

Memorandum 85-11

Subject: Study L-1000 - Probate Code (Jurisdiction; Probate of Wills;
Contest of Wills)

Attached to this memorandum as Exhibit 1 is a draft of the first part of the administration provisions of the new Probate Code. Exhibit 2 contains comments to the repealed provisions of existing law with an indication of their disposition. Exhibit 3 contains conforming amendments.

The redrafted provisions fall into the following rough outline of the new Code.

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

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Part 3. Administration ProceedingsPart 4. Closing Estate Administration

DIVISION 8. DISPOSITION OF ESTATES WITHOUT ADMINISTRATION

Part 1. Determination or Confirmation of Community PropertyPart 2. Collection of Small Estates by AffidavitPart 3. Small Estate Set AsidePart 4. Succession Without Administration

The basis of the Uniform Probate Code approach is that it is better to have a simple and automatic rule than to consume the decedent's estate in litigation over domicile. Moreover, the average decedent would want an orderly procedure to apply to the estate that would prevent it from being forcibly separated into geographical segments merely because courts in two or more states arrive at inconsistent conclusions as to where the decedent was domiciled. The Editorial Board for the Code points out, "It is believed that in the great majority of cases, the benefit of a prompt determination in avoiding repeated litigation outweighs the advantages of a local determination of this issue." Response of the Joint Editorial Board for the Uniform Probate Code 27 (1974).

There is an additional point the staff believes should be made in connection with this discussion. Although the advantages of uniformity of the law among the states may be greater for some matters than for others, the conflict of laws area is one where uniformity seems a particularly important goal. Does the Commission wish to adopt the Uniform Code approach?

§ 7122. Authority of court or judge

Earlier drafts of this provision indicated that the probate court is a court of general jurisdiction. The purpose of this provision is to ensure that the court will be able to resolve all questions relating to the estate that come before it. Concern was expressed that by making the probate court a court of general jurisdiction, the court might be required to hear nonprobate matters given a statutory priority. We have sought to resolve this problem in the current draft by limiting the general character of the court's jurisdiction to "proceedings under this division."

§ 7130. Grounds for transfer

Existing law provides only one basis for a change in venue of a probate proceeding: there is no judge qualified to act in the proper county. Thus the general grounds for change of venue provided in the Code of Civil Procedure, such as convenience of parties and witnesses or interest of justice, are inapplicable. Estate of Scott, 15 Cal. 220 (1850). This appears unduly restrictive, and the staff draft incorporates alternate versions of the general change of venue rules.

However, concern has been expressed about expanding the bases for change of venue. It could enable a potential will contestant to shop around for a favorable court, or to use change of venue motions as a delaying tactic. With the grounds for change of venue limited, litigation on this matter is discouraged.

The staff believes that on this point the Commission must weigh the advantages of change of venue in terms of convenience to the parties against the possibility of its use as a litigation tactic, and come to a judgment on balance on this point.

§ 7131. Place of transfer

Existing law provides only one place for transfer of a probate proceeding--an adjoining county. This may or may not make sense in terms of convenience of witnesses, proximity to the decedent's property, etc. Certainly, the possible places for change of venue should include another county where the decedent's property is located. The staff draft includes this expansion. However, the same concern about forum shopping applies to this provision as to the preceding provision.

§ 7145. Trial by jury

As a general rule, jury trial in probate matters is not required unless expressly provided by statute. The State Bar notes that broad language in existing Probate Code Section 1230 seems to imply the right to a jury trial on many issues of fact. The State Bar suggests a statutory provision such as in subdivision (a) of draft Section 7145 that specifically limits jury trial--"it would eliminate the contention that there are many issues of fact in probate that may be subject to jury trials." The staff agrees.

§ 7210. Petition

In this section and the following sections the staff has made a combined draft of the provisions governing the petition for probate of the decedent's will and the petition for appointment of a personal representative. This simplifies drafting and also conforms to the treatment given by the Judicial Council forms.

§ 7212. Contents of petition

Existing law requires the petition for probate to list the "residence" of heirs and devisees of the decedent. Jack E. Cooper (Exhibit 4) has written to suggest that "address" would be more appropriate since

it will more likely result in actual notice to the interested persons, and "residence" for jurisdictional purposes is not involved here. The staff has incorporated this suggested change in the draft.

Existing law also requires the petition to state the character and estimated value of the decedent's estate. The State Bar Executive Committee points out that this requirement is not followed in Los Angeles County, and perhaps should be limited to cases where a probate referee is appointed in connection with the initial petition or where there is no waiver of bond. The Los Angeles County Bar Committee also feels clarification is necessary. The staff believes the matter should be flagged for now and reviewed again when our review of the remainder of the administration provisions is complete. We may need the estimate of value for other functions, such as for preliminary distributions or sales limitations.

§§ 7230-7246. Publication of notice

The provisions on publication of notice incorporate Commission decisions made when this matter was considered at the June 1983 meeting. Specifically, publication is to be made once rather than three times-- "the main purpose of the notice is to inform creditors and to give the proceeding in rem effect, and for these purposes one publication is sufficient; a single publication will also expedite probate." Minutes, June 1983. In addition, notice should be published in a newspaper of general circulation in the county, rather than the city, in which the decedent resided--"this will expedite probate since many times the newspaper in the city is only published weekly; it will also help reduce probate costs by enabling competition among publishers; and it will help avoid jurisdictional problems caused by confusion over boundaries of adjacent suburban cities." Minutes, June 1983. The size of type to be used in the notice should not be specified by statute but should be left to the discretion of the publisher--"this will encourage competition and will avoid jurisdictional problems where the wrong type size is inadvertently used." Minutes, June 1983.

Because these decisions were made before the appointment of a majority of the current Commissioners and without the participation of the legal publishers, the Commission should take the opportunity to review the decisions. We have invited the California Newspaper Publishers

Association to attend the meeting. We note that Commissioner Stodden has written to us that publication should be in a newspaper of the county rather than the city, for jurisdictional reasons. Both the State Bar and the Los Angeles County Bar take the same position, and also point out that a newspaper of general circulation in the county is more likely to give broader notice.

The Commission also requested to the staff to give the Commission specific suggestions for reducing the length of published notice. Professor Turrentine has suggested that published notices be consolidated and published once weekly, consisting of a listing of estates, addresses, and times. The county clerk would supervise this publication scheme, for which an increased probate filing fee would be required. The increased fee would be more than offset by the elimination of individual publication costs--"the present system of individual publication of notice of probate and notice to creditors should be abolished as unduly expensive and unsatisfactory." Turrentine, Introduction to the California Probate Code, 52 West's Annotated California Codes 39 (1956).

The staff has devised a similar, but probably more politically acceptable scheme, that we have incorporated in Section 7241 (contents of notice). Under this scheme, a publisher would be authorized to consolidate all notices of probate, publishing the detailed information of each estate, and to print the boiler plate general information to heirs, beneficiaries, and creditors only once following all notices. The statute would not require this, but would leave it to competitive forces to implement.

Commissioner Stodden suggests that the notice also contain information about what the representative is authorized to do under independent powers provisions, for purposes of public notice. Is the Commission interested in adding such information to the notice?

§ 7242. Notice to alleged decedent

Section 7242 contains provisions new to California law for notice to and a search for an alleged decedent where the fact of death may be in doubt. These provisions are drawn from Uniform Probate Code Section 3-403(b), and the staff believes they would be a useful addition to the California law.

§ 7250. Delivery of will by custodian

The State Bar comments that, "The requirement that the custodian of the will deliver the will to the Clerk of the Superior Court or to the

executor is often not observed. Perhaps this section should be clarified to provide that it will be delivered to the Clerk of the Court for safe-keeping." The staff is not sure of the precise changes the State Bar would like to see in this section. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association is also puzzled by this suggestion.

