

Memorandum 86-29

Subject: Study L-1028 - Estate and Trust Code (Independent Administration)

Attached is a draft of the Tentative Recommendation Relating to Independent Administration. This is presented for Commission approval before it is sent out to interested persons for review and comment. We will review the comments we receive on the tentative recommendation when we determine what provisions we will include in the new Estate and Trust Code.

The Tentative Recommendation reflects the decisions the Commission made when it last considered this subject. We have noted in italics in the draft statute those matters that deserve special attention by the Commission.

Attached as Exhibit 1 is a letter sent to the Commission by the Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association. With one exception, the staff recommends that the suggestions of the Legislative Committee be adopted. In some cases adoption of the suggestion will require revision of the attached draft of the Tentative Recommendation. We note the suggestions of the Legislative Committee in the italic notes you will find under various sections of the draft statute.

The draft statute also contains bold-face notes. We plan to include these bold-face notes in the Tentative Recommendation we send out for comment. We will delete the italic notes that note particular matters for Commission attention.

We plan to go through the draft statute section by section at the meeting. Please read the preliminary portion of the Tentative Recommendation prior to the meeting and note any editorial revisions

on it and turn it in to the staff at the meeting. If you are not satisfied with any portion of the preliminary portion of the tentative recommendation, please bring up the matter at the meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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February 13, 1986

John H. DeMouilly, Esq.
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California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Study L-1028 - Estates and Trusts Code
Independent Administration

Dear Mr. DeMouilly:

The Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association has reviewed the tentative recommendation regarding independent administration and would like to make the following comments and suggestions:

1. §10551. Actions requiring advice of proposed action. Subdivision (c) of §10551 as drafted requires advice of proposed action for selling or exchanging personal property, except for "securities sold upon an established stock or bond exchange..." In reviewing this subdivision, it was the opinion of the Legislative Committee that stocks sold "over-the-counter" should be included in the exception to §10551 because the market value of such stock is ascertainable on a daily basis from listed quotations and that, in fact, many probate attorneys have assumed that such stocks were included in the exception. However, technically, "over-the-counter" stocks are not sold "upon an established stock exchange." We would, therefore, recommend that the language of subdivision (c) of §10551 be revised to read as follows:

"(c) Selling or exchanging personal property, except for stock or bonds sold by a registered broker-dealer during the regular course of business,

Mr. John H. DeMouilly
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securities sold upon an established stock or bond exchange, and other assets referred to in [Sections and 771.5] when sold for cash."

The suggested language would include stock sold over-the-counter, as well as all other assets included in the Commission's tentative recommendation. The use of the term "stock or bonds" rather than the term "securities" in the recommended revision is suggested to clearly eliminate from the purview of the exception the sale of partnership interests and other "securities" sold by a registered broker-dealer.

After prolonged discussion, the Legislative Committee determined that it was not in agreement with the suggestion of the EPTPL Team that an exception be made to the requirement of giving advice of proposed action for selling or exchanging tangible personal property where the property in question is of minimal value. In most cases, such property could be sold under the provisions of current §770. In the event §770 does not apply to the proposed sale, the personal representative can always use an ex parte petition in an emergency situation. If the property is not the type of property referred to in §770 and no "emergency situation" exists, the Legislative Committee believes that there is no reason why advice should not be given. The Committee believes that, by deleting the requirement of giving advice where the property is of minimal value, whether that value be \$2,000 or \$5,000, and using the value as determined by the probate referee's appraisal in applying the provision, there could be substantial abuse and litigation, particularly when the personal property appraised by the referee has been appraised as a unit and not item by item.

The Legislative Committee also recommends that proposed §10551(e) be revised to read as follows:

"(e) Entering into any contract, other than a lease of real property, which by its provisions cannot be terminated by the personal representative within two years ~~and~~ is not to be performed within two years."

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There are circumstances in which a contract entered into by the personal representative will provide for services to be rendered by the other party to the contract for a term exceeding two years but will also provide that the contract is terminable by the personal representative at will or at specified intervals that do not exceed two years. The Legislative Committee believes that there is no reason to treat the entering into of such a contract any differently from a contract that is to be performed within two years.

2. Re §10556. Delivery or mailing of advice of proposed action and copy of form for objecting to proposed action.

The Legislative Committee agrees with the comments of the San Diego Subcommittee and opposes shortening the notice period under §10556.

3. Re §10560. Effect of failure to object to proposed action.

The Legislative Committee questions the reason for the discrepancy between the language contained in (1) and (2) of subdivision (c) of §10560. Part (2) of that subdivision requires that the person making the motion "establishes by clear and convincing evidence...", whereas part (1) of that subdivision requires that the person making the motion "establishes..." It appears to the Legislative Committee that the difference in language could be interpreted to require a lesser showing in one case than in the other. The Legislative Committee therefore recommends that the language of subdivision (c) of §10560 be revised to read as follows:

"(c) The Court may review the action taken upon motion of a person who establishes by clear and convincing evidence that (1) he or she did not actually receive the advice or proposed action before the time to object expired or (2) the personal representative violated an applicable fiduciary duty in taking the action."

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With regard to the circumstances under which the Court, on its own motion, may review the action of the personal representative, the Legislative Committee believes that, for the protection of creditors, the Court's authority to review the action should be limited to those cases in which no advice of the proposed action was given to the creditor in question. If advice was given to the creditor, the creditor should be limited to the same remedies available to an heir or devisee to whom advice was given. Similarly, the Legislative Committee would limit the authority of the Court to review actions to protect the interests of an heir or devisee who lacked capacity to those situations in which no advice was given to the guardian, conservator or other personal representative of such heir or devisee. If a guardian or conservator has been appointed for a person lacking capacity, it would appear that an advice given to such personal representative should have the same effect as an advice given to any other beneficiary and should likewise limit the remedies available.

The Legislative Committee also questions the reference in the above subsection to an heir or devisee who was unborn at the time the advice was given. It would appear that, in order to give the personal representative any sense of security or finality with regard to any action taken under IAEA, the personal representative would have to petition the Court for appointment of guardians ad litem for all unborn heirs or devisees at the time probate proceeding were instituted and give advice of all actions to such guardians ad litem.

The Legislative Committee therefore recommends that the language of subdivision (d) of §10560 be revised to read as follows:

"(d) The court may review the action of the personal representative on its own motion where necessary to protect the interests of creditors of the estate who were not given advice of the action, or to protect the interests of an heir or devisee who, at the time the advice was given lacked capacity to object to the proposed action or was a minor and

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no advice was given to the guardian, conservator or other personal representative of such heir or devisee."

4. §10600. Judicial Council form for advice of proposed action.

In view of the fact that the Judicial Council has already prescribed a form for advice of proposed action, the Legislative Committee believes that the language of §10600 should be changed to read as follows:

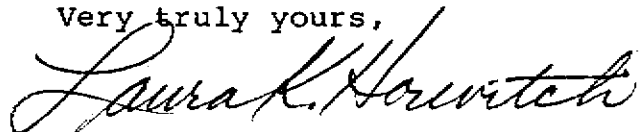
"10600. The form prescribed by the Judicial Council shall be used to give advice of proposed action."

There is, therefore, no need for §10601 and that section should be deleted.

5. §10451. Notice of Hearing.

The Legislative Committee agrees with the recommendation that the language in subdivision (c) of §10451 be expanded as suggested.

Very truly yours,



LAURA KIMCHE HORWITZ,
Chair, Legislative Committee
Estate Planning, Probate and
Trust Section
Beverly Hills Bar Association

LKH:ip

STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION

STAFF DRAFT

(not approved by Commission)

TENTATIVE RECOMMENDATION

relating to

PROBATE LAW

(INDEPENDENT ADMINISTRATION OF ESTATES)

March 1986

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines the recommendation it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN JUNE 1, 1986.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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March 15, 1986

LETTER OF TRANSMITTAL

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The goal is to submit an entire new code to the Legislature for enactment in 1987. The Commission is sending drafts of portions of the new code to interested persons and organizations for review and comment.

This tentative recommendation sets forth the Commission's tentative conclusions concerning the portion of the new code relating to independent administration of estates (existing Prob. Code §§ 591-591.9).

The preliminary portion of the tentative recommendation indicates the principal substantive revisions the proposed legislation would make in existing law.

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

A Comment follows each section of the proposed legislation. The Comment gives the source of the section and indicates any changes the section would make in existing law.

Comments showing the disposition of each section of existing law that would be superseded by the proposed legislation can be found at the end of the tentative recommendation.

