

Memorandum 84-4

Subject: Study L-827 - Probate Law and Procedure (Waiver of Accounting)

In response to the Commission's request, the staff has drafted a proposed statute for waiver of accounting in probate. The proposed statute is attached to this Memorandum as Exhibit 1. Most counties deal with waiver of accounting in their local probate rules, published by the C.E.B. in California Local Probate Rules (4th ed. 1983). These rules are excerpted in Exhibit 2 to this Memorandum.

In general, the local probate rules are fairly restrictive as to when an accounting may be waived. The proposed statute, on the other hand, is quite liberal in permitting waiver of accounting. Thus there are significant differences between the proposed statute and many local rules. Some of the policy issues raised by these differences are discussed below.

Should Entire Accounting Be Subject to Waiver or Merely Detailed Accounting?

Some counties permit waiver of the account in its entirety. Others only permit waiver of the detailed accounting, the effect of which is to make it unnecessary to list the detail of receipts and disbursements. However, the summary of account must be presented (see, e.g., Lake County). The proposed statute (Exhibit 1) permits waiver of the entire accounting on the assumption that if no beneficiary wants it, it serves no useful purpose.

Waiver for Minor, Conservatee, or Trust

Some counties permit waiver for a minor or incompetent person by a guardian or conservator, but only after first obtaining permission to do so from the court in which the guardianship or conservatorship is pending (see, e.g., Alameda County). Others expressly forbid waiver of the account when any beneficiary is a minor or an incompetent (see, e.g., Sacramento County). The proposed statute permits a guardian or conservator of the estate to waive the accounting on behalf of a minor or conservatee, and provides that no court approval in the guardianship or conservatorship proceeding is necessary. This is consistent with the thrust of the 1979 revision of the guardianship-conservatorship law to reduce the instances where court approval is required.

With respect to waiver for a trust, some counties permit waiver by the trustee alone if the trustee has been appointed (see Stanislaus County) or has filed a consent to act (see Orange County). Other counties permit waiver by the trustee if all beneficiaries join (see Alameda County and San Francisco). Still others provide that an account may not be waived by a trust (see, e.g., Marin County, Riverside County, San Bernardino County, San Diego County). The proposed statute permits a trustee to waive on behalf of the trust if the trustee's consent to act has been filed with the court.

In View of Local Rules, Should There Be Statewide Legislation?

The argument in favor of statewide legislation regarding waiver of accounting is that the rules should be uniform, and waiver should be liberally permitted as in the proposed statute (Exhibit 1). Against statewide legislation, it may be argued that the counties and courts of appeal have already comprehensively dealt with the matter, and local policy should not be overridden by the Legislature. What is the Commission's desire?

Respectfully submitted,

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EXHIBIT 1Probate Code § 933 (added). Waiver of accounting

933. (a) The executor or administrator is not required to render an account when all persons entitled to distribution of the estate have executed and filed one of the following:

(1) A written waiver of accounting.

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

(b) The waiver of accounting shall be executed as follows:

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

(2) If the distributee is a minor, by a person authorized to receive money or property belonging to the minor as provided in Chapter 2 (commencing with Section 3400) of Part 8 of Division 4. If the waiver is executed by a guardian of the estate of the minor, the waiver may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

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

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

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

(c) Notwithstanding waiver of the account, the executor or administrator shall file a report at the time the account would otherwise have been required showing the amount of fees or commission paid or payable to the executor or administrator and to the attorneys and setting forth the basis for determining such amount.

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

Comment. Section 933 is new and codifies case law authority for waiver of the account. See *Middlecoff v. Superior Court*, 149 Cal. 94, 84 P. 764 (1906). Section 933 is drawn from local probate rules. See, e.g., Alameda County Probate Rule 705; Contra Costa County Probate Rules 501, 505; Fresno County Probate Rule 603; Los Angeles County Probate Rules 13.02, 13.06; Orange County Probate Rule 7.02; Sacramento County Probate Rule 702; San Bernardino County Probate Rule 701; San Diego County Probate Rule 601; San Francisco Probate Rule 11.06; San Mateo County Probate Rule VI: III §H.

