probate. The lawyer's power to sign the petition may be useful in some circumstances, and the change seems unnecessary.

2. The tentative recommendation raises the issue of providing actual notice to known creditors. It seems unduly burdensome to require the personal representative to report the names and addresses of all the creditors to the court along with proof of service of notice to those creditors. One possible improvement would be to require that the personal representative (1) file a list of the known, unpaid debts of the decedent and (2) give actual notice to the creditors listed there. The commission also should consider

how to integrate the normal four-month creditors' period with any actual notice requirement.

3. Section 8200(a) in certain circumstances does not allow a nominated executor 30 days to file a will. For example, the custodian of a will might deliver the will to the nominated executor on the day after the day of death, upon which the nominated executor must file the will within 10 days. The section easily may be revised to allow an executor a full 30 days to gather the information necessary to prepare the petition to be filed simultaneously with the will.

4. Section 8200(c)--authorizing release of an original will--suggests that the original will should be attached to the petition for probate. However, new section 8002(c) requires only that a copy of the will be attached to the petition, and in practice the petition typically includes only a copy. Section 8200(c) should be revised to provide that the clerk may furnish a copy (rather than the original) for attachment to a petition for probate.

5. Section 8202 should refer to a "certified" rather than "duly authenticated" copy of the will. A duly authenticated copy is a copy attached to which is proof of its establishment in accordance with the laws of another state (see current sections 360-362). If the will is "duly authenticated," then no additional proof of the will should be required, contrary to the last sentence of section 8202.

6. Section 8403 should be revised to authorize the proposed personal representative to take the oath of office at any time after (or simultaneously with) the signing of the petition for probate, rather than only after the petition is filed.

7. Section 8404(b) requires the personal representative to include a driver's license number and social security number on the signed statement of duties and liabilities. The comment provides no reason for this requirement, and the requirement seems unwarranted.

8. New section 8441(b) provides that a person who takes more than fifty percent (50%) of the value of the estate has priority as administrator with the will annexed. In some estates, no one person is entitled to fifty percent (50%) of the estate, but several persons whose combined interests exceed fifty percent (50%) might jointly choose to serve or to nominate an administrator. Section 8441(b) does not appear to allow any such "joinder" of beneficiaries.

Further, the new law does not clearly state that those taking fifty percent (50%) of an estate may nominate an administrator with will annexed. The comment to section 8441 refers to section 8465, but section 8465 by its terms refers only to administrators. Moreover, the nominee of those taking fifty percent (50%) often will not be entitled to priority under section 8465(b). If a will leaves an estate in equal shares to five unrelated individuals, it seems anomalous that those five individuals acting unanimously could not nominate an administrator who would have priority over the decedent's intestate heirs.

9. Section 8442(b) should be revised to allow a will to overcome its operation by granting discretionary powers to any personal representative, and not just the executor named in the will.

With the exception of the comments noted above, your tentative recommendations appear to be a welcome restatement of California law. We have not noted in this letter the many small improvements that the tentative recommendations propose.

The views expressed in this letter are our own and do not necessarily reflect the views of Pillsbury, Madison & Sutro.

Very truly yours,

George F. Montgomery, II
(415) 983-1948

Dena Burnham Kreider
(415) 983-7224

TICOR TITLE INSURANCE

J. Earle Norris
Vice President and
Senior Claims Counsel

May 30, 1986

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

Re: California Law Revision Commission
Study L-1028 Tentative Recommendation
(Independent Administration Of Estates)
and Study L-1010 Tentative Recommendation
(Opening Estate Administration)

Dear Mr. DeMoully:

After receiving the above-captioned materials, I distributed them to the various members of the SubCommittee of which I am Chairman. After review and contact by the undersigned with each of those Subcommittee members, I am able to report to you that we do not find any of the provisions in the tentative recommendations that would now cause any difficulty with the conveyance of title or the issuance of title insurance. Of course, I would like to be kept apprised of any further changes or revisions that the Commission may make in the future.

I hope the comments in this letter are useful and if I could be of further assistance, please do not hesitate to contact the undersigned.

Sincerely yours,

J. Earle Norris

JEN:elm

cc:Nathaniel Sterling
Robert Reyburn
Clark Staves
James Wickline
Members of the Subcommittee

LAW OFFICES
OGLE, GALLO & MERZON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHARLES E. OGLE*
RAY A. GALLO*
JAMES B. MERZON*
WILLIAM A. BOOTH
SHARON K. GARRETT

CHARLES G. KIRSCHNER

*A PROFESSIONAL CORPORATION

770 MORRO BAY BOULEVARD
MORRO BAY, CALIFORNIA 93442
(805) 772-7353 · 772-7379
MAIL TO: POST OFFICE BOX 720

SAN LUIS OBISPO OFFICE
(805) 543-1662

July 18, 1986

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

Re: Review and comments to recommendation relating to proposed New Estate and Trust Code March, 1986)

Gentlemen:

Although I have missed your June 1, 1986, deadline, I nonetheless, submit my review and comments as follows:

1. Generally, I approve the tentative recommendations as they stand.

2. Specifically, I comment as follows:

A. I endorse the proposal concerning the duty of the executor to file a will with the court, and the allied procedures outlined at the top of page 2.

B. I endorse the notice of hearing procedures outlined at pages 2 and 3. I specifically endorse the procedure regarding notice to known creditors and to creditors who become known, etc.

C. I endorse the procedure regarding bond of personal representative, outlined on page 9.

D. I endorse the procedure regarding informing personal representative of duties, at the top of page 11.

E. I endorse the procedures regarding suspension of powers of personal representative and, more specifically, authority of the court to award attorney fees when a petition to suspend is brought unnecessarily,

also outlined on page 11.

Though my review and comments are tardy, I wish to remain on your mailing list.

Very truly yours,

CHARLES E. OGLE

CEO:CC

JEROME SAPIRO
ATTORNEY AT LAW
SUTTER PLAZA, SUITE 605
1388 SUTTER STREET
SAN FRANCISCO, CA. 94109-5416
(415) 928-1515

June 2, 1986

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

Re: Tentative Recommendations
Proposed Estate and Trust Code
Opening Estate Administration
March, 1986

Dear Commissioners:

Although having missed the deadline for comments, I do want to acknowledge receipt of your tentative recommendations concerning both Opening of Estate Administration and Independent Administration of Estates.

Thank you for the opportunity to review same.

I certainly can live with all of same, recognizing that much still remains for your further consideration as indicated therein.

I do wish to make just a few comments:

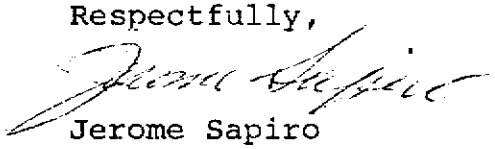
1) Concerning deposit of Wills by custodian on learning of death, it has always been the law that same be delivered to the Clerk of the Court or to the executor named therein. Your remark relating to this at page 1 of the Tentative Recommendation relating to Opening Estate Administration only refers to delivery to the executor. I personally believe that the law should require delivery to the Clerk of the Court only, - the best place to assure those interested that same will be available. A photocopy could be required to be given to the executor by the custodian. This would necessitate change in proposed Estate & Trust Code §8200.

2) To my knowledge in my practice, once a Will is deposited by the custodian, it is not released to the petitioner for probate. The petitioner attaches a photocopy of the Will to his petition. The deposited Will is correlated with the petition upon its filing. It does not make sense for the Clerk of the Superior Court to release a Will previously deposited for attachment to a petition for its probate. In practice the original Wills are kept secure by the Clerk, not attached to the petition. In my opinion, once a Will is deposited it should never be released by the Clerk. The reasons should be obvious.

Please keep me on the mailing list, but correct the address to which some of your communications have been directed. My correct address is:

Jerome Sapiro
Attorney at Law
1388 Sutter Street, Suite 605
San Francisco, CA, 94109-5416.

Respectfully,



Jerome Sapiro

JS:mes

LAW OFFICE OF
CHARLES G. SCHULZ
517 BYRON STREET
POST OFFICE BOX 1299
PALO ALTO, CALIFORNIA 94302
TELEPHONE (415) 326-8080

June 3, 1986

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

Re: Proposed New Estate and Trust Code (Opening Estate Administration)

1. Petition for Probate. There is a conflict between the times specified in § 8001 and § 8200(a)(2). The executor, upon receiving Will, should have 30 days within which to petition. Ten days is too short.

2. Setting Petition for Hearing. The real source of delay is publication in newspapers in the community of residence which are published weekly. If hearing time should be 15 days for probates, it should also be 15 days for a petition for letters of administration. Having arbitrary differences in the period of notice leads to confusion.

3. Service of Notice. I am unaware of any Probate Code law which requires extending the period of time for service in case notice is given by mail. § 8110 as proposed, in its comment, incorporates CCP rules which substantially can extend the time for notice. This provision seems to be contrary to § 8003, which indicates that the hearing on the petition shall be held within 15 to 30 days after filing. Again, the requirement of added days for service by mail can only lead to confusion and inadvertent errors.

4. Notice to Creditors. I am in favor of requiring the personal representative to mail a Notice of Hearing to creditors the names of which come to the representative's attention in the ordinary course of dealing with the decedent's affairs until the time for filing Creditor's Claims has closed. If a creditor notification comes to the representative's attention before the end of 4 months, that creditor should receive an additional 30 days, by the notice procedure you have outlined. A creditor should not have to respond within 30 days; the response should be before the end of 4 months, or 30 days after notification, whichever is longer. I would delete reference to "preparing the Inventory" because this is too vague.

5. Will Contests. I would keep the right of jury trial. I do not approve making attorneys fees an additional cost

to be charged to the unsuccessful contestant in a post-probate will contest. (Charging other costs is allright.) The period of time to get information in a pre-probate will contest is very short. So, some contests must be brought after probate, to bring to light conduct which is properly the basis of a contest, such as pressure by a natural object of bounty, when the respondent has actually engaged in very coercive conduct. I think the system works satisfactorily now, without putting contestants to the added risk of paying attorneys fees to the estate's attorney.

6. Representative's Statement of Duties. Some representatives do not have a driver's license but perhaps only a California Identification Card. If the social security number is confidential, I see no reason for the court to have it. On the other hand, if a person is going to act as fiduciary, I think the person should be willing to disclose his or her social security number "for the record".

7. Representative's Bond. The introduction, on page 10, suggests a 4-year period for limitation of actions. However, § 8488 establishes a 3-year period.

I have several general comments.

a. The proposed Estate and Trust Code places more discretion in the court. Unfortunately, in some counties, there are very few judges with probate experience, and the calendars also are crowded. The combination is bad for the exercise of intelligent discretion.

b. There is no provision for a personal representative's purchasing an asset of the estate. This may be the only way to provide a market for an asset. I understand the problems of self-dealing, but I think such sales should be approved, upon a proper showing of reasonable value and efforts to expose the property. If the beneficiaries do not object and the court finds that the efforts are reasonable, such a sale should be approved. This possibly could even be done under the Independent Administration of Estates Act, by proper advice of proposed action, but I tend to think some more formality might be a good control.

Thank you for considering these comments.

Sincerely yours,

Charles G. Schulz

CHARLES G. SCHULZ

CGS:bh

cc: Barbara A. Beck, Atty; Keith P. Bartel, Esq.; Lloyd W. Homer, Esq.

MILTON BERRY SCOTT
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW
1200 MT. DIABLO BLVD., SUITE 310
WALNUT CREEK, CALIFORNIA 94596
(415) 938-1535

May 16, 1986

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

Re: Proposed New Estate and Trust Code
(Opening Estate Administration Study L-1010)

Gentlemen:

This comment is directed to you in relation to the very massive new estate and trust code dealing with opening estate administration which was circulated in March of this year.

While I have no objections to virtually all provisions of the code, and feel that the California Law Revision Commission has done an excellent job in terms of consolidating and revising portions of the Code to make it better organized and more succinct, I do have one comment.

Proposed Section 8252 (b) eliminates jury trial in connection with will contests. The comment on page 21 of the March 1986 draft states that "jury trial is not constitutionally required. There is a high percentage of reversals on appeals of jury verdicts, with the net result that the whole jury/appeal process serves mainly to postpone enjoyment of the estate, enabling contestants as a practical matter to force compromise settlements to which they would not otherwise be entitled." No citation is given under these comments.

I would appreciate knowing what percentage of will contests are reversed, and how the authors determine that contestants have been able to force compromises to which they would not otherwise have been entitled.

In your entire syllabus on the recommended changes in the probate code, I can only find one reference with regard to will contests on page 4. Your only reference, other than the Estate of Beach, is with regard to comments on the California

Probate Code which the law revision commission apparently made in 1931, some 55 years ago. You state "but also because jury verdicts upholding a contest are reversed upon appeal in the great majority of cases." Under this heading you cite the Stanford Law Review 1953 article on will contests and trial and Section 21.139 of California Decedent Estate Administration, Volume 2. I can find no supporting statement in my copy of Section 21.139.

I believe that jury trial is an important alternative available to individuals who wish to contest a will. While I do not disagree with the Estate of Beach that jury trials are unconstitutionally required, if in fact any number of jury verdicts have been reversed, then I would suggest this should be analyzed as to why there have been difficulties in the field.

