

Memorandum 87-29

Subject: Study L-1027 - Probate Code (Accounts--draft of tentative recommendation)

Attached to this memorandum is a draft of the tentative recommendation relating to accounts. The draft incorporates Commission decisions made at previous Commission meetings where this material was first considered.

The Commission has received a number of letters relating to accounts in probate. See Exhibits 1-8. The points made in these letters are raised in Notes following the sections of the draft to which they relate.

Our objective is to review the draft to make whatever changes appear necessary in order to prepare the tentative recommendation for distribution for comment.

This memorandum incorporates and supersedes Memorandum 87-1 and the first four supplements to it.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

MARDER & MARDER

ATTORNEYS AT LAW

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LOS ANGELES, CALIFORNIA 90049

MUNCIE D. MARDER
KENNETH A. MARDERTELEPHONES:
(213) 476-6265
(213) 879-5430

December 19, 1984

John Demouilly, Esq.
California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, California 94306

Re: Attorney's fees on Motion to Surcharge Personal
Representative

Dear Mr. Demouilly:

I have recently been involved in two cases representing beneficiaries in a motion to surcharge corporate executors. These brought to my attention certain inequities in the law that bother me. I spoke to Commissioner Ann Stodden about them, and she suggested I write directly to you.

In the ordinary course of events, beneficiaries who are dissatisfied with the accounting or other actions of the personal representative of a decedent's estate retain other counsel to file objections to the accounting and to surcharge the executor and/or its attorneys. Sometimes the issues are extensive and complex, and the hearing may take several days or more. Ordinarily the Court will order distribution of the remainder of the estate but withhold a certain portion from distribution to cover attorney's fees and costs should the personal representative prevail. If the beneficiary prevails, he must pay his own attorney's fees.

Although it is not glaringly obvious, the end result is that the beneficiaries pay their attorney's fees and the executor's attorney's fees if the beneficiaries lose, and the beneficiaries pay their own attorney's fees if they win.

It seems to me that this is contrary to the general public policy that attorney's fee statutes are reciprocal in nature except in those cases where a public benefit is conferred.

John Demouilly, Esq.

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December 19, 1984

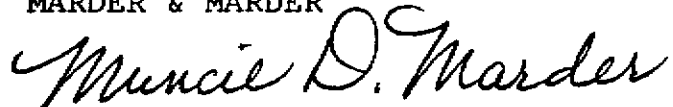
In the surcharge cases the opposite occurs. The personal representative has to pay only its own attorney's fees when it does not prevail. The beneficiaries, on the other hand, must pay their own attorney's fees win or lose, and the estate distribution is lessened by the personal representative's attorney's fees when the beneficiaries do not prevail.

I have had to explain this inequity to several of my clients, and have found that it has a very chilling effect on their willingness to challenge what they and I perceive to be a wrongful or negligent act of the personal representative. I believe this is something that could be remedied by appropriate legislation clarifying the source and extent of attorney's fees to be awarded in such cases.

I, along with many other probate attorneys I have spoken to, would appreciate your Committee's consideration of these issues.

Sincerely yours,

MARDER & MARDER

A handwritten signature in cursive script that reads "Muncie D. Marder".

Muncie D. Marder

MDM/wrr

cc: Commissioner Ann Stodden, LASC

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April 3, 1985

FILE NO.

Mr. Nathaniel Sterling
 Law Revision Commission
 4000 Middlefield Road
 Suite D-2
 Palo Alto, CA 94303

Re: Probate Notice Requirements

Dear Mr. Sterling:

It has come to the attention of the Estate Planning, Probate and Trust Section of the Santa Clara County Bar Association that there may be some ambiguities in the California Probate Code requirements for notice at the time of final distribution. Specifically, sections 1200.5(11) and (12) require notice of an account and a petition for distribution be provided to any personal representative who is not the petitioner and to anyone else who has filed Requests For Special Notice. On the other hand, sections 926 and 1020 require notice of hearing on an accounting or petition for final distribution be provided to those persons whose interest in the estate is affected by the matter being heard. It is the practice in Santa Clara County to require compliance with sections 926 and 1020, that is, to require notice to all distributees of the petition for final distribution. However, some confusion does exist because section 1200.5 appears not to require such notice.