Under paragraph (2) of subdivision (b), a waiver may be made on behalf of a minor by the minor's parent or guardian of the estate as provided in Sections 3400-3402. If waiver is by the guardian of the estate of the minor, approval of the guardianship court is not required. Formerly, under some local probate rules, either court approval was required (see Alameda County Probate Rule 705) or waiver of the account could not be made by or on behalf of a minor (see Contra Costa County Probate Rule 501; Los Angeles County Probate Rule 13.02; Orange County Probate Rule 7.02; Sacramento County Probate Rule 702; San Bernardino County Probate Rule 701; San Diego County Probate Rule 601; San Francisco Probate Rule 11.06). Similarly, a conservator of the estate may waive the account without approval of the conservatorship court (approval formerly required under Alameda County Rule 705).

Paragraph (4) of subdivision (b) permits a trustee who has consented to act to waive the account on behalf of the trust. This is drawn from Orange County Probate Rule 7.02. Formerly, a number of other local probate rules provided either that all beneficiaries of the trust were required to join in waiving the account (see Alameda County Probate Rule 705; San Francisco Probate Rule 11.06) or that an account could not be waived on behalf of a trust (see Contra Costa County Probate Rule 501; Sacramento County Probate Rule 702; San Bernardino County Probate Rule 701; San Diego County Probate Rule 601).

EXHIBIT 2

California Local Probate Rules

Uniform Local Rules for Third Appellate District Superior Courts, Rule 12.15 (applicable in the following counties; Alpine, Amador, Butte, Calaveras, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Shasta, Sierra, Siskiyou, Sutter, Tehama, Trinity, Yolo, and Yuba):

12.15. In addition to items otherwise required by law, a petition for final distribution shall contain the following matters unless set forth in the account and report:

. . . .

4. An accounting if assets are to be distributed to a trustee, conservator or guardian.

Alameda County Rule 705:

1. The court will approve a final distribution without an account only when all of the following conditions have been met:

a. Each of the distributees affected by the accounting has filed a duly acknowledged waiver of the account.

b. When there is a distributee who is a minor or is a ward in a guardianship or conservatorship proceeding, only when the guardian or conservator proves he has received permission to waive the accounting from the court having jurisdiction of the guardianship or conservatorship.

c. When the distributee is an estate or trust, only when the personal representative and the beneficiaries of the estate or trust have waived the accounting. If any beneficiaries are unascertained, the accounting may not be waived.

Contra Costa County Rules 501 (portion) and 505:

501. . . . There is no statutory authority for the waiver of an account but it is permitted by case law. The detailed accounting may be waived when all interested persons so agree and all are adults and competent. When property is being distributed in trust, an account may not be waived by the trustee. The effect of the waiver is to make it unnecessary to list the detail of receipts and disbursements. All other matters must be presented in the report. . . .

505. In accounts, or in petitions for distribution accompanied by waiver of accounting, the report must state the amount of administrator's

or executor's commissions paid and the amount of attorney's fees paid, and set forth the basis for the calculation.

Fresno County Rule 603:

603. In all accounts or in petitions for distribution accompanied by waiver of accounting, the report must state the administrator's or executor's fees paid and the attorney's fees paid, and must explain how the fees were calculated.

Lake County Rule 9.4 (portion):

9.4. . . . There is no statutory authority for the waiver of an account but it is permitted by case law. The detailed accounting may be waived when all persons interested so agree and all are adults and competent. When property is being distributed in trust, an account may not be waived by the trustee. The effect of the waiver is to make it unnecessary to list the detail of receipts and disbursements. All other matters, including the summary of account, must be presented in the report.

Los Angeles County Rules 13.02 (portion) and 13.06:

13.02. . . . There is no statutory authority for the waiver of an account, but it is permitted by case law. The detailed accounting may be waived when all persons interested so agree and all are adults and competent. The effect of the waiver is to make it unnecessary to list the detail of receipts and disbursements. All other matters must be presented in the report. . . .

13.06. In accounts, or in petitions for distribution accompanied by waiver of accounting, the report must state the amount of administrator's or executor's commissions payable and the amount of attorney's fees payable and set forth the basis for the calculation.