A jury trial, I believe, is an important right in our constitutional system of government. The argument that you make for the abolition of jury trials could also be made for many other subjects, including democratic government. Democratic government is also very unwieldy and it would be much easier to have a dictatorship. Very few individuals would support the abolition of democratic government merely because it is costly and unwieldy and not as efficient as a dictatorship.

I would appreciate your comments on how the writers of this syllabus arrived at the conclusion that a great majority of cases are reversed, and what current statistics (not necessarily going back 33 or 65 years) support this conclusion.

Very truly yours,

MILTON BERRY SCOTT

MBS:lcj

California Newspaper Service Bureau, Inc.

INCORPORATED 1934

120 WEST SECOND STREET
P.O. BOX 31
LOS ANGELES, CALIFORNIA 90053
PHONE (213) 625-2541

PUBLIC NOTICE ADVERTISING

LOS ANGELES—SACRAMENTO
SAN DIEGO
SAN FRANCISCO—SANTA ANA

June 4, 1986

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

Dear Commissioners:

Subj: Study L-1010, new Estate and Trust Code, "Opening Estate Administration, March 1986," Tentative Recommendation; Comment.

The Law Revision Commission is considering a recommendation that "...actual, as opposed to published, notice should be given to known creditors and to creditors who become known to the personal representative...." (Study, pages 3 and 9).

There can be no question that actual notice is superior to a notice published in a newspaper (constructive notice) when everyone entitled to notice can be reached by mail or personal service.

The "Mennonite Board of Missions" and the "Continental Insurance Co." cases make the point that actual notice should be given when it can be accomplished. The California Newspaper Service Bureau does not question that opinion.

Public notice is important where notice must be given publicly because a public interest exists. Public notice is necessary where government, or private party, wants to engage the public in the issue at hand for whatever information the public is willing to come forward with, as for instance a public hearing.

Or when property is for sale and the law requires exposure to the market, and a reasonable effort to obtain the best price for the benefit of persons interested in the proceeds of the sale.

Or, as in the probate of an estate when it is important that all creditors, especially where there may be unknown creditors, have an opportunity to read a notice in their newspaper, either directly themselves, or indirectly because a friend brought the notice to their attention. The word of mouth communication system among people who know each other is amazingly active, and a great adjunct to the effectiveness of public notice.

Public notices serve this purpose in every instance where it is important that no stone be left unturned in notifying unidentified persons who might have an interest in the proceeding at hand. Persons who, not notified would have a cause of action for lack of notification.

A newspaper is a community communication system and should be used as such by government and private parties with legal obligations to carry out, just as they are used by everyone to announce events in which they are interested, either as citizens, or as citizens with business to transact.

Sincerely,

Michael D. Smith
General Manager

LAW OFFICES
ELLIOTT & WARD
COURTHOUSE SQUARE, SUITE 580
1000 FOURTH STREET
SAN RAFAEL, CALIFORNIA 94901
(415) 454-5656

ROBERT W. ELLIOTT
EDMOND C. WARD
JILL E. BERRYMAN

March 25, 1986

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

Gentlemen:

Since you are revising the California Probate Code (soon to be renamed the Estate and Trust Code) I would request that you direct your attention to Probate Code §333 which requires publication "in a newspaper of general circulation in the city where the decedent resided at time of death".

I am enclosing a list of adjudicated newspapers in Marin County as of January 1, 1984.

Prior to the enactment of Probate Code §333 in its present form, publications were usually made in "The Independent Journal" which is published every day but Sunday and which is widely distributed throughout Marin County. When publishing in "The Independent Journal" we can usually figure on a probate hearing date (Probate Calendar is heard on Mondays) within two weeks of filing a Petition for Probate.

Since the enactment of Probate Code §333 in its present form we must cope with weekly or other non-daily publication schedules in many of the small towns in Marin County.

Our office has encountered two instances, one involving "The Mill Valley Record" and the other involving "The Novato Advance" where, due to publisher error, publication was not completed until after the designated probate hearing date. We must usually allow about one month from the time of filing a Petition for

Probate until the hearing date when weekly newspapers are involved, and in the two cases mentioned above, additional delays were encountered when republication was necessary because of publisher error. Many of these so-called "adjudicated newspapers" are simply not widely read and do not give adequate notice. I had never heard of several of them until Probate Code §333 in its present form was enacted.

I understand that the California Law Revision Commission is reluctant to ruffle the feathers of newspaper publishers, but Probate Code §333 has given rise to delays in probate procedure at best and incompetence at worst.

I have been practicing probate law for over 30 years in the San Francisco Bay Area.

Very truly yours,

Edmond C. Ward

ECW/dmr
Enclosure

ADJUDICATED NEWSPAPERS IN MARIN COUNTY
(JANUARY 1, 1984)

NEWSPAPER	AREA FOR WHICH ADJUDICATED	COURT DECREE NO.
THE ARK Post Office Box 1054 Tiburon, CA 94920 453-2652	Tiburon	69007
THE COASTAL POST (formerly the Great Western Pacific Coastal Post) Post Office Box 31 Bolinas, CA 94924 868-1600	Central Judicial District of the Municipal Court of Marin County	105139
THE COURT REPORTER Post Office Box 330 San Rafael, CA 94901 456-5700	San Rafael	109081
THE INDEPENDENT JOURNAL Post Office Box 330 San Rafael, CA 94915 883-8600	San Rafael and Novato	25568 108440
THE MARIN SCOPE Post Office Drawer S Sausalito, CA 94965 332-3778	Sausalito	63227
THE MILL VALLEY RECORD 48 Miller Avenue Mill Valley, CA 94941 388-3211	Mill Valley	22060
THE NOVATO ADVANCE Post Office Box 8 Novato, CA 94947 892-1516	Novato	8386

NEWSPAPER	AREA FOR WHICH ADJUDICATED	COURT DECREE NO.
THE POINT REYES LIGHT (formerly the Baywood Press) Post Office Box 210 Point Reyes Station, CA 94956 663-8404	County of Marin	19307
THE ROSS VALLEY REPORTER (formerly the Valley Sun) 11 Library Place San Anselmo, CA 94960 457-4414	San Anselmo	114123
THE SAN RAFAEL NEWS POINTER (formerly The Terra Linda News) 31 Joseph Court San Rafael, CA 94903 472-1200	San Rafael	50274
THE TWIN CITY TIMES (formerly The Ebb Tide) Post Office Box 65 Corte Madera, CA 94925 924-8552	Corte Madera	89459

FOOTNOTES:

1. A newspaper of general circulation adjudicated in a City pursuant to Section 6000 or 6008 of the Government Code is also, by virtue of such adjudication, automatically or by operation of law, a newspaper of general circulation adjudicated for the County and State. [79 OP. Att'y. Gen. 1116 (1980); In re Covina Argus-Citizen, 177 Cal.App.2d 315 (1960)].

2. The following Cities in Marin County do not have adjudicated newspapers: Belvedere, Fairfax, Larkspur and Ross.

BRIAN G. MANION
HAROLD WEINSTOCK*
BILL GENE KING
L. GLENN HARDIE**
LOUIS A. REISMAN
SUSSAN H. SHORE
MARTIN A. NEUMANN
*CERTIFIED SPECIALIST - TAXATION LAW
CALIFORNIA BOARD OF LEGAL SPECIALIZATION
**CERTIFIED SPECIALIST - FAMILY LAW
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

WEINSTOCK, MANION, KING, HARDIE & REISMAN
A LAW CORPORATION
1888 CENTURY PARK EAST - SUITE 800
CENTURY CITY
LOS ANGELES, CALIFORNIA 90067

TELEPHONES (213)
879-4481 OR 553-8844

May 14, 1986

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

Gentlemen:

Thank you for sending me your tentative recommendations relating to the proposed new Estate and Trust Code regarding opening estate administration and also independent administration of estates, both dated March, 1986.

I am in agreement with your tentative recommendations.

Very truly yours,

Harold Weinstock

HW/sms

CHAMBERS OF
The Superior Court
VENTURA, CALIFORNIA
ROBERT R. WILLARD, JUDGE

April 18, 1986

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

Gentlemen:

I have received and thank you for a copy of your tentative recommendations relating to the new Estate and Trust Code, Studies L-1010 and L-1028.

In general, I heartily approve the restatements and changes suggested. They appear to be carefully drafted. My few specific comments relate to relatively minor matters. I mention them only because I have encountered the problems numerous times in presiding over Ventura County's probate calendar for more than 15 years.

Section 8110. I suggest consideration of requiring notice to be served upon beneficiaries named in the last preceding will known to or reasonably ascertained by the petitioner. The problem is illustrated by a case now pending in Ventura County. Decedent made a very substantial bequest to a non-profit corporation operating in Los Angeles County. The beneficiary had no information that such a will existed. Shortly before death decedent, a conservatee who had been found to be incompetent, executed a new will under very suspicious circumstances, eliminating the bequest and leaving her estate to a recent acquaintance. The later will was admitted to probate and the time to contest the will after probate expired before the non-profit corporation became aware of the facts. The wills had been drawn by the same attorney.

Section 8002(c). I suggest that the copy of the will required to be attached to the petition be a typed copy. All too often a photocopy is attached which is difficult to decipher. Also there may be ambiguity as to what is being offered for probate if the will contains deletions or alterations.

Let me repeat that I think these drafts are excellent.

Sincerely,

Robert R. Willard

ROBERT R. WILLARD
Judge of the Superior Court
Retired, but on assignment to preside over probate calendar

RRW:vm

ELIZABETH R. McKEE
2911 Alta Mira Drive
Richmond, CA 94806
(415) 222-0383

Study L-1010 - OPENING ESTATE ADMINISTRATION

Page 3 - Notice to Creditors: I would also recommend that actual notice, as opposed to relying only on published, be given to known creditors with a 30-day claim period as a lot of creditors do not read legal notices usually published in newspapers that have a limited general circulation and customarily used by attorneys. A proof of service should also accompany the notice denoting the date of mailing/serving notice in order for the creditor to determine the 30-day time period.

Page 11 - Informing Personal Representative of Duties: This proposal is also a good idea, especially if an attorney forgets to give the personal representative a statement as to his/her duties, does and don'ts as recommended in the California Decedent Estate Administration book published by CEB (and most attorneys do forget). However, I would like to know how this will be implemented, the cost and time involvement of such a requirement especially if the "clerk" is to deliver the statement to the personal representative.

EXHIBIT 32

BYRNES, TRIAY & REED
ATTORNEYS AT LAW
2030 FRANKLIN STREET, FIFTH FLOOR
OAKLAND, CALIFORNIA 94612
(415) 452-1360

CHARLES A. TRIAY
BRYANT H. BYRNES
PHILIP D. REED, III

OF COUNSEL
WENDY A. TUCKER

September 11, 1986

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

Re: Proposed New Estate and Trust Code

Gentlemen:

Enclosed please find my completed questionaire.

I have reviewed the proposed Estate and Trust Code (opening estate administration) and have the following comments:

Section 8224 and the sections which it replaces or broadens, Sections 351 and 374, are troublesome in that they do not provide for the confrontation of the witness by cross examination, and do not even require that the "testimony" being perpetuated be verified under penalty of perjury.

Section 8352 is even more troublesome as it removes the right to a jury trial in will contests. In my practice I have found that the prospect of the cost and time delay involved in jury trials and subsequent appeals is a strong inducement to settlement of will contests. The comment makes reference to settlements resulting in distributions or payments to people who are not entitled to them. That is pure spectulation and that the comment can be made about any law suit settlement. Many of the issues involved in will contests should be determined by jury rather than by the court, such as questions regarding the capacity of the testator, fraud, undue influence, etc.

Regarding Section 8273, the fact that, at present, a contest after probate can be defended by the personal representative at the cost of the estate is adequate incentive for a contestant to file his contest before probate. The imposition of attorneys fees as well as costs against the losing party in a contest after probate might make a contestant think twice before filing a contest after probate, but it would also make the personal representative less inclined to defend against a contest filed after probate. I am not convinced this section is necessary or

contest after probate, but it would also make the personal representative less inclined to defend against a contest filed after probate. I am not convinced this section is necessary or desirable.

I do not see the need for Section 8400 and 8401. Section 8400 merely restates existing law and Section 8401 is not necessary in my experience because any amounts coming into the hands of a person prior to being appointed as personal representative, whether or not later so appointed, must be accounted for and delivered to the personal representative under existing law.

Section 8462 appears to require an heirship determination prior to appointment of a personal representative in the case of conflictiog petitions for appointment as personal representative.

The wording of Section 8463 should be made more explicit in that it supersedes Section 8461 when applicable.

Yours truly,

BYRNES, TRIAY & REED

Charles A. Triay

CAT:jr
Enc.

CEB

CALIFORNIA CONTINUING EDUCATION OF THE BAR

2300 Shattuck Avenue, Berkeley, CA 94704
(415) 642-3973; Direct Phone: (415) 642-8317

August 1, 1986

John H. DeMoully, Esq.
Executive Secretary
California Law Revision
Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94306

Re: Special Administrators

Dear John:

Occassionally the personal representative has an interest adverse to the estate with respect to some very particular item of property or perhaps a debt. In contested estates, this may lead to efforts to disqualify the representative as a matter of spite or litigation strategy. I believe it would be appropriate to permit the court to appoint a special administrator for specific purposes without removing the personal representative completely.

