

#L-1048

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10/28/87

Memorandum 87-94

Subject: Study L-1048 - Rules of Procedure in Probate (Approval of Recommendation for Printing)

Attached to this memorandum is the *Recommendation Relating to Rules of Procedure in Probate*, which implements decisions made at the October meeting. This recommendation is submitted for approval to print, subject to any additional revisions made at the November meeting.

At the November meeting, we plan to consider only those sections that have been revised or that are new, specifically Sections 1020, 1021, 1023, 1043, 7241, 7242, and 7263.

Respectfully submitted,

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STATE OF CALIFORNIA
California Law Revision Commission

Staff Draft

RECOMMENDATION
relating to
RULES OF PROCEDURE IN PROBATE

November 1987

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

November 20, 1987

To: The Honorable George Deukmejian
Governor of California and
The Legislature of California

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The ultimate goal is to submit a new Probate Code to the Legislature. The new code will replace the existing Probate Code.

This recommendation sets forth the Commission's proposed revisions relating to general rules of procedure in the Probate Code.

The explanatory text of this recommendation explains the principal revisions it would make in existing law. Additional changes are noted in the comments following the sections of the proposed legislation. The comment gives the source of the section and indicates the nature of the changes the section would make in existing law.

The proposed legislation is drafted as a part of the new code. In some cases, you will find a reference to other parts of the new code that are still being prepared and are not yet available.

Comments showing the disposition of each section of existing law that would be repealed in the proposed legislation can be found at the end of this recommendation.

Respectfully submitted,

Ann E. Stodden
Chairperson

RECOMMENDATION*relating to***RULES OF PROCEDURE IN PROBATE****Introduction**

This recommendation proposes general procedural provisions. Most of these provisions are redrafted and reorganized versions of sections in the existing Probate Code. Included in this recommendation are general rules that apply to the entire code and some additional rules that apply only to the new division governing decedent estate administration.¹ The following discussion notes important changes and policy issues that are involved in the proposed legislation. Minor and technical changes are noted in the comments following the proposed sections.

Pleadings

The proposed law provides as a general rule that petitions, objections, responses, reports, and accounts are to be in writing and signed by the persons filing the paper. This rule generalizes provisions found in several procedures in the Probate Code.² As a general rule, responses and objections may also be made in writing at

1. See Division 7 (commencing with Section 7000). Much of Division 7 is included in the Commission's 1987 probate bill, 1987 Cal. Stat. ch. 923, (operative July 1, 1988). The remainder of the material to be included in Division 7 is planned to be introduced in the 1988 legislative session. A new Division 3 (commencing with Section 1000) will be composed of general provisions including proposed Sections 1000-1049 and 1210 included in this recommendation and the general notice provisions set out in Sections 1200-1265 which are included in 1987 Cal. Stat. ch. 923 (operative July 1, 1988).

2. See, e.g., Prob. Code §§ 380 (will contest after probate), 440 (petition for letters of administration), 522 (removal of personal representative), 921 (filing of verified account), 1025.5 (report of status of administration).

or before a hearing.³ The proposed law recognizes that the court has discretion to hear an oral response or objection and determine it at the hearing or, in the alternative, to continue the hearing so that the response or objection may be reduced to writing. This proposal is generally consistent with some local court rules.⁴ If a party is absent from the county or for some other reason is unable to verify a petition, objection, or response, the proposed law permits the party's attorney to verify. Similarly, the party's attorney may sign the petition, objection, or response, unless the party is a fiduciary.

Guardian ad Litem

General provisions in the Code of Civil Procedure provide for the appointment of a guardian ad litem to represent the interests of a minor, an incompetent person, or a person for whom a conservator has been appointed.⁵ A guardian ad litem may also be appointed to represent the interests of unknown persons, persons not in being, or persons in a class that is unascertained.⁶ These general provisions are applicable to appointment of a guardian ad litem in estate administration proceedings and in other proceedings under the Probate Code except for proceedings relating to trusts. For many years, the

3. See, e.g., Prob. Code §§ 370 (written grounds of opposition to probate of will), 442 (opposition to petition for administration), 927 (written exceptions to account), 1041 (written objection to delivery of estate of nonresident).

4. The usual practice is to grant a continuance if an objection is made orally at a hearing. See, e.g., Probate Policy Memorandum, Los Angeles County, 3.05, in California Local Probate Rules 19-13 (8th ed. Cal. Cont. Ed. Bar 1987); Probate Policy Memorandum, Orange County, 1.04, *id.* at 30-18; Probate Policy Memoranda, Riverside County, 6.0105, *id.* at 33-11; Probate Rules, Santa Barbara County, 414.J, *id.* at 42-11. Some local court rules appear to allow consideration of oral objections at the hearing. See, e.g., Rules of Probate Practice, Marin County, 107, *id.* at 21-5.

5. Code Civ. Proc. § 372.

6. Code Civ. Proc. § 373.5.

statutes governing trust administration have provided separate statutory authority for appointment of a guardian ad litem.⁷

The proposed law generalizes the guardian ad litem provision as it has developed in the area of trust law and applies it to the entire Probate Code. This is largely a technical revision, but it has the effect of making probate practice consistent. The special Probate Code section would apply in place of the general provisions in the Code of Civil Procedure. Thus, the rules relating to minors who are 14 years of age or older, and to minors who are under 14 years old,⁸ would not apply in probate proceedings.

Jurisdiction and Power of Court

The proposed law continues the rule that proceedings for administration of decedents' estates are within the jurisdiction of the superior court.⁹ While recognizing the power of a superior court to organize in distinct departments to handle different types of cases, the proposed law eliminates any question as to the equitable powers of the court when it considers questions relating to estate administration by making clear that the superior court "sitting in probate" is a court of general jurisdiction.¹⁰

7. See former Prob. Code §§ 1120 (as amended by 1963 Cal. Stat. ch. 863, § 1) (testamentary trusts), 1138.7 (as added by 1970 Cal. Stat. ch. 849, § 2) (living trusts), 1215.3 (as added by 1974 Cal. Stat. ch. 171, § 1) (notice in trust proceedings). These provisions are generally restated without substantive change in the new Trust Law. Prob. Code § 17208.

8. Code Civ. Proc. § 373. These rules are made inapplicable by Probate Code Section 17208 (as well as by its predecessor sections) for the purpose of trust proceedings. There does not appear to be any reason to treat a 14-year-old differently in probate proceedings than in trust proceedings.

9. See Prob. Code §§ 300, 301.

10. This proposal is consistent with Probate Code Section 17001 in the Trust Law. For additional background, see *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 575-82 (1986); see also Goldberg, *The Sterilization of Incompetents and the "Late Probate Court" in California: How Bad Law Makes Hard Cases*, 18 Pac. L.J. 1, 7-15 (1986).