§ 7265. Perpetuation of testimony

Existing law requires that the testimony of a witness to a lost or destroyed will be "reduced to writing, signed by the witness and filed." The purpose of this requirement is to make the record admissible as evidence in case of a subsequent will contest if the witness is unavailable at that time. The staff believes that the general procedure for use of a court reporter for preservation of testimony should be adequate here as it is elsewhere. In fact, the State Bar points out that where there is a court reporter, the requirement of a transcribed and signed booklet simply means an additional step and additional expense. The staff draft makes the "reduced to writing" provision permissive rather than mandatory, and makes clear that a court reporter's transcript is equally admissible.

§ 7267. Effect of admission of will to probate

Existing Section 384 permits a minor or incompetent person who is not a party to a probate proceeding to contest the probate of a will at any time up to four months after the disability is removed. The staff draft does not continue this provision. The Probate Code requires notice to be given all heirs and devisees both personally and by publication. The court's assumption of jurisdiction following this notice is conclusive unless there was fraud in the procurement of the court order. These general rules appear satisfactory, and the staff sees no need to continue the special provision for non-party minors and incompetents.

Admission of a will to probate does not preclude subsequent admission of another will, whether consistent or inconsistent. Under existing law, another will may be admitted to probate even after the time to contest a will has elapsed. Estate of Moore, 180 Cal. 570, 182 P. 285 (1919). The Commission has previously reviewed this area and decided that there should be some limit on the time another will is offered for probate, and that limit should be the close of estate administration. Section 7267(b) implements this decision. We have also added to Section

7267(b) provisions drawn from the Uniform Probate Code governing procedure where more than one will is admitted to probate.

This approach renders unnecessary Probate Code Section 322, which provides:

The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the deviser's death the instrument containing such devise is duly proved as a will, or written notice of such devise is recorded with the recorder of the county where the land lies. This section does not limit the finality of any decree of distribution in the estate of the decedent.

This unique provision implies that a conveyance of property by an intestate heir of the decedent is subject to rescission upon subsequent probate of a will within four years after the decedent's death. However, the last sentence of the statute, added in 1953, makes clear that the transferee is protected if the property was distributed to the heir by a decree of the probate court. This means the provision now covers only the situation where there has been no decree of distribution, in which case the transferee would not ordinarily be bona fide. In the common situation where there is no decree of distribution--one spouse taking a community property interest by succession from the other--the surviving spouse by statute has full power to deal with the property after 40 days. In sum, the section no longer appears to serve a purpose. The State Bar has also questioned the propriety of this statute, as has the Los Angeles County Bar.

§ 7271. Summons

Existing law requires that when a will contest is initiated by the filing of written grounds of opposition to the probate of the will, a citation must be served on all interested persons requiring them to plead to the contest. The "citation" is not really a true citation in the sense that it is enforceable by contempt, but is in effect a summons issued by the probate court, and in fact is required to be served in the same manner as a summons in a civil action. The staff can see no useful purpose in preserving this special form of citation, and has replaced it in the draft with a summons.

§ 7273. Trial

Section 7273 continues existing California law that appears to put the burden of proof on the will contestant rather than on the will

proponent. This appears to conflict with the general Probate Code rule that, "The party affirming is plaintiff, and the one denying or avoiding is defendant." Section 1230. However, the cases have resolved this confusion by imposing the burden of proof of due execution on the proponent of the will, and the burden of proof of lack of testamentary capacity or undue influence on the contestant.

The State Bar critique of the Uniform Probate Code criticized the Uniform Code for failing to deal with procedural aspects of contests of wills, whereas California law contains "detailed provisions concerning the procedures to be followed in contested cases, such as the issuance and service of citations, perpetuation of testimony, costs, and the applicable time limits. To abandon such provisions without inserting others could cause unnecessary uncertainty in contested proceedings." State Bar Report at 92. However, the Uniform Probate Code does contain detail lacking in California statutes on the specific burden and order of proof in will contests. In light of the State Bar's criticism, the Commission may wish to add such additional detail to the California statute.

Uniform Probate Code Section 3-407 provides:

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

Existing law provides that in the case of a will contest a jury trial may be had as to the following issues:

- (1) Competency of decedent to make will.
 - (2) Freedom of decedent from duress, menace, fraud, and undue influence.
 - (3) Due execution and attestation of will.
 - (4) Any other question substantially affecting validity of will.
- Perry Evans, draftsman of the code, observes that this does not include the question of identity or legitimacy of a contestant. "If a jury

trial is permitted at all, why should not the jury pass upon all conflicts in the evidence? Perhaps jury trials should be avoided, and therefore the province of the jury in will contests should not be enlarged. But it would seem to be more logical to do away altogether with the jury trial in such cases, or else leave all questions of fact to the jury, as in other sorts of actions." Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 616 (1931).

On the issue of whether jury trial should be preserved for will contests, whether before or after probate, it should first be noted there is no constitutional impediment to elimination of jury trial. The courts have consistently held that a jury trial is not required in probate matters unless statutorily provided. See, e.g., Estate of Beach, 15 Cal.3d 623, 542 P.2d 994, 125 Cal. Rptr. 570 (1975). In fact, the original Probate Act of 1851 did not provide for jury trial in will contests; the jury trial provision was added in 1855. Since then it has been observed that in will contest cases, the jury more often than not finds for the contestant, probably due largely to the emotional fact situations present in these cases. See, e.g., Note, Will Contests on Trial, 6 Stan. L. Rev. 91 (1953); Breidenbach, Will Contests, in 2 California Decedent Estate Administration §§ 21.139-21.141 (Cal. Cont. Ed. Bar 1975). And, more often than not, the appellate courts overturn the jury verdict because of insufficiency of the evidence.

This phenomenon seems to argue for repeal of the jury trial in will contests. There is a substantial waste of time and resources in going through the jury trial, appeal, and reversal process. But it can also be argued that the jury trial is a safety valve to circumvent the inadequacies of the law of testamentary capacity and undue influence, in tough cases. But then, if the law is inadequate, it should be changed rather than reliance placed on the jury. And in fact, the safety valve function doesn't work if the appellate court is constrained by law to overturn the jury verdict.

The bias of the staff is against jury trials. It seems somewhat presumptuous of the bickering would-be heirs to impose upon the citizenry to hear their squabble over who gets the decedent's assets. This, combined with the adverse experience with jury trials in the will contest area, leads the staff to conclude that they should not be continued. The trial judge is perfectly capable of finding the facts of testamentary capacity and undue influence. The staff draft omits the jury trial

provision. Whether it is politically feasible to eliminate the jury trial remains to be seen, but the staff believes it is worth a try.

The State Bar Probate Executive Committee, on the other hand, is very much in favor of retaining the right to a jury trial in a will contest.

§ 7274. Evidence of execution

Existing law requires that, in a will contest, all subscribing witnesses "who are present in the county" must be produced and examined. The State Bar queries, and the Los Angeles County Bar does too, whether this limitation on production of witnesses is appropriate, in light of the general civil procedure provisions for compelling attendance of witnesses outside the county.

An examination of the general law on compelling attendance reveals that the 1872 Code required attendance of a witness outside the county if the residence of the witness was within 30 miles of the place of trial. This distance limitation was extended by a series of amendments over the years to 50 miles, 100 miles, 150 miles, and 500 miles. Finally in 1981 the distance limitation was eliminated and Code of Civil Procedure Section 1989 now provides that a witness is not obliged to attend "unless the witness is a resident within the state at the time of service."