We would appreciate your attention to this matter in connection with your current revision of the California Probate Code. Please do not hesitate to contact me should you need any further information or clarification.

Very truly yours,



 Carla Holt

CH:tlp
 cc: Honorable Charles Gordon
 Mr. John DeMouilly
 (List Con't on Next Page)

Mr. Nathaniel Sterling
April 3, 1985
Page 2

cc: State Bar Section Consultants:

Theodore J. Cranston
Charles A. Collier, Jr.
James A. Willett
H. Bruce Friedman
Lloyd W. Homer
John S. Hartwell
D. Keith Bilter

Richard Gorini

MEMORANDUM

Date: April 20, 1986

FROM: Irving Kellogg
821 Monte Leon Drive
Beverly Hills, CA 90210
213-551-9127

To: California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, Ca 94303-4739

Subject: Study L-1028, Independent Administration of Estates, March 1986, and Study L-1010, Opening Estate Administration, March 1986.

Comments:

Study L-1028.

1. Page 4. I commend the Commission's development of a Statutory Waiver of Advice of Proposed Action Form, and the expansion of exemptions to over the counter securities as stated.

The Commission should seek to insert more Statutory Forms into the Probate Code so that there will be uniformity by statute. This statutory uniformity should minimize lawyers' failures to comply accurately with requirements and recipients' challenges to carelessly prepared forms.

Statutory Form for Probate Accounting. The Commission should consider the development of a standard accounting format for probate accountings. The benefits of such a standard are inestimable:

(1). All probate courts or divisions could apply computerized review and court training could be simplified. Therefore, court administration would be expedited.

(2). Lawyers' would not be wildly creative or ignorantly deficient, thereby causing delays and costs in administration.

(3). Beneficiaries could refer to a standard or confer with their CPAs who would learn the statutory standard.

(4). CPAs could assist executors in accounting matters, reducing expenses of administration. The same benefit would apply to paralegals who would have a statutory form to rely on.

(5). Communication between probate court reviewers and attorneys would be expedited.

These benefits or advantages are similar to those derived from the Principal and Income Law that brought order out of chaos in that area. In proceeding, if the suggestion is considered to be worthwhile, the Commission should enlist the aid of experts in fiduciary accounting.

The danger is that corporate fiduciaries with computer designed programs would battle this suggestion vigorously. The Commission should bear in mind that very few beneficiaries or their CPAs understand those computer designed reports. For certain, very few lawyers understand them.

I have enclosed Chapter 32 - Fiduciary Accounting from my book, How To Find Negligence and Misrepresentations in Financial Statement. You may find the chapter valuable in considering my suggestion about uniform fiduciary accounting in California.

2. Page 33. The form for advice of proposed action.

This is excellent. It reflects current Plain English principles in every respect.

3. Page 36. WAIVER OF ADVICE OF PROPOSED ACTION.

Having been the original draftperson of the Statutory Wills, and having struggled with my colleagues over the need to simplify the warning that appears on both of them, I am sensitive to this type of warning. The following is my suggestion about improvements in that warning. I have, in my corrections, switched some passive voice structures to active voice and inserted personal pronouns so that readers identify themselves in the warning.

WAIVER OF PROPOSED ACTION

WARNING. THE LAW REQUIRES THAT THE PERSONAL REPRESENTATIVE MUST GIVE YOU NOTICE OF CERTAIN ACTIONS THE PERSONAL REPRESENTATIVE PROPOSES TO TAKE WITH RESPECT TO PROPERTY OF THE ESTATE. THE PERSONAL REPRESENTATIVE MUST GIVE YOU THAT NOTICE BEFORE TAKING THAT ACTION.

YOU HAVE THE RIGHT (1) TO OBJECT TO A PROPOSED ACTION, AND (2) TO REQUIRE THAT THE COURT MUST SUPERVISE THAT PROPOSED ACTION. IF YOU DO NOT OBJECT BEFORE THE PERSONAL REPRESENTATIVE ACTS, THEN YOU LOSE THAT RIGHT

AND YOU CANNOT OBJECT LATER.

IF YOU SIGN THIS FORM, YOU GIVE UP YOUR RIGHT TO.....

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

(1) YOUR RIGHT....

(2) YOUR RIGHT....

