

#L-1047

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09/24/86

Memorandum 86-90

Subject: Study L-1047 - Estate and Trust Code (Appeals)

Attached to this memorandum is a staff draft of provisions relating to appeals. This draft implements decisions made at the September 1986 meeting. It also proposes some new material, as reflected in the *Notes* following the relevant sections.

The staff does not believe that this material should be sent out as a separate tentative recommendation. It would be best to include it with other procedural provisions when that tentative recommendation is distributed. (See Memorandum 86-91.)

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

Staff Draft

## TENTATIVE RECOMMENDATION

relating to

## APPEALS

Appealable Orders

Under existing law, there is no right to appeal an order in proceedings involving a decedent's estate unless specifically so provided.<sup>1</sup> Appealable orders are listed in Probate Code Section 1240. The new code continues this approach but makes the following revisions in the list of appealable orders:

- The new code makes clear that an order granting or revoking letters of administration with the will annexed is appealable and that an order granting or revoking letters of special administration or special administration with general powers is not appealable.<sup>2</sup>
- The authority to appeal an order granting or modifying a family allowance<sup>3</sup> is expanded in the new code to permit appeal of an order terminating a family allowance. This is consistent with the appealability of an order modifying a family allowance or refusing to grant a family allowance.<sup>4</sup>
- Existing law permits the appeal of an order directing or authorizing the grant of an option to purchase real

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1. See the cases cited in 9 B. Witkin, *California Procedure Appeal* § 115, at 132 (3d ed. 1985).

2. Probate Code Section 1240(a) refers simply to granting or revoking letters testamentary or of administration. The more detailed provision in the new code codifies rules provided in the cases and in other sections. See *Estate of Smith*, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of order appointing public administrator as administrator with the will annexed); *Estate of Hughes*, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); Prob. Code §§ 461, 465.

3. Prob. Code § 1240(e).

4. See Lyon, *Statutory Protections for Family Members*, in 2 *California Decedent Estate Practice* § 16.22 (Cal. Cont. Ed. Bar 1986).

property.<sup>5</sup> The new code extends the provision to options to purchase personal property since the basic considerations are the same.

- Existing law permits the appeal of an order determining that property is community property passing or belonging to the surviving spouse under Probate Code Section 655.<sup>6</sup> The new code extend this provision property of any character since the confirmation procedure is not limited to community property.

- Existing law permits the appeal of an order fixing an inheritance tax or determining that none is due.<sup>7</sup> The new code omits this provision in view of the repeal of the inheritance tax.<sup>8</sup>

- The new code adds a provision permitting the appeal of an order appointing a guardian ad litem. This changes the rule under existing law.<sup>9</sup>

#### [Stay on Appeal]

[The new code provides general rules governing stay on appeal that are drawn from the Guardianship and Conservatorship Law.<sup>10</sup> Existing statutes relating to administration of decedents' estates do not provide special stay rules. Instead, reliance must be placed on general rules in the Code of Civil Procedure<sup>11</sup> and in the cases.<sup>12</sup>

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5. Prob. Code § 1240(g).

6. Prob. Code § 1240(o).

7. Prob. Code § 1240(p).

8. A transitional provision will provide for appeals under the law prior to June 8, 1982, when the inheritance tax was repealed by an initiative. See the discussion under ["Transitional Provisions"], *infra*.

9. See, e.g., Estate of Hathaway, 111 Cal. 270, 271, 43 P. 754 (1896); Estate of Emery, 199 Cal. App. 2d 22, 26, 18 Cal. Rptr. 86 (1962).

10. See Prob. Code § 2751.

11. See Code Civ. Proc. §§ 916-917.9.

12. See, e.g., Estate of Hultin, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947) (order appointing executor); Estate of Gibson, 233 Cal. App.

The new code does not attempt to revise the substance of this law, but makes it more accessible to probate practitioners.]

### Effect of Reversal of Appointment of Personal Representative

Existing law provides that where the appointment of an executor or administrator is reversed on appeal for error, lawful acts of the executor or administrator are as valid as though the order had been confirmed.<sup>13</sup> This rule is ambiguous and can be misleading. The new code limits this rule to the determination of rights of persons dealing with the personal representative.<sup>14</sup>

### Judgment Roll

An appeal may be made on the papers in the judgment roll.<sup>15</sup> The contents of the judgment roll for purposes of the Probate Code are specified by statute.<sup>16</sup> The new code adds the statement of decision to the judgment roll; this reflects the practice in probate courts.<sup>17</sup>

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2d 125, 130, 43 Cal. Rptr. 302 (1965) (order appointing administrator); Estate of Sam Lee, 26 Cal. 2d 295, 296, 158 P.2d 193 (1945) (order appointing public administrator).