In view of this history, the county limitation in existing Probate Code Section 372 is puzzling. The staff sees no obvious reason for protecting a subscribing witness to a will more than any other witness--just the opposite. A subscribing witness is a voluntary party and can reasonably expect that at some point he or she may be called upon to testify in a probate proceeding. The existing law is even more anomalous when one realizes that the attendance of other witnesses outside the county may be compelled in a will contest, but not the subscribing witnesses, the very persons who observed the testator and noted his or her capacity, etc., at the time of execution of the will.

The staff draft of Section 7274 omits the county limitation on compelling attendance of subscribing witnesses.

§ 7281. Summons

Existing law provides for a will contest after probate, initiated by filing a petition to revoke probate and issuance of a "citation". The same considerations apply to a citation in this situation as apply to a citation in a will contest. The staff has replaced the citation with the more appropriate summons.

§ 7283. Costs and attorney's fees

Existing law imposes trial costs on the losing party in a proceeding to revoke the probate of a will (contrary to the general rule in probate that the court has discretion to award costs--Section 1232). Luther J. Avery, a San Francisco attorney, has written to suggest that the cost rule be extended to attorney's fees as well. The staff draft incorporates this suggestion.

The State Bar Probate Committee has declined to take a position on this point, noting that the State Bar Board of Governors has sponsored general legislation on attorney's fees. The general legislation would award attorney's fees against a person who rejects a settlement offer and then fails to achieve a better award. This is not inconsistent with what appears in our draft, and the staff recommends we pursue our draft because it is better tailored to will contests. The likelihood of legislation being enacted of the type sponsored by the State Bar is remote, and in any case it would not apply to special proceedings such as probate.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT 1

999/326

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. DISPOSITION OF DECEDENT'S PROPERTY

§ 7110. Application of statute

7110. This division applies to all property of a person who dies domiciled in this state and to real property located in this state and tangible personal property customarily kept in this state prior to death of a person who dies not domiciled in this state.

Comment. Section 7110 is drawn from Section 1-301 of the Uniform Probate Code. The court may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or the United States. Code Civ. Proc. § 410.10.

30966

§ 7111. Passage of decedent's property

7111. Title to a decedent's property passes upon 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 7111 is the same in substance as the first portion of former Section 300. The term "property" includes real and personal property and "devise" includes a bequest. The decedent's heirs are determined as provided in Part 2 (commencing with Section 6400) of Division 6 (intestate succession). The rules stated in Section 7111 are subject to limitations. See, e.g., Section 7112 and Comment thereto (limitations on passage of property).

CROSS-REFERENCES

Definitions

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

§ 7112. Limitations on passage of property

7112. The power of a person to leave property by will, and the rights of heirs, devisees, and creditors to the decedent's property, are subject to the restrictions and limitations contained in this code.

Comment. Section 7112 is the same in substance as the first sentence of Section 3-101 of the Uniform Probate Code. For express limitations on the passage of the decedent's property, see, e.g., Sections 7113 (property subject to administration), 100-104 (effect of death of married person on community and quasi-community property), 6145 (lapsed gifts), 260-295 (disclaimers), 6560-6573 (omitted spouse and children).

CROSS-REFERENCES

Definitions

Devisee § 34
Heirs § 44

999/351

§ 7113. Property subject to administration

7113. Except as otherwise provided by law, all of the decedent's property is subject to administration under this division.

Comment. Section 7113 is the same in substance as the last portion 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. Section 7113 is a specific application of the general rule stated in Section 7112 (limitations on passage of property). The introductory proviso makes clear that the rule stated in Section 7113 is subject to exception. See, e.g., _____ (succession without administration). Cf. Division 5 (commencing with Section 5100) (nonprobate transfers).

999/355

CHAPTER 2. JURISDICTION AND VENUE

Article 1. Courts and Judges

§ 7120. Jurisdiction in superior court

7120. The superior court has jurisdiction in proceedings under this division.

Comment. Section 7120 is the same in substance as a provision of former Section 300 and the introductory portion of former Section 301. Proceedings under this division include probate of wills (Sections 7250-7283), appointment of personal representatives (Sections _____), and administration proceedings (Sections _____ - _____).

§ 7121. Venue

7121. (a) If the decedent was domiciled in this state at the time of death, the proper county for proceedings under this division is the county in which the decedent resided, regardless where the decedent died.

(b) If the decedent was not domiciled in this state at the time of death, the proper county for proceedings under this division is:

(1) The county in which the decedent died if property of the decedent is located in that county.

(2) Any county in which property of the decedent is located, regardless where the decedent died, if no property of the decedent is located in the county in which the decedent died or if the decedent did not die in this state. If property of the decedent is located in more than one county, the proper county is the county in which a petition for probate of the decedent's will or appointment of a personal representative is first filed, and the superior court of that county has exclusive jurisdiction of the administration of the estate.

[(c) For the purpose of this section:

(1) A debt is located where the debtor resides or, if the debtor is a person other than an individual, where the debtor has its principal office.

(2) Commercial paper, investment paper, or another instrument is located where the instrument is located.

(3) An interest in property held in trust is located where the trustee may be sued.]

Comment. Subdivisions (a) and (b) of Section 7121 are the same in substance as the venue provisions of former Section 301. The substitution of "domicile" for "residence" codifies existing law.

[Subdivision (c) is drawn from Section 3-201(d) of the Uniform Probate Code (1977) and is intended to aid determinations concerning the location of assets that may be relevant in cases involving non-domiciliaries. Cf. Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971 (1901) (situs of chose in action and other intangible property). "Instrument" is defined in Commercial Code § 9105.

Note. Provisions relating to ancillary administration in California of estates of non-domiciliaries have not yet been examined.]

§ 7122. Authority of court or judge

7122. 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 all of the following:

(a) Power to make orders and to take all other action necessary and proper to administer justice in the matters that come before it.

(b) Power to take action at chambers or out of court.

(c) Power to make and issue all necessary orders and writs to enforce the production of documents, papers, and property and to compel the appearance or attendance of parties and witnesses.

Comment. Section 7122 reverses the former rule that the superior court sitting in probate matters was a court of limited jurisdiction. See 7 B. Witkin, Summary of California Law, Wills and Probate §§ 233-234 at 5741-43 (8th ed. 1974).

Subdivision (a) is the same in substance as Section 1-302(b) of the Uniform Probate Code. Subdivision (b) is supplemented by Section 7123 (actions at chambers). Subdivision (c) expands a provision of former Section 321 (production of wills and attendance of witnesses).

999/358

§ 7123. Actions at chambers

7123. (a) A judge of the court may, at chambers, in addition to the matters authorized by Section 166 of the Code of Civil Procedure, do any of the following:

(1) Appoint appraisers.

(2) Receive inventories and accounts to be filed.

(3) Suspend the powers of executors, administrators, [guardians, and conservators] in the cases allowed by law.

(4) Appoint a special administrator [and grant letters of temporary guardianship or conservatorship].

(5) Approve claims.

(6) Direct the issuance from the court of all writs and process necessary in the exercise of the powers of the court in matters under this [code].

(b) A judge of the court may not, at chambers, hear or determine applications for confirmation of sale of real property in proceedings under this [code].

Comment. Section 7123 is the same in substance as provisions formerly found in Section 166 of the Code of Civil Procedure. See also Section 1457 (guardianship and conservatorship).

Note. The substance of each subdivision of this section will be reviewed at the time the related substantive provisions are reviewed. Since this provision applies to guardianship and conservatorship as well as estate administration, relocation to a general section of the code may be proper.

968/978

§ 7124. Disqualification of judge

7124. (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 2 (commencing with Section 7130), in any of the following cases:

- (1) The judge is interested as an heir or devisee.
- (2) The judge is named as executor or trustee in the will.
- (3) The judge is in any other manner interested.