YOU HAVE THE RIGHT TO CANCEL THIS WAIVER AT ANY TIME, BY NOTIFYING THE PERSONAL REPRESENTATIVE ORALLY OR IN WRITING THAT YOU CANCEL THIS WAIVER.

.....

3. BY SIGNING BELOW, I WAIVE MY RIGHT...(CHECK ONLY ONE BOX.....)

(SIGNATURE OF PERSON SIGNING WAIVER)

Print your name: _____

Your address: _____

Study L-1010

1. Page 5. Competence of person appointed personal representative.

Has the problem of the inherent and latent conflict of interest between a spouse of a later marriage and the decedent's children of a former marriage been discussed or thought about. This is one of the more troublesome areas in both estate planning and decedents' administration.

Not directly related to the competence of the person appointed personal representative, but a problem indirectly related is the problem of a corporate fiduciary choosing the attorney who drafted the decedent's will to be the attorney to represent the corporate fiduciary. This occurs with disturbing regularity although there may be no relationship between that attorney and the natural objects of the decedent's bounty. A court case in San Diego within the past two years confirmed the fiduciary's right to choose its attorney. The facts, however, were egregious. The beneficiaries were, in my opinion, justifiably outraged by the fiduciary's blatant backscratching.

Query, then: Should there be some rule as to the requirement for the fiduciary to consider in its appointment of

an attorney the relationship of the attorney to the decedent,
considering the attorney's expertise in probate????

Thank you for sending these reports.

Sincerely yours,

Irving Kellogg
Irving Kellogg

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PLEASE REFER TO
FILE NO.

January 12, 1987

FEDERAL EXPRESS

James Quillinan, Esq.
444 Castro Street, #900
Mountain View, CA 94041

Re: LRC Memorandum 87-1, Accounts

Dear Jim:

On January 8, 1987, Team 4 (Richard Polse, Harley Spitler, William Hoisington, James Willett, Janet Wright and I) discussed LRC Memorandum 87-1, Accounts.

1. Introduction to Staff Draft, page 2.

Team 4 agrees that a jury trial should be eliminated on issues of fact in the contest.

2. Section 10900.

2.1 Team 4 believes that the language of this section is archaic.

2.2 Team 4 suggests that the section be written as follows:

The personal representative has a duty to account as hereinafter provided in this part.

3. Section 10901.

3.1 Team 4 believes that Section 10901 should be rewritten and suggests the following:

Section 10901. An account shall be verified and shall show the following:

(a) A summary statement, together with supporting schedules, of:

(1) Property in all inventories.

- (2) Receipts, excluding principal items.
- (3) Gains on sales.
- (4) Other acquisitions of property.
- (5) Disbursements.
- (6) Losses on sales.
- (7) Other dispositions of property.
- (8) Property remaining.

3.2. The second sentence of subsection (b) should be relocated.

3.3 "Shall" should be substituted for "may" in the second sentence of subsection (b).

3.4 The first word of subsection (c) should be deleted and replaced with the word "any".

3.5 Team 4 agrees that subsection (a) should be located among the duties of the personal representative rather than among items to be included in the account.

3.6 Team 4 believes that the Commission should continue to develop uniform standards for fiduciary accounting.

4. Section 10902.

Team 4 suggests that the section be restated as follows:

Upon request by an interested person, the personal representative shall produce those documents supporting the account that have been specified in the request.

5. Section 10950.

5.1 Subsection (a) should be deleted.

5.2 Subsections (b) and (c) should set forth a time limit; Team 4 suggests two years after the entry of the order for final distribution.

5.3 Subsection (c) should be restated as follows:

If an interested person files a petition requesting the personal representative to file an account, and no accounting has been filed for a period of one year, the court shall order the personal representative within a specified time.

5.4 All of the sections should be subject to no waiver having been filed.

5.5 Court action should be predicated upon a showing of reasonable cause.

6. Section 10951.

The section should be subject to no waiver having been filed.

7. Section 10952.

7.1 The section should be subject to no waiver having been filed.

7.2 Team 4 suggests that the first section be restated as follows:

Upon petition of a successor personal representative, the court may order a personal representative who resigns, is removed from office or whose authority is otherwise terminated to file an account.

7.3 In the second sentence, the word "made" should be deleted and the word "filed" substituted therefor.

7.4 If the authority of a personal representative is terminated by court order, then the personal representative should not thereafter have to account.