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INDEPENDENT ADMINISTRATION

The Independent Administration of Estates Act,¹ enacted in 1974,² permits the court to authorize the personal representative to administer a decedent's estate with a minimum of supervision.³ The personal representative may petition the court for authority to administer the estate under the Act.⁴ The court must grant the authority unless good cause is shown why it should not be granted.⁵

If the authority is granted, many actions that otherwise would be taken under court supervision may be taken without court supervision.⁶ However, the personal representative must give prior

-
1. Prob. Code §§ 591-591.9.
 2. 1974 Cal. Stat. ch. 961. For subsequent amendments and additions to the 1974 act, see 1977 Cal. Stat. ch. 243, 1978 Cal. Stat. ch. 298, 1980 Cal. Stat. ch. 955, 1982 Cal. Stat. ch. 1521, 1983 Cal. Stat. ch. 17, 1984 Cal. Stat. chs. 144, 451, 1017, 1985 Cal. Stat. chs. 359, 982.
 3. The enactment was a response to public criticism of the probate process as requiring too much court involvement and attorneys' time, and being too complex and costly. See Note, Probate Reform: California's Declaration of Independent Administration, 50 S. Cal. L. Rev. 155 (1976).
 4. Prob. Code § 591.1.
 5. Prob. Code § 591.1. See also Prob. Code § 591.7 (revocation of authority where good cause shown). Independent administration authority may not be granted if the decedent's will provides that the decedent's estate shall not be administered under the Act. Prob. Code § 591.1.
 6. Prob. Code § 591.6.

advice of many proposed actions to affected persons;⁷ and, if an interested person objects, the personal representative may take the proposed action only under court supervision.⁸

The Commission studied the Independent Administration of Estates Act during 1983-1985 and submitted recommendations proposing improvements in the Act.⁹ The enactment of these recommendations¹⁰ avoids the need to make further substantial changes in the Independent Administration of Estates Act. Accordingly, the new code merely reorganizes and restates and

7. Prob. Code §§ 591.3-591.4, 591.8. Advice of the proposed action is required to be given to the devisees and legatees whose interest in the estate is affected by the proposed action; to the heirs of the decedent in intestate estates; to the State of California if any portion of the estate is to escheat to it; and to any persons who have filed a request for special notice pursuant to Probate Code Section 1202 (the persons who may request special notice include a creditor, a beneficiary under a trust, any other person interested in the estate, and the State Controller).

Advice of proposed action is required for the following actions: selling or exchanging real property, granting options to purchase real property, selling or exchanging personal property (with certain exceptions), leasing real property for more than a year, entering into any contract (other than a lease of real property) not to be performed within two years, selling, incorporating or operating for longer than six months an unincorporated business of the decedent, commencing payment of or increasing a family allowance or paying a family allowance for more than 12 months after the death of the decedent, investing funds of the estate (with certain exceptions), completing a contract of the decedent to convey real or personal property, borrowing money, executing a mortgage or deed of trust or giving other security, and determining specified claims to real or personal property. Prob. Code § 591.3.

8. Prob. Code § 591.5.

9. Recommendations Relating to Probate Law (Independent Administration of Decedent's Estate), 17 Cal. L. Revision Comm'n Reports 401, 405 (1984). See also 1985 Cal. Stat. chs. 359 and 982, enacted upon recommendation of California Law Revision Commission, 18 Cal. L. Revision Comm'n Reports 216, 370-373 (1986).

10. 1984 Cal. Stat. ch. 451; 1985 Cal. Stat. chs. 359, 982.

generally continues the existing provisions of the Act with the changes noted below.¹¹

Special administrators. Under existing law, the independent administration statute does not apply to special administrators.¹² The new code permits independent administration authority to be granted to a special administrator if the special administrator is appointed with the powers of a general administrator.¹³ This new authority will be useful, for example, in an estate with a lengthy will contest where virtually all of the administration is handled by the special administrator, and the only act which occurs after the final resolution of the will contest is the distribution of the estate assets.

Use of independent administration procedure for proposed actions not requiring advice of proposed action. The new code includes a new procedure that permits the personal representative to give advice of a proposed action even though the independent administration statute does not require that advice of proposed action be given before taking that action. Failure to object to the proposed action has the same effect as failure to object to a proposed action for which advice of proposed action is required. This new procedure will permit the

11. Some minor changes are not noted below but are indicated in the Comment to the pertinent provision of the new code.

12. Prob. Code § 591.1.

13. The independent administration authority will be granted upon request unless (1) good cause is shown why the authority should not be granted or (2) the decedent's will provides that the decedent's estate shall not be administered under independent administration authority.

personal representative to determine whether an interested person objects to the proposed action and will protect the personal representative if no one objects. It will also encourage the personal representative to keep persons interested in the estate informed of proposed actions and will require court approval of the proposed action before it is taken if there is an objection.

Dispensing with advice of proposed action where certain over-the-counter securities sold. Under existing law,¹⁴ advice of proposed action must be given where securities are proposed to be sold unless the securities are to be sold on an established stock or bond exchange. The new code permits the sale without giving advice of proposed action of an over-the-counter security designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc. Daily quotations for these over-the-counter stocks are published daily in the Wall Street Journal and many regular daily newspapers.

Permitting general waiver of right to advice of proposed action or waiver of right to advice of proposed action for all transactions of a particular kind. Existing law permits a person to waive the right to receive advice of a proposed action only with respect to a particular proposed action.¹⁵ A general waiver of the right to receive advice of all proposed actions is not permitted. Nor is a waiver of the right to receive advice of proposed action for all transactions of a particular kind.

14. Prob. Code § 591.3(b)(3).

15. Prob. Code § 591.3(d).

The new code provides for a Statutory Waiver of Advice of Proposed Action Form. Use of this form permits a person to waive the right to receive notice of all proposed transactions or to waive the right to receive notice of particular kinds of proposed actions. The new form includes an appropriate warning to the person using the form of the consequences of signing the form. Using the new form, a person can, for example, waive the right of receive notice of actions with respect to investing funds of the estate without waiving the right to receive notice with respect to sales of real property. Or a person not interested in the management of estate who trusts the personal representative can waive the right to any notice at all respect to any actions the personal representative might decide to take.

Review of actions taken upon court's own motion. Under existing law, failure to object to a proposed action is a waiver of any right to have the court later review the action taken unless the person who fails to object establishes that he or she did not actually receive advice of the proposed action before the time to object expired; but, even though there were no objections to the proposed action, the court on its own motion can review the action of the personal representative after the action is taken.¹⁶

The new code limits the court's power to review on its own motion to cases involving the interests of creditors and cases involving the interests of heirs and devisees who lack capacity or are unborn. The

16. Prob. Code § 591.5(d).

new code expands the rights of a person who fails to object to a proposed action to give the person a right to have the court later review the action taken if the person establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the action. The purpose of the advice of proposed action is to bind persons who receive it if they fail to make a timely objection to the proposed action. Limiting the scope of review by the court on its own motion will further this purpose by protecting the personal administrator from a later objection to the action by a competent person who received the advice of proposed action and failed to make a timely objection to the proposed action.¹⁷

Application to pending proceedings. Since the new independent administration provisions make only minor changes in existing law, the new provisions are made applicable to proceedings pending on the date the new code becomes operative.

17. The new code will permit a guardian ad litem to be appointed to consent or object to proposed actions or to waive advice of proposed action on behalf of a heir or devisee who, at the time the advice was given, lacked capacity to object to the proposed action or was a minor or was unborn.

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PART 6. INDEPENDENT ADMINISTRATION OF ESTATES

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- § 10401. "Court supervision" defined
- § 10402. This part not applicable if will so provides
- § 10403. Special administrator
- § 10404. Application of part

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- § 10451. Notice of hearing
- § 10452. Hearing; order; endorsement on letters
- § 10453. Increase in amount of bond
- § 10454. Revocation of independent administration authority

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CHAPTER 5. FORMS

- § 10600. Judicial Council form for advice of proposed action
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DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 6. INDEPENDENT ADMINISTRATION OF ESTATES

CHAPTER 1. GENERAL PROVISIONS

§ 10400. Citation of this part

10400. This part shall be known and may be cited as the Independent Administration of Estates Act.

Comment. Section 10400 continues former Probate Code Section 591 without substantive change.

§ 10401. "Court supervision" defined

10401. As used in this part, "court supervision" includes judicial authorization, approval, confirmation, and instructions.

Comment. Section 10401 continues a portion of the second sentence of subdivision (a) of former Probate Code Section 591.2 without substantive change. See also Section 10500(a)(2) (requirements applicable to court confirmation of sales of real property do not apply to sales under independent administration).

§ 10402. This part not applicable if will so provides

10402. The personal representative may not be granted authority to administer the estate under this part if the decedent's will provides that the estate shall not be administered under this part.

Comment. Section 10402 continues the second sentence of subdivision (a) of former Probate Code Section 591.1 without substantive change. For purposes of Section 10402, a provision in the decedent's will that the estate shall not be administered under former Article 2 of Chapter 8 of Division 3 of the Probate Code (former Sections 591 through 591.9, inclusive), or under the Independent Administration of Estates Act, is a provision that the estate shall not be administered under this part. See also Section 10502 (introductory clause) (will may restrict powers exercisable under independent administration authority).

