

#L-1041

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Memorandum 86-100

Subject: Study L-1041 - Rules of Procedure (Procedural Provisions for
1987 Legislation)

Attached to this memorandum is a draft of procedural rules to be included in the 1987 probate legislation. Please note that the bulk of the rules are simply renumbered versions of existing rules. The renumbering is necessary to make room for the new notice provisions. We plan to do a thorough revision of the procedural rules in connection with enactment of the general Estate and Trust Code at the 1988 legislative session.

Respectfully submitted,

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Assistant Executive Secretary

Rules of Procedure for 1987 Legislation

Prob. Code § 300 (amended). Jurisdiction in superior court

SEC. . Section 300 of the Probate Code is amended to read:

300. When a person dies, the title to the person's property, real and personal, passes to the person to whom it is devised or bequeathed by the decedent's estate as provided in Part 2 (commencing with Section 6400) of Division 6; but all of the decedent's property is subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale, or other disposition under the provisions of this ~~division~~ code, and is chargeable with the expenses of administering the decedent's estate, and the payment of the decedent's debts and the family allowance, except as otherwise provided in this code.

Comment. Section 300 is amended to recognize that administration of the decedent's estate is governed by other provisions in this code as well as this division. See Divisions 6 (commencing with Section 6100) and 7 (commencing with Section 9000).

Prob. Code § 303 (amended). Disqualification of judge

SEC. . Section 303 of the Probate Code is amended to read:

303. (a) No will shall be admitted to probate or letters of administration granted or other proceeding had (except the ordering of a transfer as ~~hereinafter~~ provided in subdivision (b)), before any judge who is interested as ~~an heir of the decedent, or as a legatee or devisee under a will, or when he~~ a beneficiary or creditor, or is named as executor or trustee in the will, or is in any other manner interested or disqualified from acting. A judge who was a witness to a will is disqualified from acting in any proceeding prior to and including the admission of the will to probate or in any proceeding involving its validity or interpretation.

(b) When a petition is filed praying for the admission of a will to probate or for the granting of letters of administration, or when proceedings are pending with respect to an estate, and there is no judge of the superior court in that county qualified to act, the court or judge

must make an order transferring the proceedings to the superior court of an adjoining county, and the clerk must transmit to the clerk of the court to which the proceedings are transferred a certified copy of the order together with all papers in the proceedings on file in ~~his~~ the clerk's office; and thereafter the court to which the proceedings are transferred shall exercise the same jurisdiction over the estate and all matters relating to the administration thereof as if it had original jurisdiction. But such transfer shall not be ordered when some other judge qualified to act is assigned by the chairman of the judicial council to sit in the county where such proceedings are pending, to hear such proceedings.

Comment. Section 303 is amended to make clear that a judge who is a creditor of an estate is disqualified from acting in the proceeding. This supersedes former Section 704 (claim by judge). The other changes in the section are technical. See Section 24 ("beneficiary" defined).

Prob. Code §§ 1200-1242 (repealed). Notices, orders and procedure

SEC. . Chapter 22 (commencing with Section 1200) of Chapter 22 of Division 3 of the Probate Code is repealed.

Comment. For disposition of the repealed sections, see the Appendix to this report.

Prob. Code §§ 1280-1299 (added). Orders and procedure

SEC. . Chapter 22.5 (commencing with Section 1280) is added to Division 3 of the Probate Code, to read:

CHAPTER 22.5. ORDERS AND PROCEDURE

Article 1. Rules of Procedure

§ 1280. Trials

1280. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. When a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, must settle and

frame the issues to be tried. If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions. Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions.

Comment. Section 1280 continues former Section 1230 without change.

§ 1281. New trials

1281. A motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings to determine heirship and interests in estates, and in those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury, whether or not they were so tried.

Comment. Section 1281 continues former Section 1231 without change.

§ 1282. Costs

1282. When not otherwise prescribed by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.

Comment. Section 1282 continues former Section 1232 without change.