(b) A judge who was a witness to a 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 7124 is the same in substance as the first paragraph of former Section 303. For general law on disqualification, see Code of Civil Procedure §§ 170-170.8.

968/981

Article 2. Transfer of Proceedings

§ 7130. Grounds for transfer

7130. The court or judge shall order a proceeding under this division transferred to another county in the following cases:

(a) There is no judge of the court qualified to act. This subdivision 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.

[(b) Where to do so is in the interest of justice.]

[(c) Any other ground provided by law for transfer in civil cases generally.]

Comment. Subdivision (a) of Section 7130 is the same in substance as a portion of the second paragraph of former Section 303. Subdivision (b) is new; grounds of transfer may include the convenience of parties and witnesses.

968/986

§ 7131. Place of transfer

7131. Transfer of a proceeding pursuant to 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 7131 is new. The provision for transfer to an adjoining county continues a provision of the second paragraph of former Section 303.

968/987

§ 7132. Retransfer

7132. Upon petition of an interested person before the administration of the estate is closed, a proceeding transferred pursuant to this article may be retransferred to the court in which the proceeding was originally commenced if the court determines that the convenience of the parties interested would be promoted by the retransfer and both of the following conditions are satisfied:

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

[(b) The causes for which the proceeding was transferred no longer exist.]

Comment. Section 7132 is the same in substance as a portion of former Section 305.

Note. The meaning of subdivision (b) is under study.

CROSS-REFERENCES

Definition

Interested person § 48

968/996

§ 7133. Procedure for transfer

7133. Transfer of a proceeding pursuant to this article shall be in the same manner and with the same effect as transfer of actions and proceedings pursuant to the Code of Civil Procedure.

Comment. Section 7133 continues the effect of a portion of the second paragraph of former Section 303 and a portion of former Section 305. See Code Civ. Proc. § 399 (transmittal of papers; jurisdiction of receiving court).

Note. This section may be unnecessary in light of Section 7140 (general rules of practice govern).

969/001

§ 7134. Effect of transfer on personal representative

7134. The transfer of a proceeding pursuant to this article does not affect the right of any person to appointment as personal representative, and the same persons are entitled to appointment in the order provided in this division.

Comment. Section 7134 is the same in substance as former Section 304.

Note. The need for this provision is being reviewed.

29194

CHAPTER 3. RULES OF PROCEDURE

§ 7140. General rules of practice govern

7140. Except as otherwise provided by this [code] or by rules adopted by the Judicial Council, the rules of practice applicable to civil actions are applicable to and constitute the rules of practice in proceedings under this [code].

Comment. Section 7140 generalizes the first sentence of former Section 1233. Thus, all issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. (Former Section 1230.) The general rules of practice apply to discovery, trials, new trials, appeals, and all other matters of procedure. (Former Section 1233.) Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions. (Former Section 1230.)

Note. Whether this section is over-generalized is under review.

29325

[§ 7141. Judicial Council to prescribe forms

7141. The Judicial Council may prescribe the form of the applications, notices, orders, and other documents required by this division. Any such form prescribed by the Judicial Council is deemed to comply with this division.

Comment. Section 7141 is consistent with Cal. Const. Art. 6, § 6, and Gov't Code § 68511. Cf. Section 1456 (guardianship-conservatorship).]

Note. The scope of Judicial Council authority generally is under study.

405/855

§ 7142. Clerk to set matters for hearing

7142. When a petition, report, or account which requires a hearing is filed with the clerk of the court pursuant to this division, the clerk shall set the matter for hearing.

Comment. Section 7142 continues provisions that were scattered throughout former Division 3. See, e.g., former Sections 327, 441, 578, 578a, 584, 584.2, 584.3, 584.5, 591.1, 591.7, 605, 643, 653, 662, 718.5, 755, 758, 771, 771.3, 773, 810, 831, 841, 851, 851.5, 854, 1000, 1004, 1041, 1068, 1102, 1120, 1120.1a, 1123.5, 1125.1, 1129, 1138.6, 1139.3, 1139.15, 1172, 1191, 1200, 1355. Cf. Section 1451 (guardianship-conservatorship).

29344

§ 7145. Trial by jury

7145. (a) Except as otherwise expressly provided in this division, there is no right to a jury trial in proceedings under this division.

(b) When a party is entitled to a jury trial:

(1) If a jury is demanded and the issues are not sufficiently made up by the written pleadings on file, the court on due notice shall settle and frame the issues to be tried.

(2) If a jury is not demanded, the court shall try the issues joined [, and sign and file its decision in writing, as provided in civil actions].

Comment. Section 7145 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). [Some provisions of this division do grant the right to trial by jury. See Sections 371, 382, 928, 1081, 1230, and 1231.] See also Sections 1452 (guardianship-conservatorship) and _____ (trusts).

Subdivision (b) continues the substance of the third and fourth sentences of former Section 1230.

CHAPTER 4. NOTICES

§ 7150. Mailing

7150. If any notice under this division is required to be mailed, the notice shall be deposited, first class postage prepaid, in a post office, subpost office, substation, mailbox, mail chute, or other like facility in this state regularly maintained by the United States postal service.

Comment. Section 7150 generalizes provisions found in former Sections 328 and 441.

2962

PART 2. OPENING ESTATE ADMINISTRATION

CHAPTER 1. COMMENCEMENT OF PROCEEDINGS

§ 7210. Petition

7210. Any interested person may, at any time after the death of the decedent, petition the court for an order establishing the fact of the decedent's death and either or both of the following:

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

(b) Appointment of a personal representative.

Comment. Section 7210 continues the substance of former law. See, e.g., former Section 323 (petition for probate of will). The court having jurisdiction is the superior court of the proper county. Sections 7120 (jurisdiction in superior court), 7121 (venue), and 7130-7134 (transfer of proceedings).

CROSS-REFERENCES

Definitions

Court § 30

Interested person § 48

Personal representative § 59

Note: The interrelation of this provision with the various limitation periods and protection of BFPs, as well as the evidentiary effect of an unprobated will, is under study.

§ 7211. Failure of person named executor to petition

7211. Unless good cause for delay is shown, if a person named in a will as executor fails to petition the court for probate of the will and appointment as personal representative within 30 days after the person has knowledge of the death of the testator and that the person is named as executor, the person may be held to have renounced the right to appointment as personal representative.

Comment. Section 7211 is the same in substance as former Section 324. If the person named as executor is held to have renounced the right to appointment, the court may appoint another competent person as personal representative. See Section _____.

2963

§ 7212. Contents of petition

7212. (a) The petition shall be in writing, signed by the petitioner, and filed with the clerk of the court.

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

(1) The jurisdictional facts.

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

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

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

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

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

Comment. Subdivision (a) of Section 7212 is drawn from former Section 440 (application for letters of administration). Subdivisions (b) and (c) are the same in substance as portions of former Sections 326 (petition for probate of will) and 440 (petition for letters of administration), with the substitution of the address for the residence of heirs and devisees and the addition of an express requirement that a copy of the will be attached. The provision of former Section 440 for signature by counsel for the petitioner is not continued.

CROSS-REFERENCES

Definitions

Court § 30
 Devisee § 34
 Executor § 37
 Heirs § 44
 Personal representative § 59

2964

§ 7213. Setting and notice of hearing

7213. When the petition is filed, the clerk of the court shall do all of the following:

- (a) Set the petition for hearing by the court upon a day not less than 10 nor more than 30 days after the petition is filed.
- (b) Cause notice of the hearing to be given in the manner prescribed in Chapter 2 (commencing with Section 7230).