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

§ 10403. Special administrator

10403. A special administrator may not be granted authority to administer the estate under this part unless the special administrator is appointed with the powers of a general administrator.

Comment. Section 10403 replaces the third sentence of subdivision (a) of former Probate Code Section 591.1. That sentence provided that the independent administration provisions did not apply to special administrators. Section 10403 permits independent administration authority to be granted to a special administrator if the special administrator is appointed with the powers of a general administrator. See Section [465]. This new authority will be useful, for example, in an estate with a lengthy will contest where virtually all of the administration is handled by the special administrator, and the only act which occurs after the final resolution of the will contest is the distribution of the estate assets. In such a case, the special administrator may obtain independent administration authority unless good cause is shown why the authority should not be granted.

An applicant for letters of special administration with powers of a general administrator can obtain independent administration authority only as provided in Sections 10450-10453, inclusive. The applicant must petition for the authority as provided in Section 10450; notice of the hearing must be given in compliance with the requirements of Section 10451; and the provisions of Sections 10452 and 10453 are applicable. If there is an urgent need for appointment of a special administrator, the petition for independent administration authority can be filed under Chapter 2 (commencing with Section 10450) after the special administrator has been appointed in order to avoid the delay that necessarily will result from the requirement that notice of hearing be given under Section 10451.

§ 10404. Application of part

10404. (a) This part applies to all of the following cases:

(1) Where authority to administer the estate is granted under this part.

(2) Where authority to administer the estate was granted under former Sections 591.1 to 591.9, inclusive, of the Probate Code on a petition filed after January 1, 1985.

(3) Where authority was granted prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act and one of the following requirements is satisfied:

(A) A petition was filed under former Section 591.1 of the Probate Code after January 1, 1985, requesting that the personal representative be granted the full authority that could be granted under the Independent Administration of Estates Act in effect at the time the petition was filed, and the petition was granted.

(B) A petition is filed under this part requesting that the personal representative be granted the full authority that can be granted under this part, and the petition is granted.

(b) Except as provided in paragraph (3) of subdivision (a), a personal representative who was granted authority prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act shall continue to administer the estate under the provisions of the Independent Administration of Estates Act that were applicable at the time the petition was granted.

Comment. Section 10404 is a new provision that makes clear that this part applies to a pending proceeding where independent administration authority was granted subsequent to January 1, 1985, under the former Probate Code provisions that governed independent administration authority. Section 10404 also permits a personal representative who was granted independent administration authority prior to January 1, 1985, to exercise the authority granted by this part where a petition is filed under this part requesting such authority and the petition is granted.

CROSS-REFERENCES

Definitions

Personal representative § 58

CHAPTER 2. GRANTING OR REVOKING INDEPENDENT ADMINISTRATION AUTHORITY

§ 10450. Petition for order granting independent administration authority

10450. (a) To obtain authority to administer the estate under this part, the personal representative shall petition the court for that authority either in the petition for his or her appointment or in a separate petition filed in the estate proceedings.

(b) A petition under this part may request either of the following:

(1) Authority to administer the estate under this part.

(2) Authority to administer the estate under this part without authority to do either of the following under the authority of this part:

(A) Sell or exchange real property.

(B) Grant an option to purchase real property.

Comment. Subdivision (a) of Section 10450 continues the first sentence of subdivision (a) of former Probate Code Section 591.1 without substantive change. Subdivision (b) continues subdivision (b) of former Probate Code Section 591.1 without substantive change.

Subdivision (b) of Section 10450 permits the petitioner either (1) to request authority to administer the estate under this part (this authority permits the personal representative to administer the estate using the full authority that may be granted under this part) or (2) to request authority to administer the estate under this part without independent administration authority with respect to the real property transactions listed in subdivision (b)(2). The petitioner might request the limited authority that excludes real property transactions in order to avoid the need for an increased bond to cover the estimated net proceeds of real property transactions (see Section 10453). Or the petitioner may request the limited authority because no real property transactions will take place in the course of administration of the estate.

The personal representative, despite the grant of independent administration authority, may seek court supervision of the transaction. See Section 10500(b). Hence, for example, even though the personal representative has been granted independent administration authority that encompasses real property transactions, the personal representative may sell real property under the statutory provisions that govern real property sales when independent administration authority has not been granted. Likewise, the personal representative may decide to seek court approval or instructions concerning a transaction rather than using independent administration authority because there is a lack of agreement as to the desirability of the transaction among the persons interested in the estate or because some of the heirs or devisees who would receive an advice of proposed action lack the capacity to object to the proposed action (see subdivision (d) of Section 10560) or for some other reason.

Authority to administer the estate under this part may not be granted where the decedent's will provides that the estate shall not be administered under this part. See Section 10402. Likewise, the authority of the personal representative to exercise particular powers under the Independent Administration of Estates Act may be restricted by the decedent's will. See Section 10502 (introductory clause). A special administrator may not be granted independent administration authority unless the special administrator is appointed with the powers of a general administrator. See Section 10403 and the Comment to that section.

CROSS-REFERENCES

Definitions

Personal representative § 58

Real property § 68

Verification of petition § 7203

§ 10451. Notice of hearing

10451. (a) If the authority to administer the estate under this part is requested in the petition for appointment of the personal representative, notice of the hearing on the petition shall be given to the persons and in the manner prescribed in Chapter 2 (commencing with Section 7230) of Part 2 of Division 7 and shall be included in the notice of hearing required by that chapter.

(b) Where proceedings for the administration of the estate are pending at the time a petition is filed under Section 10450, notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200]. At least 10 days before the date set for hearing of the petition by the court, the petitioner shall cause notice of the hearing to be mailed to the person named as executor in the will of the decedent if not the petitioner and to all devisees and to all known heirs of the decedent and to all persons who have requested notice as provided in Section [1202].

(c) The notice of hearing of the petition for authority to administer the estate under this part, whether included in the petition for appointment or in a separate petition, shall include the substance of the following statement: "The petition requests authority to administer the estate under the Independent Administration of Estates Act. This authority would permit the personal representative to act without court supervision that would otherwise be required. The petition will be granted unless good cause is shown why it should not be."

Comment. Subdivision (a) of Section 10451 continues subdivision (c) of former Probate Code Section 591.1 without substantive change. Subdivision (b) continues subdivision (d) of former Probate Code Section 591.1 with the addition of the requirement that notice of hearing be given to the person named as executor in the will of the decedent if not the petitioner. Subdivision (c) restates subdivision (e) of former Probate Code Section 591.1 with the addition of the last two sentences of the statement which are new.

CROSS-REFERENCES

Clerk to set petition for hearing § 7202
Definitions
Devisee § 34
Heirs § 44
Personal representative § 58
Proof of giving notice § 7308

Note. The notice requirements of subdivisions (a) and (b) of Section 10451 will be reviewed by the Commission when the general notice provisions are drafted.

§ 10452. Hearing; order; endorsement on letters

10452. (a) Any interested person may appear and object to the granting of authority to administer the estate under this part by filing at or before the hearing a written statement setting forth the objection.

(b) Unless the court determines that the objecting party has shown good cause why the authority requested in the petition should not be granted, the court shall grant the requested authority.

(c) The letters shall be endorsed to the effect that the letters are issued under this part and, if the authority granted does not include authority to sell or exchange real property or grant options to purchase real property under this part, that limitation shall be included in the endorsement.

Comment. Section 10452 continues subdivisions (f) and (g) of former Probate Code Section 591.1 without substantive change. The phrase "at or before the hearing" has been added in subdivision (a). Subdivision (c) recognizes that independent administration authority may exclude real property transactions. See Section 10450(b)(2).

CROSS-REFERENCES

Definitions

Interested person § 48

Letters § 52

Real property § 68

Limited independent administration authority § 10450(b)(2)

§ 10453. Increase in amount of bond

10453. If the personal representative is otherwise required to file a bond and is authorized to sell real property of the estate without court supervision under this part, the court, in its discretion, may fix the amount of the bond at not less than the estimated value of the personal property, the estimated net proceeds of the real property authorized to be sold under this part, and the estimated value of the probable annual gross income of all the property belonging to the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount.

Comment. Section 10453 continues subdivision (b) of Probate Code Section 591.9 without substantive change.

CROSS-REFERENCES

Definitions

Court supervision § 10401
Personal property § 57
Personal representative § 58
Property § 62
Real property § 68
Limited independent administration authority §§ 10450(b)(2), 10452(c)

Note. Section 10453 will be reviewed when the general provisions relating to bonds are drafted.

§ 10454. Revocation of independent administration authority

10454. (a) Any interested person who objects to continued administration of the estate under this part may file a petition setting forth the basis for revoking the authority of the personal representative to continue administration of the estate under this part.

(b) Notice of the hearing on the petition shall be served on the personal representative in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court.

(c) If the court determines that good cause has been shown, the court shall make an order revoking the authority of the personal representative to continue administration of the estate under this part.