13. Prob. Code § 1241. This rule does not apply where the order is reversed for lack of jurisdiction. Estate of Schwartz, 87 Cal. App.2d 569, 573, 197 P.2d 223 (1948); Security-First Nat'l Bank v. Superior Court, 100 Cal. App. 702, 704-06, 280 P. 995 (1929).

14. This rule is drawn from case law. See Estate of Gibson, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965).

15. See Cal. R. Court 5; Abbott, *Designating the Record*, in California Civil Appellate Practice § 8.1, at 208, § 8.47-8.48, at 239-40 (Cal Cont. Ed. Bar 2d ed. 1985).

16. Prob. Code § 1242. The contents of the judgment roll in civil proceedings generally are specified in Code of Civil Procedure Section 670.

17. The new code also omits the provision in Probate Code Section 1242 that the papers making up the judgment roll need not be attached together. Until 1939, Code of Civil Procedure Section 670 required that the papers constituting the judgment roll be attached together. See 1939 Cal. Stat. ch. 733, § 1. The nonattachment provision derives from a cautious transitional provision apparently intended to make clear that the attachment requirement was in fact repealed. By now, it

The Law Revision Commission solicits opinions on whether the contents of the judgment roll should be left to Judicial Council rule. Basing an appeal on the judgment roll appears to be a function of court rule, rather than statute, and court rules also give the superior court the authority to augment the record whenever necessary to prevent a miscarriage of justice.<sup>18</sup>

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can safely be assumed that court clerks have become accustomed to the practice of not attaching the judgment roll papers together; consequently, this provision is surplus.

18. See Cal. R. Court 5(f).

CHAPTER 6. APPEALS

§ 7400. Appealable orders or refusals to make orders

7400. An appeal may be taken from the making of, or the refusal to make, any of the following orders:

(a) Granting or revoking letters testamentary, letters of administration, or letters of administration with the will annexed, but not letters of special administration or letters of special administration with general powers.

(b) Admitting a will to probate or revoking the probate of a will.

(c) Setting aside a small estate under Section 6609 [enacted by 1986 Cal. Stat. ch. 783].

(d) Setting apart a probate homestead or property claimed to be exempt from enforcement of a money judgment.

(e) Granting, modifying, or terminating a family allowance.

(f) Directing or authorizing the sale or conveyance or confirming the sale of property.

(g) Directing or authorizing the granting of an option to purchase property.

(h) Adjudicating the merits of a claim under [Chapter 10 (commencing with Section 9860) of Part 5 (conveyance or transfer of property claimed to belong to decedent or other person)].

(i) Allocating debts under [Chapter 10 (commencing with Section 9860) of Part 5].

(j) Settling an account of a personal representative.

(k) Instructing or directing a personal representative.

(l) Directing or allowing the payment of a debt, claim, devise, or attorney's fee.

(m) Determining the persons to whom distribution should be made.

(n) Distributing property.

(o) Determining that property passes to, or confirming that property belongs to, the surviving spouse under Section 13656 [enacted by 1986 Cal. Stat. ch. 783].

(p) Authorizing a personal representative to invest or reinvest surplus money under Section [9732].

(q) Appointing a guardian ad litem.

Comment. Section 7400 restates former Probate Code Section 1240 [as amended by 1986 Cal. Stat. ch. 820] without substantive change, except as follows: (1) Subdivision (a) codifies the former rules that orders granting or revoking letters of administration with the will annexed are appealable, but that letters of special administration or letters of special administration with general powers are not. See Estate of Smith, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of order appointing public administrator as administrator with the will annexed); Estate of Hughes, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); former Prob. Code §§ 461, 465. (2) Language in subdivision (e) permitting the appeal of an order terminating a family allowance is new. (3) The part of subdivision (m) of former Probate Code Section 1240 relating to determination of heirship is replaced by Section 325 (appeal of order determining membership in a class). (4) Subdivision (g) relating to options is not limited to real property options as was former subdivision (g). (5) Subdivision (o) is not limited to orders determining that property is community property passing to the surviving spouse as was former subdivision (o). (6) Former subdivision (p) relating to appeals concerning inheritance tax is replaced by Section \_\_\_\_ (transitional provision). (7) Subdivision (q) is new.