A less common but related problem arises when the executor's attorney is alleged to have an interest adverse to the estate. A disgruntled heir may allege improper conduct by the attorney with respect to the attorney's representation of the deceased. If so, an issue arises with respect to whether the attorney must be removed entirely. If the representative retains another attorney, then fee allocation problems arise. I don't have a solution for this, but perhaps someone else does.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

JAD-S/kg

EXHIBIT 34

JACK E. COOPER
ATTORNEY AT LAW
225 BROADWAY, SUITE 1500
SAN DIEGO, CALIFORNIA 92101
(619) 232-4525

August 7, 1986

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

Gentlemen:

I have received advance copies of the proposed legislative change to various sections of the Probate Code. I attempted to review those revisions but was overwhelmed by the shear volume of them. Unfortunately, the net result was that I submitted no comments regarding the proposed changes. I apologize.

With regard to spousal property petitions (Probate Code §§649.1 et. seq.), I have encountered some problems in interpreting the meaning of those sections. It seems clear from §655 that if the Court reads a will attached to a spousal property petition the Court can interpret that will and issue an order determining what assets of the deceased spouse passed to the surviving spouse and what assets do not. Similarly, the Court under that section can determine what assets are community property which pass to the surviving spouse and which assets are not community property, and therefore, do not pass to the spouse. The question I have is: If a will is submitted in conjunction with a petition for a spousal property set aside, and another party wishes to contest the will, may the Court hear the matter and issue its order determining that some or all of the assets pass to the surviving spouse or must a petition for probate be submitted and a normal will contest pursued? I feel that under §655 the Court does have the authority to hear the matters presented and to make a determination with regard to that will just as it could any other case whether the will was being contested or not. Would you please advise me of the legislative intent or could you perhaps make some amendment that would clarify this issue.

JACK E. COOPER
ATTORNEY AT LAW

Another problem that has been encountered, and which is mentioned in the most recent CEB book on conservatorships; is a minor who suffers a head injury during adolescence a developmentally disabled person if the head injury results in diminishment of the individual's physical and mental capabilities? It does appear on the face of it that the adolescent is a developmentally disabled person under the definition in the Code. However, it seems to be interpreted differently in various counties throughout the State.

Another issue involving limited conservatorships is whether or not there must be a limited conservatorship established if the person is developmentally disabled. The Code section ~~which~~ allows the powers of a general conservator for a limited conservator, does that then mean that a developmentally disabled person can have a general conservatorship or are they required to have a limited conservatorship? I believe that it does make a huge difference because of the Code section (§2351.5) which provides that the conservator for a limited conservatorship must obtain such training and habilitation as will permit the limited conservatee to perform to the maximum extent of his capability. There is no comparable provision in a general conservatorship.

I would greatly appreciate your response to this inquiry.

Very truly yours,

Jack E. Cooper

JACK E. COOPER

JEC:cak

JC3/108A

CHARLES W. LUTHER
FLORENCE J. LUTHER

LAW OFFICES OF
LUTHER & LUTHER
A PROFESSIONAL CORPORATION
FAIR OAKS, CALIFORNIA 95628

MAILING ADDRESS
P. O. BOX 1030
FAIR OAKS, CA 95628
OFFICE
11101 FAIR OAKS BLVD. SUITE B
TELEPHONE
(916) 967-5400

October 6, 1986

California Law Revision Commission
4000 Middlefield Road, Suite E-2
Palo Alto, California 94303-4739

Re: **The New Estate and Trust Code**

Dear Sir or Madam:

Thank you for forwarding to me the tentative recommendations relative to the new Estate and Trust Code.

I would like to suggest that the Commission consider the problem with respect to Special Administrators, or what could be a problem, with respect to the right of a Special Administrator to make final distribution of an estate.

Under the present case law (Estate of Davis, (1917) 175 Cal. 198,) even when distribution is the only remaining step, a General Administrator or Executor must be appointed for that purpose even though a Special Administrator may have completed all of the work necessary in the probate proceedings, including the filing of notice to creditors.

It would seem it may create an unnecessary delay in an estate, where all the creditors have in fact been protected, and there is no other controversy in the estate, to delay the distribution of the estate simply for the formality of appointing a General Administrator or Executor, where no contest exists.

It is possible the law may be limited to the cases where the Special Administrator and the person who would be the Executor under the Will are one and the same, or some other limitation, but it does seem there should be some circumstances under which a Special Administrator with general powers should be able, upon court approval, to distribute the estate to the persons entitled thereto.

In cases of a Will contest or where the admission of a Will would be a prerequisite to distribution, these requests for a Special Administrator to terminate the Estate may not be feasible, but at least it is something I think the Commission should consider.

I would also like to comment with respect to requiring the personal representative to serve personal notice on known creditors. If the Commission feels that is a necessity, then I think the Commission should limit the definition of a "known creditor" to someone who is known to the personal representative within four months from the date of the appointment of the representative.

The new Code establishing outside limits for entertaining creditor's claims "one year after the personal representative is appointed or the time and order for final distribution is made, whichever occurs first" seems much too long a period to allow the uncertainty of creditor's claims to continue.

Thank you for your review of these comments.

Very truly yours,

LUTHER & LUTHER
A Professional Corporation

By: FLORENCE J. LUTHER

FJL:saw

McGEORGE SCHOOL OF LAW

UNIVERSITY OF THE PACIFIC 3200 Fifth Avenue, Sacramento, California 95817

October 22, 1986

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

Attention: Mr. John H. DeMoully
Executive Secretary

Re: Estate and Trust Code No. L-1045

Dear Mr. DeMoully:

In addition to my comments concerning other recommendations, I refer to proposed section 52 which mentions "letters of special administration (with general powers)." In order to avoid confusion, would it be well to refer to "letters of special administration" and "letters of special administration with general powers"?

I have examined the other tentative recommendations and have no further suggestions.

Very truly yours,

Benjamin D. Frantz

BENJAMIN D. FRANTZ
Professor of Law

BDF:bk

1/20/87
ns

Outline

PART 2. OPENING ESTATE ADMINISTRATION

CHAPTER 1. COMMENCEMENT OF PROCEEDINGS

§ 8000. Petition
§ 8001. Failure of person named executor to petition
§ 8002. Contents of petition
§ 8003. Setting and notice of hearing
§ 8004. Opposition
§ 8005. Hearing
§ 8006. Court order
§ 8007. Determination of jurisdiction conclusive

CHAPTER 2. NOTICE OF HEARING

Article 1. Contents

§ 8100. Form of notice

Article 2. Service of Notice

§ 8110. Persons on whom notice served
§ 8111. Service on Attorney General
§ 8112. Notice to Director of Health Services and other state agencies
§ *8113. Notice involving foreign citizen*

Article 3. Publication or Posting

§ 8120. Publication or posting required
§ 8121. Publication of notice
§ 8122. Good faith compliance with publication requirement
§ 8123. Posting of notice
§ 8124. Type size
§ 8125. Affidavit of publication or posting
§ 8126. Contents of subsequent published or posted notice

CHAPTER 3. PROBATE OF WILL

Article 1. Production of Will

§ 8200. Delivery or filing of will by custodian
§ 8201. Order for production of will
§ 8202. Will detained outside jurisdiction

Article 9. Nonresident Personal Representative

PART 2. OPENING ESTATE ADMINISTRATION

CHAPTER 1. COMMENCEMENT OF PROCEEDINGS

§ 8000. Petition

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

(a) Appointment of a personal representative.

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

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

CROSS-REFERENCES

Appointment of public administrator § 7641
Definitions
  Interested person § 48
  Personal representative § 58
  Will § 88

Note. The interrelation of this provision with the various limitation periods and protection of BFPs, as well as the evidentiary effect of an unprobated will, will be taken up in connection with distribution and discharge.

§ 8001. Failure of person named executor to petition

8001. Unless good cause for delay is shown, if a person named in a will as executor fails to petition the court for administration of the estate within 30 days after the person has knowledge of the death of the decedent, the person may be held to have waived the right to appointment as personal representative.

Comment. Section 8001 restates former Probate Code Section 324 without substantive change. If the person named as executor is held to have waived the right to appointment, the court may appoint another

competent person as personal representative. See Section 8440 (administrators with the will annexed).

CROSS-REFERENCES

Definitions
Person § 56
Personal representative § 58
Will § 88

§ 8002. Contents of petition

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

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

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

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

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

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

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

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

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

CROSS-REFERENCES

Definitions
Devisee § 34
Heirs § 44
Person § 56

Personal representative § 58
Property § 62
Will § 88
Verification required § 1284

Note. Subdivision (a) requires the petition to be signed by the petitioner, whereas existing Section 440 permits counsel for the petitioner to sign. George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21) state that "The lawyer's power to sign the petition may be useful in some circumstances, and the change seems unnecessary." It is worth noting that under the Commission's general approach to the Estate and Trust Code, the petition will have to be verified; this will impose some restraint on signing of the petition by the attorney, and perhaps that is all that is needed. See Code Civ. Proc. § 446 (verification must be made by party unless unable, and attorney verifying pleading must include in affidavit why party was unable).

Subdivision (c) requires a copy of the will to be attached to the petition. Judge Robert R. Willard of Ventura County (Exhibit 30) suggests that the copy be required to be typed. "All too often a photocopy is attached which is difficult to decipher. Also there may be ambiguity as to what is being offered for probate if the will contains deletions or alterations."

The San Mateo County Bar Association Probate Section (Exhibit 1) suggests that a proponent of a will or any party petitioning for letters of administration be required to disclose knowledge of the existence of a later will, or of any will, as the case may be. "This could be accomplished by an appropriate revision to the Judicial Counsel form."

§ 8003. Setting and notice of hearing

8003. When the petition is filed:

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

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

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

CROSS-REFERENCES
Clerk to set matter for hearing § 1285

Note. Under existing law the minimum time for setting the petition for hearing is 10 days, which this section increases to 15 days. This change in law met with the approval of David B. Flinn of San Francisco (Exhibit 9) ("the new provisions for setting the petition for hearing and giving notice are good ones") and John G. Lyons of San Francisco (Exhibit 15) ("the time periods in proposed Section 8003 appear to be desirable changes").

However, this change was also strongly opposed. Douglas Butler of Torrance (Exhibit 4) labels the increase in time for establishing a probate from 10 days to 15, "ill-advised". He states that while additional time for a notice of hearing is desirable, there are many instances where undue harm to the estate occurs through delay. "In many estates it is difficult to locate persons who are entitled to notice but have no beneficial interest in the estate. The 15-day notice will cause undue delays. As long as a court can retain the jurisdiction to continue the matter upon the objection of any beneficiary or on its own motion, there should be no reason that the notice should be increased to 15 days." The San Mateo County Bar Association Probate Section (Exhibit 1) takes a similar position, stating that, "It may be appropriate, however, to permit upon request of an interested person, one mandatory continuance of such a hearing in order to allow interested persons additional time to prepare for the hearing and to raise objections, if appropriate."

Charles G. Schulz of Palo Alto (Exhibit 25) expresses a different concern with the change to 15 days--he believes the time should be the same for both a petition for probate and a petition for letters of administration. "Having arbitrary differences in the period of notice leads to confusion." He apparently fails to realize that the tentative recommendation combines the two petitions in one, so in fact the tentative recommendation does what he suggests.

§ 8004. Opposition

8004. An interested person may contest the petition by filing an objection setting forth written grounds of opposition. The court may continue the matter upon an oral request made at the hearing for time to file an objection setting forth written grounds of opposition.

(b) If appointment of the personal representative is contested, the grounds of opposition may include a challenge to the competency of the personal representative or the right to appointment. If the contest asserts the right of another person to appointment as personal representative, the contestant shall also file a petition and serve notice in the manner prescribed in Article 2 (commencing with Section 8110) of Chapter 2, and the court shall hear the two petitions together.

(c) If a will is contested, the procedure is that prescribed in Article 3 (commencing with Section 8250) of Chapter 3.

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

CROSS-REFERENCES

Definitions
  Interested person § 48
  Person § 56
  Personal representative § 58
  Will § 88
Verification required § 1284

§ 8005. Hearing

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

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

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

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

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

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

(c) The following matters shall be established:

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

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

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

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

CROSS-REFERENCES

Definitions
  Person § 56
  Property § 62
  Will § 88

§ 8006. Court order

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

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

Comment. Subdivision (a) of Section 8006 is new. For the minute order admitting a will to probate, see Section 8225.

Subdivision (b) restates the last paragraph of former Probate Code Sections 326 and 440 without substantive change.

CROSS-REFERENCES

Definitions
Personal representative § 58
Will § 88

§ 8007. Determination of jurisdiction conclusive

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

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

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

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

Comment. Section 8007 restates former Probate Code Section 302 without substantive change and extends it to cover probate of a will as well as appointment of a personal representative.