(d) Upon the making of an order under this section, new letters shall be issued without the endorsement described in subdivision (c) of Section 10452.

Comment. Section 10454 continues former Probate Code Section 591.7 without substantive change.

CROSS-REFERENCES

Clerk sets petition for hearing § 7202

Definitions

Interested person § 48
Letters § 52
Personal representative § 58
Proof of giving notice § 7308
Verification of petition § 7203

CHAPTER 3. ADMINISTRATION UNDER INDEPENDENT ADMINISTRATION AUTHORITY

§ 10500. Administration without court supervision

10500. (a) Except as provided in this chapter, and subject to Chapter 4 (commencing with Section 10550) and the applicable fiduciary duties, a personal representative who has been granted authority to administer the estate under this part may:

(1) Administer the estate without court supervision as provided in this part, but in all other respects the personal representative shall administer the estate in the same manner as a personal representative who has not been granted authority to administer the estate under this part.

(2) Sell property of the estate either at public auction or private sale, and with or without notice, for such price and upon such terms and conditions as the personal representative may determine, and the requirements applicable to court confirmation of sales of real property, including publication of notice of sale, court approval of agents' and brokers' commissions, and sale at not less than 90 percent of appraised value, do not apply to sales made under authority granted under this part. This paragraph applies to any sale made under authority of this part on or after January 1, 1985.

(b) Notwithstanding subdivision (a), the personal representative may obtain court supervision as provided in this code of any action to be taken by the personal representative during administration of the estate.

Comment. Subdivision (a) of Section 10500 continues the first sentence and the first portion of the second sentence of former Probate Code Section 591.2 and subdivision (a) of former Probate Code Section 591.9 without substantive change. See also Section 10401 (defining "court supervision"). Paragraph (2) of subdivision (a) is designed to make clear that sales under independent administration authority are not subject to the statutory requirements that apply to sales made under court supervision. Thus, for example, the commission of the realtor who lists or obtains the purchaser of real property sold under independent administration authority is not subject to the approval of the court. Nor does the 90-percent-of-appraised-value requirement apply when a sale is under independent administration authority. Publication of notice of sale is not required where the sale is made under independent administration authority. Likewise, notice of sale, court confirmation, and approval of the commission of the agent, broker, or auctioneer is not required where a sale of personal property is made under independent administration authority.

Subdivision (b) of Section 10500 continues the first sentence of subdivision (b) of former Probate Code Section 591.2 without substantive change.

As the introductory clause of Section 10500 recognizes, a personal representative who has been granted only limited authority under this part may not exercise authority with respect to matters not included within the scope of the authority granted. See Section 10501(e). See also Sections 10450(b)(2) and 10452(c) (limited independent administration authority). The introductory clause also recognizes that independent administration authority must be exercised in compliance with the provisions of this part. See Chapter 4 (commencing with Section 10550) (giving advice of proposed action). And the exercise of the authority under this part is subject to the requirement that the personal representative act in a fiduciary capacity in exercising the authority. See Sections 10500 (introductory clause), 10560 (review of action taken on motion of person who failed to object to action where there is clear and convincing proof that the personal representative violated an applicable fiduciary duty in taking the action). See also Section _____ (fiduciary duty of personal representative).

CROSS-REFERENCES

Definitions

Court supervision § 10401

Personal representative § 58

Property § 62

Real property § 68

Limited independent administration authority §§ 10450(b)(2), 10452(c)

§ 10501. Matters requiring court supervision

10501. Notwithstanding any other provision of this part, a personal representative who has obtained authority to administer the estate under this part is required to obtain court supervision, in the manner provided in this code, for any of the following actions:

(a) Allowance of commissions of the personal representative

(b) Allowance of attorney's fees.

(c) Settlement of accountings.

(d) Preliminary and final distributions and discharge.

(e) Sale or exchange of real property and grant of an option to purchase real property if the authority of the personal representative granted under this part specifically excludes the authority to take such action under the authority of this part.

Comment. Section 10501 continues the last portion of the second sentence of subdivision (a) of former Probate Code Section 591.2

without substantive change. In connection with subdivision (e) of Section 10501, see Sections 10450(b)(2) and 10452(c) (limited independent administration authority). See also Section 10502 (introductory clause) (will may restrict powers exercisable under independent administration authority).

CROSS-REFERENCES

Definitions

Court supervision § 10401

Personal representative § 58

Real property § 68

Limited independent administration authority §§ 10450(b)(2), 10452(c)

§ 10502. Specific independent administration powers

10502. Unless restricted by the will and subject to Section 10501, a personal representative who has been granted authority to administer the estate under this part has all of the following powers, in addition to any other powers granted to a personal representative by this code, which powers can be exercised in the manner provided in this part:

(a) To manage, control, convey, divide, exchange, partition, and to sell for cash or on credit; to lease for any purpose, including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases; and to grant options to purchase real property for a period within or beyond the administration of the estate.

(b) To invest and reinvest money of the estate in any one or more of the following:

(1) Deposits in banks and in accounts in insured savings and loan associations.

(2) Eligible securities for the investment of surplus state moneys as provided for in Section 16430 of the Government Code.

(3) Units of a common trust fund described in Section [585.1].

(4) Mutual funds which are comprised of (A) direct obligations of the United States maturing not later than one year from the date of investment or reinvestment or (B) repurchase agreements with respect to direct obligations of the United States, regardless of maturity, in which the fund is authorized to invest.

(c) Invest and reinvest any surplus moneys in his or her hands in any manner provided by the will.

(d) To borrow; and to place, replace, renew or extend any encumbrance upon any property in the estate.

(e) To abandon worthless assets or any interest therein.

(f) To make ordinary or extraordinary repairs or alterations in buildings or other property.

(g) To vote a security, in person or by general or limited proxy.

(h) To sell or exercise stock subscription or conversion rights.

(i) To hold a security in the name of a nominee or in any other form without disclosure of the estate, so that title to the security may pass by delivery, but the personal representative is liable for any act of the nominee in connection with the security so held.

(j) To insure the assets of the estate against damage or loss and to insure the personal representative against liability with respect to third persons.

(k) To allow, pay, reject, contest, or compromise any claim by or against the estate; to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible; and to institute, compromise, and defend actions and proceedings.

(l) To pay taxes, assessments, and other expenses incurred in the collection, care, and administration of the estate.

(m) To continue the operation of the decedent's business to the extent the personal representative determines that to be for the best interest of the estate and those interested therein.

(n) To pay a reasonable family allowance.

(o) To make a disclaimer.

(p) To grant an exclusive right to sell property, for a period not to exceed 90 days, where the personal representative determines that to be necessary and advantageous to the estate.

Comment. Section 10502 continues former Probate Code Section 591.6 without substantive change, but paragraphs (3) and (4) have been added to subdivision (b) of Section 10502 to conform Section 10502 to subdivision (h) of Section 10551.

The words "by compromise," which appeared at the end of the first clause of subdivision (j) of former Section 591.6, are omitted at the end of the first clause of subdivision (k) of Section 10502 because these words are as unnecessary and their omission does not make a substantive change in the meaning of the provision.

The personal representative must exercise the powers listed in Section 10502 in the manner provided in this part. Accordingly, if the action to be taken is one listed in Section 10551, the personal representative can take the action only if the requirements of Chapter 4 (commencing with Section 10550) (advice of proposed action) are satisfied. See Section 10550. The powers listed in this section are subject to any limitations on the powers granted to the personal representative to administer the estate under this part. See Section 10501(e) (real property transactions). See also Sections 10450(b)(2), 10452(c) (limited independent administration authority). The introductory clause of Section 10502 recognizes that the decedent's will may restrict powers otherwise exercisable under independent administration authority. The personal representative must also comply with the applicable fiduciary duties in exercising independent administration powers. See Section ____.

CROSS-REFERENCES

Definitions

Account in insured savings and loan association § 27.3
Person § 56
Personal representative § 58
Property § 62
Real property § 68
Security § 70
Will § 88

Note. The listing of powers in Section 10502 is intended to supplement the other powers granted a personal representative under the provisions of the code relating to supervised administration. The introductory portion of Section 10502 gives the personal representative who has independent administration authority powers which are "in addition of any other powers granted by this code." Hence, it is not necessary to list in Section 10502 those powers that are granted to a personal representative under the supervised administration provisions of the code. The listing of the powers in Section 10502 should be limited to those powers that the personal representative may be granted by the court under provisions of the code relating to supervised administration, that is powers that the personal representative can obtain by petitioning the court for authority to exercise the particular power. Accordingly, the listing of powers in Section 10502 will be reviewed when the Commission drafts the estate management provisions of the code so that Section 10502 can be revised so that it does not list powers that the personal representative has under the supervised administration provisions but does list all the powers that the personal representative may obtain only upon petition to the court.

