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#L-1035

Memorandum 85-91

Subject: Study L-1035 - Estates and Trusts Code (Administration
of Estates of Missing Persons Presumed Dead)

Attached to this memorandum is a redraft of the existing provisions governing administration of estates of missing persons presumed dead. The redraft preserves existing law, but please see the notes and queries following the redrafted provisions.

Respectfully submitted,

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Assistant Executive Secretary

PART 11. ADMINISTRATION OF ESTATES OF MISSING PERSONS
PRESUMED DEAD

§ 9000. "Missing person" defined

9000. As used in this part, unless the provision or context otherwise requires, "missing person" means a person who is presumed to be dead under Section 9001.

Comment. Section 9000 (formerly Section 1350) which permits use of the phrase "missing person" for convenient reference, continues the terminology of former Section 280.

§ 9001. Presumption of death for purposes of administration

9001. In proceedings under this division, a person who is absent for a continuous period of five years, during which time the person has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier.

Comment. The first sentence of Section 9001 (formerly Section 1351) supersedes a portion of former Section 280 (person deemed missing person if absent for seven years). The second sentence is new. Section 9001 is the same in substance as Uniform Probate Code Section 1-107(3). See also Evid. Code §§ 667 (general presumption of death), 1282 (finding of presumed death by federal employee).

§ 9002. Manner of administration and distribution of missing person's estate

9002. The estate of a missing person may be administered and distributed, as though the person were dead, in the manner provided generally for the administration and distribution of estates of deceased persons, subject to the provisions of this part, except that no preliminary or final distribution of the property of the missing person shall be made until the lapse of one year after the appointment and qualification of the personal representative.

Comment. Section 9002 (formerly Section 1352) restates without substantive change a portion of former Section 280 and a portion of former Section 285 and supersedes former Sections 285, 286, and 294. See also Section 9008 (recovery of property by missing person upon reappearance).

The provision of Section 9002 that no preliminary or final distribution may be made until the lapse of one year after the appointment and qualification of the executor or administrator does not preclude payment of a family allowance.

CROSS-REFERENCES

Definition

Personal representative § 59

§ 9003. Jurisdiction of court

9003. (a) If the missing person was a resident of this state at the time of the person's disappearance, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this part.

(b) If the missing person was a nonresident of this state at the time of the person's disappearance, the superior court of any county where any real property of the missing person is located, or of the county where any personal property is located if there is no real property in this state, has jurisdiction for the purposes of this part.

Comment. Section 9003 (former Section 1353) continues a portion of former Section 281.

Queries. Subdivision (a) simply repeats the general rules on jurisdiction and venue. Is the repetition necessary?

Subdivision (b) provides a variant from the general rules on jurisdiction and venue. The general rules permit venue in any county in which property is located, whereas subdivision (b) requires the county where real property is located. Is there a basis for this difference?

Our State Bar consultants suggest adding a requirement that proceedings be captioned "Estate of _____, a missing person," a provision found in old law. We eliminated this requirement because captions are properly subject to court rule and Judicial Council forms.

§ 9004. Petition for administration or probate

9004. (a) A petition may be filed in the court having jurisdiction under Section 9003 for the administration of the estate of a missing person.

(b) The petition may be filed by any one or more of the following:

- (1) The spouse or a member of the family of the missing person.
- (2) A person interested in the estate of the missing person.
- (3) A friend of the missing person.

(c) In addition to the matters otherwise required in a petition for administration of the estate, the petition shall state all of the following:

(1) The last known place of residence of the missing person.

(2) The time and circumstance of the person's disappearance.

(3) That the missing person has not been heard from by the persons most likely to hear (naming them and their relationship to the missing person) for a period of five years and the whereabouts of the missing person is unknown to those persons and to the petitioner.

(4) A description of any search or inquiry made concerning the whereabouts of the missing person.

[(d) The petition shall be verified to the best knowledge and belief of the petitioner.]

Comment. Section 9004 (formerly Section 1354) supersedes a portion of former Section 282. Pursuant to subdivision (c) and Section 9002, the general requirements for a petition for administration of the estate (see Section 8002) are applicable.

CROSS-REFERENCES

Definition

Verification § _____

§ 9005. Notice of hearing

9005. Notice of hearing shall be served and published, and proof made in the same manner as in proceedings for administration of the estate of a decedent, except that notice of hearing on the petition shall also be sent by registered mail to the missing person at his or her last known address, if any.

Comment. Section 9005 supersedes former Section 1355 (which replaced former Sections 282 and 283). Section 9005 no longer provides for a three-month hearing date or a 90-day publication provision.

CROSS-REFERENCES

Clerk to set petition for hearing § _____
Certified mail equivalent of registered mail § 5

Note. We have conformed the hearing date and publication times to those in probate administration generally, pursuant to a suggestion of the State Bar and LA County Bar. We have likewise conformed the other notice provisions. Lengthened notice is no longer necessary in the missing person situation because Section 9006 now gives the court the ability to require further notice where it appears that the initial notice may be inadequate.

§ 9006. Determination whether person is person presumed to be dead;
search for missing person

9006. (a) At the hearing, the court shall determine whether the alleged missing person is a person who is presumed to be dead under Section 9001. In addition to the testimony at the hearing, the court may receive in evidence and consider the affidavits and depositions of persons likely to have heard from or know the whereabouts of the alleged missing person.

(b) If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a reasonably diligent search and to report the results of the search. The court may order the search to be made in any manner that seems advisable, including any or all of the following methods:

(1) Inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the missing person.

(2) Notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the missing person.

(3) Engaging the services of an investigator.