Jury Trial

The proposed law continues the general rule in estate administration that there is no right to a jury trial unless the right is expressly granted by statute.¹¹ For a jury trial to be available under the proposed law, however, a particular proceeding must expressly provide for a jury trial. The proposed law does not continue the rule that a jury trial is available by virtue of the provision applying the rules of practice in civil actions in any case where the Probate Code provides for issues of fact to be framed.¹²

The proposed law thus rejects the line of cases that found the framing of factual issues to be an independent statutory ground for requiring a jury trial. This change is in line with the reasoning of *Estate of Beach*¹³ and *Heiser v. Superior Court*¹⁴ which applied a stricter standard for determining whether factual issues required a jury trial under former Probate Code Section 1230. This revision is also consistent with other recent probate legislation.¹⁵

Appealable Orders

Under existing law, there is no right to appeal an order in proceedings involving a decedent's estate unless specifically so

11. *Estate of Beach*, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); *Heiser v. Superior Court*, 88 Cal. App. 3d 276, 278-80, 151 Cal. Rptr. 745 (1979); see generally, 7 B. Witkin, *California Procedure Trial* §§ 82-83, at 84-85, §§ 87-88, at 87-88, § 96, at 94-95 (3d ed. 1985).

12. See Prob. Code § 1230 (continued in Prob. Code § 1280, 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988); see, e.g., *Budde v. Superior Court*, 97 Cal. App. 2d 615, 218 P.2d 103 (1950).

13. 15 Cal. 3d 623, 642-44, 542 P.2d 994, 125 Cal. Rptr. 570 (1975).

14. 88 Cal. App. 3d 276, 279-81, 151 Cal. Rptr. 745 (1979).

15. See Prob. Code §§ 1452 (guardianships and conservatorships), 17006 (trusts). The Uniform Probate Code limits jury trials to cases where they are constitutionally required. See Uniform Probate Code § 1-306 (1982).

provided.¹⁶ Appealable orders are listed in Probate Code Section 1297 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988). The proposed law continues this approach but makes several revisions in the list of appealable orders.

The proposed law makes clear that an order granting or revoking letters of administration with the will annexed is appealable and that an order granting or revoking letters of special administration or special administration with general powers is not appealable.¹⁷

The authority to appeal an order granting or modifying a family allowance¹⁸ is expanded in the proposed law to permit appeal of an order terminating a family allowance. This is consistent with the appealability of an order modifying a family allowance or refusing to grant a family allowance.¹⁹

Existing law permits the appeal of an order directing or authorizing the grant of an option to purchase real property.²⁰ The proposed law extends the provision to options to purchase personal property since the basic considerations are the same.

16. See the cases cited in 9 B. Witkin, *California Procedure Appeal* § 115, at 132 (3d ed. 1985).

17. Probate Code Section 1297(a) (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988) (restating former Prob. Code § 1240(a)) refers simply to granting or revoking letters. The more detailed provision in the proposed law codifies rules provided in the cases and in other sections. See *Estate of Smith*, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of order appointing public administrator as administrator with the will annexed); *Estate of Hughes*, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); Prob. Code §§ 461, 465.

18. Prob. Code § 1240(e) (continued in Prob. Code § 1297(e), 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988).

19. See Lyon, *Statutory Protections for Family Members*, in 2 *California Decedent Estate Practice* § 16.22 (Cal. Cont. Ed. Bar 1986).

20. Prob. Code § 1240(g) (continued in Prob. Code § 1297(g), 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988).

Existing law permits the appeal of an order fixing an inheritance tax or determining that none is due.²¹ The proposed law omits this provision in view of the repeal of the inheritance tax.²²

Stay on Appeal

Existing statutes relating to administration of decedents' estates do not provide special rules governing stays on appeal. Instead, reliance must be placed on general rules in the Code of Civil Procedure²³ and in the cases.²⁴ The proposed law does not attempt to revise the substance of this law, but makes it more accessible to probate practitioners by providing general rules governing stay on appeal that are drawn from guardianship and conservatorship law.²⁵

Judgment Roll

An appeal may be made on the papers in the judgment roll.²⁶ The contents of the judgment roll for purposes of the Probate Code are specified by statute.²⁷ The proposed law adds the statement of

21. Prob. Code § 1240(p) (continued in Prob. Code § 1297(p), 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988).

22. A transitional provision will provide for appeals under the law prior to June 8, 1982, when the inheritance tax was repealed by an initiative.

23. See Code Civ. Proc. §§ 916-917.9.

24. See, e.g., *Estate of Hultin*, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947) (order appointing executor); *Estate of Sam Lee*, 26 Cal. 2d 295, 296, 158 P.2d 193 (1945) (order appointing public administrator); *Estate of Gibson*, 233 Cal. App. 2d 125, 127-30, 43 Cal. Rptr. 302 (1965) (order appointing administrator).

25. See Prob. Code § 2751.

26. See Cal. R. Court 5; Abbott, *Designating the Record*, in *California Civil Appellate Practice* § 8.1, at 208, § 8.47-8.48, at 239-40 (Cal. Cont. Ed. Bar 2d ed. 1985).

27. Prob. Code § 1242 (continued in Prob. Code § 1299, 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988). The contents of the judgment roll in civil proceedings generally are specified in Code of Civil Procedure Section 670.

decision to the judgment roll; this reflects the practice in probate courts.²⁸

Liability for Costs

Several provisions of existing law deal in general terms with the liability of a personal representative for costs of litigation.²⁹ Probate Code Section 719 makes the personal representative personally liable for costs, but permits reimbursement from the estate unless the suit or proceeding in which costs were awarded was prosecuted or defended "without just cause." On the other hand, Probate Code Section 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988, restating Probate Code Section 1232) provides for costs to be paid by a party to proceedings or out of assets of the estate "as justice may require."

The new code adopts the general rule provided in Probate Code Section 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988, restating Probate Code Section 1232) in preference to the rule of Probate Code Section 719. This eliminates the inconsistency under existing law and adopts the more general of the two rules. As under

28. The proposed law also omits the provision in Probate Code Section 1299 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988) that the papers making up the judgment roll need not be attached together. Until 1939, Code of Civil Procedure Section 670 required that the papers constituting the judgment roll be attached together. See 1939 Cal. Stat. ch. 733, § 1. This nonattachment provision derives from a cautious transitional provision apparently intended to make clear that the attachment requirement was in fact repealed. By now, it can safely be assumed that court clerks have become accustomed to the practice of not attaching the judgment roll papers together; consequently, this provision is surplus.

29. See Code Civ. Proc. § 1026; Prob. Code §§ 719 (1987 Cal. Stat. ch. 923, § 38, operative July 1, 1988), 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988). Special provisions govern the liability for costs in certain circumstances. See, e.g., Prob. Code §§ 383 (costs in probate revocation), 9653 (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988) (costs in action to recover fraudulently conveyed property), 9257 (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988) (disallowed creditor's claim by representative), 9255 (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988) (costs not allowed where creditor contests amount allowed in satisfaction of claim unless creditor prevails), 1002 (costs on preliminary distribution), 6544 (costs of proceedings for family allowance).

existing law,³⁰ the general statutory rule is subject to any contrary rule provided by statute or court rule.

Code of Civil Procedure Section 1026, as it applies to executors, administrators, and trustees, makes the estate liable for costs unless the court directs costs to be paid by the fiduciary personally "for mismanagement or bad faith in the action or defense." The new code retains this rule without substantive change.³¹

30. See Prob. Code § 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988) (restating former Prob. Code § 1232).

31. Section 1026 also applies to persons "expressly authorized by statute" to prosecute or defend an action. Section 1026 would be amended to add guardians and conservators to the list of fiduciaries covered by the section.

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DIVISION 3. GENERAL PROVISIONS OF A PROCEDURAL NATURE

PART 1. GENERAL PROVISIONS

CHAPTER 1. RULES OF PRACTICE

§ 1000. General rules of practice

1000. Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions apply to and constitute the rules of practice in proceedings under this code.