CHAPTER 4. ADVICE OF PROPOSED ACTION

§ 10550. Giving advice of proposed action

10550. (a) Prior to the consummation of any of the actions described in Section 10551 without court supervision, a personal representative who has been granted authority to administer the estate under this part shall give advice of proposed action as provided in this chapter. Nothing in this subdivision authorizes a personal representative to take an action under this part if the personal representative does not have the power under Section 10502 to take the action under this part.

(b) A personal representative who has been granted authority to administer the estate under this part may, but need not, give advice of proposed action prior to taking an action that is not described in Section 10551. Nothing in this subdivision authorizes a personal representative to take any action the personal representative is not otherwise authorized to take.

Comment. Subdivision (a) of Section 10550 continues paragraph (1) of subdivision (a) of former Probate Code Section 591.3 without substantive change.

The second sentence of subdivision (a) is new. This new sentence is merely clarifying and makes no substantive change in prior law. The sentence makes clear that if the powers of the personal representative do not include authority with respect to sales and exchanges of real property and grants of options to purchase real property (see subdivision (e) of Section 10501), the mere fact that the power is listed in Section 10551 gives the personal representative no right or authority to exercise the power using the procedure provided in this chapter. In such a case, the power may be exercised only pursuant to the provisions relating to court supervision of the sale or exchange of the real property or the grant of the option to purchase the real property, as the case may be, and the provisions of this part have no application to the transaction.

Subdivision (b) of Section 10550 is a new provision that permits a personal representative to use the procedure provided in this chapter with respect to an action that the personal representative proposes to take even though the action is not one for which advice of proposed action is required. For example, the personal representative may want to proceed under subdivision (b) where the proposed action is the compromise of a claim by or against the estate (see Section 10502(k)). This action is one that ordinarily does not require an advice of proposed action. See Section 10551 (actions requiring advice of proposed action). If the procedure provided by this chapter is used with respect to the proposed action, the person who fails to object to the proposed action waives the right to have the court later

review the action taken unless one of the exceptions to the waiver provision is applicable in the particular case. See Section 10560. See also Section 10559(b) and the Comment to that section. Use of the advice of proposed action procedure avoids the need to petition the court for instructions on the proposed compromise in order to preclude a later challenge to the accounts of the personal representative.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 10551. Actions requiring advice of proposed action

10551. The actions requiring advice of proposed action are all of the following:

- (a) Selling or exchanging real property.
- (b) Granting options to purchase real property.
- (c) Selling or exchanging personal property, except for any of the following:
 - (1) Securities sold upon an established stock or bond exchange.
 - (2) A security designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc.
 - (3) Other assets referred to in [Sections 770 and 771.5] when sold for cash.
 - (d) Leasing real property for a term in excess of one year.
 - (e) Entering into any contract, other than a lease of real property, which by its provisions cannot be terminated by the personal representative within two years and is not to be performed within two years.
 - (f) Continuing for a period of more than six months from the date of appointment of the personal representative of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of the decedent's death, or the sale or incorporation of such a business.
 - (g) The first payment, the first payment for a period commencing 12 months after the death of the decedent, and any increase in the payments, of a family allowance.

(h) Investing funds of the estate, except depositing funds in any of the following:

(1) Banks and in accounts in insured savings and loan associations.

(2) Units of a common trust fund described in Section [585.1].

(3) Direct obligations of the United States maturing not later than one year from the date of investment or reinvestment.

(4) Mutual funds which are comprised of either of both of the following:

(A) Direct obligations of the United States maturing not later than one year from the date of investment or reinvestment.

(B) Repurchase agreements with respect to direct obligations of the United States, regardless of maturity, in which the fund is authorized to invest.

(i) Completing a contract entered into by the decedent to convey real or personal property.

(j) Borrowing money or executing a mortgage or deed of trust or giving other security.

(k) Determining third-party claims to real and personal property if the decedent died in possession of, or holding title to, the property, or determining the decedent's claim to real or personal property title to or possession of which is held by another.

Comment. Section 10551 continues subdivision (b) of former Probate Code Section 591.3 without substantive change except:

(1) Paragraph (2) of subdivision (c), which authorizes the sale of an over-the-counter stock that is designated as a national market system security on an interdealer quotation system, or subsystem thereof, is new. Daily quotations for these over-the-counter stocks are published in the Wall Street Journal and many other regular daily newspapers. Under prior law, only a security sold on an established stock or bond exchange could be sold without giving advice of proposed action.

(2) Subdivision (e) makes clear that advice of proposed action need not be given if a contract is one that by its terms can be terminated by the personal representative within two years. There is no reason to treat the entering into of such a contract any differently from a contract that is to be performed within two years.

(3) The last portion of subdivision (h) of Section 10551 substitutes "direct obligations of the United States" for "any obligation" which appeared in prior law. This change makes this provision reflect the apparent legislative intent in enacting the provision.

If the personal representative is not authorized to sell or exchange real property or grant options to purchase real property under this part (see subdivision (e) of Section 10501), those powers can be exercised only under the provisions relating to court supervision and the provisions of this part have no application to the transaction. See also the Comment to Section 10550.

CROSS-REFERENCES

Definitions

Account in insured savings and loan association § 27.3
Personal property § 57
Personal representative § 58
Real property § 68
Security § 70

Note. Section 10551 will be reviewed when the Commission drafts the estate management provisions of the new code. Section 10551 should not require advice of proposed action for those actions that the personal representative can take under supervised administration without prior court authorization.

Note. Time did not permit the staff to verify that the language used in subdivision (c)(2) of Section 10551 accurately describes the over-the-counter stocks for which quotations can be found in daily newspapers.

The Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association has reviewed a prior draft of this tentative recommendation and suggests in substance that subdivision (c)(2) read:

(2) Stocks or bonds sold by a registered broker-dealer during the regular course of business.

The Legislative Committee makes a strong case that this language reflects existing practice by many probate attorneys who do not realize that "over-the-counter" stocks are not sold "upon an established stock exchange" as required by the existing statute. See Exhibit I attached to Memorandum 86-29.

The last time the Commission considered this section, it was suggested that subdivision (e) be revised to make clear that advice of proposed action need not be given if a contract can be terminated by the personal representative within two years, even though it is possible that the contract might not be performed within two years if

it is not terminated before two years expire. For example, as the Legislative Committee points out: "There are circumstances in which a contract entered into by the personal representative will provide for services to be rendered by the other party to the contract for a term exceeding two years but will also provide that the contract is terminable by the personal representative at will or at specified intervals that do not exceed two years." To clarify the provision, the staff has revised subdivision (e) to adopt language suggested by the Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association. See Exhibit 1 attached to Memorandum 86-29.

Paragraphs (4) of subdivision (b) (relating to mutual funds and repurchase agreements) will be conformed to the provision that the Commission includes in the estate management portion of the new code relating to powers and duties of personal representatives. See Memorandum 85-110.

§ 10552. Persons to whom advice of proposed action must be given

10552. Except as provided in Sections 10553 and 10554, advice of proposed action shall be given to all of the following:

(a) Each devisee whose interest in the estate is affected by the proposed action.

(b) Each heir of the decedent if the estate is an intestate estate.

(c) Each person who has filed a request for special notice pursuant to Section [1202].

(d) If the personal representative is the trustee of a trust that is a devisee under the will of the decedent, each person interested in the trust, as determined in cases of future interests pursuant to paragraph (1), (2), or (3) of subdivision (a) of Section 15804.

(e) The State of California if any portion of the estate is to escheat to it.

Comment. Section 10552 continues the introductory clause and paragraph (2) of subdivision (a) of former Probate Code Section 591.3 without substantive change other than the addition of subdivision (d) which is new.

CROSS-REFERENCES

Consent to proposed action § 10553

Definitions

Devisee § 34

Heirs § 44

Person § 56

Waiver of right to receive advice of proposed action § 10554

Note. Subdivision (d) of Section 10552 refers to Section 15804. This section is contained in Assembly Bill 2652 (new trust law) (introduced in the California legislature on January 13, 1986). Section 15804 will supersede existing Probate Code Section 1215.1.

§ 10553. Consent to proposed action

10553. Advice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

Comment. Section 10553 continues subdivision (c) of former Probate Code Section 591.3 without substantive change. Section 10553 provides a method that can be used to avoid the delay that otherwise would result from the requirement that a person given advice of proposed action be allowed a specified period of time--see Section 10556(b) and (c) and Section 10557--within which to object to the proposed action.

CROSS-REFERENCES

Definitions

Person § 56

§ 10554. Waiver of advice of proposed action

10554. (a) The advice of proposed action need not be given to any person who, in writing, waives the right to the advice of proposed action with respect to the particular proposed action. The waiver may be executed at any time before or after the proposed action is taken. The waiver shall describe the particular proposed action and may waive particular aspects of the advice, such as the delivery, mailing, or time requirements of Section 10556, or the giving of the advice in its entirety for the particular proposed action.