Comment. Section 7213 is the same in substance as portions of former Sections 327 (probate of will) and 441 (application for letters). The provision of former Section 327 for setting the hearing between 30 and 45 days after the petition is filed is not continued; it is unnecessary with the changes in the notice of hearing requirements. See Sections 7240 et seq. and Comments thereto.

31052

§ 7214. Opposition

7214. (a) Any interested person may contest the petition by filing written grounds of opposition.

(b) If the contest is of the appointment of the personal representative, the grounds of opposition may include a challenge to the competency of the personal representative or the right to appointment. If the grounds assert the right of another person to appointment as personal representative, the contestant shall also file a petition and serve notice in the manner prescribed in Article 2 (commencing with Section 7240) of Chapter 2, and the court shall hear the two petitions together.

(c) If the contest is of the will, the procedure is that prescribed in Chapter 3 (commencing with Section 7250).

Comment. Subdivisions (a) and (b) of Section 7214 are the same in substance as former Section 442 and a portion of the first sentence of former Section 407. Subdivision (c) is included as a cross-reference.

CROSS-REFERENCES

Definitions

- Court § 30
- Interested person § 48
- Personal representative § 59

2965

§ 7215. Hearing

7215. (a) At the hearing on the petition, the court shall hear and determine any objections.

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

- (1) The time, place, and manner of the decedent's death.
- (2) The place of the decedent's domicile and residence at the time of death.
- (3) The character and value of the decedent's property.
- (4) Whether or not the decedent left a will.

(c) The following matters must be proved by competent evidence:

- (1) The jurisdictional facts, including the fact of the decedent's death and whether the decedent was domiciled in this state at the time of death.
- (2) The existence or nonexistence of the decedent's will.
- (3) That notice of the hearing was given as required by statute.

Comment. Section 7215 is the same in substance as former Section 443 and a portion of the first sentence of former Section 407.

31053

§ 7216. Court order

7216. (a) If the court finds the necessary jurisdictional facts exist, the court shall make an order establishing the fact of the decedent's death and the jurisdiction of the court. Where appropriate and upon satisfactory proof, the court order shall admit the decedent's will to probate and appoint a personal representative.

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

Comment. Subdivision (c) of Section 7216 is new. Subdivision (b) is the same in substance as the last paragraph of former Sections 326 and 440.

28752

§ 7217. Determination of jurisdiction conclusive

7217. (a) Except as provided in subdivision (b), an order of the court admitting a will to probate or appointing a personal representative, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked.

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

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

(2) The court order is based upon the erroneous assumption of death.

Comment. Section 7217 is the same in substance as former Section 302.

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

CROSS-REFERENCES

Definition

Court § 30

31070

CHAPTER 2. NOTICE

Article 1. Contents of Notice

§ 7230. Form of notice

7230. The notice of hearing, whether served pursuant to Article 2 (commencing with Section 7240) or published or posted pursuant to Article 3 (commencing with Section 7245), shall state substantially as follows:

"NOTICE TO CREDITORS AND OTHER INTERESTED PERSONS
OF PETITION TO ADMINISTER
ESTATE OF _____

A petition has been filed by _____ in the Superior Court of _____ County requesting that _____ be appointed as personal representative to administer the estate of _____ [under the Independent Administration of Estates Act] [and for probate

of the decedent's will dated _____, which is available for examination in the court file]. The petition is set for hearing in Dept. No. _____ at _____ (Address)

on _____ at _____. (Date of hearing) (Time of hearing)

Information for heirs, beneficiaries, creditors and contingent creditors, and persons who may be otherwise interested in the will and/or estate appears below.

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

INFORMATION FOR HEIRS, BENEFICIARIES, CREDITORS AND CONTINGENT CREDITORS, AND OTHER INTERESTED PERSONS

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

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

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

Comment. Section 7230 is the same in substance as the second sentence of former Section 328 and former Section 333(b), except that the type size is not specified, a reference to the decedent's will is added, and the order of the parts of the notice is somewhat rearranged. Section 7230 also continues the substance of the last sentence of Section 441. Section 7230 consolidates the published or posted notice with the general notice served on heirs or beneficiaries, so that there is a single form of notice.

Article 2. Service of Notice

§ 7240. Persons on whom notice served

7240. At least 10 days before the hearing on the petition, notice of the hearing shall be served on all of the following persons other than the petitioner:

(a) Each heir of the decedent.

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

Comment. Section 7240 is the same in substance as the first part of the first sentence of former Section 328 and a portion of the second sentence of former Section 441.

31074

§ 7241. Manner of service of notice

7241. Notice of the hearing shall be served personally or by mail addressed to the person at the person's place of residence or mailing address, if known to the petitioner, or if not, at the county seat of the county where the proceedings are pending.

Comment. Section 7241 is the same in substance as the last portion of the first sentence of former Section 328 and the second sentence of former Section 441.

CROSS-REFERENCES

Definition

Mailing § 7130

31176

§ 7242. Service on alleged decedent

7242. (a) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing shall be served on the alleged decedent by registered mail to his or her last known address.

(b) The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(1) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent.

(2) By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent.

(3) By engaging the services of an investigator.

(c) The costs of any search directed pursuant to subdivision (b) shall be paid by the petitioner if there is no administration or by the estate of the decedent if there is administration.

Comment. Section 7242 is drawn from Uniform Probate Code Section 3-403(b).

31180

§ 7243. Service on Attorney General

7243. If the decedent's will involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state, or involves or may involve a devise for charitable purposes without an identified devisee, notice of hearing accompanied by a copy of the petition and the will shall be served upon the Attorney General personally or by mail addressed to the Attorney General at the office of the Attorney General at Sacramento, California.

Comment. Section 7243 is the same in substance as the second paragraph of former Section 328.

CROSS-REFERENCES

Definitions

- Devise § 32
- Devisee § 34
- Mailing § 7150

31156

Article 3. Publication of Notice

§ 7245. Publication or posting of notice

7245. (a) In addition to service of the notice of hearing as provided in Article 2 (commencing with Section 7243), notice shall also be published or posted at least 10 days before the hearing.

(b) Publication shall be in a newspaper of general circulation in the county that is circulated within the community in which the decedent resided at the time of death [or, if the decedent was not domiciled in this state at the time of death, in the community in which property of the decedent is located]. If there is no such newspaper, notice shall be posted at the courthouse of the county and two of the most public places within the community.

(c) The petition shall not be heard by the court unless an affidavit showing due publication or posting of the notice has been filed with the court. The affidavit shall contain a copy of the notice and state the date of its publication or posting.

Comment. Section 7245 continues the substance of portions of former Section 333, with the following changes:

(1) Notice may be published in any newspaper of general circulation in the county and is not limited to a daily or weekly newspaper in the city. This change makes unnecessary former Section 334 (good faith compliance with publication requirements).

(2) Publication is required once rather than three times.

(3) The type-size of published notice is not specified.

(4) Posting at the county courthouse is one of the required three postings.

Note. Provisions relating to nondomiciliaries have not yet been reviewed.

31073

§ 7246. Contents of published or posted notice

7246. Notwithstanding Section 7230:

(a) The notice of hearing may be published together with the notice of hearing in other estates by grouping all the notices together and publishing the information for heirs, beneficiaries, creditors and contingent creditors, and other interested persons only once immediately following all the notices.

(b) After the notice of hearing is published or posted and an affidavit filed, any subsequent publication or posting of the notice may omit notice of the decedent's death from the caption and may omit the information for creditors and contingent creditors.

Comment. Subdivision (a) of Section 7246 is new. Subdivision (b) continues the substance of former Section 333(d).

