

## First Supplement to Memorandum 85-91

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

The Executive Committee of the Estate Planning, Trust, and Probate Law Section of the California State Bar has considered Memorandum 85-91, relating to administration of estates of missing persons presumed dead. Their comments are contained in the letter attached as Exhibit 1 and are noted below.

§ 9002. Manner of administration and distribution of missing person's estate. This section precludes distribution of a missing person's estate until a year has elapsed after appointment of a personal representative. This in effect converts the 5-year missing person statute to a 6-year statute. The Bar Committee questions the one-year delay--"Is this necessary?"

The staff does not believe the additional year delay is necessary, particularly in light of Section 9008, which gives a missing person who reappears five years to rescind any distributions. The staff would delete the one year delay in reliance on general provisions governing preliminary distributions.

§ 9003. Jurisdiction of court. Subdivision (a) of Section 9003 repeats general rules on jurisdiction and venue. The staff questions the need for this repetition, and the Bar Committee feels it is not necessary to repeat them. The staff would delete the provisions from the statute and cross-refer to the general rules.

Subdivision (b) contains a special venue rule where the missing person is a nonresident--administration must be in the county where real property is located, as opposed to the general rule that administration of the estate of a nonresident may be in any county in which real or personal property is located. The Bar Committee feels there should not be a variance from the general rules here and that real and personal property should be treated in the same manner. The staff agrees, and would delete the special venue provision. Deletion of the special venue provision would also alleviate the concern

expressed by the Bar Committee that the provision appears to invite use of California courts for a nonresident missing person in situations where use of a court of another state would be more appropriate.

In the Queries to this section, the staff noted a suggestion we had received to specify the form of caption of a missing person administration proceeding. The Bar Committee feels that the specified caption should not be required, and the staff agrees--the matter should be left to court rule and Judicial Council forms.

§ 9004. Petition for administration or probate. The Bar Committee questions the terminology of subdivision (b) that a "member of the family" may commence administration proceedings for the estate of a missing person. They suggest more standard terms be used, preferably terms defined in the code. The staff agrees with this suggestion. The term "interested person" is defined in Section 48 to include an heir, devisee, child, spouse, creditor, beneficiary, or other person having a right or claim, and the staff would use and rely on this term.

§ 9006. Determination whether person is person presumed to be dead; search for missing person. Subdivision (a) refers to "testimony at the hearing", which causes the Bar Committee concern that there is an implication that affidavits and declarations cannot be received at the hearing. The staff would replace the phrase "testimony at the hearing" with the phrase "evidence at the hearing", as suggested by the Bar Committee.

Subdivision (c) provides that if the court orders a further search for the missing person, the cost of the search is borne by the person seeking administration if the missing person is found and by the estate if not found. The Bar Committee believes the statute should emphasize the estate as the initial source and primary responsibility for this cost. Presumably they would prefer to see a provision along the following lines:

(c) The costs of any search ordered by the court pursuant to subdivision (b) shall be paid by the estate of the missing person. If there is no administration and it appears that the petition was filed without probable cause, the estate may recover the costs from the petitioner.

The staff has no problem with such a provision.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

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SECTION 8 10 FILE NO.

November 13, 1985

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FEDERAL EXPRESS

James V. Quillinan  
555 Franklin Street  
San Francisco, CA 94102-4498

Re: LRC Memo 85-91, Admin. of Estate of Missing Persons

Dear Jim:

On November 11, 1985, Janet Wright, Harley Spitler and I ("Team 4") held a telephone conference respecting LRC Memo 85-91. The following are our comments with respect to that Memorandum:

1. Section 9002. Team 4 questioned why the property of a missing person could not be distributed until one year after the appointment and qualification of the personal representative; this provision converts the five year requirement into six. Is this necessary?
2. Section 9003(a). Team 4 felt that it was not necessary to repeat the general rules on jurisdiction and venue as set forth in Section 9003(a).
3. Section 9003(b). Does Section 9003(b) invite a person to use the California courts in situations where it would be more appropriate for him/her to use a court of another state?
4. Section 9003(b). Team 4 felt that there should not be a variance from the general rules on jurisdiction and venue with respect to requiring a proceeding in the county where real property is located. Real and personal property should be treated in the same manner.
5. Section 9003. Notwithstanding the fact that the State Bar consultants suggested the requirement, Team 4 felt that the proceeding should not have to be captioned with "Estate of \_\_\_\_\_, a missing person".

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6. Section 9004(a). Team 4 questioned the language used in Section 9004, i.e. "member of the family"; Team 4 felt it would be better to use more standard terms (e.g. related by blood, marriage) and, if possible, terms defined in the Probate Code.
7. Section 9006(a). Under Section 9006(a), the word "testimony" is used; does this imply that testimony must be given at the hearing? Team 4 suggests that the word "evidence" be used so that affidavits or declarations could be used in lieu of testimony.
8. Section 9006(c). Team 4 felt that the estate of the missing person should bear primary responsibility for the costs of administration, and that Section 9006(c) should emphasize the missing person's estate as the initial source of payment.

We hope that the above report is of assistance to you.

Should you have any questions, please do not hesitate to contact the undersigned.

Cordially,

*Kathryn A. Ballsun*

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Encl.

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