(b) The advice of proposed action need not be given to any person who has executed a Statutory Waiver of Advice of Proposed Action Form that satisfies the requirements of Section 10603 and in that form has made either of the following:

(1) A general waiver of the right to advice of proposed action.

(2) A waiver of the right to advice of proposed action of all transactions of a type which includes the particular proposed action.

Comment. Subdivision (a) of Section 10554 continues subdivision (d) of former Probate Code Section 591.3 without substantive change. The subdivision permits waiver of advice of proposed action only with respect to a particular proposed action. A person entitled to advice of proposed action to execute a written waiver under subdivision (a) that would, for example, permit notice of a particular proposed real property transaction to be given to the person by telephone so that the proposed action can be expeditiously completed if the person does not object. In such a case, if the person is agreeable to the sale of the real property, the waiver could be drafted in terms that would permit the personal representative to call the person on the telephone to advise the person of an offer to buy the property and to permit the sale of the property at the price and on the terms offered if the person called is agreeable or at a price and on the terms of a counter-offer that is agreeable to the person called.

Subdivision (b) is new. Under this provision, a person could, for example, execute a statutory waiver in the form prescribed by Section 10603 to waive the right of advice of proposed action with respect to investing funds of the estate and borrowing money without waiving the right to advice of proposed action with respect to sales of real property. Or the person could waive the right to receive advice of proposed action with respect to any action the personal representative might decide to take.

CROSS-REFERENCES

Advice of proposed action, delivery or mailing requirement § 10556
Definitions

Person § 56

The Commission wanted to review the provision the staff was requested to draft to permit a general waiver of the right to advice of proposed action or a waiver of the right to advice of proposed action for all transactions of a particular type. The staff has included such a provision in subdivision (b) of Section 10554. The significant portion of the statutory waiver scheme is found in Section 10603 which sets out the statutory form.

§ 10555. Form and contents of advice of proposed action

10555. (a) The advice of proposed action shall be in a form that satisfies the requirements of Chapter 5 (commencing with Section 10600).

(b) The advice of proposed action shall contain the information required by Chapter 5 (commencing with Section 10600).

Comment. Section 10555 supersedes the third and fifth sentences of former Probate Code Section 591.4. Section 10555 makes no substantive change in the form and contents requirements for an advice of proposed action, but the requirement that the advice satisfy the form and information requirements of Chapter 5 (see the Comment to Section 10600) is substituted in Section 10555 for the duplicative and somewhat incomplete statement of the required contents that appeared in former Section 591.4.

GROSS-REFERENCES

Form for advice of proposed action §§ 10600, 10601
Time for mailing or delivery of advice § 10556

§ 10556. Delivery or mailing of advice of proposed action and copy of form for objecting to proposed action

10556. (a) The advice of proposed action shall be delivered personally to each person required to be given advice of proposed action or be sent by first-class mail to the person at the person's last known address. If the advice of proposed action is mailed to a person who resides outside the United States, it shall be sent by air mail.

(b) If the advice of proposed action is delivered personally, it shall be delivered to the person not less than 15 days before the date specified in the advice of proposed action on or after which the proposed action is to be taken.

(c) If the advice of proposed action is sent by mail, it shall be deposited in the mail not less than 20 days before the date specified in the advice of proposed action on or after which the proposed action is to be taken.

(d) A copy of the form prepared by the Judicial Council for objecting to a proposed action, or the substantial equivalent of the Judicial Council form, shall accompany or be a part of the advice of proposed action.

Comment. Subdivision (a) of Section 10556 continues the first sentence of former Probate Code Section 591.4 without substantive change. Subdivisions (b) and (c) restate the fourth sentence of former Probate Code Section 591.4 without substantive change. Subdivision (d) continues the second sentence of former Probate Code Section 591.4 without substantive change other than to permit the substantial equivalent of the Judicial Council form to be sent instead of the Judicial Council form.

CROSS-REFERENCES

Consent to proposed action § 10553
Definitions
 Person § 56
Form for objecting to proposed action § 10602
Waiver of advice of proposed action § 10554

§ 10557. Objection to proposed action

10557. A person given advice of proposed action who desires to object to the proposed action may deliver or mail a written objection to the personal representative at the address stated in the advice of proposed action, so that the objection is received before the date specified in the advice of proposed action on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is the later time.

Comment. Section 10557 continues subdivision (a)(2) of former Probate Code Section 591.5 without substantive change, except that Section 10557 makes clear that only a person given advice of proposed action can object in the manner provided in Section 10557. Section 10558, on the other hand, permits a person to obtain a court order restraining the taking of a proposed action without court supervision whether or not the person has been given advice of proposed action.

Section 10557 applies whether the the advice of proposed action is given pursuant to subdivision (a) of Section 10550 (giving of advice mandatory) or under subdivision (b) of that section (giving of advice permissive). See also Section 10560 (effect of failure to object).

CROSS-REFERENCES

Definitions
 Person § 56
 Personal representative § 58
Mailing §§ _____

§ 10558. Restraining order

10558. If a proposed action would require court supervision if the personal representative had not been granted authority to administer the estate under this part and a person described in Section 10552 objects to the taking of the proposed action without court supervision, the person may apply to the court having jurisdiction over the proceeding for an order restraining the personal representative from taking the proposed action without court supervision under the provisions of this code dealing with court supervision of such action. The court shall grant the requested order without requiring notice to the personal representative and without cause being shown for the order. The person who obtained the order may serve it upon the personal representative in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in the manner authorized by the court.

Comment. Section 10558 continues subdivision (a)(1) of former Probate Code Section 591.5 without substantive change.

With respect to a particular action, the person objecting to the action may:

(1) Mail or deliver a written objection to the proposed action under Section 10557 if the person has been given advice of proposed action.

(2) Apply for a restraining order under Section 10558, whether or not the person has been given advice of proposed action.

CROSS-REFERENCES

Definitions

Court supervision § 10401

Person § 56

Personal representative § 58

§ 10559. Court supervision and notice of hearing required if objection made

10559. (a) If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under this part and the personal representative has notice of a written objection made under Section 10557 or a restraining order issued under Section 10558, the personal representative shall, if the personal representative desires to take the proposed action, submit the proposed action to the court for

approval following the provisions of this code dealing with court supervision of that kind of action and may take the proposed action only under such order as may be entered by the court.

(b) If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under this part but the personal representative has given advice of the proposed action and has notice of a written objection made under Section 10557 to the proposed action, the personal representative shall, if he or she desires to take the proposed action, request instructions from the court concerning the proposed action and may take the proposed action only under such order as may be entered by the court.

(c) A person who objects to a proposed action as provided in Section 10557 or serves a restraining order issued under Section 10558 in the manner provided in that section shall be given notice of any hearing on a petition for court authorization or confirmation of the proposed action.

(d) Failure of the personal representative to comply with this section is a violation of his or her fiduciary duties and is grounds for removal from office.

Comment. Subdivisions (a) and (d) of Section 10559 continue subdivision (b) of former Probate Code Section 591.5 without substantive change. In connection with subdivision (d), see Section (to be drafted) (liability of personal representative for breach of fiduciary duties).

Where advice of proposed action is required, subdivision (a) requires that the proposed action be taken only under court supervision if the personal representative has notice of a written objection or a restraining order with respect to the proposed action. And, when taking the proposed action under court supervision, the personal representative must comply with all the provisions that apply when an action of that kind is taken under court supervision, including but not limited to any applicable publication requirement. In this respect, subdivision (a) continues prior law.

Subdivisions (a) and (b) of Section 10559 implement subdivision (b) of Section 10550. Subdivision (b) of Section 10550 is a new provision that permits a personal representative who has been granted independent administration authority to give advice of proposed action with respect to a proposed action that could be taken without giving advice of proposed action. The personal representative may give advice of proposed action (although not required to do so) in order that the person receiving the advice will waive the right to object to the proposed action if the person fails to object within the time allowed after receipt of the advice. See Section 10560.

Subdivision (a) of Section 10559 applies to not only to a case where notice of proposed action is required but also to a case where advice of proposed action is not required to be given for a proposed action that would require court supervision if independent administration authority had not been granted. If the personal representative elects to give advice of proposed action in such a case, even though not required, subdivision (a) permits the personal representative to take the proposed action only under court supervision if the personal representative has notice of an objection to the proposed action or of a restraining order issued with respect to the proposed action.

Subdivision (b) of Section 10559 applies where the personal representative determines to give advice of proposed action in a case where the personal representative would be authorized to take the proposed action without court supervision even if the personal representative had not been granted independent administration authority. In such a case, subdivision (b) requires that the proposed action be taken only after court authorization on a petition for instructions if the personal representative has notice of a written objection to the proposed action.

The benefit of the new procedure under subdivision (b) of Section 10550 and subdivisions (a) and (b) of Section 10559 is that the new procedure permits a court review of the proposed action before it is taken if the personal representative has notice of an objection rather than having the objection first made after the action has been taken. For further discussion, see the Comment to Section 10550.