CROSS-REFERENCES

Definitions
Personal representative § 58
Will § 88

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

CHAPTER 2. NOTICE OF HEARING

Article 1. Contents

§ 8100. Form of notice

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

NOTICE OF PETITION TO ADMINISTER
ESTATE OF _____

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

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

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

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

IF YOU ARE A CREDITOR or a contingent creditor of the deceased, you must file your claim with the court or present it to the personal representative appointed by the court within four months from the date of first issuance of letters as provided in [Section 700] of the California Estate and Trust Code. The time for filing claims will not expire before four months from the date of the hearing noticed above.

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

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

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

Note. The San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6) suggests that the entire petition with its attachments be sent to each person receiving notice. "My experience has been that heirs, beneficiaries and other people receiving notice appreciate having the actual papers before them rather than being told in the notice that they may examine the file at the Court. The added expense of this procedure would be offset by fewer queries about filed petitions." Along the same lines, Beryl A. Bertucio of Matthew Bender (Exhibit 3) notes that a copy of the will being offered for probate is not attached to the notice but the beneficiaries are required to inspect the will in the court file. She suggests as an alternative a new requirement that the petitioner mail a copy of the will to a person entitled to notice within five days after receipt of a written request; this suggestion would be "for security and the convenience of courts."

The San Diego group also recommends that the notice include an instruction to beneficiaries to notify the personal representative of any change of address. "Many times during administration, heirs, beneficiaries, creditors, or other people interested in the estate change their address and thereafter may or may not receive any notice filed."

Ms. Bertucio is concerned about the "ominous" character of the notice concerning Independent Administration, and that it may discourage rather than encourage use of Independent Administration. She offers suggestions to make it less forbidding. The Commission is reviewing this notice provision in connection with its separate recommendation on Independent Administration.

Article 2. Service of Notice

§ 8110. Persons on whom notice served

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

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

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

(b) The petitioner shall give other notice as the court prescribes.

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

CROSS-REFERENCES

Definitions
Devisee § 34
Heirs § 44
Will § 88

Note. We will include in this section a cross-reference to whatever provisions are developed concerning actual notice to creditors.

Judge Robert R. Willard of Ventura County (Exhibit 30) suggests that notice should also be served upon beneficiaries named in the last preceding will known to or reasonably ascertained by the petitioner. He cites a recent case where a will that made a very substantial bequest to a nonprofit corporation was revoked by the testator (who was an incompetent conservatee), and a new will was executed shortly before death under suspicious circumstances, leaving the estate to a recent acquaintance. "The later will was admitted to probate and the time to contest the will after probate expired before the non-profit corporation became aware of the facts. The wills had been drawn by the same attorney." Judge Willard mentions this matter because he has encountered the problem "numerous times in presiding over Ventura County's probate calendar for more than 15 years."

This section requires 10 days notice of hearing to interested persons, and the Comment notes that this time is extended in case of mailed service under general provisions of the Code of Civil Procedure. Charles G. Schulz of Palo Alto (Exhibit 25) questions whether the general provisions even apply (they do, under Probate Code Section 1233), and if so, whether it is desirable. "Again, the requirement of added days for service by mail can only lead to confusion and inadvertent errors." The staff thinks the added time for mailed notice is necessary. Only 10 days notice is required to open estate administration, and if 5 of those are consumed by the mailing process, this leaves very little time to respond for an interested person whose rights may be substantially affected. In our draft of general notice provisions we do not allow additional time for mailed notice, but we extend the 10 day notice requirements to 15 days. Perhaps this approach would be useful here as well.

§ 8111. Service on Attorney General

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

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

CROSS-REFERENCES

Definitions
Devise § 32
Devisee § 34
Will § 88

§ 8112. Notice to Director of Health Services and other state agencies

Note. This section is reserved for possible inclusion of existing Probate Code § 700.1 or other provisions relating to notice to state taxing authorities, depending on the provisions ultimately adopted. At the minimum, the section may be used for cross-referencing purposes.

§ 8113. Notice involving foreign citizen

Note. An additional provision might be added to the statute along the following lines:

§ 8113. Notice involving foreign citizen

8113. (a) If a citizen of a foreign country dies without leaving a will or leaves a will without naming an executor, or if it appears that property will pass to a citizen of a foreign country, notice shall be given to the consul of the foreign county.

(b) Notice under this section is required only if the particular foreign country has consul representation in the United States and the United States has treaty rights with that country.

Comment. Section 8113 is drawn from Section 7.06 of the Los Angeles County Probate Policy Memorandum (1985). The countries with which the United States has consul representation and treaty rights as of [date] are [list].

Whether this provision is particularly useful, or whether it simply adds more complexity to probate without real benefit, we do not know.

Article 3. Publication or Posting

§ 8120. Publication or posting required

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

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

Note. Provisions governing nonresident decedents are dealt with in a separate tentative recommendation.

§ 8121. Publication of notice

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

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

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

Comment. Section 8121 continues subdivision (a) of former Probate Code Section 333 without substantive change, except that the fifth sentence of former Probate Code Section 333 is continued in Section 8123 (posting of notice). If no newspaper satisfies the requirements of section, notice must be posted pursuant to Section 8123 (posting of notice).

CROSS-REFERENCES

Definitions
Property § 62

Note. This section was amended during the 1986 session to provide that if there is no newspaper of general circulation in the city of the decedent's residence or in the county that is circulated in the decedent's community, then publication must be in the paper nearest the county seat that is circulated in the decedent's community:

> *If there is no such newspaper, notice shall be published in a newspaper of general circulation published in the State of California nearest to the county seat of the county in which the decedent resided or the property is located, and which is circulated within the community in which the decedent resided or the property is located.*

See Chapter 711 of the Statutes of 1986. The staff will incorporate this new provision in the draft.

A number of letters objected to the requirement that publication of notice be in a newspaper published in the city where the decedent resided. The Marin County Bar Association Probate and Estate Planning Section (Exhibit 18) forwarded the Commission a resolution to allow use of any newspaper of general circulation in the city, whether based in that city or in the surrounding county. They state that the reliability of notice is extremely important in probate matters, but that their membership has found that "newspapers generally circulated in only one city are more susceptible to publication delays and deadline variances." Charles G. Schulz of Palo Alto (Exhibit 25) also observes that "The real source of delay is publication in newspapers in the community of residence which are published weekly."

Edmond C. Ward of San Rafael (Exhibit 28) observes that before the enactment of the city newspaper publication requirement, publication was usually done in a daily paper and would usually result in a probate hearing date within two weeks of filing the petition. Under the new rule, due to publisher error, publication on two occasions was not completed until after the designated probate hearing date. "We must usually allow about one month from the time of filing a Petition for Probate until the hearing date when weekly newspapers are involved, and in the two cases mentioned above, additional delays were encountered when republication was necessary because of publisher error. Many of these so-called 'adjudicated newspapers' are simply not widely read and do not give adequate notice. I had never heard of several of them until Probate Code § 333 in its present form was enacted. I understand that the California Law Revision Commission is reluctant to ruffle the feathers of newspaper publishers, but Probate Code § 333 has given rise to delays in probate procedure at best and incompetence at worst. I have been practicing probate law for over 30 years in the San Francisco Bay Area."

§ 8122. Good faith compliance with publication requirement

8122. The Legislature finds and declares that, to be most effective, notice of hearing should be published in compliance with Section 8121. However, the Legislature recognizes the possibility that in unusual cases due to confusion over jurisdictional boundaries or oversight such notice may inadvertently be published in a newspaper

that does not satisfy Section 8121. Therefore, to prevent a minor error in publication from invalidating what would otherwise be a proper proceeding, the Legislature further finds and declares that notice published in a good faith attempt to comply with Section 8121 is sufficient to provide notice of hearing and to establish jurisdiction if the court expressly finds that the notice was published in a newspaper of general circulation published within the county and widely circulated within a true cross-section of the community in which the decedent resided or the property was located in substantial compliance with Section 8121.

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

CROSS-REFERENCES

Definitions
Property § 62

§ 8123. Posting of notice

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

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

CROSS-REFERENCES

Definitions
Property § 62

§ 8124. Type size

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

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

§ 8125. Affidavit of publication or posting

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

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

§ 8126. Contents of subsequent published or posted notice

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

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

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

CHAPTER 3. PROBATE OF WILL

Article 1. Production of Will

§ 8200. Delivery or filing of will by custodian

8200. (a) Unless a petition for probate of the will is earlier filed, the custodian of a will shall, within 30 days after having knowledge of the death of the testator, do one of the following:

(1) File the will with the clerk of the superior court of the county in which the estate of the decedent may be administered.

(2) Deliver the will to the person named in the will as executor, who shall, within 10 days after delivery of the will, either petition for probate of the will or file the will with the clerk of the superior court of the county in which the estate of the decedent may be administered.

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

(c) A will filed with the clerk pursuant to this section shall be released by the clerk for attachment to a petition filed with the court for probate of the will, or otherwise upon receipt of a court order for production of the will.

Comment. Section 8200 is drawn from former Probate Code Section 320. Section 8200 adds a filing requirement for the named executor in possession of a will and a procedure for production of the filed will.

CROSS-REFERENCES

Defined terms
Person § 56
Will § 88

Note. Subdivision (a) of this section requires that the executor file the will within 10 days after receipt from another person. This provision is endorsed by Charles E. Ogle of Morro Bay (Exhibit 23). However, two respondents thought 10 days within which to petition or file is inadequate; the executor should have at least 30 days. See comments of George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21) and Charles G. Schulz of Palo Alto (Exhibit 25). As Montgomery and Kreider point out, "the custodian of a will might deliver the will to the nominated executor on the day after the day of death, upon which the nominated executor must file the will within 10 days. The section easily may be revised to allow an executor a full 30 days to gather the information necessary to prepare the petition to be filed simultaneously with the will."

Jerome Sapiro of San Francisco (Exhibit 24) has a different perspective. He doesn't believe the custodian should deliver the will to the executor at all. "I personally believe that the law should require delivery to the Clerk of Court only, - the best place to assure those interested that same will be available. A photocopy could be required to be given to the executor by the custodian."

Subdivision (c) of this section provides that a will filed with the clerk shall be attached to a petition for probate of the will. George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21) and Jerome Sapiro point out that this conflicts both with existing practice and with Section 8002, which provides only that a copy of the will must be attached to the petition. They suggest that subdivision (c) be made consistent by providing that the clerk may furnish a copy (rather than the original) for attachment to the petition. The staff will make this change.

§ 8201. Order for production of will

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

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

CROSS-REFERENCES

Definitions
Person § 56
Will § 88

§ 8202. Will detained outside jurisdiction

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

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

CROSS-REFERENCES

Definitions
Person § 56
State § 74
Will § 88

Note. George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21) question use of the term "duly authenticated" in this section, stating that a duly authenticated copy is "a copy attached to which is proof of its establishment in accordance with the laws of another state (see current Sections 360-362). If the will is 'duly authenticated,' then no additional proof of the will should be required." The staff believes this analysis is correct, and will refer instead to a "certified" copy of the will, as they suggest.

Article 2. Proof of Will

§ 8220. Evidence of subscribing witness

8220. Unless there is a contest of a will:

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

(b) Evidence of execution of a will may be received by an affidavit of a subscribing witness to which there is attached a

photographic copy of the will, or by an affidavit in the original will that includes or incorporates the attestation clause.

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

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

CROSS-REFERENCES

Definitions
Will § 88

§ 8221. Proof where no subscribing witness available

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

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

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

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

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

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

CROSS-REFERENCES

Definitions
Will § 88

§ 8222. Proof of holographic will

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

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

§ 8223. Proof of lost or destroyed will

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

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

CROSS-REFERENCES

Definitions
Will § 88

§ 8224. Perpetuation of testimony

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

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

CROSS-REFERENCES

Definitions
Will § 88

Note. Charles A. Triay of Oakland (Exhibit 32) finds this provision and its predecessors "troublesome" in that "they do not provide for the confrontation of the witness by cross examination, and do not even require that the 'testimony' being perpetuated be verified under penalty of perjury."

§ 8225. Admission of will to probate

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

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

Comment. Section 8225 supersedes former Probate Code Section 332.

CROSS-REFERENCES

Definitions
Will § 88

§ 8226. Effect of admission of will to probate

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

(b) Admission of a will to probate does not preclude the subsequent probate of another will of the decedent before the close of administration, and the court may, but need not, determine how any provisions of a will are affected by another will.

(c) After the close of administration, no other will may be admitted to probate.

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

Subdivision (b) restates former Probate Code Section 385. Subdivision (b) is consistent with Section 6120 (revocation by subsequent will). If more than one will is admitted to probate, the court should determine what provisions, if any, control nomination of an executor.

Subdivision (c) is new. It precludes probate of another will after close of administration. Cf. Estate of Moore, 180 Cal. 570, 182 P. 285 (1919). For treatment of after-discovered property, see Section 11641 (distribution and discharge).

CROSS-REFERENCES

Definitions
Person § 56
Will § 88

Note. In order to give finality in probate, subdivision (c) precludes admission of a will to probate after close of administration. Both the San Mateo County Bar Association Probate Section (Exhibit 1) and the San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6) note the ambiguity in the words "close of administration," as used in both subdivisions (b) and (c). The staff would revise this to preclude probate of a will after "the court makes an order for final distribution of the property." This would also resolve the policy question raised by Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7)--"It is rather unusual for a later will to be discovered while there is still undistributed property, but the need for finality is not so great that we should penalize the real beneficiaries when this occurs."