Marin County Rules 413, 603, and 715:

413. Petitions for final distribution, whether or not the account is waived, should set forth and itemize all approved creditors' claim of the estate that were paid, and all debts in excess of \$50.00 paid without claims filed.

603. There is no statutory authority for the waiver of an account but it is permitted by case law. The detailed accounting may be waived when all persons interested so agree, all are adults and competent, and it appears that all creditors have been paid. The effect of the waiver is to make it unnecessary to list the detail of receipts and disburse-

ments. (See Rules 413 and 715 herein.) When property is being distributed in trust, an account may not be waived by the trustee. See Middlecoff v. Superior Court, (1906) 149 Cal. 94.

715. The waiver of an account by the residuary beneficiary or beneficiaries is sufficient even though there may be specific legatees and devisees, if the petition for distribution specifically enumerates the bequests and devises, prays that they be distributed and alleges that there are sufficient assets to satisfy such specific bequests and devises. The personal representative is not, of course, to be discharged until all receipts of distributees are on file.

Orange County Rule 7.02:

7.02. Upon petitions for preliminary distribution, estates authorized to be administered under the Independent Administration of Estates Act are not required to file an accounting, except where distribution is to be made to a Trustee. However, an account may be waived by the Trustee in such cases if the named Trustee's consent to act has been filed with the Court. Although a preliminary distribution may be made without an accounting, sufficient facts must be set forth in the petition to allow the Court to ascertain that the estate is solvent. Except for good cause shown, all petitions for preliminary distribution pursuant to Probate Code Section 1004 will be set for hearing in the manner required by Probate Code Section 1200.

With respect to petitions for final distribution, there is no statutory authority for the waiver of an account, but it is permitted by case law. The detailed accounting may be waived when all parties interested so agree and when all are adults and competent. The effect of the waiver is to make it unnecessary to list the detail of receipts and disbursements. All other matters must be presented in the report.

Riverside County Rule 1002:

1002. There is no statutory authority for the waiver of an account but it is permitted by case law. The detailed accounting may be waived when all persons interested so agree and all are adults and competent. An account may not be waived by a testamentary trustee or other fiduciary to whom property is being distributed. The effect of the waiver is to make it unnecessary to list the detail of receipts and disbursements. All other matters must be presented in the report.

Sacramento County Rule 702:

702. The detailed accounting may be waived when all persons interested so agree. Such waiver shall be in writing and filed with the court either as part of the petition or separately. A beneficiary who has received the full share of the estate to which he is entitled, and who has acknowledged the same in writing on file, is not an interested person for the purposes of this rule.

Waiver will not be permitted when any interested party is a minor, a conservatee, a party acting in a fiduciary capacity including a testamentary trustee appointed in the decedent's will, or a contingent or unascertained remainderman.

San Bernardino County Rule 701 (portion):

701. . . . There is no statutory authority for the waiver of an account but it is permitted by case law. The detailed accounting may be waived when all persons interested so agree and all are adults and competent. An account may not be waived when there is a testamentary trust. The effect of the waiver is to make it unnecessary to list the detail of receipts and disbursements. All other matters must be presented in the report. . . .

San Diego County Rules 601 (portion) and 603:

601. . . . A detailed accounting may be waived when all persons interested so agree and all are adults and competent. An account may not be waived when there is a testamentary trust.

603. It is not sufficient in reports accompanying accounts or in reports where an accounting is waived to allege merely that all claims have been paid, but the claims presented or filed must be listed, showing the claimant, the nature, the amount, date of payment and the disposition of each claim. If any claim has been rejected, the date of service of notice of rejection of the claim shall be stated.

San Francisco Rule 11.06:

11.06. (a) Waiver of account is permitted by case law when all persons interested in the final distribution agree in writing, all persons are competent adults, and all creditors have been paid.

(b) When property is distributed in trust, an account may be waived by the appointed trustee only if all beneficiaries of the trust, who must be at least 18 years of age and under no legal disability, join in the written waiver. See Middlecoff v. Superior Court (1906) 149 Cal. 94, 84 P. 764.