Subdivision (c) of Section 10559 continues subdivision (e) of former Probate Code Section 591.5 without substantive change. This subdivision requires that notice of hearing be given to a person who has made a written objection under Section 10557 or has served a restraining order under Section 10558. See Section 10560(a). Subdivision (c) requires that notice of hearing be given of the hearing of a petition for instructions authorizing a proposed action described in subdivision (b) as well as of a hearing on a petition for court authorization or confirmation of a proposed action described in subdivision (a).

CROSS-REFERENCES

Definitions

Court supervision § 10401

Personal representative § 58

§ 10560. Effect of failure to object to proposed action

10560. (a) A person who has been given advice of proposed action as provided in Sections 10550 to 10556, inclusive, may object to the proposed action only by one or both of the following methods:

(1) Delivering or mailing a written objection as provided in Section 10557.

(2) Serving a restraining order obtained under Section 10558 before the date specified in the advice of proposed action on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is the later time.

(b) Except as provided in subdivisions (c) and (d), the failure to object as provided in subdivision (a) is a waiver of any right to have the court later review the proposed action after it has been taken.

(c) The court may review the action taken upon motion of a person who (1) establishes that he or she did not actually receive the advice of proposed action before the time to object expired or (2) establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the action.

(d) The court may review the action of the personal representative on its own motion where necessary to protect the interests of creditors of the estate or the interests of an heir or devisee who, at the time the advice was given, lacked capacity to object to the proposed action or was a minor or was unborn.

Comment. Subdivision (a) of Section 10560 continues the substantive effect of the first sentence of subdivision (d) of former Probate Code Section 591.5.

Subdivisions (b) and (c) continue the second sentence of subdivision (d) of former Probate Code Section 591.5 with the addition of the provision in subdivision (c) that permits a person who has failed to object to have the court later review the action if the person establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the proposed action. Thus, for example, the person could obtain court review if the person establishes by clear and convincing evidence that the personal representative violated Section [583] (purchase by personal representative of property of, or claim against, estate) in taking the action.

Subdivision (b) applies only where the advice of proposed action was given as provided in Sections 10550-10556. The advice must contain the information required by Chapter 5 (commencing with Section 10600), including a description of the proposed action in reasonably specific terms, with additional information if the proposed action involves a sale or exchange of real property or an option to purchase real property. See Sections 10555 and 10601.

Subdivision (d) supersedes the last sentence of subdivision (d) of former Probate Code Section 591.5. Subdivision (d) narrows the situations where the court can review the action of the personal representative on its own motion to cases where necessary to protect the interests of creditors of the estate or an heir or devisee who lacked capacity to object to the proposed action or was unborn. As to the right of a person who failed to object to the action to obtain court review, see subdivision (c). The court is not authorized to review the proposed action on motion of a person who consented to the proposed action (Section 10553) or waived the advice of proposed action (Section 10554). See the Comments to Sections 10553 and 10554. A guardian ad litem can be appointed to object, waive, or consent to proposed actions under the Independent Administration of Estates Act where the person entitled to advice of proposed action lacks the capacity to act with respect to the proposed action. See Section (to be drafted) (general provision permitting appointment of guardian ad litem).

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Person § 56

Personal representative § 58

Note. The time when an objection can be raised will be reviewed when the provisions relating to closing of estate administration are drafted. The objection could be raised upon a final accounting. Once the estate is closed, there could be no objection (except for fraud). The good faith purchaser or encumbrancer is protected. See Section 10561.

Note. The Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association (Exhibit I to Memorandum 86-29) has two suggestions concerning Section 10560:

(1) The Committee would require that the person seeking review establish "by clear and convincing evidence" that the person did not actually receive the advice of proposed action before the time to object expired. The staff does not recommend that this change be made. The person is proving a negative, and ordinarily the only proof will be testimony that the person did not receive the advice of proposed action. This testimony must be balanced against the inference that mail sent is delivered. We believe that the

requirement that proof be by clear and convincing evidence would create confusion and place an unreasonable burden on a person who actually did not receive notice but cannot prove that by clear and convincing evidence.

(2) The Legislative Committee recommends that the language of subdivision (d) be revised to read in substance as follows:

(d) The court may review the action of the personal representative on its own motion where necessary to protect the interests of any of the following:

(1) A creditor of the estate who was not given advice of the action.

(2) An heir or devisee who, at the time the advice was given lacked capacity to object to the proposed action or was a minor and no advice of proposed action was given to the guardian, conservator, or other personal representative of such heir, devisee, [or minor].

The Legislative Committee draft did not include "or minor" at the end of paragraph (2). The staff does not know what "other personal representative" found in the last portion of paragraph (2) would include. The staff recommends the substance of the revision suggested by the Legislative Committee. For further discussion of this suggestion, see Exhibit 1 (pages 4-5) attached to Memorandum 86-29

When this tentative recommendation was previously considered, the Commission asked the staff to draft a provision to provide that a guardian ad litem can be appointed to object, waive, or consent to proposed actions under the Independent Administration of Estates Act. The staff has drafted a general provision for appointment of guardians ad litem in probate proceedings. See Memorandum 86-28 (prepared for March meeting).

§ 10561. Protection of persons dealing in good faith with personal representative

10561. (a) The failure of the personal representative to comply with subdivision (a) of Section 10550, with Sections 10552, 10555, 10556, and 10559, and with Chapter 5 (commencing with Section 10600), and the taking of the action by the personal representative without such compliance, does not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers or the rights of third persons dealing in good faith with the personal representative who changed their position in reliance upon the action, conveyance, or transfer without actual notice of the failure of the personal representative to comply with those provisions.

(b) No person dealing with the personal representative has any duty to inquire or investigate whether or not the personal representative has complied with the provisions listed in subdivision (a).

Comment. Section 10561 continues subdivision (b) of former Probate Code Section 591.4 and subdivision (c) of former Probate Code Section 591.5 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Property § 62

CHAPTER 5. FORMS

§ 10600. Judicial Council form for advice of proposed action

10600. If the Judicial Council prescribes a form for advice of proposed action, the form used to give advice of proposed action shall be one of the following:

(a) The form prescribed by the Judicial Council.

(b) A form that is in substantial compliance with either the requirements of the Judicial Council form or the requirements of the form set out in Section 10601.

Comment. Section 10600 is new. If the Judicial Council has not prescribed a form for advice of proposed action, the form prescribed by Section 10601 should be used, but a form may be used if the form either is in substantial compliance with the Judicial Council form or the statutory form set out in Section 10601.

§ 10601. Form for advice of proposed action.

10601. Except as provided in Section 10600, the advice of proposed action shall be in substantially the following form and shall contain the information required by the following form:

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

Estate of _____

No. _____

deceased

ADVICE OF PROPOSED ACTION
(Probate Code Section 10601)

1. The personal representative of the estate of the deceased is:

(Name(s))

2. The personal representative has authority to administer the estate without court supervision under the Independent Administration of Estates Act (California Probate Code Sections 10400-10603).

3. On or after _____, 19__, the personal representative will take the following action:

[Enter the date on or after which the proposed action is to be taken. (The advice of proposed action must be delivered not less than 15 days before this date if it is personally delivered or must be deposited in the mail not less than 20 days before this date if it is sent by mail.)]

[Describe proposed action in reasonably specific terms. If the proposed action involves a sale or exchange of real property or an option to purchase real property, (1) state the material terms of the transaction, including any sale price and the amount of or method of calculating any compensation paid or to be paid to an agent or broker in connection with the transaction, (2) state the amount of any probate inventory valuation of the property on file with the court, and (3) set forth the following statement: "A sale of real property without court supervision means that the sale will not be presented to the court for confirmation at a hearing at which higher bids for the property may be presented and the property sold to the highest bidder."].

4. If you need more information, you may call:

(Name)

(Telephone number)

5. If you object to the proposed action:

(a) Sign the enclosed objection form and deliver or mail it to the personal representative at the following address: [specify name and address]

OR

(b) Apply to the court for an order preventing the personal representative from taking the proposed action without court supervision.

6. Your written objection or the court order must be received by the personal representative before the date specified above, or before the proposed action is taken, whichever is later. If you object, the personal representative may take the proposed action only under court supervision.

7. IF YOU DO NOT OBJECT IN WRITING OR OBTAIN A COURT ORDER PREVENTING THE PROPOSED ACTION, YOU WILL BE TREATED AS IF YOU CONSENTED TO THE PROPOSED ACTION AND YOU MAY NOT OBJECT AFTER THE PROPOSED ACTION HAS BEEN TAKEN.

Dated: _____

(Signature of personal representative or
attorney for personal representative)

Comment. Section 10601 continues subdivision (a) of former Probate Code Section 591.8 with the addition of an informational statement in the form concerning the time for delivery or mailing of the advice of proposed action. The form is designed to provide the person receiving an advice of proposed action with the information the person needs in order to react to the advice. The form prescribed by this section may be superseded by a Judicial Council form. If the Judicial Council has prescribed a form for advice of proposed action, the Judicial Council form should be used instead of the form prescribed by this section, but use of the form prescribed by this section does not invalidate the advice of proposed action. See Section 10600.