Rawlins Coffman of Red Bluff (Exhibit 5) is concerned about the possible adverse impact of subdivision (c) when issues of title arise later. He notes, for example, that a surviving spouse may take property without administration; does subdivision (c) preclude later probate of the decedent's will if that becomes necessary to clear title to the property? He also cites an instance of a case where the decedent's will was not probated, but a court order was obtained terminating joint tenancy vesting; twenty years later the decedent's will was probated in order to make clear that the surviving spouse was the decedent's beneficiary in order to receive property coming from the estate of the decedent's mother. Would subdivision (c) impair the ability to do this? The staff does not believe subdivision (c) would affect either of these situations. Neither involved prior administration of the decedent's estate, so there was never a prior determination of the decedent's beneficiaries or court-ordered distribution to them. Therefore there was never a close of estate administration to preclude the later probate of the will. Had there been a prior estate administration, the prior estate administration would presumably have involved a determination of the decedent's beneficiaries, and a subsequent probate would not be necessary.

A recent case notes that the rules limiting late admission of a will to probate are subject to exception in the case of extrinsic fraud. Estate of Sanders, 40 Cal. 3d 607 (1985). The staff will add a reference to this case in the Comment to the section. The staff will also delete the word "other" from subdivision (c), as suggested by the San Diego group.

Article 3. Contest of Will

§ 8250. Summons

8250. When an objection is made pursuant to Section 8004, the clerk shall issue a summons directed to the persons required by Section 8110 to be served with notice of hearing of a petition for

administration of the decedent's estate. The summons shall contain a direction that the persons summoned file with the court a written pleading in response to the contest within 30 days after service of the summons.

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

CROSS-REFERENCES

Definitions
Person § 56

Note. Chapter 14 of the Statutes of 1986 added to the law a provision that, "An executor named in the will is under no duty to defend a contest of the will until he or she is appointed as executor by the court." The staff will add this provision to this section in the redraft.

Jack E. Cooper of San Diego (Exhibit 34) raises the question of what procedures apply to a will "contest" when a will is submitted as part of a Probate Code Section 650 community property confirmation proceeding. The general will contest provisions set out in this article should apply; perhaps it would be worthwhile adding a cross-reference in the community property confirmation statute.

§ 8251. Responsive pleading

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

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

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

CROSS-REFERENCES

Definitions
Interested person § 48

§ 8252. Trial

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

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

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

CROSS-REFERENCES

Definitions
Court § 29
Will § 88

Note. Subdivision (a) of this section prescribes burdens of proof in will contests. This provision was specifically approved by Beryl A. Bertucio of Matthew Bender (Exhibit 3), who likes the change reflecting case law and who observes that "it parallels the burden on a party seeking rescission of or defending an action to enforce any other document for those reasons."

Subdivision (b) would eliminate jury trial in will contests. The reasons for this proposal are to reduce the time, expense, and burden on courts and jurors generated by jury trial, as well as to avoid the usual situation in these cases of the jury ignoring instructions and finding for the will contestant and then having the verdict overturned on appeal. This common phenomenon was illustrated again recently in the case of Estate of Mann, 184 Cal. App. 3d 593 (1986). The court in that case remarked, "It is no secret that instructions such as this are repeatedly ignored. In 1892 our Supreme Court unhappily observed that 'juries lean against wills which to them seem unequal or unjust.' In several later cases decided before the turn of the century the Supreme Court again noted, with apparently increasing distress, that '[t]he upsetting of wills is a growing evil', and that 'quite a number of people have come to think that the right to dispose of property by will has but little significance, and may be legally disregarded whenever the testator has not disposed of his property in a manner which suits the views of a jury.' The Supreme Court more recently adverted to this problem in Estate of Fritschi, where it pointed out that a 'legion' of

appellate decisions have been necessary in order to 'strike down attempts of juries to invalidate wills upon the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their properties.'" 184 Cal. App. 3d at 593 (citations omitted). The court goes on to note that although the right to jury trial is neither granted by the constitution nor available under the English common law, elimination of the right, as some have proposed, is a legislative and not a judicial responsibility. Professor Simes, in his article "The Function of Will Contests," 44 Mich. L. Rev. 503 (1946), notes that a majority of American states provide for a jury trial for largely historical reasons, relating to ejectment in land title cases, and concludes that "the issues of fact would seem to be of a sort which could better be dealt with by a court than by a jury." 44 Mich. L. Rev. at 557.

Of the comments we received on this recommendation, one noted express approval of elimination of jury trial. See Beryl A. Bertucio of Matthew Bender (Exhibit 3). Seven commentators disapproved the recommendation and would keep jury trial in will contests.

The most common reason given in support of the jury trial system is that it is an important right of the parties. San Mateo County Bar Association Probate Section (Exhibit 1) ("parties should have a right to have matters resolved by a jury"); Michael Patiky Miller of Palo Alto (Exhibit 19) ("jury system has been a bulwark of our democracy since the days of the Magna Carta"); Milton Berry Scott of Walnut Creek (Exhibit 26) (jury trial "is an important right in our constitutional system of government").

Other reasons given to keep jury trial are: It provides an important alternative to contestants. Milton Berry Scott of Walnut Creek (Exhibit 26). It is as much a part of litigation as any other area of civil or probate law. San Mateo County Bar Association Probate Section (Exhibit 1); David B. Flinn of San Francisco (Exhibit 9). The prospect of the cost and time delay involved in jury trial and subsequent appeal is a strong inducement to settlement. Charles A. Triay of Oakland (Exhibit 32).

One commentator questioned the statistics showing a high rate of reversal on appeal (Milton Berry Scott of Walnut Creek (Exhibit 26)); another pointed out that reversals occur in other fields of litigation as well (Michael Patiky Miller of Palo Alto (Exhibit 19); and others noted that the high rate of reversal is outweighed by the importance of jury trial (San Mateo County Bar Association Probate Section (Exhibit 1) and San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6)).

Among the comments were a number of suggestions offered to deal with the jury trial problem without eliminating jury trial. Michael Patiky Miller of Palo Alto (Exhibit 19) states, "The best way to reduce the chance of jury upset is to have better instructions from the bench." The San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6) suggests as a compromise use of a 6 member jury for will contests. David B. Flinn of San Francisco (Exhibit 9) would not have a problem with the jury being advisory to the probate judge rather than fully binding. [This last point is an interesting one; the staff notes that in a number of jurisdictions, trial before an equity jury is called for, with the consequence that the verdict is purely advisory. See Delaware, Kansas, Massachusetts, Nevada, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin.]

§ 8253. Evidence of execution

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

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

CROSS-REFERENCES

Definitions
Will § 88

§ 8254. Judgment

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

Comment. Section 8254 supersedes former Probate Code Section 373.

CROSS-REFERENCES

Definitions
Will § 88

Article 4. Revocation of Probate

§ 8270. Petition for revocation

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

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

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

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

CROSS-REFERENCES

Definitions
Interested person § 48
Person § 56
Will § 88

§ 8271. Summons

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

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

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

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

CROSS-REFERENCES

Definitions
Devisee § 34
Heirs § 44
Personal representative § 58
Will § 88

§ 8272. Revocation

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

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

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

CROSS-REFERENCES

Definitions
Person § 56
Personal representative § 58
Will § 88

§ 8273. Costs and attorney's fees

8273. Notwithstanding Section ____, in the case of a petition to revoke the probate of a will after a prior contest of the will:

(a) If the probate is revoked, the costs and a reasonable attorney's fee incurred in the proceeding shall be paid by the estate of the decedent.

(b) If the probate is not revoked, the costs and a reasonable attorney's fee incurred in the proceeding shall be paid by the petitioner.

Comment. Section 8273 supersedes former Section 383. Section 8273 is an exception to the general rules governing costs. See Section ____ (to be drafted).

CROSS-REFERENCES

Definitions
Will § 88

Note. Under existing law if a proceeding is brought for revocation of probate, costs are awarded but not attorney's fees. In addition, if the proceeding is successful, the court has discretion to award the costs against either the estate or the person who resisted the proceeding. This recommendation requires an award of attorney's fees as well as costs and requires the award against the estate in all cases in which the proceeding is successful.

The aspect of this section requiring an award against the estate and not against the person who resisted the proceeding was opposed by David B. Flinn of San Francisco (Exhibit 9). He states that "there are a number of situations where it is solely the interested person who has brought about the defense of the will contest and not the other heirs or the estate as a whole."

The aspect of this section requiring an award of attorney's fees as well as costs received a mixed reaction. The San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6) believes that adding attorney's fees to costs is "an excellent move" that "would certainly help eliminate frivolous lawsuits as well as push litigants into negotiated settlements more frequently." They feel attorney's fees should be awarded to the victorious party in all litigation, not just probate revocations. This provision is opposed by David B. Flinn of San Francisco (Exhibit 9) for the very same reason--"Attorneys' fees awards are a fine idea if they are added to all civil litigation, but there is simply no reason to carve out will contest litigation as something special."

Charles G. Schulz of Palo Alto (Exhibit 25) opposes the attorney fee provision, noting that some contests must be brought after probate because the period of time to get information in a will contest is very short. In some cases the revocation proceedings are necessary to bring to light conduct that is properly the basis of a contest, such as pressure by a natural object of bounty or engaging in coercive conduct. "I think the system works satisfactorily now, without putting contestants to the added risk of paying attorneys fees to the estate's attorney."

Charles A. Triay of Oakland (Exhibit 32) also is concerned that the attorney fee provision will upset the balance in will contests. He observes that the attorney fee provision might make a contestant think twice about seeking revocation of probate, but that a contestant already has an incentive under existing law to bring the contest before probate, since after probate the will may be defended at the expense of the estate. On the other hand, the award of attorney fees against the losing party would make the personal representative less inclined to defend against the revocation proceeding. "I am not convinced this section is necessary or desirable."

CHAPTER 4. APPOINTMENT OF PERSONAL REPRESENTATIVE

Article 1. General Provisions

§ 8400. Appointment necessary

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

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

Comment. Section 8400 restates former Probate Code Section 400 without substantive change. Letters may not be issued until the person appointed takes the oath of office and gives any required bond. See Section 8403 (oath) and Article 5 (commencing with Section 8480) (bond). It should be noted that a petitioner for appointment as personal representative may deliver or deposit property of the decedent in the petitioner's possession in a controlled account. See Section 8401.

CROSS-REFERENCES

Appointment of public administrator § 7641
Definitions
  Letters § 52
  Person § 56
  Personal representative § 58
  Will § 88

Note. Chapter 14 of the Statutes of 1986 added to the law a provision that, "An executor named in the will is under no duty to defend a contest of the will until he or she is appointed as executor by the court." The staff will add a cross-reference to this provision in the Comment.

Charles A. Triay of Oakland (Exhibit 32) sees no need for this section. It "merely restates existing law."

§ 8401. Deposit in controlled account

8401. (a) Notwithstanding Section 8400, a petitioner for appointment as personal representative may deliver money, securities, or personal property in the petitioner's possession to any of the following financial institutions, or allow any of the following financial institutions to retain money, securities, and personal property already in its possession, for deposit in any of the following accounts:

(1) An account in a bank or trust company insured by a government agency or collateralized.

(2) An account in an insured savings and loan association.

(3) An account in insured credit union.

(b) The petitioner shall obtain and file with the court a written receipt including the agreement of the financial institution that the money, securities, or other personal property, including any earnings thereon, shall not be allowed to be withdrawn except upon authorization of the court.

(c) In receiving and retaining money, securities, or other personal property under this section, the financial institution is protected to the same extent as though it had received the money, securities, or other personal property from a person who had been appointed personal representative.

Comment. Section 8401 restates the second paragraph of former Probate Code Section 541.1 without substantive change. See also Section 2328 (guardianship and conservatorship).

CROSS-REFERENCES

Definitions
- Account § 21
- Account in an insured credit union § 72
- Account in an insured savings and loan association § 21.3
- Financial institution § 40
- Personal representative § 58
- Security § 70
- Trust company § 83

Note. Beryl A. Bertucio of Matthew Bender (Exhibit 3) and the San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6) are unhappy with the financial institution terminology used in this section. So is the staff. We are reworking the terminology for general use throughout the code in connection with general definitions for the 1987 legislation, and we will replace these provisions with those when we have them perfected.

Charles A. Triay of Oakland (Exhibit 32) doesn't think this section is even needed. In his experience, "any amounts coming into the hands of a person prior to being appointed as personal representative, whether or not later so appointed, must be accounted for and delivered to the personal representative under existing law."

§ 8402. Qualifications

8402. (a) Notwithstanding any other provision of this chapter, a person is not competent to act as personal representative in any of the following circumstances:

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

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

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

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

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

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

Comment. Paragraph (a)(1) of Section 8402 continues a provision of former Probate Code Section 401 without substantive change. Paragraph (a)(2) supersedes the remainder of former Probate Code Section 401.

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

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

For contest of appointment, see Section 8004.

CROSS-REFERENCES

Definitions
Interested person § 48
Person § 56
Personal representative § 58
Will § 88

Note. With respect to subdivision (a)(4) of this section, David B. Flinn of San Francisco (Exhibit 9) states, "The non-resident provisions on personal representatives seem okay as long as the testator has the right, by will, to waive the requirement and specifically appoint, if he desires, a non-resident." The draft recognizes this in subdivision (b).