8. Section 10953.

8.1 In subsection (b), the duty of the legal representative should be limited to the extent that the legal representative has information or records available for the purpose.

- 8.2 Team 4 is uncertain as to the meaning of the word "available" in subsection (c), line 8 and is concerned about the extent of the attorney's duty.
- 8.3 The fee should be based upon the level of compensation currently paid to practitioners in the area for similar services.
- 8.4 Team 4 is uncertain as to the meaning of the word "abscond" as it appears in subsection (c).

9. Section 10954.

- 9.1 In subsection (b) the words "has been filed" should be deleted and replaced with "is on file".
- 9.2 Team 4 believes that subsection (d) should be restated as follows:

An accounting should not be waived until all distributees are ascertained, represented by a guardian ad litem or otherwise adequately represented.

10. Chapter 3.

Team 4 believes that the title of Chapter 3 should be reexamined because the chapter deals with other than just procedural matters.

11. Section 11001.

- 11.1 Team 4 believes that (4) should not be deleted.
- 11.2 Team 4 believes that the notice provisions should be uniform and should be all in one place.
- 11.3 Subsection (b) should be restated as follows:

If the petition for approval of the account requests commissions or fees

12. Section 11002.

12.1 Subsection (b)(3) should provide that it is subject to the provisions of Section 10590.

12.2 The words "good faith" should be deleted from subsection (c).

12.3 Subsection (c) should be restated as follows:

If, upon hearing, the court rules against the exceptions and determines the exceptions were without reasonable cause, the court shall order that the fees and costs of the personal representative and attorney incurred to defend the account against the exceptions shall be charged against and paid for by the contestant.

12.4 Team 4 agrees with Mr. Marder that the common fund doctrine should be incorporated into the Probate Code.

12.5 Team 4 believes that subsection (a) should be clarified so that oral exceptions are permitted as well as a reasonable time to file written objections.

13. Section 11003.

13.1 Subsection 11003 should end after the word "oath".

13.2 In subsection (b), second sentence "referees" should be "referee(s)".

14. Section 11004.

14.1 Team 4 believes that the practitioners are confused by this section; clarification is required.

14.2 The consensus of Team 4 is that notwithstanding that the enforcement of the decedent's obligation was barred by the running of the claims period, that the claim should be allowed.

James Quillinan, Esq.
Page 6
January 12, 1987

If Team 4 may be of further assistance, please do not hesitate to contact us.

Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN,
A Member of
STANTON and BALLSUN
A Law Corporation

KAB/kf

c: Richard Polse, Esq.
Harley Spitler, Esq.
Janet Wright, Esq.
Clare Springs, Esq.
William Hoisington, Esq.
Lloyd Homer, Esq.
Chuck Collier, Esq.
James Willett, Esq.
Irv Goldring, Esq.
Jim Devine, Esq.
Jim Opel, Esq.
Keith Bilter, Esq.



February 9, 1987

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: California Law Revision Commission -
Memorandum 87-1

Gentlemen:

On behalf of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, I submit the following comments on one of the memoranda listed on the agenda for the meeting scheduled for February 19-20, 1987.

Memorandum 87-1 deals with amendments to the Estate and Trust Code pertaining to accounts rendered in probate proceedings. Section 10901 prescribes the contents of an accounting. Subsection (a)(2) requires the account to show "the amount of receipts, excluding capital items". We surmise that the purpose of this is to show only income receipts; however, some items are both. For example, dividends and interest accrued at death are reported on the inventory and appraisal yet they are also items of income. How are they to be reported under Section 10901(a)(2)?

Section 10902 requires the personal representative to submit documents supporting his account for inspection upon order of the court or upon request by an interested party. We are concerned that a simple request by an interested party is enough to require the personal representative to submit the documents for his administration of the estate for audit by the interested party. We believe it would be preferable to require the personal representative to submit documents supporting his account for inspection and audit upon order of the court on its own motion or pursuant to a petition filed by an interested person.

Section 10952 requires a personal representative who resigns or is removed from office or whose authority

is otherwise terminated to file an account "when ordered by the court upon petition of a successor personal representative." Why limit the requirement of an account, particularly when it is that of a resigning personal representative or one who has been removed or whose authority has terminated, to situations when it is ordered by the court upon petition of a successor personal representative? It is precisely this type of situation when an account should be required. After all, when an estate is closed the personal representative is required under proposed Section 10951 to file a final account.