CHAPTER 3. PROBATE OF WILL

Article 1. Production of Will

§ 7250. Delivery of will by custodian

7250. (a) The custodian of a will shall, within thirty days after being informed that the testator is dead, deliver the will to one of the following persons:

- (1) The clerk of the court having jurisdiction of the estate.
- (2) The person named in the will as executor.

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

Comment. Section 7250 is the same in substance as former Section 320. For the jurisdiction of the court, see Sections 7120-7121.

3036

§ 7251. Order for production of will

7251. If, upon petition alleging that a person has possession of the will of a decedent, the court is satisfied that the allegation is true, the court shall order the person to produce the will.

Comment. Section 7251 is the same in substance as a portion of former Section 321. The court or judge has general authority to enforce the production of wills and the attendance of witnesses. See Section 7122 (authority of court or judge). For notice and hearing procedures, see Sections _____.

CROSS-REFERENCES

Definition

Court § 30

3038

§ 7252. Will detained outside jurisdiction

7252. If the will of a person who at the time of death was domiciled in this state is detained in a court of any other state or country and cannot be produced for probate in this state, a copy of the will duly authenticated may be admitted to probate in this state with the same force and effect as the original will. The same proof shall be required as if the original will were produced.

Comment. Section 7252 is the same in substance as former Section 330. Proof of a duly authenticated copy may be made in the same manner as proof of an original will. Thus the court may authorize a copy to be presented to the witnesses and the witnesses may be asked the same questions with respect to the copy as if the original will were present. See Article 2 (commencing with Section 7260) (proof of will).

3116

Article 2. Proof of Will

§ 7261. Evidence of subscribing witness

7261. Unless there is a contest of a will:

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

(b) Evidence of execution of a will may be received by an affidavit of a subscribing witness to which there is attached a photographic copy of the will, or by an affidavit in the original will that includes or incorporates the attestation clause.

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

Comment. Section 7261 is the same in substance as the first two sentences of former Section 329 and the last sentence of former Section 1233.

3117

§ 7262. Proof where no subscribing witness available

7262. If no subscribing witness is available as a witness within the meaning of Section 240 of the Evidence Code, the court may, if the will on its face conforms to all requirements of law, permit proof of the will by proof of the handwriting of the testator and one of the following:

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

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

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

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

Comment. Section 7262 continues the substance of the fourth sentence of former Section 329, with the exception of the language relating to a writing "at the end" of the will. The signatures of subscribing witnesses no longer must appear at the end. Section 6110 (execution). If the subscribing witnesses are competent at the time of attesting the execution, their subsequent incompetency, from whatever cause, will not prevent the probate of the will, if it is otherwise satisfactorily proved. Cf. Evidence Code § 240 ("unavailable as a witness").

3118

§ 7263. Proof of holographic will

7263. A holographic will may be proved in the same manner as other private writings.

Comment. Section 7263 is the same as former Section 331.

3119

§ 7264. Proof of lost or destroyed will

7264. The petition for probate of a lost or destroyed will shall include or be accompanied by a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate, and the order shall be entered at length in the minutes.

Comment. Section 7264 is the same in substance as the first two sentences of former Section 351.

31189

§ 7265. Perpetuation of testimony

7265. The testimony of each witness concerning the execution or provisions of a will or the testamentary capacity of the decedent or other issue of fact, whether or not the will is contested, may be reduced to writing, signed by the witness, and filed. The testimony so preserved, or an official reporter's transcript of the testimony, shall be admissible in evidence in any subsequent proceeding concerning the will if the witness has become unavailable as a witness within the meaning of Section 240 of the Evidence Code.

Comment. Section 7265 continues and broadens former Section 374 (will contests) and the last sentence of former Section 351 (proof of

lost or destroyed will). The former provisions were treated as permissive rather than mandatory in practice and by case law.

31054

§ 7266. Admission of will to probate

7266. (a) When the court admits a will to probate, the will shall be recorded in the minutes by the clerk, with the notation: "Admitted to probate (giving date)."

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

Comment. Section 7266 is the same in substance as former Section 332.

31055

§ 7267. Effect of admission of will to probate

7267. (a) If no person contests the validity of a will or petitions for revocation of probate of the will within the time prescribed in this chapter, admission of the will to probate is conclusive.

(b) Nothing in this section precludes the subsequent probate of another will of the decedent before the close of estate administration. If more than one will is admitted to probate, the court shall determine what provisions, if any, control nomination of an executor. The court may, but need not, determine how any provisions of a will are affected by another will.

Comment. Subdivision (a) of Section 7267 continues the substance of the first portion of former Section 384. The last portion of former Section 384, allowing a petition to revoke probate within four months after the disability of a non-party minor or incompetent person is removed, is not continued. The time within which a contest must be made is prior to the hearing (Section 7270), and the time within which revocation of probate may be sought is 120 days after the will is admitted (Section 7280).

Subdivision (b) continues the substance of former Section 385, but precludes probate of another will after close of administration. Cf. Estate of Moore, 180 Cal. 570, 182 Pac. 285 (1919). It is consistent with Section 6120 (revocation by subsequent will). Subdivision (b) is also drawn in part from Section 3-410 of the Uniform Probate Code.

Article 3. Contest of Will

§ 7270. Opposition to will

7270. At any time before the hearing of the petition for probate of a will, any interested person may contest the will by filing written grounds of opposition.

Comment. Section 7270 is the same in substance as the first portion of the first sentence of former Section 370.

CROSS-REFERENCES

Definition

Interested person § 48

3123

§ 7271. Summons

7271. Upon the filing of the opposition, the court shall issue a summons directed to all interested persons. The summons shall direct the persons summoned to plead to the contest within 30 days after service of the summons.

Comment. Section 7271 is the same in substance as the last portion of the first sentence of former Section 370, except that the citation is replaced by a summons. Service of the summons must be made in the manner provided by law for service of summons in a civil action. Section [7140] (application of rules of civil procedure). Section 7271 does not limit the persons to be notified, and thus requires notice to all interested persons wherever residing, including minors and incompetents.

CROSS-REFERENCES

Definition

Interested person § 48

3124

§ 7272. Responsive pleading

7272. (a) The petitioner or any other interested person may jointly or separately answer the contest or demur to the contest within the time prescribed in the summons.

(b) Demurrer may be made upon any of the grounds of demurrer available in a civil action. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 10 days, within which to amend the contest. If the demurrer is overruled, the respondents

may, within 10 days after receipt of written notice thereof, answer the contest.

Comment. Section 7272 is the same in substance as the second, third, and fourth sentences of former Section 370.

3125

§ 7273. Trial

7273. At the trial, the contestant is the plaintiff and the petitioner is the defendant. The court shall try and determine any contested issue of fact that affects the validity of the will.

Comment. Section 7273 is the same in substance as former Section 371, with the exception of the provision for jury trial, which is not continued.

3126

§ 7274. Evidence of execution

7274. At the trial, each subscribing witness shall be produced and examined. If no subscribing witness is available as a witness within the meaning of Section 240 of the Evidence Code, the court may admit the evidence of other witnesses to prove the due execution of the will.

Comment. Section 7274 is the same in substance as former Section 372, with the exception of the limitation on production of witnesses outside the county, which is not continued. See Section 7140 (general rules of practice govern) and Code Civ. Proc. § 1989 (compelling attendance of witnesses). The court may admit proof of the handwriting of the testator and of any of the subscribing witnesses as evidence of the due execution of the will. Section 7262 (proof where no subscribing witness available).

3127

§ 7275. Judgment

7275. Upon the proof taken, the court shall render judgment either admitting the will to probate or rejecting it.

Comment. Section 7275 is the same in substance as former Section 373, with the exception of the reference to the special verdict of a jury, which is no longer necessary. See Section 7273 and Comment thereto (jury trial not continued).