#### CROSS-REFERENCES

##### Definitions

Community property § 28  
Devise § 32  
Family allowance § 38  
Probate homestead § 60  
Property § 62  
Surviving spouse § 78  
Will § 88  
Guardian ad litem § 7204  
Judgment roll contents § 95

Note. At the September 1986 meeting, the Commission decided to add subdivision (q) making an order for appointment of a guardian ad litem appealable. It should be noted that this rule was rejected in Estate of Hathaway, 111 Cal. 270, 271, 43 P. 754 (1896), on the grounds that the removal, like the appointment, of a guardian ad litem is under the control of the court in which the case is pending, and to take the power to appoint or remove the guardian ad litem from the trial court would frustrate the purpose of the appointment.

Note. The staff proposes to make an order terminating a family allowance appealable, as set out in subdivision (e). It is stated in a recent CEB book that, "[a]lthough there is no case directly on point, it follows that an order terminating a family allowance would likewise be appealable." Lyon, Statutory Protections for Family Members, in 2 California Decedent Estate Practice § 16.22 (Cal. Cont. Ed. Bar 1986).

Note. The staff has added the references to administrators with the will annexed and to special administrators to subdivision (a). Since the matter of appealability is covered in this section, it should not be covered in draft Section 8541. At some point, the staff will search the remainder of this division to find other special provisions relating to appeal. The Commission decided at the September meeting that all appealable orders should be collected in this section. The staff assumes that this means that provisions to the effect that an order is or is not appealable should not be scattered at random through the division on estate administration.

**§ 7401. Stay on appeal**

7401. (a) Except as provided in subdivision (b), an appeal pursuant to Section 7400 stays the operation and effect of the order.

(b) Notwithstanding that an appeal is taken from the order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the personal representative, or may appoint a special administrator to exercise the powers, from time to time, as though no appeal were pending. Acts of the personal representative or special administrator pursuant to the directions of the court made under this subdivision are valid, regardless of the result of the appeal.

Comment. Section 7401 is new and is drawn from Section 2751 (stay on appeal in guardianship and conservatorship law). Subdivision (a) is consistent with the case-law rule under former law that the appeal of an order appointing a personal representative suspends the powers of the personal representative and stays proceedings in the probate court. See Estate of Hultin, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947); Estate of Gibson, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965). See also Code Civ. Proc. § 917.9 (discretion to require undertaking in case of automatic stay).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Special administrators § 8540 et seq.

**§ 7402. Effect of reversal of order appointing personal representative**

7402. If an order appointing a personal representative is reversed on appeal for error, lawful acts of the personal representative performed between the time letters are issued and the reversal are as valid as though the order were affirmed.



Comment. Section 7402 restates former Probate Code Section 1241 without substantive change, except that the reference to the time of qualification is replaced by the reference to the time letters are issued. See Section 8400(a) (appointment of personal representative effective upon issuance of letters).

#### CROSS-REFERENCES

##### Definition

Letters § 52

Personal representative § 58

Note. It has been suggested that the purpose of this section, among other things, is "to protect third persons in their dealings in estate matters with an executor or administrator whose appointment is later reversed." *Estate of Gibson*, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965). While Gibson cited no authority, it appears to be a correct statement. However, Gibson did not suggest what other purposes this section might have. For another case that did not know what to make of Probate Code Section 1241, see *Estate of Schwartz*, 87 Cal. App.2d 569, 573, 197 P.2d 223 (1948). It should also be noted that Section 1241 does not apply where the appointment is reversed for lack of jurisdiction. See *Estate of Schwartz*, supra; *Security-First Nat'l Bank v. Superior Court*, 100 Cal. App. 702, 704-06, 280 P. 995 (1929).

A provision with a like purpose has been added to trust law in the Commission's recent recommendation. See Prob. Code § 18100 (enacted by 1986 Cal. Stat. ch. 820, operative July 1, 1987). Perhaps the section should be revised to make clear that it applies to third persons who act in good faith and without actual knowledge that the personal representative is exceeding his or her powers or exercising them improperly. A provision of this sort might read as follows:

§ 7402 [alternative]. Protection of person dealing with personal representative whose appointment is reversed

7402. If an order appointing a personal representative is reversed on appeal for error, with respect to a person dealing with the personal representative who acts in good faith and without actual knowledge that the personal representative is exceeding the personal representative's powers or improperly exercising them, acts of the personal representative performed between the time letters are issued and the reversal are as valid as though the order were affirmed.