Section 10953 requires the "legal representative" of a deceased personal representative or an incompetent personal representative to file an account of the administration of the personal representative and to settle the account of the personal representative "as in other cases". Presumably this would require the legal representative to file a verified account. In Section 10953(c) when the personal representative dies, becomes incompetent or absconds and no legal representative was appointed, the court may compel the attorney of the absconding, deceased or incompetent personal representative to file an accounting. The account of the attorney, however, need not be verified and a fee shall be allowed to the attorney for extraordinary services. The legal representative may have no more information available to him than the attorney would have, yet it appears that the legal representative would be required to file a verified accounting and there is no assurance that he would be compensated out of the estate. We see no reason for the dichotomy of treatment.

Section 11002 deals with exceptions to accounts. Subsection (b) gives a representative list of matters that may be raised in a contest of an account. Subsection (b)(3) permits contest of "actions taken by the personal representative not previously authorized or approved by the court". The representative acting under the Independent Administration of Estates Act pursuant to an advice of proposed action may take certain actions which consenting beneficiaries or beneficiaries who have received the proper advice of proposed action may not later contest. This provision needs to be coordinated with those provisions of the Independent Administration of Estates Act.

Section 1104 states when the court may approve

payment of debts for which no creditor's claim was filed. It appears to continue former Section 929 of the Probate Code. However, there is no requirement that the payment occur prior to the expiration of the claim's filing period. Therefore, it appears possible that an executor could pay a debt for which no claim has been filed that would otherwise be barred by the expiration of the claim's filing period.

Section 11005 deals with the conclusiveness of a court order. It continues the substance of Section 931 of the Probate Code that the settlement of an account is conclusive against all interested persons; provided, however, a person under a legal disability has the right anytime up until entry of the order of final distribution of the estate to reopen a prior account. We see no reason to give a person under a legal disability the limited right to reopen an accounting that has been settled by the court and that would be otherwise final, but for the disability of the beneficiary.

We agree with Mr. Marder's statement that there is no reciprocity with respect to recovering attorneys fees from the personal representative in a successful surcharge action, although Section 11002(c) permits a personal representative to recover attorneys fees from an unsuccessful contestant. We believe it would be appropriate to permit, as part of the surcharge against a personal representative, the recovery of a successful contestant's attorneys fees and costs.

Sincerely,

Executive Committee
Probate & Trust Law
Section

By: 
Richard Lee Stack

RLS:dw

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FEDERAL EXPRESS

March 10, 1987

James Quillinan, Esq.
444 Castro Street, #900
Mountain View, CA 94041

Re: Second Supplement to Memorandum 87-1, Accounts

Dear Jim:

On March 7, 1987, Team 4 (Harley Spitler, William Hoisington, James Willett and I) discussed the Second Supplement to Memorandum 87-1, Accounts. Team 4's comments about the above-referenced Memorandum are as follows:

This report will address the issues raised by the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association ("LACBA Executive Committee") in its February 9, 1987 letter to the Law Revision Commission.

1. Section 10901(a)(2). The LACBA Executive Committee questioned how certain items that could be characterized as both principal and income (e.g., an accrued dividend as of the date of death) were to be reported under Section 10901(a)(2).

This is valid issue, and one to which Team 4 has no ready response. However, Team 4 suggests that one approach would be to make an adjustment in the final item required on an account, namely in property remaining on hand. Team 4 believes that additional consideration by the Commission of this issue is warranted.

2. Section 10953. The LACBA Executive Committee suggests that it would be preferable "to require the personal representative to submit documents supporting his account for inspection and audit upon order of the Court on its own motion or pursuant to a petition filed by an interested person."

Team 4 believes that a less formal approach is appropriate.

James Quillinan, Esq.

March 10, 1987

Page 2

In its January 12, 1987 letter to the Commission, Team 4 suggested that Section 10902 be restated as follows:

Upon request by an interested person, the personal representative shall produce those documents supporting the account that have been specified in the request.

Team 4 urges the Commission to adopt Team 4's proposal.

3. Section 10952. The LACBA Executive Committee asks "why limit the requirement of an account, particularly when it is that of a resigning personal representation or one who has been removed or whose authority has terminated, to situations when it is ordered by the Court upon petition of a successor personal representative?"