§ 1283. Rules of practice

1283. Except as otherwise provided by this code or by rules adopted by the Judicial Council, the provisions of Part 2 (commencing with Section 307) and of Article 3 (commencing with Section 2016) of Chapter 3 of Title 3 of Part 4 of the Code of Civil Procedure are applicable to and constitute the rules of practice in the proceedings mentioned in this code with regard to discovery, trials, new trials, appeals, and all other matters of procedure.

An affidavit or verified petition must be received as evidence when offered in any uncontested probate proceedings, including proceedings relating to the administration of estates of decedents and proceedings relating to the administration of estates of persons for whom a guardian or conservator has been appointed and in uncontested proceedings to establish a record of birth. The evidence of one or more of the subscribing witnesses may be received by an affidavit to which there is attached a photographic copy of the will, in any uncontested will proceedings.

Comment. Section 1283 continues former Section 1233 without change.

§ 1284. Verification required

1284. (a) Except as otherwise provided by statute, all of the following shall be verified:

(1) A petition, report, or account.

(2) An objection or response to a petition, report, or account.

(b) The verification of a petition shall be made by the petitioner. The verification of a report or account shall be made by the person making the report or account. The verification of an objection or response shall be made by the objector or respondent.

Comment. Subdivision (a) of Section 1284 generalizes provisions found in Sections 467, 511, 541(b), 550, 604, 608, 609, 613, 615, 921, 922, 1025.5, 1064, 1068, 1190, and 1354, and in former Sections 578, 578a, 584.3(a), 584.5, 705, 707, 718.5, 721(b), 755, 831, 841, 842.1, 851, and 851.5. Subdivision (a) is comparable to Sections 1450 (guardianship and conservatorship law) and 17201(a) (trust law).

Subdivision (b) is new. It makes clear the person who is to make the verification.

§ 1285. Clerk to set matter for hearing

1285. When a petition, report, account, or other matter that requires a hearing is filed with the clerk of the court, the clerk shall set the matter for hearing.

Comment. Section 1285 generalizes provisions found in Sections 327, 441, 605, 643, 653, 662, 718.5, 1000, 1004, 1041, 1068, 1102, 1172, 1191, 1200, and 1355, and in former Sections 578, 578a, 584, 584.2, 584.3, 584.5, 591.1, 591.7, 755, 758, 771, 771.3, 773, 810, 831, 841, 851, 851.5, and 854. It is comparable to Sections 1451 (guardianship and conservatorship law) and 17201(b) (trust law).

§ 1286. Continuance

1286. The court may continue or postpone any hearing, from time to time, in the interest of justice.

Comment. Section 1286 continues the first portion of former Section 1205 without change.

§ 1287. Hearing and order

1287. At the hearing the court shall hear and determine the matter and any response or objection presented and shall make such orders as may be appropriate.

Comment. Section 1287 generalizes a number of provisions found in the Probate Code. See, e.g., Sections 407, 440, 852.

§ 1288. United States as an interested person

1288. Where compensation, pension, insurance, or other allowance is made or awarded by a department or bureau of the United States government to a decedent's estate, the department or bureau has the same right as an interested person to request special notice, to commence and prosecute an action on the bond of a personal representative, and to file written exceptions to a personal representative's account or contest the account.

Comment. Section 1288 restates former Section 1203 without substantive change. See Section 58 ("personal representative" defined).

§ 1289. Guardian or conservator acting for ward or conservatee

1289. If an interested person has a guardian or conservator of the estate who resides in this state, personal service on the guardian or conservator of any process, notice, or court order concerning a decedent's estate is equivalent to service on the ward or conservatee, and it is the duty of the guardian or conservator to attend to the interests of the ward or conservatee in the matter. The guardian or conservator may appear for the ward or conservatee and waive any process, notice, or order to show cause that a person not under legal disability might waive.

Comment. Section 1289 restates former Section 1208 without substantive change. See Section 48 ("interested person" defined).

Article 2. Orders

§ 1290. Recital of jurisdictional facts

1290. Orders and decrees of the court or judge must be entered at length in the minute book of the court, or else signed by the judge and filed, provided that decrees of distribution shall be entered at length in a judgment book or other permanent record of the court.