Comment. Section 1000 replaces the first through the fourth sentences of former Section 1280 and the first paragraph of former Section 1283. This section provides a default rule that applies in circumstances where there is no special rule applicable in probate proceedings. For example, the general rules of practice apply to discovery, trials, new trials, appeals, and other matters of procedure. General rules of the Code of Civil Procedure do not apply, however, where this code provides a special rule. For example, jury trials are strictly limited in proceedings under this code. See Sections 1452 (jury trials in guardianship and conservatorship proceedings), 7200 (jury trials in estate administration), 17006 (jury trials in trust administration). The right to make a motion for a new trial in proceedings for administration of a decedent's estate is limited in Section 7220. The right to appeal in decedent estate administration is limited to the orders set out in Section 7240. Many other limitations are provided in this chapter and in other provisions throughout this code. This general rule is also subject to the rulemaking power of the courts. See Section 1001.

§ 1001. Judicial Council and local court rules

1001. (a) The Judicial Council may provide by rule for the practice and procedure under this code. Unless disapproved by the Judicial Council, a court may provide by local rule for the practice and procedure under this code. Judicial Council and local court rules shall be consistent with the applicable statutes.

(b) The Judicial Council may prescribe the form of the applications, notices, orders, and other documents required by this code. Any such form prescribed by the Judicial Council is deemed to comply with this code.

Comment. Section 1001 is consistent with the fourth paragraph of Section 6 of Article 6 of the California Constitution and with Government Code Section 68511. Cf. Section 1456 (guardianship and conservatorship).

§ 1002. Costs

1002. Unless it is otherwise provided by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.

Comment. Section 1002 restates former Section 1282 without substantive change. For special provisions relating to costs, see, e.g., Sections 383 (costs in probate revocation), 1002 (costs on preliminary distribution), 6544 (costs of proceedings for family allowance), 9255 (costs where creditor contests amount of allowed claim), 9257 (disallowed creditor's claim by representative), 9653 (costs in action to recover fraudulently conveyed property). See also Code Civ. Proc. § 1026 (costs in actions involving fiduciary estate).

§ 1003. Appointment of guardian ad litem

1003. (a) The court may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate:

- (1) A minor.
- (2) An incapacitated person.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(c) The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner.

Comment. Section 1003 is a new provision that generalizes former Section 17208 (guardian ad litem in trust proceedings). Section 1003 is also comparable to Section 1-403(4) of the Uniform Probate Code (1982). The general provisions for appointment of a guardian ad litem in Code of Civil Procedure Sections 372-373.5 do not apply to the

appointment of a guardian ad litem under this code. See Section 1000 (general rules of civil practice apply unless this code provides a different rule). A guardian ad litem may be appointed in situations where a guardian or conservator has already been appointed, if the need for a guardian ad litem exists. See Section 1455 (guardianship and conservatorship law does not limit authority to appoint guardian ad litem). This section is not intended to limit any power the court may have to appoint an attorney to represent the interests of an incapacitated person. If a beneficiary has an interest in only part of an estate, the court may not charge expenses to the whole estate, but only to the beneficiary's interest. See Estate of Corotto, 125 Cal. App. 2d 314, 325, 270 P.2d 498 (1954).

CROSS-REFERENCES

Definitions

Interested person § 48

Person § 56

§ 1004. Lis pendens

1004. If a proceeding affects the title to or the right of possession of real property, notice of the pendency of the proceeding may be filed under Section 409 of the Code of Civil Procedure.

Comment. Section 1004 is new provision that generalizes former Sections 2523 (guardianship and conservatorship) and 9863 (claims of title in estate administration). Section 1004 does not refer to proceedings that "concern" title or the right of possession of real property, as does Code of Civil Procedure Section 409, and thus provides a more restrictive rule than would otherwise apply through the incorporation provision of Section 1000. Other provisions of the Code of Civil Procedure applicable to lis pendens apply under this code by virtue of Section 1000 (general rules of practice). See, e.g., Code Civ. Proc. § 409.1 (expunging lis pendens).

CROSS-REFERENCES

Definitions

Real property § 68

CHAPTER 2. PETITIONS AND OTHER PAPERS

§ 1020. Petitions, reports, accounts

1020. Except as provided in Section 1023, a petition, objection, response, report, or account shall be in writing, signed by all of the petitioners, objectors, or respondents, or by all of the persons making the report or account, and filed with the court clerk.

Comment. Section 1020 generalizes several former provisions. See, e.g., former Sections 380 (will contest after probate), 440 (petition for letters of administration), 522 (removal of personal

representative), 921 (filing of verified account), 1025.5 (report of status of administration). The introductory clause recognizes that the attorney for a nonfiduciary may sign a petition, objection, or response under certain circumstances. See Section 1023. See also Section 9630 (authority of joint personal representatives to act).

Note. This section has been revised as indicated to implement a decision made at the October meeting. The references to objections and responses have been added for consistency with Sections 1021 and 1023.

§ 1021. Verification required

1021. (a) All of the following shall be verified:

(1) A petition, report, or account filed under this code.

(2) An objection or response filed under this code to a petition, report, or account.

(b) Except as provided in ~~subdivision--(e)~~ Section 1023, the verification shall be made as follows:

(1) A petition shall be verified by the petitioner or, if there are two or more parties joining in the petition, by any of them.

(2) A report or account shall be verified by the person who has the duty to make the report or account or, if there are two or more persons having a duty to make the report or account, by any of them.

(3) An objection or response shall be verified by the objector or respondent or, if there are two or more parties joining in the objection or response, by any of them.

~~(e) If a petitioner, objector, or respondent is absent from the county or for some other cause is unable to make a verification, the petition, objection, or response may be verified by the attorney for the petitioner, objector, or respondent.~~

Comment. Section 1021 restates former Section 1284 without substantive change. Subdivision (a) is comparable to Sections 1450 (guardianship and conservatorship law) and 17201(a) (trust law).

Subdivision (b) restates former Section 1284(b) without substantive change. In the case of a corporate fiduciary, a responsible person, such as a corporate officer, should verify a report or account.

~~Subdivision (e) permits verification by a party's attorney in limited circumstances. This provision is drawn in part from Code of Civil Procedure Section 446, but provides a different rule governing the situations where an attorney may make a verification in place of a party. The manner of verification, however, is governed by Code of Civil Procedure Section 446.~~

For an exception to the verification requirement, see Section

10953 (account where personal representative dies or becomes incompetent).

Note. This section has been revised as indicated to implement a decision made at the October meeting. See draft Section 1023.

§ 1022. Affidavit or verified petition as evidence

1022. An affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code.

Comment. Section 1022 generalizes the first sentence of the second paragraph of former Section 1283. The declaration of an attorney is admissible as an affidavit under this section. Proceedings under this code include proceedings relating to the administration of estates of decedents and proceedings relating to the administration of estates of persons for whom a guardian or conservator has been appointed. See also Code Civ. Proc. § 2009 (affidavit may be used to establish record of birth).

§ 1023. Signing and verification by attorney

1023. If a petitioner, objector, or respondent is absent from the county or for some other cause is unable to sign or verify a petition, objection, or response, the person's attorney may do either or both of the following:

(a) Sign the petition, response, or objection, if the petitioner, objector, or respondent is not a fiduciary.