CROSS-REFERENCES

Definitions

Court supervision § 10401
Personal representative § 58
Real property § 68

Note. The Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association (Exhibit 1 to Memorandum 86-29) suggests that the statutory form be deleted as unnecessary in view of the fact that the Judicial Council has prescribed the form. However, the Commission has determined that an advice of proposed action is sufficient if it substantially satisfies the requirements of the statutory form. Hence, we need to retain the statutory form

§ 10602. Judicial Council form for objecting to proposed action

10602. (a) The Judicial Council shall prepare a form that a person may use to object to a proposed action pursuant to Section 10557.

(b) A person who wishes to object to a proposed action either may use the Judicial Council form or may make the objection in any other writing that satisfies the requirements of this part.

Comment. Section 10602 continues subdivision (b) of former Probate Code Section 591.8 without substantive change.

CROSS-REFERENCES

Sending form for objecting with or as a part of advice of proposed action § 10556

§ 10603. Statutory form for waiver of advice of proposed action

10603. A Statutory Waiver of Advice of Proposed Action Form shall be in substantially the form set out in this section and shall include the warning set out in this section, either typed in all capital letters or printed in not less than 10-point bold-face type or a reasonable equivalent thereof:

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

Estate of _____

No. _____

(deceased)

WAIVER OF ADVICE OF PROPOSED ACTION

(California Estate and Trust Code Section 10603)

WARNING. THE LAW REQUIRES THAT YOU BE GIVEN NOTICE OF CERTAIN ACTIONS THE PERSONAL REPRESENTATIVE PROPOSES TO TAKE WITH RESPECT TO PROPERTY OF THE ESTATE. THIS NOTICE MUST BE GIVEN BEFORE THE PROPOSED ACTION IS TAKEN. YOU HAVE THE RIGHT TO OBJECT TO A PROPOSED ACTION AND TO REQUIRE THAT IT BE TAKEN ONLY UNDER THE SUPERVISION OF THE COURT. IF YOU DO NOT OBJECT BEFORE THE ACTION IS TAKEN, YOU CANNOT OBJECT LATER.

IF YOU SIGN THIS FORM, YOU WAIVE THE RIGHT TO RECEIVE NOTICE. THIS MEANS THAT YOU GIVE THE PERSONAL REPRESENTATIVE THE RIGHT TO TAKE ACTIONS CONCERNING THE PROPERTY OF THE ESTATE WITHOUT FIRST GIVING YOU THE NOTICE REQUIRED BY LAW, AND YOU CANNOT OBJECT AFTER THE ACTION IS TAKEN.

IF YOU SIGN THIS FORM, YOU MUST ALSO CHECK ONE OF THE BOXES BELOW TO INDICATE WHETHER YOU WAIVE:

(1) THE RIGHT TO NOTICE OF ANY ACTION THE PERSONAL REPRESENTATIVE MAY DECIDE TO TAKE.

(2) THE RIGHT TO NOTICE OF ONLY ONE OR MORE PARTICULAR KINDS OF ACTIONS.

YOU HAVE THE RIGHT TO REVOKE THIS WAIVER AT ANY TIME BY NOTIFYING THE PERSONAL REPRESENTATIVE ORALLY OR IN WRITING OF THE REVOCATION.

IF YOU DO NOT UNDERSTAND THIS FORM, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

1. The personal representative of the estate of the deceased is:

2. The personal representative has authority to administer the estate without court supervision under the Independent Administration of Estates Act (California Probate Code Sections 10400-10603)

3. I hereby waive the right to advice of proposed action with respect to the following (Check one box only to indicate your choice):

(a) Any action the personal representative is authorized to take under the Independent Administration of Estates Act.

(b) Any of the kinds of transactions listed below that the personal representative is authorized to take under the Independent Administration of Estates Act.

Dated: _____

(Signature of Person Executing Waiver)

Comment. Section 10603 is new. See the Comment to Section 10554.

Note. The Commission wanted the staff to draft this provision for review by the Commission prior to distribution of this tentative recommendation for review and comment to interested persons and organizations.

DISPOSITION OF REPEALED PROBATE CODE SECTIONS

Probate Code § 591 (repealed). Short title

Comment. Former Section 591 is continued without substantive change in Section 10400.

Probate Code § 591.1 (repealed). Petition for independent administration authority

Comment. The first sentence of subdivision (a) of former Section 591.1 is continued in Section 10450(a) without substantive change. The second sentence is continued in Section 10402 without substantive change. The third sentence is replaced by Section 10403. See the Comment to Section 10403. The requirement that the clerk set the petition for hearing is continued in Section 7202, which is a general provision.

Subdivision (b) is continued without substantive change in subdivision (b) of Section 10450. Subdivisions (c) and (d) are continued without substantive change in subdivisions (a) and (b), respectively, of Section 10451. Subdivision (e) is continued without substantive change in subdivision (c) of Section 10451. Subdivision (f) is continued without substantive change in subdivision (a) of Section 10452. Subdivision (g) is continued without substantive change in subdivisions (b) and (c) of Section 10452.

Probate Code § 591.2 (repealed). Manner of administration; court supervision

Comment. The first two sentences of subdivision (a) of former Section 591.2 are continued without substantive change in paragraph (1) of subdivision (a) of Section 10500 except that the portion of the second sentence defining "court supervision" is continued without substantive change in Section 10401. The portion of subdivision (a) stating the matters that require court supervision is continued in Section 10501 without substantive change. The first sentence of subdivision (b) is continued in subdivision (b) of Section 10500 without substantive change. See the Comment to Section 10500. The second sentence of subdivision (b) is omitted as unnecessary. If the personal representative does not take the proposed action under independent administration authority, the action is taken under the procedures that apply where the personal representative does not have independent administration authority, and any publication requirement of the applicable procedure must be satisfied.

Probate Code § 591.3 (repealed). Advice of proposed action

Comment. Paragraph (1) of subdivision (a) of former Section 591.3 is continued in subdivision (a) of Section 10550 without substantive change. The portion of paragraph (2) of subdivision (a) defining "advice of proposed action" is omitted as unnecessary since the term "advice of proposed action" is uniformly used in the new statutory provisions. The remainder of paragraph (2) of subdivision (a) and the introductory clause of subdivision (a) are continued in Section 10552 without substantive change. Subdivision (b) of former Section 591.3 is continued in Section 10551 without substantive change. Subdivision (c) of former Section 591.3 is continued in Section 10553 without substantive change. Subdivision (d) is continued in Section 10554 without substantive change.

Probate Code § 591.4 (repealed). Notice of proposed action

Comment. The first sentence of former Section 591.4 is restated without substantive change in subdivision (a) of Section 10556. The second sentence is continued without substantive change in subdivision (d) of Section 10556. The third and fifth sentences are replaced by Section 10555. See the Comment to Section 10555. The fourth sentence is restated without substantive change in subdivisions (b) and (c) of Section 10556. Subdivision (b) of former Section 591.4 is continued without substantive change in Section 10561.

Probate Code § 591.5 (repealed). Objection to proposed action

Comment. Subdivision (a)(1) of former Section 591.5 is continued in Section 10558 without substantive change. Subdivision (a)(2) is continued without substantive change in Section 10557, but the former provision is made applicable to any case where advice of proposed action is given, whether or not the proposed action is one for which advice of proposed action is required. Subdivision (b) is continued without substantive change in subdivisions (a) and (d) of Section 10559. Subdivision (c) is continued in Section 10561 without substantive change. The substantive effect of the first sentence of subdivision (d) is continued in subdivision (a) of Section 10560. The remainder of subdivision (d) is replaced by subdivisions (b), (c), and (d) of Section 10560. See the Comment to Section 10560. Subdivision (e) is continued without substantive change in subdivision (c) of Section 10559.

Probate Code § 591.6 (repealed). Independent administration powers²⁵

Comment. Former Section 591.6 is continued in substance in Section 10502 with clarifying revisions. See the Comment to Section 10502.

Probate Code § 591.7 (repealed). Revocation of independent administration authority

Comment. Former Section 591.7 is continued in Section 10454 without substantive change. The provision of former Section 591.7 requiring that the clerk set the petition for hearing is continued in Section 7202 which is a general provision.

Probate Code Section 591.8 (repealed). Form of advice of proposed action.

Comment. Subdivision (a) of former Section 591.8 is continued in substance in Section 10601 with some additions and revisions. See the Comment to Section 10601. Subdivision (b) is continued in Section 10602 without substantive change.

Probate Code Section 591.9 (repealed). Sales of property.

Comment. Subdivision (a) of former Section 591.9 is continued without substantive change in Section 10500(a)(2). Subdivision (b) is continued in Section 10453 without substantive change.