(c) The costs of any search ordered by the court 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. Subdivision (a) of Section 9006 (formerly Section 1356) is drawn from the last sentence of former Section 284. Subdivisions (b) and (c) are drawn from subdivision (b) of Section 3-403 of the Uniform Probate Code.

§ 9007. Appointment of personal representative and determination of
date of disappearance

9007. (a) If the court finds that the alleged missing person is a person presumed to be dead under Section 9001, the court shall do both of the following:

(1) Appoint a personal representative for the estate of the missing person in the manner provided for the estates of deceased persons.

(2) Determine the date of the missing person's death.

(b) The personal representative shall administer and distribute the estate of the missing person in the same general manner and method of procedure, and with the same force and effect, as provided by statute for the administration and settlement of the estates of deceased persons, except as otherwise provided in this chapter.

Comment. Subdivision (a) of Section 9007 (formerly Section 1357) restates a portion of former Section 284 without substantive change. See also Sections 9001 (death presumed at end of five-year period unless sufficient evidence of earlier death), 9002 (manner of administration and distribution). Subdivision (b) continues former Section 294 without substantive change.

CROSS-REFERENCES

Definition

Personal representative § 59

§ 9008. Recovery of property by missing person upon reappearance

9008. (a) If the missing person reappears:

(1) The missing person may recover property of the missing person's estate in the possession of the personal representative, less fees, costs, and expenses thus far incurred.

(2) The missing person may recover from distributees any property of the missing person's estate that is in their possession, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all the circumstances, but any action under this paragraph is forever barred five years after the time the petition is filed under Section 9004.

(b) The remedies available to the missing person under subdivision (a) are in addition to any remedies available to the missing person by reason of any fraud or intentional wrongdoing.

(c) Except as provided in subdivisions (a) and (b), the decree of final distribution, when it becomes final, is conclusive as to the rights of the missing person and the rights of the heirs, devisees, and legatees of the missing person.

(d) If a dispute exists as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under Section 8800,

notwithstanding the limitations of time prescribed in Section 8800, for the determination of the identity of the person claiming to be the reappearing missing person.

Comment. Section 9008 (formerly Section 1358) supersedes former Sections 287-290 and a portion of former Section 292. Subdivisions (a) and (b) are drawn from the last paragraph of Section 3-412 of the Uniform Probate Code. The Uniform Probate Code provision has been revised to add a provision barring an action under paragraph (a)(2) five years after the time the petition is filed under Section 9004. This additional provision continues the general effect of the portions of former Sections 287-292 that gave a distribution conclusive effect after the missing person had been missing 10 years. Subdivision (c) is consistent with Section _____ (effect of a decree of final distribution in probate proceedings generally). Subdivision (c) permits a distributee to convey a good title to property of the missing person prior to the time an action by the missing person against the distributee would be barred under subdivision (a)(2). This is because subdivision (c) provides a rule that the decree of final distribution, when it becomes final, is conclusive as to the rights of the missing person. The exception to this rule in subdivision (a)(2) is limited to property in the hands of the distributee or its proceeds in the hands of the distributee; subdivision (a)(2) does not permit an action against the person to whom the property has been transferred by the distributee. Where a distributee has encumbered property of the missing person, the lender likewise would be protected under subdivision (c); but, if the action of the missing person is not barred under subdivision (a)(2), the reappearing missing person might recover from the distributee the property subject to the encumbrance. Subdivision (d) is drawn from a portion of former Section 287.

CROSS-REFERENCES

Definition

Personal representative § 59

Note. We have restored to subdivision (a)(1) language relating to fees, costs, and expenses at the suggestion of our State Bar consultants.

§ 9009. Application of chapter

9009. (a) This part applies only to cases where a petition is filed under Section 9004 after December 31, 1983. If a petition is filed under Section 9004 after December 31, 1983, the required period of absence of the alleged missing person may include a period of absence that commenced to run before that date.

(b) This chapter does not apply to any proceeding under former Sections 280 to 294, inclusive, that is pending on December 31, 1983,

and the law that applies to such proceeding on December 31, 1983, shall continue to apply after that date.

Comment. Section 9009 (formerly Section 1359) is drawn in part from former Section 293.

COMMENTS TO REPEALED SECTIONS

Prob. Code § 1350 (repealed)

Comment. Former Section 1350 is continued in Section 9000 ("missing person" defined).

Prob. Code § 1351 (repealed)

Comment. Former Section 1351 is continued in Section 9001 (presumption of death for purposes of administration).

Prob. Code § 1352 (repealed)

Comment. Former Section 1352 is continued in Section 9002 (manner of administration and distribution of missing person's estate).

Prob. Code § 1353 (repealed)

Comment. Former Section 1353 is continued in Section 9003 (jurisdiction of court).

Prob. Code § 1354 (repealed)

Comment. Former Section 1354 is continued in Section 9004 (petition for administration or probate).

Prob. Code § 1355 (repealed)

Comment. Former Section 1355 is superseded by Section 9005 (notice of hearing). Section 9005 no longer provides for a three-month hearing date or a 90-day publication provision.

Prob. Code § 1356 (repealed)

Comment. Former Section 1356 is continued in Section 9006 (determination whether person is person presumed to be dead; search for missing person).

Prob. Code § 1357 (repealed)

Comment. Former Section 1357 is continued in Section 9007 (appointment of personal representative and determination of date of disappearance).

Prob. Code § 1358 (repealed)

Comment. Former Section 1358 is continued in Section 9008 (recovery of property by missing person upon reappearance).

Prob. Code § 1359 (repealed)

Comment. Former Section 1359 is continued in Section 9009 (application of chapter).