(b) Verify the petition, objection, or response.

Comment. Section 1023 provides exceptions to the general rules applicable to signing and verification under Sections 1020 and 1021. Subdivision (a) is a new provision that permits the attorney of a person who is not a personal representative, trustee, guardian, or conservator to sign a petition, response, or objection in place of the person who would otherwise be required to sign under Section 1020.

Subdivision (b) permits verification by a party's attorney in limited circumstances. This provision is drawn in part from Code of Civil Procedure Section 446, but provides a different rule governing the situations where an attorney may make a verification in place of a party. The manner of verification, however, is governed by Code of Civil Procedure Section 446.

CROSS-REFERENCES

Definitions

Fiduciary § 39

Note. This section is new and implements a decision made at the October meeting. The cross-reference to the definition of "fiduciary" means the following provision which is currently set out as a

conforming revision to the revision of the *Fiduciaries' Wartime Substitution Law* (see Memorandum 87-78, p. 15). The definition reads as follows: "'Fiduciary' means personal representative, trustee, guardian, conservator, or other legal representative."

CHAPTER 3. HEARINGS AND ORDERS

§ 1040. General hearing procedure

1040. The provisions of this chapter govern the hearing of all matters under this code, except where the statute that provides for the hearing of the matter prescribes a different procedure.

Comment. Section 1040 is new. It is intended to simplify the procedural statutes of this code and eliminate duplication and unnecessary variances by prescribing a uniform hearing procedure.

§ 1041. Clerk to set matters for hearing

1041. When a petition, report, account, or other matter that requires a hearing is filed with the court clerk, the clerk shall set the matter for hearing.

Comment. Section 1041 restates former Section 1285 without substantive change.

§ 1042. Notice of hearing

1042. A hearing under this code shall be on notice unless the statute that provides for the hearing dispenses with notice.

Comment. Section 1042 is new. For provisions permitting ex parte hearings, see, e.g., Sections 203 (proceedings to establish fact of death), 8541 (procedure for appointment of special administrator), 9735 (purchase of securities or commodities sold short), 10200 (sale or surrender for redemption or conversion of securities). See also Section 1220(f) (mailed notice dispensed with for good cause).

§ 1043. Response or objection

1043. (a) An interested person may appear and make a response or objection in writing at or before the hearing.

(b) An interested person may appear and make a response or objection orally at the hearing. ~~The court in its discretion may hear and determine the response or objection at the hearing or may grant a continuance for the purpose of making the response or objection in~~

~~writing.~~ The court in its discretion shall either hear and determine the response or objection at the hearing, or grant a continuance for the purpose of allowing a response or objection to be made in writing.

(c) A request for a continuance for the purpose of making a written response or objection shall not itself be considered as a response or objection, nor shall the failure to make a response or objection during the time allowed be considered as a response or objection.

Comment. Section 1043 supersedes a number of former provisions. See, e.g, former Sections 370 (written grounds of opposition to probate of will), 442 (opposition to petition for administration), 927 (written exceptions to account), 1041 (written objection to delivery of estate of nonresident). Section 1043 does not apply where a particular statute provides a different procedure. See Section 1040.

Subdivision (c) is a new provision. In the context of a will contest, this provision means that a potential contestant is not deemed to have contested the will merely because of a request for a continuance for the purpose of determining whether to contest the will.

§ 1044. Plaintiff and defendant

1044. The petitioner or other party affirming is the plaintiff and the party objecting or responding is the defendant.

Comment. Section 1044 restates the second sentence of former Section 1280 without substantive change.

§ 1045. Continuance or postponement

1045. The court may continue or postpone any hearing, from time to time, in the interest of justice.

Comment. Section 1045 continues former Section 1286 without change.

§ 1046. Hearing and order

1046. The court shall hear and determine any matter at issue and any response or objection presented and shall make appropriate orders.

Comment. Section 1046 restates former Section 1287 without substantive change.

§ 1047. Recital of jurisdictional facts unnecessary

1047. Except as otherwise provided in this code, an order made in

a proceeding under this code need not recite the existence of facts, or the performance of acts, upon which jurisdiction depends, but need only contain the matters ordered.

Comment. Section 1047 restates former Section 1290 without substantive change. For an exception to this section, see Section 8006 (jurisdictional facts in court order opening probate).

§ 1048. Entry and filing

1048. (a) Except as provided in subdivision (b), orders shall be either entered at length in the minute book of the court or signed by the judge and filed.

(b) An order for distribution shall be entered at length in a judgment book or other permanent record of the court.

Comment. Section 1048 restates former Section 1291 and part of the fourth sentence of former Section 1280 without substantive change.

§ 1049. Enforcement of order

1049. An order may be enforced as provided in Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure.

Comment. Section 1049 restates part of the last sentence of former Section 1280 without substantive change. It elaborates one aspect of Section 1000 (general rules of practice govern).

§ 1050. Judgment roll

1050. The judgment roll in a proceeding under this code consists of the following papers, where applicable:

(a) In all cases:

(1) The petition, application, contest, report, or account that initiates a particular proceeding.

(2) Any order directing notice of the hearing to be given.

(3) Any notice of the hearing, and any order to show cause made in the proceeding, with the affidavits showing publication, posting, or mailing of the notice or order as may be required by law or court order.

(4) Any citation, in case no answer or written opposition is filed by a party entitled, by law or court order, to notice of the proceeding by citation, with the affidavit or proof of service and, if service of the citation is made by publication, the affidavit of publication and the order directing publication.

- (5) Any finding of the court or referee in the proceeding.
- (6) The order or statement of decision made in the proceeding.
- (7) Any letters of the personal representative.
- (b) If an answer, demurrer, written opposition, or counter petition is filed in a proceeding:
 - (1) Pleadings and papers in the nature of pleadings.
 - (2) Any orders striking out a pleading in whole or in part.
 - (3) Any order made on demurrer, or relating to a change of parties, in the proceeding.
 - (4) The verdict of the jury, if any.
- (c) If the proceeding is for the probate of a will, the will.
- (d) If the proceeding is a contest of a will, for the revocation of the probate of a will, or for a preliminary or final distribution of property under a will:
 - (1) The will.
 - (2) The order admitting the will to probate.
- (e) If the proceeding is for the settlement of the final account of a personal representative or for final distribution of property in an estate, the affidavit showing publication of notice to creditors.

Comment. Section 1050 restates former Section 1299 without substantive change. However, the former provision stating that the papers constituting the judgment roll need not be attached together is omitted as unnecessary. The reference to the statement of decision in subdivision (a)(6) is new. The reference in subdivision (d) to partial and ratable distributions has been replaced by a reference to preliminary distributions.

CROSS-REFERENCES

Appealable orders

- Decedent's estate administration § 7240
- Guardianship and conservatorship § 2750
- Insurance or employee benefit trust § 6327
- Trust administration § 17207

Definitions

- Letters § 52
- Personal representative § 58
- Will § 88

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. PASSAGE OF DECEDENT'S PROPERTY

§ 7000. Passage of decedent's property

7000. Subject to Section 7001, title to a decedent's property passes on the decedent's death to the person to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession.

Comment. Section 7000 restates the first part of former Section 300 without substantive change. The decedent's heirs are determined as provided in Part 2 (commencing with Section 6400) of Division 6 (intestate succession). The rule stated in Section 7000 is subject to limitations. See Section 7001 and the Comment thereto.