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§ [95]. Judgment roll

[95]. The judgment roll in a proceeding under this code consists of the following papers, where applicable:

(a) In all cases:

(1) The petition, application, contest, report, or account that initiates a particular proceeding.

(2) Any order directing notice of the hearing to be given.

(3) Any notice of the hearing, and any order to show cause made in the proceeding, with the affidavits showing publication, posting, or mailing of the notice or order as may be required by law or court order.

(4) Any citation, in case no answer or written opposition is filed by a party entitled, by law or court order, to notice of the proceeding by citation, with the affidavit or proof of service [and, if service of the citation is made by publication, the affidavit of publication and the order directing publication].

(5) Any finding of the court or referee in the proceeding.

(6) The order or statement of decision made in the proceeding.

(7) Any letters of the personal representative.

(b) If an answer, demurrer, written opposition, or counter petition is filed in a proceeding:

(1) Pleadings and papers in the nature of pleadings.

(2) Any orders striking out a pleading in whole or in part.

(3) Any order made on demurrer, or relating to a change of parties, in the proceeding.

(4) The verdict of the jury, if any.

(c) If the proceeding is for the probate of a will, the will.

(d) If the proceeding is a contest of a will, for the revocation of the probate of a will, or for a preliminary or final distribution of the estate under a will:

(1) The will.

(2) The order admitting the will to probate.

(e) If the proceeding is for the settlement of the final account of a personal representative or for the final distribution of an estate, the affidavit showing publication of notice to creditors.

Comment. Section [95] restates former Probate Code Section 1242 without substantive change. However, the former provision stating that the papers constituting the judgment roll need not be attached together

is omitted as unnecessary. The reference to the statement of decision in subdivision (a)(6) is new. The reference in subdivision (d) to partial and ratable distributions has been replaced by a reference to preliminary distributions.

#### CROSS-REFERENCES

##### Appealable orders

Decedent's estate administration § 7400  
Guardianship and conservatorship § 2750  
Insurance or employee benefit trust § 6327  
Trust administration § 17207

##### Definitions

Letters § 52  
Personal representative § 58  
Will § 88

*Note.* The Commission has deferred decision on whether to recommend that the contents of the judgment roll be governed by Judicial Council rules. It appears that the importance of the judgment roll is not what it was when stricter and more mechanical rules of civil procedure prevailed. See 9 B. Witkin, *California Procedure Appeal* § 417, at 414-15 (3d ed. 1985). The staff has not found any reference to the judgment roll in the statutes on appeal in the Probate Code. The basing of an appeal on the judgment roll is governed by court rule. See Cal. R. Ct. 5; Abbott, *Designating the Record*, in *California Civil Appellate Practice* § 8.1, at 208, § 8.47-8.48, at 239-40 (Cal Cont. Ed. Bar 2d ed. 1985).

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#### Code of Civil Procedure § 904.1 (technical amendment). Appealable judgments and orders of superior court

SEC. . Section 904.1 of the Code of Civil Procedure is amended to read:

904.1. An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or

denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order ~~or decree~~ made appealable by the provisions of the *Probate Estate and Trust Code*.

Comment. Subdivision (j) of Section 904.1 is revised to conform to the terminology of the Estate and Trust Code. See Est. & Trust Code § 7400 (appealable orders or refusals to make orders).

Staff Draft

COMMENTS TO REPEALED SECTIONS

§ 1240. Appeal

Comment. Former Section 1240 is restated in Estate and Trust Code Section 7400 without substantive change, except for the following: the part of subdivision (m) relating to determination of heirship is superseded by Estate and Trust Code Section 325 (appeal of order determining membership in a class) See the Comment to Est. & Trust Code § 7400.

§ 1241. Effect of reversal of order appointing personal representative

Comment. Former Section 1240 is restated in Estate and Trust Code Section 7402 without substantive change.

§ 1242. Contents of judgment roll

Comment. Former Section 1242 is restated in Estate and Trust Code Section [95] without substantive change. However, the former provision to the effect that the papers constituting the judgment roll need not be attached together is omitted as unnecessary.