§ 8403. Oath

8403. (a) Before letters are issued, the personal representative shall take and subscribe an oath to perform, according to law, the duties of the office. The oath may be taken and dated on or after the time the petition for appointment as personal representative is filed, and may be filed with the clerk at any time after the petition is granted.

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

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

CROSS-REFERENCES

Definitions
Letters § 52
Personal representative § 58

Note. George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21) believe this section should be revised to authorize the proposed personal representative to take the oath of office at any time after (or simultaneously with) the signing of the petition for probate, rather than only after the petition is filed. This makes sense to the staff--it will enable the petitioner to avoid making an extra trip to the attorney's office just to sign the oath.

§ 8404. Statement of duties and liabilities

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

> DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVE
>
> When you have been appointed a personal representative of an estate by this court, you become an officer of the court and assume certain duties and obligations. An attorney is best qualified to advise you regarding these matters. You should clearly understand the following:
>
> 1. You must manage the estate's assets with the care of a prudent person dealing with someone else's property. This means you must be cautious and you may not make any speculative investments.
>
> 2. You must keep the money and property of this estate separate from anyone else's, including your own. When you open a bank account for the estate, it must be in the name of the estate. All estate accounts must earn interest. Never deposit estate funds in your personal account or otherwise commingle them with anyone else's property. The securities of the estate must also be held in the name of the estate.
>
> 3. There are many restrictions on your authority to deal with the estate's property. You should not spend any of the estate's money until you have received either permission from the court or if so advised by your attorney. You may reimburse yourself for official court costs paid by you to the County Clerk and for the premium on your bond. You may not pay fees to your attorney or to yourself without prior order of the court. If you do not obtain the court's permission when it is required, you may be removed as personal representative and/or you may be surcharged, i.e., you may have to reimburse the estate from your own personal

funds. You should consult with your attorney concerning the legal requirements affecting sales, leases, mortgages, and investments of estate property.

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

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

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

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

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

CROSS-REFERENCES

Definitions
Personal representative § 58

Note. The concept of requiring the personal representative to sign a statement of duties was well received. The Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17) felt that this was a good provision and that the proposed statement was well written. This provision was also endorsed by Charles E. Ogle of Morro Bay (Exhibit 23). Elizabeth R. McKee of Richmond (Exhibit 31) states, "This proposal is also a good idea, especially if an attorney forgets to give the personal representative a statement as to his/her duties, does and don'ts as recommended in the California Decedent Estate Administration book published by CEB (and most attorneys do forget)."

The contents of subdivision (a) will be reviewed in connection with changes in the administration provisions and conformed where necessary. Subdivision (a) requires the clerk to deliver the statement form to the personal representative. This requirement was viewed as burdensome and unnecessary by a number of commentators, who felt the attorney could just as easily provide the form unless the case was in pro per. See comments of Beryl A. Bertucio of Matthew Bender (Exhibit 3) ("attorney instead of the clerk should be charged with the duty to supply the form"); Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7) ("statute should merely require the filing of the signed document on or after the time the petition for probate is filed (and before letters are issued). Otherwise, we will end up with court clerks who take the position that the document cannot be executed in advance--a real pain in the neck when dealing with a court in another part of the state."); Elizabeth R. McKee of Richmond (Exhibit 31) ("I would like to know how this will be implemented, the cost and time involvement of such a requirement especially if the 'clerk' is to deliver the statement to the personal representative.")

Subdivision (b) requires the statement to include the personal representative's driver's license number and social security number. This requirement received substantial resistance from the commentators. Several observed that not all personal representatives have driver's licenses. Others noted that the social security number must be kept confidential, which is difficult to achieve and will impose added costs on local government because of the paperwork required to keep it confidential. One commentator made the point that if there is intentional fraud, you will likely get a false number in any case. The general feeling among these commentators was that the license and social security requirement is unwarranted. See Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7), Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17), George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21), Charles G. Schulz of Palo Alto (Exhibit 25).

§ 8405. Form of letters

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

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

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

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

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

CROSS-REFERENCES

Appointment of public administrator § 7641
Definitions
  Letters § 52
  Person § 56
  Personal representative § 58
  Real property § 68

§ 8406. Suspension of powers of personal representative

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

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

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

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

CROSS-REFERENCES

Definitions
Interested person § 48
Person § 56
Personal representative § 59
Property § 62

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

Charles E. Ogle of Morro Bay (Exhibit 23) endorses this section, and specifically the authority of the court to award attorney fees when a petition to suspend is brought unnecessarily.

§ 8407. Claims against personal representative

8407. Appointment of a person as personal representative does not discharge the person from any claim the decedent has against the person. The personal representative is liable for the claim as for so much money in the possession or control of the personal representative when the claim becomes due.

Comment. Section 8407 restates portions of former Section 602 and extends the provisions from executors to all personal representatives. See also Section 8801 (contents of inventory).

CROSS-REFERENCES

Definitions
Person § 56
Personal representative § 58

Note. This provision was erroneously included among the creditor claims provisions. It belongs either here or with general provisions on personal representative liability.

§ 8408. Selection of attorney

8408. In the selection of an attorney, the personal representative shall consider the relationship of the attorney to the beneficiaries or other interested persons.

Comment. Section 8408 is new. It may be appropriate to select an attorney who has a relationship with the beneficiaries, or to avoid selection of an attorney who has an interest adverse to the estate (for example because of alleged improper conduct in the prior representation of the decedent).

CROSS-REFERENCES

Definitions
Beneficiary § 24
Interested person § 48
Personal representative § 58

Note. The staff does not necessarily recommend this section or one like it. It is included merely to present issues raised in two letters commenting on the tentative recommendation. Irving Kellogg of Beverly Hills (Exhibit 10) notes a problem where a corporate fiduciary chooses 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." He cites a recent case in San Diego in which the court confirmed the fiduciary's right to choose its attorney but in which the beneficiaries were "justifiably outraged by the fiduciary's blatant backscratching."

Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 33) carries this argument one step further by noting that the attorney may have an interest actively adverse to the beneficiaries. "A disgruntled heir may allege improper conduct by the attorney with respect to the attorney's representation of the deceased. If so, an issue arises with respect to whether the attorney must be removed entirely." He points out that if the personal representative retains another attorney, then fee allocation problems arise. "I don't have a solution for this, but perhaps someone else does."

Article 2. Executors

§ 8420. Right to appointment as personal representative

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

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

CROSS-REFERENCES

Definitions
- Person § 56
- Personal representative § 58
- Will § 88

§ 8421. Executor not specifically named

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

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

CROSS-REFERENCES

Definitions
Person § 56
Personal representative § 58
Will § 88

§ 8422. Power to designate executor

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

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

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

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

CROSS-REFERENCES

Definitions
Person § 56
Will § 88

§ 8423. Successor trust company as executor

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

Comment. Section 8423 restates former Probate Code Section 404 without substantive change. A trust company is an entity that has qualified to engage in and conduct a trust business in this state. A trust company may act as an executor. See Sections 83, 300; Fin. Code § 1580.

CROSS-REFERENCES

Definitions
Trust company § 83
Will § 88

§ 8424. Minor named as executor

8424. (a) If a person named as executor is under the age of majority and there is another person named as executor, the other person may be appointed and administer the estate until the majority of the minor, who may then be appointed as coexecutor.

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

Comment. Section 8424 restates without substantive change the portion of former Probate Code Section 405 that related to a minor named as executor. The court may exercise its discretion under this section.

CROSS-REFERENCES

Definitions
Person § 56
Personal representative § 58

§ 8425. When fewer than all executors appointed

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

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

CROSS-REFERENCES

Definitions
Person § 56
Will § 88

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

Article 3. Administrators With Will Annexed

§ 8440. Appointment

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

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

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

CROSS-REFERENCES

Definitions
Personal representative § 58
Will § 88

§ 8441. Priority for appointment

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

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

Comment. Section 8441 restates without substantive change the second sentence and supersedes the third sentence of former Probate Code Section 409. Subdivision (b) gives priority to devisees, who need not be entitled to succeed to all or part of the estate under the law of succession in order to have priority. For appointment of the nominee of a person entitled to priority, see Section 8465.

CROSS-REFERENCES

Definitions
Person § 56
Will § 88

Note. George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21) note that this section does not expressly provide for appointment of a nominee, but only by implication from the provisions on appointment of administrators. The staff believes the statute should be clear on this matter and would add a specific reference to nominees in the section.

Montgomery and Kreider's main concern, however, is that subdivision (b) does not appear to allow several beneficiaries whose interests total 50% to jointly act or to nominate a person to act for them. It is arguable that the statute does authorize several beneficiaries to act together, since the singular includes the plural. Section 10. However, it would be a simple matter to add a sentence making clear that beneficiaries whose interests total 50% may act jointly.

§ 8442. Authority of administrator with will annexed

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

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

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

CROSS-REFERENCES

Definitions
Will § 88

Note. George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21) point out that a will may confer a discretionary power or authority upon any personal representative, not just one named in the will, and this should be recognized by statute. The staff will add language to recognize this exception to subdivision (b).

Article 4. Administrators

§ 8460. Appointment of administrator

8460. (a) If the decedent dies intestate, the court shall appoint an administrator as personal representative.

(b) The court may appoint one or more persons as administrator.

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

CROSS-REFERENCES

Definitions
Person § 56
Personal representative § 58

§ 8461. Priority for appointment

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

(a) Surviving spouse.

(b) Children.

(c) Grandchildren.

(d) Other issue

(e) Parents

(f) Brothers and sisters.

(g) Grandparents.

(h) Issue of grandparents.

(i) Children of a predeceased spouse.

(j) Other next of kin.

(k) Relatives of a predeceased spouse.

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

(m) Public administrator.

(n) Creditors.

(o) Any other person.

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

CROSS-REFERENCES

Definitions
Child § 26
Issue § 50
Parent § 54
Person § 56
Predeceased spouse § 59
Surviving spouse § 78

Note. Irving Kellogg of Beverly Hills (Exhibit 10) points out a problem in the first two priorities--the inherent and latent conflict of interest between a spouse of a later marriage and the decedent's children of a former marriage. "This is one of the more troublesome areas in both estate planning and decedents' administration." He offers no suggested solutions.

David B. Flinn of San Francisco (Exhibit 9) has a problem with priority (m)--the public administrator. "I would like to see the Public Administrator further down the list. If there is a genuine next-of-kin who is going to inherit the property, his or her interest in an efficient administration is certainly prior to that of a Public Administrator's office." The staff doesn't understand this comment. It seems to us that the public administrator is about as far down the list as it can get.

§ 8462. Priority of relatives

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

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

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

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

CROSS-REFERENCES

Definitions
Predeceased spouse § 59
Surviving spouse § 78
Will § 88

Note. Charles A. Triay of Oakland (Exhibit 32) is concerned that this section appears to require an heirship determination prior to appointment of a personal representative in the case of conflicting petitions for appointment. The staff believes that it is the nature of a priority scheme to require this; we do not understand the concern.

§ 8463. Surviving spouse

8463. If the surviving spouse is a party to an action for separate maintenance, annulment, or dissolution of the marriage of the decedent and the surviving spouse, and was living apart from the decedent on the date of the decedent's death, the surviving spouse has priority next after brothers and sisters.

Comment. Section 8463 supersedes subdivision (a)(6) and the second paragraph of subdivision (a)(1) of former Probate Code Section 422. There is an inherent conflict of interest between the surviving spouse and other heirs of the decedent in the situation described in this section.

CROSS-REFERENCES

Definitions
Surviving spouse § 78

Note. David B. Flinn of San Francisco (Exhibit 9) agrees with this provision. Charles A. Triay of Oakland (Exhibit 32) believes this section should state expressly that it supersedes the priority schedule of Section 8461; this is easily done, and the staff will do it.

Beryl A. Bertucio of Matthew Bender (Exhibit 3) suggests that this section be tempered to provide more fairly for the surviving spouse in the case of an amicable dissolution. She suggests a couple of options:

(1) Simply disqualify the surviving spouse on the same basis as anyone else in a potential conflict. See Section 8502 (removal for protection of estate or interested persons).

(2) Limit this section to situations where the dissolution is contested.

She points out that even in conflict situations, the surviving spouse may know more about the decedent's affairs than anyone else, and a solution other than reduction of priority could avoid added delay and expense.

§ 8464. Minors and incompetent persons

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

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

CROSS-REFERENCES

Definitions
Person § 56

§ 8465. Nominee of person entitled to appointment

8465. (a) The court may appoint as administrator a person nominated by a person otherwise entitled to appointment or by the guardian or conservator of the estate of a person otherwise entitled to appointment. The nomination shall be made in writing and filed with the court.

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

(c) If a person making a nomination for appointment of an administrator is other than a person described in subdivision (b), the court in its discretion may appoint either the nominee or a person of a class lower in priority to that of the person making the nomination, but other persons of the class of the person making the nomination have priority over the nominee.

Comment. Section 8465 restates without substantive change provisions found in former Probate Code Sections 409 and 423 and a portion of subdivision (a)(1) of former Probate Code Section 422. "Grandparent" and "issue" have been added to subdivision (b) consistent with Section 8461. The nominee is not entitled to appointment unless legally competent. Section 8401 (qualifications).