CROSS-REFERENCES

Definitions

Devise § 32
Heirs § 44
Person § 56
Property § 62
Will § 88

§ 7001. Limitations on passage of decedent's property

7001. The decedent's property is subject to administration under this code, except as otherwise provided by law, and is subject to the rights of beneficiaries, creditors, and other persons as provided by law.

Comment. Section 7001 restates the substance of the last part of former Section 300. Administration of the decedent's estate includes possession by the personal representative, control by the court, sale and other disposition of the property, charges of administration, and payment of debts and family allowance. The requirement of administration is subject to exceptions. See, e.g., Sections 160 (contract rights), 5100-5407 (multiple party accounts), 13000-13660 (disposition without administration), 15000-18201 (trusts), and the law governing joint tenancy. For provisions relating to the rights of beneficiaries, creditors, and others, see, e.g., Sections 100-105 (effect of death of married person on community and quasi-community property), 260-295 (disclaimers), 6146-6147 (lapsed gifts), 6510-11 (exempt property), 6520-6528 (probate homestead), 6540-6545 (family

allowance), 6560-6573 (omitted spouse and children), 6600-6615 (small estate set-aside), 21400-21406 (abatement).

CROSS-REFERENCES

Definitions

Beneficiary § 24

Property § 62

CHAPTER 2. JURISDICTION AND COURTS

Article 1. Jurisdiction and Venue

§ 7050. Jurisdiction and authority of court or judge

7050. (a) The superior court has jurisdiction of proceedings under this code concerning the administration of the decedent's estate.

(b) The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including but not limited to the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 7050 restates a provision of former Section 300 and the introductory part of former Section 301 without substantive change. Subdivision (a) is comparable to Section 2200 (jurisdiction of guardianship and conservatorship proceedings). Proceedings concerning administration of a decedent's estate include the probate of wills (Sections 8200-8273), appointment of personal representatives (Sections 8400-8577), and estate management (Sections 9600-10382). Where appropriate, the reference to the superior court in subdivision (a) means the department or judge of the court that deals with probate matters.

Subdivision (b) expands a provision of former Section 321 (the judge may make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses) and abandons the former rule that the superior court "sitting in probate" was a court of limited jurisdiction. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 233-34, at 5741-43 (8th ed. 1974). Subdivision (b) makes clear that the probate court, when considering cases brought before it under this division, has all the powers of the superior court exercising its general jurisdiction. Hence, while preserving the division of business among different departments of the superior court, this section rejects the limitation on the powers of the probate court that has been cited in appellate decisions. See, e.g., *Copley v. Copley*, 80 Cal. App. 3d 97, 106, 145 Cal. Rptr. 437 (1978). See also Section 17001 (full-power court under Trust Law).

§ 7051. Venue in case of domiciliary

7051. If the decedent was domiciled in this state at the time of death, the proper county for proceedings concerning administration of the decedent's estate is the county in which the decedent was domiciled, regardless of where the decedent died.

Comment. Section 7051 restates without substantive change the venue provisions of former Section 301 applicable to domiciliaries. The substitution of "domicile" for "residence" codifies existing law. See, e.g., Estate of Phillips, 269 Cal. App. 2d 656, 659, 75 Cal. Rptr. 301 (1969); Estate of Brace, 180 Cal. App. 2d 797, 802, 4 Cal. Rptr. 683 (1960); Estate of Glassford, 114 Cal. App. 2d 181, 186-87, 249 P.2d 908 (1952).

CROSS-REFERENCES

Petition for administration of estate § 8000

§ 7052. Venue in case of nondomiciliary

7052. If the decedent was not domiciled in this state at the time of death, the proper county for proceedings under this division is one of the following:

(a) If property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died, the county in which the nondomiciliary decedent died.

(b) If no property of the nondomiciliary decedent is located in the county in which the nondomiciliary decedent died or if the nondomiciliary decedent did not die in this state, any county in which property of the nondomiciliary decedent is located, regardless of where the nondomiciliary decedent died. If property of the nondomiciliary decedent is located in more than one county, the proper county is the county in which a petition for ancillary administration is first filed, and the court in that county has jurisdiction of the administration of the estate.

Comment. Section 7052 restates the nondomiciliary venue provisions of former Section 301 without substantive change. The substitution of "domicile" for "residence" codifies existing law. See the Comment to Section 7051. See also Section 12511 (ancillary administration).

CROSS-REFERENCES

Petition for administration of estate § 8000

Article 2. Disqualification of Judge

§ 7060. Disqualification of judge

7060. (a) In addition to any other ground provided by law for disqualification of a judge, a judge is disqualified from acting under this division, except to order the transfer of a proceeding as provided in Article 3 (commencing with Section 7070), in any of the following cases:

- (1) The judge is interested as a beneficiary or creditor.
- (2) The judge is named as executor or trustee in the will.
- (3) The judge is otherwise interested.

(b) A judge who participates in any manner in the drafting or execution of a will, including acting as a witness to the will, is disqualified from acting in any proceeding prior to and including the admission of the will to probate or in any proceeding involving its validity or interpretation.

Comment. Section 7060 is the same in substance as the first paragraph of former Section 303. For general provisions on disqualification, see Code Civ. Proc. §§ 170-170.8.

CROSS-REFERENCES

Definitions

Beneficiary § 24

Article 3. Transfer of Proceedings

§ 7070. Grounds for transfer

7070. The court or judge shall order a proceeding under this division transferred to another county if there is no judge of the court in which the proceeding is pending who is qualified to act. This section does not apply if a judge qualified to act is assigned by the chairman of the Judicial Council to sit in the county and hear the proceeding.

Comment. Section 7070 restates part of the second paragraph of former Section 303 without substantive change. Transfer of a proceeding under this article is in the same manner and with the same effect as transfer of actions and proceedings under the Code of Civil Procedure. See Section 1000 (general rules of practice govern); Code Civ. Proc. § 399 (transmittal of papers; jurisdiction of receiving court). These provisions supersede parts of former Sections 303 and 305.

§ 7071. Place of transfer

7071. Transfer of a proceeding under this article shall be to another county in which property of the decedent is located or, if there is no other county in which property of the decedent is located, to an adjoining county.

Comment. Section 7071 is new. The provision for transfer to an adjoining county continues a provision of the second paragraph of former Section 303.

§ 7072. Retransfer

7072. Upon petition of an interested person before the administration of the estate is closed, a proceeding transferred under this article may be retransferred to the court in which the proceeding was originally commenced if the court determines that both of the following conditions are satisfied:

(a) Another person has become judge of the court where the proceeding was originally commenced who is not disqualified to act in the administration of the estate.

(b) The convenience of the parties interested would be promoted by the retransfer.

Comment. Section 7072 is the same in substance as part of former Section 305.

CROSS-REFERENCES

Definition

Interested person § 48

CHAPTER 3. RULES OF PROCEDURE

Article 1. Trial by Jury

§ 7200. Trial by jury

7200. Except as otherwise expressly provided in this division, there is no right to a jury trial in proceedings under this division.