Comment. Section 1290 continues former Section 1220 without change.

§ 1291. Entry and filing

1291. All orders and decrees of the court or judge must be entered at length in the minute book of the court, or else signed by the judge and filed, provided that decrees of distribution shall be entered at length in a judgment book or other permanent record of the court.

Comment. Section 1291 continues former Section 1221 without change.

§ 1292. Recordation of order affecting real property

1292. (a) When an order is made determining any matter affecting title to real property, a certified copy of the order may be recorded in the office of the county recorder of any county in which the property or a part thereof is situated.

(b) From the time of filing the certified copy of the order for record, notice is imparted to all persons of the contents of the order.

Comment. Section 1292 restates former Probate Code Section 1222, making recordation permissive rather than mandatory. For mandatory recordation of a court-ordered transaction affecting real property, see Section 1293 (transfer or conveyance of property pursuant to court order).

§ 1293. Transfer or conveyance of property pursuant to court order

1293. (a) As used in this section, "transaction" means a transaction affecting title to property in the estate, including but not limited to:

(1) In the case of real property, a conveyance (including a sale, option, or order confirming a sale or option), a lease, the creation of a mortgage, deed of trust, or other lien or encumbrance, the setting apart of a probate homestead, or the distribution of property.

(2) In the case of personal property, a transfer or the creation of a security interest or other lien on the property.

(b) Whenever the court makes an order that authorizes or directs a transaction, the the personal representative shall execute the transaction in accordance with the terms of the order.

(c) A transaction affecting real property in the estate executed by the personal representative shall set forth therein that it is made by authority of the order authorizing or directing the transaction and shall give the date of the order. The personal representative shall record a certified copy of the order in the office of the county recorder in each county in which any portion of the real property is situated. This subdivision does not apply to a lease of property.

(d) A transaction executed by the personal representative in accordance with an order authorizing or directing the transaction has the same effect as if the decedent were living at the time of the transaction and had carried it out in person while having legal capacity to do so.

Comment. Subdivisions (a), (b), and (c) of Section 1293 restate portions of former Probate Code Sections 786 (sales of real property), 832-833 (mortgages), 842-843 (leases), and 852-853 (property claimed to belong to decedent or other person). These subdivisions are comparable to subdivisions (a), (b), and (c) of former Probate Code Section 2111 (guardianship and conservatorship).

Subdivision (c) applies to any conveyance of an interest in real property of the estate, including but not limited to the granting of an option to purchase real property of the estate, but does not apply to a lease of real property of the estate. The order authorizing or directing the personal representative to make a lease of real property of the estate may, however, be recorded if the lessee or the personal representative so desires. See Section 1292 (recordation of order affecting real property).

Subdivision (d) is drawn from subdivision (d) of Section 2111 (guardianship and conservatorship) and is consistent with provisions formerly scattered through the Probate Code. See former Probate Code Sections 786 (sales of real property), 834 (mortgages, pledges, deeds of trust), 843 (leases), 853 (property claimed to belong to decedent or other person). Whether or not after-acquired title is passed by an instrument executed by the personal representative depends on the terms of the instrument. See generally 3 B. Witkin, Summary of California Law Real Property §§ 86, 160, at 1840, 1900-01 (8th ed. 1973).

§ 1294. Delivery to county treasurer

1294. When a personal representative, public or otherwise, deposits money or other personal property in a county treasury during administration or after final distribution of the estate of a deceased person, the personal representative shall, within 30 days after the date on which the court makes the decree of distribution or any order amending the decree, deliver to the county treasurer a certified copy of the decree or other court order.

Comment. Section 1294 restates the first paragraph of former Section 1224 without substantive change. See Section 58 ("personal representative" defined). Section 1294 omits the second paragraph, which was a transitional provision that is no longer necessary.