CROSS-REFERENCES

Definitions
Child § 26
Issue § 50
Parent § 54
Person § 56
Surviving spouse § 78

§ 8466. Priority of creditor

8466. If a creditor claims appointment as administrator, the court in its discretion may deny the appointment and appoint another person.

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

CROSS-REFERENCES

Definitions
Person § 56

§ 8467. Equal priority

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

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

CROSS-REFERENCES

Definitions
Person § 56

Note. The Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17) disagrees with the proposal to appoint a disinterested person. "Admittedly, it may be a difficult decision for the court to choose one of two competitors who are of equal priority under the statute, particularly when the ability to administer is approximately equal. However, that should not be a reason for the appointment of a disinterested person, which would be a result unlikely to have been favored by the decedent. This is an area in which the appointment of a disinterested person could become the routine solution in some courts."

§ 8468. Administration by any competent person

8468. If persons having priority fail to claim appointment as administrator, the court may appoint any person who claims appointment.

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

CROSS-REFERENCES

Definitions
Person § 56

Article 5. Bond

§ 8480. Bond required

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

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

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

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

CROSS-REFERENCES

Appointment of public administrator § 7641
Definitions
  Interested person § 48
  Letters § 52
  Person § 56
  Personal representative § 58
Judge in chambers may approve bond § 7061

Note. Robert H. Faust and Julia Kingsbury of Arcadia (Exhibit 12) suggest that if an estate is fully protected by bond, an estate representative should be given unlimited power of administration.

§ 8481. Waiver of bond

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

(b) If a petition for appointment of a personal representative alleges that all beneficiaries have waived in writing the requirement of a bond and the written waivers are attached to the petition, the court may direct that no bond be given. This subdivision does not apply if the will requires a bond.

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

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

CROSS-REFERENCES

Definitions
  Beneficiary § 24
  Interested person § 48
  Letters § 52
  Personal representative § 58
  Will § 88
Verification required § 7251

Note. One of the most controversial proposals in the tentative recommendation was to allow the court in its discretion to require a bond even though bond has been waived by all beneficiaries. This proposal was approved by the Western Surety Company (Exhibit 14), John G. Lyons of San Francisco (Exhibit 15), and Charles E. Ogle of Morro Bay (Exhibit 23). Mr. Lyons believes this is a very desirable proposal because, "A waiver my be given under pressure in some cases." The Western Surety Company believes a bond is inexpensive insurance and points out that the State Bar's 1973 analysis and critique of the Uniform Probate Code criticizes the UPC for excusing bond as a routine matter in informal cases.

On the other hand, the proposal was opposed by The San Mateo County Bar Association Probate Section (Exhibit 1), Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7), David B. Flinn of San Francisco (Exhibit 9), Ian D. McPhail of Santa Cruz (Exhibit 16), Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17), and Michael Patiky Miller of Palo Alto (Exhibit 19). There were a number of common concerns expressed by these commentators:

(1) The matter should not be left to the discretion of the court. See, e.g. Flinn ("I see no reason why an arbitrary judge should be able to require a bond."); McPhail ("To give the Court discretion to require a bond in these cases is legislative and judicial arrogance, overriding the wishes of the testator and/or all beneficiaries of the estate."); Miller ("We should do all that we can to prevent arbitrary and capricious decisions from occurring, and giving them legislative sanction is not wise."); Strathmeyer ("If there is to be freedom in this society, it must include the freedom to be stupid in those instances where the good of the public is not involved. Second, it is the function of courts to apply the law to facts--not issue arbitrary fiats for the administration of the local fiefdom. For both reasons, I strongly object to a provision which allows courts in their whimsy to require a bond which has been waived.").

(2) A likely consequence is that courts by local rule or otherwise will require a bond automatically in every case. See, e.g., Flinn ("The result will be a probate judge in one or more counties who simply sets it upon himself that there is going to be a bond in every estate, even when the beneficiaries feel comfortable.").

(3) It imposes an unnecessary expense on beneficiaries. See, e.g., Kern County ("The decedent should continue to be permitted to save the estate the expense of a bond and the beneficiaries should be able to save themselves that expense if the will does not waive bond."). One resolution to this problem is suggested by McPhail--"If a beneficiary requests a bond where the will waives the bond, the Court should only be given discretion to require a bond if the beneficiary agrees that the premium or premiums will be charged against that beneficiary's share of the estate."

§ 8482. Amount of bond

8482. (a) Except as provided in Section 8481, the court in its discretion may fix the amount of the bond, including a fixed minimum amount, but the amount of the bond shall be not more than the sum of:

(1) The estimated value of the personal property.

(2) The probable annual gross income of the estate.

(3) If independent administration is granted as to real property, the estimated value of the real property.

(b) If the bond is given by personal sureties, the amount of the bond shall be twice the amount fixed by the court pursuant to subdivision (a).

(c) Before confirming a sale of real property the court shall require such additional bond as may be proper, not exceeding the maximum requirements of this section, treating the expected proceeds of the sale as personal property.

Comment. Subdivision (a) of Section 8482 supersedes the last sentence of former Probate Code Section 541(a), making explicit the authority of the court to impose a fixed minimum bond. Subdivision (b) supersedes former Probate Code Section 542.

CROSS-REFERENCES

Definitions
Personal property § 57
Real property § 68

Note. The Western Surety Company (Exhibit 14) approves the authority of the court in subdivision (a) to fix a minimum bond.

§ 8483. Reduction of bond by deposit of assets

8483. (a) This section applies where property of the estate has been deposited in an insured account in a financial institution upon condition that the property, including any earnings thereon, will not be withdrawn except on authorization of the court.

(b) In a proceeding to determine the amount of the bond of the personal representative (whether at the time of appointment or subsequently), upon production of a receipt showing the deposit of property of the estate in the manner described in subdivision (a), the court may order that the property shall not be withdrawn except on authorization of the court and may, in its discretion, do either of the following:

(1) Exclude the property in determining the amount of the required bond or reduce the amount of the bond to be required in respect of the property to an amount the court determines is reasonable.

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

Comment. Section 8483 restates the first paragraph of former Probate Code Section 541.1 without substantive change. See also Section 2328 (guardianship/conservatorship). For authority of a petitioner for appointment as personal representative to make a deposit described in this section, See Section 8401.

CROSS-REFERENCES

Definitions
Insured account in a financial institution § 46
Personal representative § 58
Property § 62

§ 8484. Excessive bond

8484. If a personal representative petitions to have the amount of the bond reduced, the petition shall include an affidavit setting forth the condition of the estate and notice of hearing shall be given as provided in Section 1220.

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

CROSS-REFERENCES

Definitions
Personal representative § 58

§ 8485. Substitution or release of sureties

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

Comment. Section 8485 restates former Probate Code Section 553.5 without substantive change. A copy of the petition and a notice of hearing must be served on the surety. Code Civ. Proc. § 996.110(c).

CROSS-REFERENCES

Definitions
Personal representative § 58

§ 8486. Cost of bond

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

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

CROSS-REFERENCES

Definitions
Personal representative § 58

Note. The Commission's recommendation eliminates the existing fee schedule for awarding the cost of the bond on the theory that bond fees are determined by the market, with bond premiums generally below the amount allowed; if the bond premiums are higher, it would be appropriate to award the higher amount if reasonable. This proposal was endorsed by the Western Surety Company (Exhibit 14), which notes that "Bonds of this type currently cost approximately 1/2 of 1% of their face amount in every state in the country, and we do not believe competition would permit any substantial upward movement in that regard

in California." Also included are figures relating to premiums received and losses paid by surety companies on personal representative bonds. See Exhibit 11 (The Surety Association of America).

Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7) believes further research might be appropriate before eliminating the bond fee schedule. "Many companies offer competitive rates, but the cheaper companies are also careful about the risks they select. Also, interest rates are dropping, so premiums may go up. Why not leave the schedule in, but add a provision authorizing the court to approve a higher premium if the representative shows he cannot obtain a bond at the statutory rate."

§ 8487. Law governing bond

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

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

§ 8488. Limitation as to sureties on bond

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

Comment. Section 8488 is new. It is comparable to Section 2333 (guardianship and conservatorship law).

CROSS-REFERENCES

Definitions
Personal representative § 58

Note. A conforming change will be made to Section 2333 so that it is consistent.

Article 6. Removal from Office

§ 8500. Procedure for removal

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

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

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

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

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

CROSS-REFERENCES

Definitions
Interested person § 48
Personal representative § 58
Person § 56

§ 8501. Revocation of letters

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

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

CROSS-REFERENCES

Definitions
Letters § 52
Personal representative § 58

§ 8502. Grounds for removal

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

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

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

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

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

(e) Any other cause provided by statute.

Comment. Section 8502 restates former Probate Code Section 524 and portions of the first sentence of former Probate Code Section 521, except that permanent removal from the state is not continued as a ground for dismissal. See Article 9 (commencing with Section 8570) (nonresident personal representative). A conflict of interest may be ground for removal under subdivision (d); it should be noted, however, that not every conflict necessarily requires removal for protection of the estate, depending on the circumstances of the particular case. Other causes for removal are provided in this article and elsewhere by statute. See, e.g., Sections 8480 (bond required), 8577 (failure of nonresident personal representative to comply with Section 8573), 8500 (failure to attend and answer).

CROSS-REFERENCES

Definitions
Interested person § 48
Personal representative § 58

Note. Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 33) points out that the personal representative may have an interest adverse to the estate with respect to a very particular item of property or debt. "In contested estates, this may lead to efforts to disqualify the representative as a matter of spite or litigation strategy. I believe it would be appropriate to permit the court to appoint a special administrator for specific purposes without removing the personal representative completely." This sounds to the staff like an interesting concept--we would call it something like a partial or temporary removal, suspension of specific powers, or the like.

§ 8503. Removal at request of person with higher priority

8503. (a) Subject to subdivision (b), an administrator may be removed from office, on the petition of the surviving spouse or a relative of the decedent entitled to succeed to all or part of the estate, or the nominee of the surviving spouse or relative, if such person is higher in priority than the administrator.

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

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

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

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

CROSS-REFERENCES

Definitions
Surviving spouse § 78

Note. The San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6) approved the provision of this section making removal discretionary with the court, as did David B. Flinn of San Francisco (Exhibit 9). Mr. Flinn adds the comment that "There should, perhaps, be a time provision." We are not certain what he means by this; perhaps the court would deny removal after administration has been going for more than, say, 4 months?

§ 8504. Subsequent probate of will

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

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

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

CROSS-REFERENCES

Definitions
Personal representative § 58
Will § 88

§ 8505. Contempt

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

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

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

CROSS-REFERENCES

Definitions
Personal representative § 58

Article 7. Changes in Administration

§ 8520. Vacancy in office

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

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

CROSS-REFERENCES

Definitions
Personal representative § 58

§ 8521. Vacancy where other personal representatives remain

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

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

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

CROSS-REFERENCES

Definitions
  Letters § 52
  Will § 88
Verification required § 1284

§ 8522. Vacancy where no personal representatives remain

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

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

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

CROSS-REFERENCES

Definitions
  Interested person § 48
  Personal representative § 58

§ 8523. Interim protection of estate

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

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

CROSS-REFERENCES

Definitions
Property § 62

§ 8524. Successor personal representative

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

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

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

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

CROSS-REFERENCES

Definitions
Person § 56
Personal representative § 58
Property § 62

§ 8525. Effect of vacancy

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

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

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

CROSS-REFERENCES

Definitions
Personal representative § 58
Property § 62

Article 8. Special Administrators

§ 8540. Grounds for appointment

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

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

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

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

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

CROSS-REFERENCES

Actions in chambers § 7061
Definitions
Personal representative § 58

Note. Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7) would like to see a more specific and direct approach for dealing with the problem of the appointment of a special administrator to perform a single act. He suggests an express provision for combining the request for approval of the act in the petition, clarifying when the approval may be given

ex parte, and making clear that such a special administrator does not incur any fiduciary duty to take other acts to protect the estate. The court would also have authority to act, if necessary, to remedy errors made in the appointment.

§ 8541. Procedure for appointment

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

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

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

Comment. Section 8541 restates former Probate Code Section 461 and the last clause of former Probate Code Section 460 without substantive change. The public administrator may no longer be directed by the court to "take charge" of the estate but may be appointed as special administrator. Appointment of a special administrator may be made by the judge in chambers. Section 7601 (actions in chambers).

CROSS-REFERENCES

Actions in chambers § 7061
Definitions
  Interested person § 48
  Person § 56

§ 8542. Issuance of letters

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

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

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

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

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

CROSS-REFERENCES

Definitions
Letters § 52

§ 8543. Waiver of bond

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

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

CROSS-REFERENCES

Definitions
Person § 56
Will § 88

§ 8544. Special powers, duties, and obligations

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

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

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

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

(4) Sell perishable property.

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

(6) Pay the interest due on all or any part of an obligation secured by a mortgage, lien, or deed of trust on property in the estate, where there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation. This power may be exercised only by court order, made upon petition of the special administrator or any

interested person, with such notice as the court deems proper, and shall remain in effect until appointment of a successor personal representative. The order may also direct that interest not yet accrued be paid as it becomes due, and the order shall remain in effect and cover the future interest unless and until for good cause set aside or modified by the court in the same manner as for the original order.