Comment. Section 7200 continues the general rule under prior law that there is no right to a jury in probate proceedings unless that right is granted by statute. Estate of Beach, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); Heiser v. Superior Court, 88 Cal. App. 3d 276, 278-80, 151 Cal. Rptr. 745 (1979). This section supersedes the third and fourth sentences of former Section 1280 as applicable to estate administration proceedings. See also Sections 1452 (guardianship and conservatorship) and 17006 (trusts).

Article 2. New Trials

§ 7220. New trial

7220. A motion for a new trial may be made only in the following cases:

(a) Contest of a will or revocation of probate of a will.

(b) Cases in which a right to jury trial is expressly granted, whether or not the case was tried by a jury.

Comment. Section 7220 restates former Section 1281 without substantive change. There is no right to a jury trial unless expressly provided by statute. See Section 7200 (trial by jury).

Article 3. Appeals

§ 7240. Appealable orders and refusals to make orders

7240. An appeal may be taken from the making of, or the refusal to make, any of the following orders:

(a) Granting or revoking letters testamentary, letters of administration, or letters of administration with the will annexed, but not letters of special administration or letters of special administration with general powers.

(b) Admitting a will to probate or revoking the probate of a will.

(c) Setting aside a small estate under Section 6609.

(d) Setting apart a probate homestead or property claimed to be exempt from enforcement of a money judgment.

(e) Granting, modifying, or terminating a family allowance.

(f) Directing or authorizing the sale or conveyance or confirming the sale of property.

(g) Directing or authorizing the granting of an option to purchase property.

(h) Adjudicating the merits of a claim under Chapter 11 (commencing with Section 9860) of Part 5 of Division 7.

(i) Allocating debts under Chapter 3 (commencing with Section 11440) of Part 9 of Division 7.

(j) Settling an account of a personal representative.

(k) Instructing or directing a personal representative.

(l) Directing or allowing the payment of a debt, claim, devise, or attorney's fee.

(m) Determining the persons to whom distribution should be made.

(n) Distributing property.

(o) Determining that property passes to, or confirming that property belongs to, the surviving spouse under Section 13656.

(p) Authorizing a personal representative to invest or reinvest surplus money under Section 9732.

Comment. Section 7240 restates former Section 1297 without substantive change, except as follows:

(1) Subdivision (a) codifies the former rules that orders granting or revoking letters of administration with the will annexed are appealable, but that letters of special administration or letters of special administration with general powers are not. See Estate of Smith, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of order appointing public administrator as administrator with the will annexed); Estate of Hughes, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); former Sections 461, 465.

(2) Language in subdivision (e) permitting the appeal of an order terminating a family allowance is new.

(3) Subdivision (g) relating to options is not limited to real property options as was former subdivision (g).

(4) Subdivision (o) is not limited to orders determining that property is *community* property passing to the surviving spouse as was former subdivision (o).

(5) The right to appeal from an order relating to determination of heirship is omitted because this procedure is not continued. See the Comment to former Section 1190.

(6) Former subdivision (p) relating to appeals concerning inheritance tax is replaced by Section 7242 (transitional provision).

CROSS-REFERENCES

Definitions

Community property § 28

Devise § 32

Family allowance § 38

Probate homestead § 60

Property § 62

Surviving spouse § 78

Will § 88

Guardian ad litem § 1003

Judgment roll contents § 1050

§ 7241. Stay on appeal

7241. (a) Except as provided in subdivisions (b) and (c), an appeal under Section 7240 stays the operation and effect of the order.

(b) Notwithstanding that an appeal is taken from the order, for the purpose of preventing injury or loss to a person or property, the

trial court may direct the exercise of the powers of the personal representative, or may appoint a special administrator to exercise the powers, from time to time, as though no appeal were pending. Acts of the personal representative or special administrator pursuant to the directions of the court made under this subdivision are valid, regardless of the result of the appeal.

(c) An appeal under Section 7240 does not stay the operation and effect of the order if the court requires an undertaking, as provided in Section 917.9 of the Code of Civil Procedure, and the undertaking is not given.

Comment. Section 7241 is new and is drawn from Section 2751 (stay on appeal in guardianship and conservatorship law). Subdivision (a) is consistent with the case-law rule under former law that the appeal of an order appointing a personal representative suspends the powers of the personal representative and stays proceedings in the probate court. See Estate of Hultin, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947); Estate of Gibson, 233 Cal. App. 2d 125, 127-30, 43 Cal. Rptr. 302 (1965). However, the powers of a personal representative that are not the subject of an appeal are not affected by the appeal and may be exercised as appropriate. See also Code Civ. Proc. § 917.9 (discretion to require undertaking in case of automatic stay); Prob. Code § 9612 (effect of final order).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. This section has been revised as indicated to implement a decision made at the October meeting.

§ 7242. Transitional provision

7242. Notwithstanding the repeal of former Section 1297, an appeal may be taken from an order or the refusal to make an order:

(a) Determining heirship or the persons to whom distribution should be made.

(b) Fixing an inheritance tax or determining that none is due.

Comment. Section 7242 provides a rule governing appeals from procedures that are not continued. See the Comment to Section 7240. This section restates subdivisions (m) and (p) of former Section 1297.

Note. This section is a new provision. As to the inheritance tax, it implements a decision made at an earlier meeting.

Article 4. Orders and Transactions Affecting Property

§ 7260. "Transaction" defined

7260. As used in this article, "transaction" means a transaction affecting title to property in the estate, including but not limited to the following:

(a) In the case of real property, a conveyance (including a sale, option, or order confirming a sale or option), a lease, the creation of a mortgage, deed of trust, or other lien or encumbrance, the setting apart of a probate homestead, or the distribution of property.

(b) In the case of personal property, a transfer of the property or the creation of a security interest or other lien on the property.

Comment. Section 7260 is a new provision drawn from Section 2111(a) (guardianship and conservatorship law). This section is intended to simplify drafting in the other sections of this article.

CROSS-REFERENCES

Definitions

Probate homestead § 60
Property § 62
Real property § 68

§ 7261. Execution of instruments authorized or directed by court order

7261. If a transaction affecting real property in the estate is executed by the personal representative in accordance with the terms of a court order, the instrument shall include a statement that the transaction is made by authority of the order authorizing or directing the transaction and shall give the date of the order.

Comment. Section 7261 is drawn from Section 2111(c) (guardianship and conservatorship law) and is consistent with several provisions in other parts of the code. See Sections 9805 (execution of encumbrance), 9948 (execution of lease), 10314 (conveyance or assignment after confirmation).

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62
Real property § 68
Transaction § 7260

§ 7262. Transfer or conveyance of property pursuant to court order

7262. A transaction executed by the personal representative in accordance with an order authorizing or directing the transaction has the same effect as if the decedent were living at the time of the transaction and had carried it out in person while having legal capacity to do so.

Comment. Section 7262 is drawn from Section 2111(d) (guardianship and conservatorship) and is consistent with several provisions in other parts of the code. See also Sections 9806 (effectiveness of encumbrance), 9868 (effectiveness of order in proceedings involving property claimed by another), 9948 (effectiveness of lease), 10314 (conveyance or assignment after confirmation). Whether or not after-acquired title is passed by an instrument executed by the personal representative depends on the terms of the instrument. See generally 3 B. Witkin, *Summary of California Law Real Property* § 86, at 1840, § 160, at 1900-01 (8th ed. 1973).