Team 4 believes that in many instances a formal accounting may not be necessary; for this reason, Team 4 suggests that the requirement of an account should be limited. In its January 12, 1987 letter to the Commission (page 3), Team 4 suggested that the Court have discretion to order an account. A copy of Team 4's January 12, 1987 letter is attached for your convenience.

4. Section 10953. The LACBA Executive Committee states that "the legal representative may have no more information available to him than the attorney would have, yet it appears that the legal representative would be required to file a verified accounting and there is no assurance that he would be compensated out of the estate. We see no reason for the dichotomy of treatment."

Team 4 agrees with the position of the LACBA Executive Committee and urges the Commission to revise Section 10953 in view of the above comments.

5. Section 11004 (formerly Section 929). The LACBA Executive Committee is concerned that "an executor may pay a debt for which no claim has been filed that would otherwise be barred by the expiration of the claims filing period."

Team 4 agrees that the section requires clarification. However, Team 4 believes that although the claims period may have expired, the claim should be allowed. (Please refer to Team 4's January 12, 1987 letter).

James Quillinan, Esq.
March 10, 1987
Page 3

6. Section 11005. The LACBA Executive Committee states that it sees "no reason to reopen an accounting that has been settled by the Court and that would be otherwise final, but for the disability of the beneficiary."

Team 4 believes that existing law should not be changed. If finality is desired for an interim accounting, then a Guardian Ad Litem can be appointed to represent a beneficiary under disability.

7. Regarding Mr. Marder's statement. The Executive Committee of the Estate Planning, Trust and Probate Law Section believes that a personal representative should not be surcharged for a successful contestant's attorneys' fees and costs. One consideration is that the Executive Committee feels that banks and other institutions would refuse to serve if a surcharge were to be imposed.

If Team 4 may be of further assistance, please do not hesitate to contact us.

Cordially,

Kathryn A Ballsun

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March 26, 1987

APR 1 1987
RECEIVED

Nathaniel Sterling,
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, Ca. 94303

Re: Study L-1027 - Estate and Trust Code
Accounts

Dear Mr. Sterling:

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

1. §10902. Production of supporting documents.

This new section, as drafted, requires a personal representative to submit the documents supporting an account for inspection and audit upon court order "or upon request by an interested person". In reviewing this provision, it was the opinion of the Legislative Committee that in most cases, the personal representative will be willing to submit documents requested by an interested person who is questioning a specific transaction or income and disbursements attributable to a specific asset (i.e. income producing real property). Unfortunately, however, we believe there are too many cases in which this provision will lead to a "fishing expedition" and will result in harassment of the personal representative, not to mention unnecessary cost to the estate, especially when there may be a hostile relationship between the representative and the beneficiaries.

In view of the fact that the Court can and will order the personal representative to submit supporting documents

when an account is not sufficiently itemized or when the Court believes that there is a sufficient basis for objections presented prior to or at the time of the hearing, we believe that the words "or upon request by an interested person" should be deleted from this section.

2. Section 10950. Court ordered account.

We believe that this Section should be consistent with the provisions of existing Section 1025.5 and, therefore, that the following language should be added to the end of subsection (c):

"...or, when a federal estate tax return is required, made more than eighteen months after issuance of letters to the personal representative."

3. Section 10952. Account after authority terminated.

This section, as drafted, provides that a personal representative whose authority is terminated "shall file an account when ordered by the court upon petition of a successor personal representative." The section further provides that the account shall be made within 90 days after the court order unless the time is extended by the Court.

We can conceive of only a limited number of cases in which a personal representative whose authority has terminated would not be required to file an account. Further, there appears to be no compelling reason to require a successor representative to file a petition with the court in order to obtain an order requiring the prior representative to account. Such a procedure would cause unnecessary delay and expense in the administration of the estate. We therefore suggest that the section be re-drafted as follows:

"Unless otherwise ordered by the Court, a personal representative who resigns, is removed from office, or whose authority is otherwise terminated, shall file an account within 90 days after receipt of notice of the appointment of a successor personal representative."

Nathaniel Sterling
California Law Revision Commission
March 26, 1987
Page Three

Although the above language imposes a notice requirement, we believe that such requirement is much less burdensome than the requirement of a petition imposed by the current language of the proposed section.