Article 4. Revocation of Probate

§ 7280. Petition for revocation

7280. Within 120 days after a will is admitted to probate, any interested person who had no actual notice either of the petition for probate or of a contest of the will may petition the court to revoke the probate of the will. The petition shall include the allegations against the validity of the will or the sufficiency of the proof.

Comment. Section 7280 supersedes the first and second sentences of former Section 380. Under the former provision any person (except a party or a person with actual notice of a will contest) could seek revocation of probate. Section 7280 limits persons entitled to seek revocation to those without actual notice of the petition for probate (or of a will contest). A will is admitted to probate when it is recorded in the minutes by the clerk. Section 7218.

CROSS-REFERENCES

Definitions

Court § 30
Interested person § 48

31197

§ 7281. Summons

7281. Upon the filing of the petition, the court shall issue a summons directed to the personal representative and to the heirs and devisees of the decedent, so far as known to the petitioner. The summons shall direct the persons summoned to plead to the petition within 30 days after service of the summons.

Comment. Section 7281 supersedes former Section 381, substituting a summons for the citation. The requirement that the summons be issued within the time allowed for filing the petition is not continued. The summons must be directed to the devisees mentioned in the will as to which revocation of probate is sought, as well as to heirs and any personal representative appointed by the court. The summons may be directed to minors or incompetent persons, or to the personal representative of a deceased person.

31436

§ 7282. Service and trial

7282. (a) The summons shall be served and proceedings had as in the case of a contest of the will.

(b) If the court determines the will is invalid or is not the last will of the testator, the court shall revoke the probate. Revocation of probate terminates the powers of the personal representative. The personal representative shall not be liable for any act done in good faith before the revocation.

Comment. Section 7282 continues the substance of former Section 382, with the exception of the provision for a jury trial, which is not continued. See Section 7135 (trial by jury).

31437

§ 7283. Costs and attorney's fees

7283. If the probate is not revoked, the costs of, and a reasonable attorney's fee incurred in, the proceeding shall be paid by the petitioner. If the probate is revoked, the costs and a reasonable attorney's fee shall be paid by the respondent or out of the property of the decedent, as the court directs.

Comment. Section 7283 continues the substance of former Section 383, and extends the rule to include a reasonable attorney's fee.

EXHIBIT 2

999/322

Probate Code § 300 (repealed)

Comment. The substance of former Section 300 is continued in Sections 7111 (passage of decedent's property), 7113 (property subject to administration), 7120 (jurisdiction in superior court), 62 ("property" defined), 32 ("devise" defined).

Probate Code § 301 (repealed)

Comment. The substance of former Section 301 is continued in Sections 7120 (jurisdiction in superior court) and 7121 (venue).

Probate Code § 302 (repealed)

Comment. The substance of former Section 302 is continued in Section 7217 (determination of jurisdiction conclusive).

Probate Code § 303 (repealed)

Comment. The substance of the first paragraph of former Section 303 is continued in Section 7124 (grounds for disqualification). The substance of the second paragraph is continued in Sections 7130 (transfer of proceedings), 7131 (place of transfer), and 7133 (procedure for transfer).

Probate Code § 304 (repealed)

Comment. The substance of former Section 304 is continued in Section 7134 (effect of transfer on personal representative).

Probate Code § 305 (repealed)

Comment. The substance of former Section 305 is continued in Sections 7132 (retransfer) and 7133 (procedure for transfer).

31541

Probate Code § 320 (repealed)

Comment. The substance of former Section 320 is continued in Section 7250 (delivery of will by custodian).

Probate Code § 321 (repealed)

Comment. The substance of former Section 321 is continued in Sections 7251 (order for production of will), 7122 (authority of court or judge), and _____ (notice and hearing procedures).

Probate Code § 322 (repealed)

Comment. Former Section 322 is superseded by Sections _____ (probate of wills, spousal dealing).

Probate Code § 323 (repealed)

Comment. The substance of former Section 323 is continued in Section 7210 (petition).

Probate Code § 324 (repealed)

Comment. The substance of former Section 324 is continued in Section 7211 (failure of person named executor to petition).

Probate Code § 326 (repealed)

Comment. The substance of the first portion of former Section 326 is continued in Section 7212 (contents of petition). The substance of the last portion is continued in Section 7216(b) (court order).

Probate Code § 327 (repealed)

Comment. The substance of the first sentence of former Section 327 is continued in Section 7213 (setting and notice of hearing). The second sentence is not continued; it is unnecessary with the changes in the notice of hearing requirements. See Sections 7240 et seq. and Comments thereto.

32108

Probate Code § 328 (repealed)

Comment. The substance of the first sentence of the first paragraph of former Section 328 is continued in Sections 7240 (persons on whom notice served), 7241 (manner of service notice), and 7130 (mailing). The substance of the second sentence is continued in Section 7230 (contents of notice).

The substance of the second paragraph is continued in Sections 7243 (service on Attorney General) and 7130 (mailing). The substance of the third paragraph is continued in Section 7130 (mailing).

Probate Code § 328.3 (repealed)

Comment. The substance of former Section 328.3 is continued in Section 6103 (will or revocation procured by duress, menace, fraud, or undue influence).

Probate Code § 328.7 (repealed)

Comment. Former Section 328.7 is continued in Section 6132 (conditional will).

Probate Code § 329 (repealed)

Comment. The substance of the first two sentences of former Section 329 is continued in Section 7261 (evidence of subscribing witness). The substance of the third sentence is continued in Section 7262 (proof where no subscribing witness available). See also Evidence Code § 240 ("unavailable as witness"). The substance of the fourth sentence is continued in Section 7262, with the exception of the language relating to a writing "at the end" of the will. The signatures of subscribing witnesses no longer must appear at the end. Section 6110 (execution).

Probate Code § 330 (repealed)

Comment. The substance of former Section 330 is continued in Section 7252 (will detained outside jurisdiction) and Chapter ___ (commencing with Section 7260) (proof of will).

Probate Code § 331 (repealed)

Comment. Former Section 331 is continued in Section 7263 (proof of holographic will).

Probate Code § 332 (repealed)

Comment. The substance of former Section 332 is continued in Section 7266 (admission of will to probate).

32119

Probate Code § 333 (repealed)

Comment. The first two sentences of subdivision (a) of former Section 333 are superseded by Section 7245(a) (publication or posting of notice). The new provision requires publication once at least 10 days before the hearing. The third sentence is not continued. The substance of the fourth and fifth sentences is continued in Section 7245(b), making clear that the county courthouse is one of the public places where notice must be posted. The last sentence is not continued; it is made unnecessary by the discontinuance of the third sentence.

The substance of subdivision (b) is continued in Section 7230 (contents of notice), with the following changes: (1) The type size is not specified. (2) Identification of the will being offered for probate is required. (3) The order of the parts of the notice is rearranged somewhat.

The substance of subdivision (c) is continued in Section 7245(c) (publication or posting of notice).

The substance of subdivision (d) is continued in Section 7246(b) (contents of notice).

Probate Code § 334 (repealed)

Comment. Former Section 334 is not continued. It is made unnecessary by the discontinuance of the third sentence of former Section 333(a).

Probate Code § 351 (repealed)

Comment. The substance of former Section 351 is continued in Section 7264 (proof of lost or destroyed will), with the exception of the requirement that testimony of witnesses be reduced to writing, signed, and filed, which is made permissive and not mandatory.

Probate Code § 352 (repealed)

Comment. The substance of former Section 352 is continued and broadened in Section 7315 (restraining personal representative pending probate of will).