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62
Real property § 68
Transaction § 7260

§ 7263. Recordation of order affecting real property

7263. If a transaction an order is made setting apart a probate homestead, confirming a sale or making a distribution of real property, or determining any other matter affecting title to real property in the estate is executed by the personal representative in accordance with the terms of a court order, the personal representative shall record a certified copy of the order in the office of the county recorder in each county in which any portion of the real property is situated.

Comment. ~~Section 7263 is drawn from Section 2111(e) (guardianship and conservatorship law) and replaces~~ restates all but the last clause of former Section 1292 (recordation of order affecting real property) without substantive change. ~~This section applies to any transaction of an interest in real property of the estate that is accomplished pursuant to court authorization or direction. See Section 7260 ("transaction" defined). This section does not apply to a transaction, such as a lease pursuant to Section 9941, where court approval is not required.~~ Recordation of an order for distribution of real property has the effect of a receipt by the distributee. See Section 11751 (receipt for distributed property).

CROSS-REFERENCES

Definitions

- Personal representative § 58
- Probate homestead § 60
- Property § 62
- Real property § 68

Note. This section has been revised as indicated to implement a decision made at the October meeting. This revision is intended to deal with the objection raised by Ken Klug. At the last meeting, as reported in the Minutes, the Commission decided to redefine "transaction" in Section 7260 to eliminate the reference to "lease" and return to the wording of Section 1292 (formerly Section 1222). However, this definition has a broader role to play in other sections in this article. Accordingly, the staff has restored the language of Section 1292 only in this section which relates to recording. Presumably, there is no objection to applying Sections 7261 and 7262 to leases since these sections do not deal with recording.

Article 5. United States as Interested Person

§ 7280. United States as interested person

7280. Where compensation, pension, insurance, or other allowance is made or awarded by a department or bureau of the United States government to a decedent's estate, the department or bureau has the same right as an interested person to request special notice, to commence and prosecute an action on the bond of a personal representative, and to file written exceptions to a personal representative's account or contest the account.

Comment. Section 7280 restates former Section 1288 without substantive change. See Section 58 ("personal representative" defined).

CONFORMING REVISIONS AND REPEALS

Code of Civil Procedure § 153 (amended). Documents under seal

SEC. . Section 153 of the Code of Civil Procedure is amended to read:

153. Except as otherwise expressly provided by law, the seal of a court need not be affixed to any proceeding therein, or to any document, except to the following:

~~1. To a writ;~~

~~2. To a summons;~~

~~3. To a warrant of arrest;~~

~~4. To the certificate of probate of a will or of the appointment of an executor, administrator, guardian, or conservator.~~

(a) A writ.

(b) A summons.

(c) A warrant of arrest.

Comment. Section 153 is amended to delete the former reference to papers in probate. This provision is unnecessary, since the form of such papers is governed by the Probate Code. See, e.g., Prob. Code §§ 2311 (letters of guardianship or conservatorship), 8405 (letters of personal representative),

Code of Civil Procedure § 166 (amended). Matters in chambers

SEC. . Section 166 of the Code of Civil Procedure is amended to read:

166. (a) The judge or judges of the superior, municipal and justice courts may, at in chambers, in the matters within the jurisdiction of their respective courts:

(1) Grant all orders and writs which are usually granted in the first instance upon an ex parte application, and ~~may, at chambers,~~ hear and dispose of such orders and writs; ~~and may also, at chambers,~~ appoint ~~appraisers,~~ referees, require and receive inventories and accounts to be filed, order notice of settlement of supplementary accounts, suspend the powers of ~~executors, administrators~~ personal representatives, guardians, or conservators in the cases allowed by law, appoint special administrators, grant ~~special letters of~~

~~administration~~---and letters of temporary guardianship or conservatorship, approve or reject claims, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate.

(2) Hear and determine all motions made pursuant to Section 657 or 663.

(3) Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court other than actions for dissolution of marriage, for legal separation, or for a judgment of nullity of the marriage, and except also applications for confirmation of sale of real property in probate proceedings.

(4) Hear and determine motions to tax costs of enforcing a judgment.

(5) Approve bonds and undertakings.

(b) A judge may, out of court, anywhere in the state, exercise all the powers and perform all the functions and duties conferred upon a judge as contradistinguished from the court, or which a judge may exercise or perform at in chambers.

Comment. Section 166 is amended to provide additional probate matters that may be heard and determined in chambers. The added provisions restate former provisions of the Probate Code without substantive change. See former Prob. Code §§ 460-464 (appointment of special administrator), 613-615 (citation to account), 703, 710-713, 718 (rejection of claim), 921-922 (citation to account), 1020.5 (notice of settlement of supplementary accounts). Section 166 is also amended to change the phrase "at chambers" to "in chambers" in conformity with modern usage.

Code of Civil Procedure § 904.1 (technical amendment). Appealable judgments and orders of superior court

SEC. . Section 904.1 of the Code of Civil Procedure is amended to read:

904.1. An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small

claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order ~~or decree~~ made appealable by the provisions of the Probate Code.

Comment. Subdivision (j) of Section 904.1 is revised to conform to the terminology of the Probate Code. See Prob. Code § 7240 (appealable orders or refusals to make orders).

Code of Civil Procedure § 1026 (amended). Costs in actions by or against fiduciaries

SEC. . Section 1026 of the Code of Civil Procedure is amended to read:

1026. In (a) Except as provided in subdivision (b), in an action prosecuted or defended by an--executor,--administrator a personal

representative, trustee of an express trust, guardian, conservator, or a person expressly authorized by statute, costs may be recovered as in an action by and or against a person prosecuting or defending in his the person's own right, but such costs must.

(b) Costs allowed under subdivision (a) shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same costs to be paid by the plaintiff or defendant, fiduciary personally, for mismanagement or bad faith in the action or defense.

Comment. Section 1026 is subdivided and amended to cover actions prosecuted or defended by a guardian or a conservator. The former reference to an executor or administrator is replaced by a reference to a personal representative. This is a nonsubstantive change. See Prob. Code § 58 ("personal representative" defined). For provisions governing liability for costs in proceedings under the Probate Code, see Prob. Code § 1002 and the Comment thereto.

Probate Code § 300 (repealed). Passage of decedent's property

Comment. The first clause of former Section 300 is restated in Section 7000 (passage of decedent's property) without substantive change. See also Sections 32 ("devise" defined), 44 ("heirs" defined), and 62 ("property" defined). The persons who succeed to the decedent's estate are prescribed in the laws governing intestate succession, Part 2 (commencing with Section 6400) of Division 6 of the Probate Code.

The last clause of former Section 300 is restated in Section 7001 (limitations on passage of decedent's property) without substantive change. See the Comment to Section 7001. Administration under the Probate Code includes possession by the personal representative, control by the court, sale and other disposition of the property, charges of administration, and payment of debts and family allowance. See Divisions 6 (commencing with Section 6100) and 7 (commencing with Section 7000) of the Probate Code.

Probate Code § 301 (repealed). Jurisdiction and venue

Comment. The introductory clause of former Section 301 is restated in Section 7050 (jurisdiction) without substantive change. The provision of former Section 301 relating to venue in cases involving domiciliaries is restated in Section 7051 (domiciliary venue) without substantive change. The provisions of former Section 301 relating to venue in cases involving nondomiciliaries are restated without substantive change in Section 7052 (nondomiciliary venue). See the Comment to Section 7052. The substitution of "domicile" for "residence" in Sections 7051-7052 codifies existing law. See the Comment to Section 7051. The reference to "exclusive" jurisdiction in the last clause of former Section 301 is omitted as surplus. See Section 7052(b).