(c) The waiver of account by the residuary beneficiary or beneficiaries is sufficient even though there may be specific legatees and devisees, if the petition for distribution specifically enumerates the bequests and devises, prays that they be distributed and alleges that there are sufficient assets to satisfy such specific bequests and devises. The personal representative is not, of course, to be discharged until all receipts of distributees are on file.

San Joaquin County Rule 702:

702. The court will approve a final distribution without an account only when all of the following conditions have been met:

A. Each of the distributees affected by the accounting has filed a duly acknowledged waiver of the account.

Comment: No distributee under guardianship or conservatorship may sign such a waiver. The guardian or conservator for the distributee may not sign without first receiving permission to do so from the Court having jurisdiction of the guardianship or conservatorship. A copy of the Order should be attached to the Waiver.

B. No part of the assets are to be distributed to a trustee, a conservator, or a guardian. Waivers are not allowed in such cases.

C. When the distributee is an estate or trust, only when the personal representative and the beneficiaries of the estate or trust have waived the accounting. If any beneficiaries are unascertained, the accounting may not be waived.

San Mateo County Rule VI (portion):

VI: III §H. Accounting of Estates can be waived only by the persons entitled to distribution of all the estate.

Santa Clara County Rules 5.1 (portion), 5.3, and 5.10 (portion):

5.1. . . . An account may be waived when all persons whose interests are affected shall have filed written waivers thereof, and all such persons are competent. When property is being distributed to a fiduciary, the waiver must be executed by the fiduciary and all beneficiaries. If a beneficiary taking under a fiduciary relationship is a minor or an incompetent, there can be no waiver of account.

5.3. In petitions in which statutory attorneys fees and/or statutory executor or administrator's commissions are sought including petitions for distributions accompanied by waiver of accountings, the calculation thereof must be set forth.

5.10. The Court may, in its discretion, require the filing of an accounting prior to the granting of an order for preliminary distribution.

. . .

Santa Cruz County Rule 3005 (portion):

3005. . . . All statutory fees shall be computed and set forth in the petition even though the accounting is waived. . . .

Solano County Rule 8.11 (portion):

8.11. . . . In all accounts, and in petitions for distribution accompanied by waivers of accounting, the report must state the fees payable to the representative and to his attorney(s), and must show the mode of calculation. . . . Waiver of accounting and assignment of interest in estates must be acknowledged or verified.

Stanislaus County Rules 1002 (portion) and 1005:

1002. . . . There is no statutory authority for the waiver of an account but it is permitted by case law. The detailed accounting may be waived when all persons interested so agree and all are adults and competent. The effect of the waiver is to make it unnecessary to list the detail of receipts and disbursements. All other matters must be presented in the report.

When property is being distributed in trust, and account may not be waived by the trustee, unless he has been appointed. . . .

1005. In accounts, or in petitions for distribution accompanied by waiver of accounting, the report must state the amount of administrator's or executor's commissions payable and the amount of attorney's fees payable and set forth the basis for the calculation. Costs shall be itemized in the petition even though and accounting is waived.

Sutter County Probate Rules (portion):

. . . In petitions for final distribution where there is a waiver of accounting the amount of the inventory and appraisal, the computation of the statutory commissions and fees and the description of the property on hand for distribution must be listed in the petition for final distribution.

[Note: Sutter County is also subject to the Uniform Local Rules for the Third Appellate District Superior Courts supra.]

Tuolumne County Rule 12.14 (portion):

12.14. In addition to items otherwise required by law, a petition for final distribution shall contain the following matters unless set forth in the account and report:

. . . .

(4) An accounting if assets are to be distributed to a trustee, conservator or guardian. . . .

Yolo County Probate Policy Sixteen (portion):

. . . .

(e) In any petition for distribution asking for authority to pay, or approval of, or reimbursement of costs expended by the personal representative or the attorney, even if accompanied by a waiver of accounting, the petition must itemize in detail each such cost and the amount thereof.

[Note: Yolo County is also subject to the Uniform Local Rules for the Third Appellate District Superior Courts supra.]