Probate Code § 370 (repealed)

Comment. The substance of the first portion of the first sentence of former Section 370 is continued in Section 7270 (opposition to will). The substance of the last portion of the first sentence is continued in Section 7271 (notice of opposition), except that the citation is replaced by a summons.

The substance of the second, third, and fourth sentences is continued in Section 7272 (responsive pleading).

Probate Code § 371 (repealed)

Comment. The substance of former Section 371 is continued in Section 3273 (trial), with the exception of the jury trial provision, which is not continued.

32120

Probate Code § 372 (repealed)

Comment. The substance of former Section 372 is continued in Section 7274 (evidence of execution). See also Section 7130 (general rules of practice govern) and Code Civ. Proc. § 1989 (compelling attendance of witnesses).

Probate Code § 372.5 (repealed)

Comment. Former Section 372.5 is continued in Section 6112(d).

Probate Code § 373 (repealed)

Comment. The substance of former Section 373 is continued in Section 7275 (judgment), with the exception of the provision for the special verdict of a jury, which is no longer necessary. See Section 7273 and Comment thereto (jury trial not continued).

Probate Code § 374 (repealed)

Comment. The substance of former Section 374 is continued in Section 7265 (perpetuation of testimony).

Probate Code § 380 (repealed)

Comment. Former Section 380 is superseded by Section 7280 (petition for revocation). Section 7280 limits persons entitled to seek revocation to those without actual notice of the petition for probate (or of a will contest).

Probate Code § 381 (repealed)

Comment. Former Section 381 is superseded by Section 7281 (summons), which substitutes a summons for the citation.

32189

Probate Code § 382 (repealed)

Comment. The substance of former Section 382 is continued in Section 7282 (service and trial), with the exception of the provision for a jury trial, which is not continued. See Section 7135 (trial by jury).

Probate Code § 383 (repealed)

Comment. The substance of former Section 383 is continued in Section 7283 (costs and attorney's fees).

Probate Code § 384 (repealed)

Comment. The substance of the first portion of former Section 384 is continued in Section 7267(a) (effect of admission of will to probate). The last portion is not continued.

Probate Code § 385 (repealed)

Comment. The substance of former Section 385 is continued in Section 7267(b) (effect of admission of will to probate), but Section 7267 precludes probate of another will after close of administration.

EXHIBIT 3

31454

Code of Civil Procedure § 153 (amended)

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 one of the following:

~~1. To a writ;~~ (a) A writ.

~~2. To a summons;~~ (b) A summons.

~~3. To a warrant of arrest;~~ (c) A warrant of arrest.

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

Comment. Section 153 is amended to delete former subdivision (4), relating to the court seal on the certificate of probate of a will or of the appointment of an executor, administrator, guardian, or conservator. This provision was unnecessary, since the seal is expressly provided by law in these cases. See Prob. Code §§ _____ (certificate of probate), _____ (letters of personal representative), 2311 (letters of guardianship or conservatorship).

998/827

Code of Civil Procedure § 166 (amended)

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 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, receive inventories and accounts to be filed, suspend the powers of executors, administrators, guardians, or conservators in the cases allowed by law, grant special letters of administration and letters of temporary guardianship or conservatorship, approve 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 chambers.

Comment. The substance of the provisions formerly found in Section 166 relating to probate is continued in Section 7212 (actions at chambers). See also Section 1457 (guardianship and conservatorship).

998/831

Probate Code § 20 (amended)

SEC. __. Section 20 of the Probate Code is amended to read:

20. Unless the provision or context otherwise requires, the words and phrases defined in this part govern the construction of Divisions 1 (commencing with Section 1), 2 (commencing with Section 100), ~~and 6 (commencing with Section 6100), and 7 (commencing with Section 7100).~~

Note. This provision should be expanded after analysis of divisions 3-5.

999/319

§ 30. Court

30. "Court" means the court having jurisdiction of the estate of a decedent.

Comment. Section 30 is the same in substance as Section 1-201(5) of the Uniform Probate Code. This definition is limited in its application. Cf. Sections 20 (application of definition), 1418 ("court" in guardianship or conservatorship proceeding). Jurisdiction of the estate of a decedent is in the superior court. Section 7210. See also Sections 7215 (venue) and 7220-7224 (transfer of proceedings).

§ 59. Personal representative

59. "Personal representative" means executor, administrator, administrator with will annexed, special administrator, or successor personal representative [and persons who perform substantially the same function under the law governing their status.]

Comment. Section 59 is the same in substance as the first sentence of Section 1-201(30) of the Uniform Probate Code.

999/324

Probate Code §§ 300-1313 (repealed)

SECTION 1. Division 3 (commencing with Section 300) of the Probate Code is repealed.

Comment. Comments that indicate the disposition of individual provisions of former Division 3 are included in the Appendix to this report. It should be noted that to the extent a new provision of this code is substantially the same as a previously existing provision relating to the same subject matter, it is to be construed as a restatement and continuation of the previously existing provision and not as a new enactment. Section 2(a).

999/321

Probate Code § 1457 (added)

SEC. __. Section 1457 is added to the Probate Code to read:

1457. A judge of the court may, at chambers, in addition to the matters authorized by Section 166 of the Code of Civil Procedure, do any of the matters authorized by Section 7212 of this code.

Comment. Section 1457 is added for cross-referencing purposes.

31459

§ 6103. Will or revocation procured by duress, menace, fraud, or undue influence

6103. A will or part of a will, or the revocation of a will or part of a will, is invalid to the extent procured by duress, menace, fraud, or undue influence.

Comment. Section 6103 is the same in substance as former Section 328.3.

§ 6112. Interested witness

6112. (a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness. Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof.

(c) If a devise made by the will to an interested witness fails because the presumption established by subdivision (b) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

(d) Notwithstanding a provision in the will that one who contests or attacks the will or any of its provisions shall take nothing under the will or shall take a reduced share, any person interested may, without forfeiting any benefits under the will, contest a provision of the will which benefits a witness to the will.

Comment. Subdivision (d) of Section 6112 continues former Section 372.5.

31510

§ 6132. Conditional will

6132. A will, the validity of which is made conditional by its own terms, shall be granted or denied probate, or denied effect after probate, in conformity with the condition.

Comment. Section 6132 is the same as former Section 328.7, which was the same as former Section 24.

EXHIBIT 4

JACK E. COOPER
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November 6, 1984

California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94306

Re: California Probate Code, section 326

Gentlemen:

California Probate Code, section 326 (4), requires that a petition for probate state:

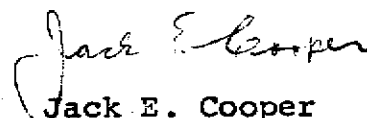
"The names, ages, residences, and relationship to decedent of the heirs, devisees and legatees of the decedent, so far as known to the petitioner"

The currently approved Judicial Council form DE-110(81) entitled Petition For Probate provides in paragraph 6 for "Residence or Mailing Address".

I respectfully submit that the code section should be amended to require the petition to state the address of the heirs etc. rather than residences. Our local probate examiners consider the petition to be defective if a post office box number is used as a the residence, and their position is certainly logical as the code now stands. With that in mind: What address is to be used for military personnel assigned to ships and overseas stations? What "residence" is to be used for rural residents who are not themselves aware of the street number given their home?

Since jurisdiction is not involved so far as the residence of the heirs is concerned, and the reason for giving data concerning the heirs is so they may be given notice, why shouldn't the petition set forth where to send notice so it has the best chance of being received? In some cases if a street address is used the correspondence will be returned whereas a box number will be delivered. Why require "residence"?

Very truly yours,


Jack E. Cooper

cc: State Bar