Probate Code § 302 (repealed). Effect of order granting letters

Comment. Former Section 302 is restated in Section 8007 (determination of jurisdiction conclusive), which extends it to cover probate of a will as well as appointment of a personal representative.

Probate Code § 303 (repealed). Disqualification; transfer

Comment. The first paragraph of former Section 303 is restated in Section 7060 (disqualification of judge) without substantive change.

The second paragraph is restated in Sections 7070 (grounds for transfer) and 7071 (place of transfer). See also Section 1000 (general rules of civil practice govern); Code Civ. Proc. § 399 (transmittal of papers; jurisdiction of receiving court).

Probate Code § 304 (repealed). Right to letters upon transfer

Comment. Former Section 304 is omitted as unnecessary.

Probate Code § 305 (repealed). Retransfer

Comment. Former Section 305 is restated in Section 7072 (retransfer), which makes retransfer permissive rather than mandatory. See also Section 1000 (general rules of civil practice); Code Civ. Proc. § 399 (transmittal of papers).

Probate Code § 719 (repealed). Personal representative's liability for costs

SEC. . Section 719 of the Probate Code is repealed.

~~719. When a judgment is recovered, with costs, against any personal representative shall be individually liable for such costs, but they must be allowed the personal representative in the administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended by the personal representative without just cause.~~

Comment. Former Section 719 is not continued. See Prob. Code § 1002 (costs under Probate Code); see also Code Civ. Proc. § 1026 (costs in actions by or against fiduciaries).

Probate Code § 1210 (added). Guardian or conservator acting for ward or conservatee

SEC. . Section 1210 is added to the Probate Code, to read:

1210. If an interested person has a guardian or conservator of the estate who resides in this state, personal service on the guardian or conservator of any process, notice, or court order concerning a decedent's estate is equivalent to service on the ward or conservatee, and it is the duty of the guardian or conservator to attend to the interests of the ward or conservatee in the matter. The guardian or conservator may appear for the ward or conservatee and waive any process, notice, or order to show cause that a person not under legal disability might waive.

Comment. Section 1210 restates former Section 1289 without substantive change. See Section 48 ("interested person" defined).

Probate Code § 1280 (repealed). Trials

Comment. The first sentence of former Section 1280 is superseded by Section 1000 (general rules of practice). See the Comment to Section 1000. The second sentence is restated in Section 1044 without substantive change.

The third and fourth sentences are superseded by Sections 1000 (general rules of practice), 1452 (jury trial under guardianship and conservatorship law), 7200 (jury trial in estate administration), and 17006 (jury trial under Trust Law). See also Code Civ. Proc. §§ 309 (court may submit issue to jury not defined by pleadings), 631 (jury trial waived if not demanded).

The last sentence is restated in Sections 1047 (entry and filing) and 1048 (enforcement of order).

Probate Code § 1281 (repealed). New trials

Comment. Former Section 1281 is restated in Section 7220 without substantive change. The provision for new trial in proceedings to determine heirship and interests in estates is omitted because this procedure is not continued.

Probate Code § 1282 (repealed). Costs

Comment. Former Section 1282 is restated in Section 1002 without substantive change.

Probate Code § 1283 (repealed). Rules of practice

Comment. The first paragraph of former Section 1283 is superseded by Section 1000 (general rules of practice govern). See the Comment to Section 1000; see also Code Civ. Proc. § 2009 (affidavit may be used to establish record of birth). The first sentence of the second paragraph is superseded by Section 1022 (affidavit or verified petition as evidence) and Code of Civil Procedure Section 2009 (affidavit in uncontested proceedings to establish record of birth). The second sentence is restated in Section 8220 (evidence of subscribing witness) without substantive change.

Probate Code § 1284 (repealed). Verification required

Comment. Former Section 1284 is restated in Section 1021 without substantive change.

Probate Code § 1285 (repealed). Clerk to set matter for hearing

Comment. Former Section 1285 is restated in Section 1041 without substantive change.

Probate Code § 1286 (repealed). Continuance or postponement

Comment. Former Section 1286 is continued in Section 1045 without change.

Probate Code § 1287 (repealed). Hearing and order

Comment. Former Section 1287 is restated in Section 1046 without substantive change.

Probate Code § 1288 (repealed). United States as interested person

Comment. Former Section 1288 is restated in Section 7280 without substantive change.

Probate Code § 1289 (repealed). Guardian or conservator acting for ward or conservatee

Comment. Former Section 1289 is restated in Section 1210 without substantive change.

Probate Code § 1290 (repealed). Recital of jurisdictional facts

Comment. Former Section 1290 is restated in Section 1047 without substantive change.

Probate Code § 1291 (repealed). Entry and filing

Comment. Former Section 1291 is restated in Section 1048 without substantive change.

Probate Code § 1292 (repealed). Recordation of order affecting real property

Comment. Former Section 1292 is restated in Section 7263 (recordation of order affecting real property) without substantive change, except that the last clause relating to the effect of recording is omitted as unnecessary. See also Section 7262 (transfer or conveyance of property pursuant to court order).

Probate Code § 1293 (repealed). Delivery to county treasurer

Comment. Former Section 1293 is superseded by Section 11853.

Probate Code § 1297. Appealable orders

Comment. Former Section 1297 is restated in Section 7240 without substantive change, except that the part of subdivision (m) relating to determination of heirship is omitted since this procedure is not continued.

Probate Code § 1299. Judgment roll

Comment. Former Section 1299 is restated in Section 1050 without substantive change. However, the former provision to the effect that the papers constituting the judgment roll need not be attached together is omitted as unnecessary.

Probate Code § 2523 (repealed). Lis pendens in guardianship and conservatorship

SEC. . Section 2523 of the Probate Code is repealed.

~~2523.---If---the---matter---concerns---real---property,---notice---of---the pendency---of---the---proceeding---may---be---filed---pursuant---to---Section---409---of---the Code---of---Civil---Procedure.~~

Comment. Former Section 2523 is generalized in Section 1004.

Probate Code § 9863 (repealed), Lis pendens in proceedings involving property claimed by another person

SEC. . Section 9863 of the Probate Code is repealed.

~~9863. If the matter concerns real property, notice of the pendency of the proceeding may be filed pursuant to Section 409 of the Code of Civil Procedure.~~

Comment. Former Section 9863 is generalized in Section 1004.

Probate Code § 17208 (repealed), Appointment of guardian ad litem

SEC. . Section 17208 of the Probate Code is repealed.

~~17208. (a) The court may, on its own motion or on request of a trustee or other person interested in the trust, appoint a guardian ad litem at any stage of a proceeding concerning the trust to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate:~~

~~(1) A minor.~~

~~(2) An incapacitated person.~~

~~(3) An unborn person.~~

~~(4) An unascertained person.~~

~~(5) A person whose identity or address is unknown.~~

~~(6) A designated class of persons who are not ascertained or are not in being.~~

~~(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.~~

~~(c) The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of trust property or by the petitioner.~~

~~(d) Sections 372 to 373.5, inclusive, of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.~~

Comment. Section 17208 is restated without substantive change and generalized in Section 1003 which applies to the entire Probate Code.