Article 3. Appeals

§ 1297. Appealable orders

1297. An appeal may be taken from an order or the refusal to make an order:

- (a) Granting or revoking letters.
- (b) Admitting a will to probate or revoking the probate thereof.
- (c) Setting aside a small estate under Section 6609.
- (d) Setting apart property as a homestead or claimed to be exempt from enforcement of a money judgment.
- (e) Granting or modifying 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 real property.
- (h) Adjudicating the merits of a claim under Chapter 11 (commencing with Section 9860) of Part 5 of Division 7.
- (i) Allocating debts under Section 980.
- (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 heirship or 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.

(p) Fixing an inheritance tax or determining that none is due.

(q) Authorizing a personal representative to invest or reinvest any surplus money under Section 9732.

Comment. Section 1297 restates former Section 1240 without substantive change. See Sections 52 ("letters" defined) and 58 ("personal representative" defined).

§ 1298. Reversal of order appointing personal representative

1298. If an order appointing a personal representative is reversed on appeal for error, all lawful acts in administration of the estate performed by the personal representative after qualification of the personal representative and before the reversal are as valid as though the order were affirmed.

Comment. Section 1298 restates former Section 1241 without substantive change. See Section 58 ("personal representative" defined).

§ 1299. Judgment roll

1299. The following papers, without being attached together, constitute the judgment roll in proceedings under this code:

(a) The petition, application, contest, report, or account that initiates a particular proceeding; any order directing notice to be given of the hearing; any notice of the hearing, or any order to show cause made, with the affidavits showing the publication, posting, or mailing of the notice or order as required by law or order of the court; the citation, in case no answer or written opposition is filed by a party entitled, by law or order of court, 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 for the publication and the order directing publication; any finding of the court or referee; the order or judgment made or rendered; and the letters, if any.

(b) If an answer, demurrer, written opposition, or counter petition is filed in the proceeding, all pleadings and papers in the nature of pleadings; all orders striking out any pleading in whole or in part; any order made on demurrer, or relating to a change of parties; the verdict of the jury, if any; and the papers described in subdivision (a).

(c) If the proceeding is for the probate of a will, the will; and if the proceeding is a contest of a will, or for the revocation of the probate of a will, or a partial, ratable, or final distribution of the estate under a will, the will and the order admitting the will to probate; and the papers described in subdivisions (a) and (b).

(d) If the proceeding is for the settlement of the final account of the personal representative, or for the final distribution of the estate, the affidavit showing publication of notice to creditors, and the papers described in subdivisions (a), (b), and (c).

Comment. Section 1299 restates former Section 1242 without substantive change. See Section 58 ("personal representative" defined).

APPENDIX

Disposition of Repealed Probate Code Sections

ARTICLE 2. ORDERS

Prob. Code § 1220 (repealed)

Comment. Former Section 1220 is renumbered as Section 1290 without change.

Prob. Code § 1221 (repealed)

Comment. Former Section 1221 is renumbered as Section 1291 without change.

Prob. Code § 1222 (repealed)

Comment. Former Section 1222 is renumbered as Section 1292, which makes recordation permissive rather than mandatory.

Prob. Code § 1224 (repealed)

Comment. The first paragraph of former Section 1224 is renumbered as Section 1294 without substantive change. The second paragraph is omitted; it was a transitional provision that is no longer necessary.

ARTICLE 3. RULES OF PROCEDURE

Prob. Code § 1230 (repealed)

Comment. Former Section 1230 is renumbered as Section 1280 without change.

Prob. Code § 1231 (repealed)

Comment. Former Section 1231 is renumbered as Section 1281 without change.

Prob. Code § 1232 (repealed)

Comment. Former Section 1232 is renumbered as Section 1282 without change.

Prob. Code § 1233 (repealed)

Comment. Former Section 1233 is renumbered as Section 1283 without change.

ARTICLE 4. APPEALS

Prob. Code § 1240 (repealed)

Comment. Former Section 1240 is restated in Section 1297 without substantive change.

Prob. Code § 1241 (repealed)

Comment. Former Section 1241 is restated in Section 1298 without substantive change.

Prob. Code § 1242 (repealed)

Comment. Former Section 1242 is restated in Section 1299 without substantive change.