(7) Exercise other powers that are conferred by order of the court.

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

Comment. Section 8544 restates former Probate Code Section 463 without substantive change and supersedes a portion of former Probate Code Section 460. Subdivision (a)(6) restates former Probate Code Section 464, with the addition of a provision that the order remains in effect until appointment of a successor. Among the other powers that the court may grant the special administrator is the power to disclaim.

CROSS-REFERENCES

Definitions
Interested person § 48
Personal representative § 58
Property § 62
Real property § 68

§ 8545. General powers, duties, and obligations

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

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

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

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

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

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

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

CROSS-REFERENCES

Definitions
Letters § 52
Personal representative § 58

Note. Professor Benjamin D. Frantz (Exhibit 36) suggests that "letters of special administration" be used to refer to all types of letters of special administration; if letters conferring general powers are to be referred to specifically, it should be done by reference to letters of special administration with general powers. This makes sense to the staff, and we plan to do this.

One problem we have noted in connection with other matters is that times for various acts (e.g., creditor claims) runs from appointment of a personal representative with general powers, but there is no requirement that notice be given. The staff plans to add to this section, "Notwithstanding Section 8541, if letters have not previously been issued to a general personal representative, the grant shall be on the same notice required for appointment of a general personal representative." The Comment will refer to Sections 8100 et seq. (notice of opening estate administration).

Florence J. Luther of Fair Oaks (Exhibit 35) states that a special administrator, even a special administrator granted general powers, may not make a distribution of the estate. In this she is supported by the most recent CEB text, which states "Neither preliminary nor final distribution may be made by a special administrator. Even when distribution is the only remaining step, a general administrator or executor must be appointed for that purpose. Estate of Davis (1917) 175 C 198, 165 P 525; Estate of Welch (1895) 106 C 427, 39 P 805." 1 California Decedent Estate Practice § 7.31 (1986).

The staff disagrees with this analysis. These cases pre-date the concept of special administration with general powers, which was first added to the law in 1920's. The concept of special administration with general powers specifically and statutorily includes all powers of general administration. Cases decided since the enactment of the general powers concept have distinguished the earlier cases outright and held that a special administrator with general powers does have the powers of a general administrator and may make distributions. "In this connection appellant makes the further contention that 'having appointed a special administrator, the court was without power to make a partial distribution.' In making this contention appellant fails to appreciate that the special administrator was appointed 'with general powers' pursuant to section 465, Probate Code....Since general administration is provided for by such an appointment, the probate court clearly had jurisdiction to determine a previously filed petition for partial distribution. The cases relied on by appellant are not helpful since they did not involve special administrators with general powers appointed pending an appeal from an order removing an

executor....Thus the deficiency pointed out in the Welch case, viz., the absence of general administration, was supplied in the instant matter by clothing the special administrator with general powers pursuant to the authority of Probate Code, section 465." Estate of Buchman, 132 Cal.App.2d 81, 281 P.2d 608 (1955).

The most the staff would do here is make a reference in the Comment to the applicability of the Buchman case and the inapplicability of the Davis case. The Comment may be useful because of the apparent confusion concerning the law on this matter. The staff would not want to add language to the statute, however, that might tend to encourage distributions. It is our impression that most special administrators with general powers are appointed because of prolonged will contests and other disputes among interested persons, and distribution will frequently be inappropriate.

§ 8546. Termination of authority

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

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

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

(2) A listing of all creditors' claims of which the special administrator has knowledge. The listing shall show the name and address of each creditor, the amount of the claim, and what action has been taken with respect to the claim. A copy of the listing shall be filed in the court.

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

Comment. Subdivisions (a) and (b) of Section 8546 restate former Probate Code Section 466, with the addition of language expressly permitting court authorization of the special administrator to complete ongoing transactions. The personal representative may prosecute to final judgment any suit commenced by the special administrator. Section 8524 (successor personal representative). Subdivision (c)

restates the first sentence of former Probate Code Section 467, with the addition of language permitting a consolidated account where the special administrator and general personal representative are the same person.

CROSS-REFERENCES

Definitions
Letters § 52
Person § 56
Personal representative § 59
Property § 62

§ 8547. Fees and commissions

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

(b) The commission and allowances of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's commission and allowances or the court in its discretion so allows. The total commission paid and extra allowances made to the special administrator and general personal representative shall not, together, exceed the sums provided in this division for commission and extra allowances for the services of a personal representative. If the same person does not act as both special administrator and general personal representative, the commission and allowances shall be divided in such proportions as the court deems just or as may be agreed to by the special administrator and general personal representative.

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

(d) Fees of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same

standards as for extraordinary services to a general personal representative, except that the award of fees to the attorney may be made upon settlement of the final account of the special administrator.

Comment. Subdivisions (a)-(c) of Section 8547 restate former Probate Code Sections 467-468, with the addition of provisions limiting payment of the special administrator until close of administration and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions. Subdivision (d) supersedes former Probate Code Section 469. See Section ____ (extraordinary fees).

CROSS-REFERENCES

Definitions
Personal representative § 59

Note. This section will be reviewed in connection with fees and commissions, and the Comment expanded to explain how the system of awarding fees works.

Article 9. Nonresident Personal Representative

§ 8570. "Nonresident personal representative" defined

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

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

CROSS-REFERENCES

Definitions
Personal representative § 59

§ 8571. Bond of nonresident personal representative

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

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

CROSS-REFERENCES

Definitions
Nonresident personal representative § 8570

Note. The Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17) felt that the authority of the court to require a bond should be limited to situations in which there is a specific reason for the bond. "Our committee again felt that, in some courts, this might lead to a situation in which the court would decide that a bond was appropriate in every such case."

§ 8572. Secretary of State as attorney

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

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

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

CROSS-REFERENCES

Definitions
Nonresident personal representative § 8570

§ 8573. Statement of address

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

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

CROSS-REFERENCES

Definitions
Nonresident personal representative § 8570

§ 8574. Manner of service

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

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

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

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

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

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

CROSS-REFERENCES

Definitions
Letters § 52
Nonresident personal representative § 8570

§ 8575. Proof of service

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

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

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

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

CROSS-REFERENCES

Definitions
Nonresident personal representative § 8570

§ 8576. Effect of service

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

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

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

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

CROSS-REFERENCES

Definitions
Nonresident personal representative § 8570

§ 8577. Noncompliance

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

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

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

CROSS-REFERENCES

Definitions
Nonresident personal representative § 8570

Article 2. Probate of Wills

§ 320 (repealed)

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

§ 321 (repealed)

Comment. Former Section 321 is restated in Estate and Trust Code Sections 8201 (order for production of will), 7060 (authority of court or judge), and 7375 (enforcement of order).

§ 322 (repealed)

Comment. Former Section 322 is [relocated to Division 6 (wills and intestate succesion)].

§ 323 (repealed)

Comment. Former Section 323 is restated in Estate and Trust Code Section 8000 (petition) without substantive change.

§ 324 (repealed)

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

§ 326 (repealed)

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

§ 327 (repealed)

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

§ 328 (repealed)

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

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

§ 328.3 (repealed)

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

§ 328.7 (repealed)

Comment. Former Section 328.7 is continued as Estate and Trust Code Section 6132 (conditional will).

§ 329 (repealed)

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

§ 330 (repealed)

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

§ 331 (repealed)

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

§ 332 (repealed)

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

§ 333 (repealed)

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

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

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

Subdivision (d) is not continued because it is no longer necessary.

§ 334 (repealed)

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

Article 3. Lost or Destroyed Wills

§ 351 (repealed)

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

§ 352 (repealed)

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

Article 4. Foreign Wills

§ 360 (repealed)

Comment. [Disposed of in connection with nonresident decedents.]

§ 361 (repealed)

Comment. [Disposed of in connection with nonresident decedents.]

§ 362 (repealed)

Comment. [Disposed of in connection with nonresident decedents.]

CHAPTER 2. CONTESTS OF WILLS

Article 1. Contests Before Probate

§ 370 (repealed)

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

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

§ 371 (repealed)

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

§ 372 (repealed)

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

§ 372.5 (repealed)

Comment. Former Section 372.5 is continued in Estate and Trust Code Section 6112(d).

§ 373 (repealed)

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

§ 374 (repealed)

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

Article 2. Contests After Probate

§ 380 (repealed)

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

§ 381 (repealed)

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

§ 382 (repealed)

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

§ 383 (repealed)

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

§ 384 (repealed)

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

§ 385 (repealed)

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

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

§ 400 (repealed)

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

§ 401 (repealed)

Comment. Former Section 401 is superseded by Estate and Trust Code Section 8402 (qualifications).

§ 402 (repealed)

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

§ 403 (repealed)

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

§ 404 (repealed)

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

§ 405 (repealed)

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

§ 405.1 (repealed)

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

§ 405.2 (repealed)

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

§ 405.3 (repealed)

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

§ 405.4 (repealed)

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

§ 405.5 (repealed)

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

§ 405.6 (repealed)

Comment. Former Section 405.6 is restated in Estate and Trust Code Section 8577 (noncompliance) without substantive change.

§ 406 (repealed)

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

§ 407 (repealed)

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

§ 408 (repealed)

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

§ 409 (repealed)

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

§ 410 (repealed)

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

CHAPTER 4. APPOINTMENT OF ADMINISTRATORS

Article 1. Competency and Priority

§ 420 (repealed)

Comment. Former Section 420 is restated in Estate and Trust Code Section 8402 (qualifications) without substantive change.

§ 421 (repealed)

Comment. Former Section 421 is restated in Estate and Trust Code Section 8402 (qualifications) without substantive change.

§ 422 (repealed)

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

§ 423 (repealed)

Comment. Former Section 423 is restated in Estate and Trust Code Section 8465 (nominee of person entitled to appointment).

§ 424 (repealed)

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

§ 425 (repealed)

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

§ 426 (repealed)

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

§ 427 (repealed)

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

Article 2. Application for Letters

§ 440 (repealed)

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

§ 441 (repealed)

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

§ 442 (repealed)

Comment. Former Section 442 is restated in Estate and Trust Code Section 8004 (opposition) without substantive change.

§ 443 (repealed)

Comment. Former Section 443 is restated in Estate and Trust Code Section 8005 (hearing) without substantive change.

Article 3. Revocation of Letters

§ 450 (repealed)

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

§ 451 (repealed)

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

§ 452 (repealed)

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

§ 453 (repealed)

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

CHAPTER 5. SPECIAL ADMINISTRATORS

§ 460 (repealed)

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

§ 461 (repealed)

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

§ 462 (repealed)

Comment. Subdivisions (a) and (b) of former Section 462 are restated in Estate and Trust Code Section 8542 (issuance of letters) without substantive change. Subdivision (a)(1) is restated in Estate and Trust Code Section 8481 (waiver of bond) without substantive change. Subdivision (a)(2) is restated in Estate and Trust Code Section 8543 (waiver of bond) without substantive change.

§ 463 (repealed)

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

§ 464 (repealed)

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

§ 465 (repealed)

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

§ 466 (repealed)

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

§ 467 (repealed)

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

§ 468 (repealed)

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

§ 469 (repealed)

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

CHAPTER 6. LETTERS, GENERALLY, AND CHANGES IN ADMINISTRATION

Article 1. Trust Companies

§ 480 (repealed)

Comment. Former Section 480 is restated in Estate and Trust Code Sections 83 ("trust company" defined) and 300 (appointment of trust company) without substantive change.

§ 481 (repealed)

Comment. Former Section 481 is restated in Estate and Trust Code Sections 83 ("trust company" defined) and 301 (oath and bond of trust company) without substantive change.

Article 2. Form of Letters

§ 500 (repealed)

Comment. Former Section 500 is superseded by Estate and Trust Code Section 8405 (form of letters).

§ 501 (repealed)

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

§ 502 (repealed)

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

Article 3. Disability and Substitution

§ 510 (repealed)

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

§ 511 (repealed)

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

§ 512 (repealed)

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

Article 4. Resignation, Suspension and Removal

§ 520 (repealed)

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

§ 521 (repealed)

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

§ 522 (repealed)

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

§ 523 (repealed)

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

§ 524 (repealed)

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

§ 525 (repealed)

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

§ 526 (repealed)

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

CHAPTER 7. OATHS AND BONDS

§ 540 (repealed)

Comment. Former Section 540 is restated in Estate and Trust Code Section 8403 (oath) without substantive change.

§ 541 (repealed)

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

Subdivision (b) is superseded by Estate and Trust Code Section 8481(b) (waiver of bond) without substantive change.

§ 541.1 (repealed)

Comment. Former Section 541.1 is restated in Estate and Trust Code Sections 8401 (deposit in controlled account) and 8483 (reduction of bond by deposit of assets) without substantive change.

§ 541.5 (repealed)

Comment. Former Section 541.5 is superseded by Estate and Trust Code Section 8486 (cost of bond).

§ 542 (repealed)

Comment. Former Section 542 is superseded by Estate and Trust Code Section 8482(b) (amount of bond).

§ 543 (repealed)

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

§ 544 (repealed)

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