4. Section 10953. Account where personal representative dies or becomes incompetent.

We make the same comments regarding the language of subsection (b) of this section as for Section 10952 above.

The following comments and/or suggested changes are made in order to resolve some questions that arise from the provisions of Section 10953 as drafted:

Subsection (c) specifically allows to the attorney who prepares an account on behalf of a deceased, absconding or incompetent representative "a fee...for this extraordinary service." No similar allowance is provided for in subsection (b) which relates to the accounting prepared by the legal representative. That omission raises the following questions: (i) whether the legal representative is to be allowed fees for such service; (ii) whether the fees are statutory or extraordinary; and (iii) from whose estate the fees are to be paid (i.e. the estate for which the account was prepared or the estate of the deceased or incompetent representative).

Logically it would seem that (i) the estate for which the account is prepared should not be "penalized" by having what would have been a statutory service converted to an extraordinary service because its personal representative died, absconded or became incompetent, and (ii) the legal representative, not being the personal representative of the estate for which the account is prepared, should not be entitled to share in commissions from that estate.

To resolve the above problems, we recommend that the Law Revision Commission redraft the proposed Section to provide that the legal representative or the attorney ordered to prepare the account be appointed by the Court as Special Administrator solely for that purpose and that such Special

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Adminsitrator shall be entitled to a portion of the statutory commission. This alternative would provide the attorney preparing the account with an additional fee but would not penalize the estate. For the legal representative preparing the account, it would provide a legal relationship between the representative and the estate and would thereby negate the argument that no commissions should be paid to the legal representative from the estate for which the account was rendered.

We also question why subsection (c) of Section 10953 provides that the Court may compel the attorney for the absconding, deceased or incompetent personal representative to file an account "...to the extent that the attorney has information or records available for the purpose", while subsection (b) does not contain similar language when the account is being filed by the legal representative. Subsection (c) also contains a provision that the account filed by the attorney need not be verified, while no similar provision is contained in subsection (b).

It is meaningless for the Court to order an account to be prepared on behalf of a deceased, incompetent, or absconding representative if there is not some requirement that the person ordered to prepare the account, whether it be the legal representative or the attorney of record, exercise some degree of diligence and effort to locate the necessary records and assets on hand in the estate. The competent probate attorney generally "guides" his client through the procedure of transferring bank accounts, securities, security accounts, etc. to the name of the estate and will have that information available. By contacting tenants of real property or payors of obligations due the estate and obtaining copies of cancelled checks, either the legal representative or the attorney of record would be able to ascertain the amount of income paid to the estate from such assets and the names of the banks to which the funds were deposited. Copies of checking account bank statements would provide information regarding disbursements. There appears to be no reason why the attorney of record ordered to prepare an account for his client should be under any lesser obligation than the legal representative, nor why the account prepared by one should be verified and the other shouldn't.

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In view of all of the foregoing comments, we recommend that subsections (b) and (c) of Section 10953 be redrafted and subsections (d), (e) and (f) be added, as follows:

"(b) Unless otherwise ordered by the Court, if the personal representative dies or becomes incompetent, the account shall be filed by the legal representative within 90 days from the date of his appointment or within 90 days after receipt of notice of the appointment of a successor of the deceased or incompetent representative, whichever last occurs.

"(c) If the personal representative dies or becomes incompetent and there is no legal representative appointed, or the personal representative absconds, the Court may compel the attorney for the absconding, deceased or incompetent personal representative or attorney of record in the estate proceeding to file an account of the administration of the absconding, deceased or incompetent personal representative.

"(d) Any legal representative or attorney required to file an account pursuant to the provisions of subsection (b) or (c) of this Section shall be appointed by the court to act as Special Administrator of the estate in which the account is to be filed, and Letters of Special Administration shall be issued to such legal representative or attorney granting such powers as might be required to enable the Special Administrator to prepare and file the account.

"(e) The Special Administrator shall be allowed a portion of the statutory commission for services rendered in preparing and filing the required account. The Court, in its discretion, may allow the Special Administrator additional compensation.

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"(f) The Special Administrator shall take such actions as are reasonably required to enable him to prepare the required account and, as part of the account, shall inform the court of the actions taken in attempting to reconstruct the administration of the personal representative whose authority is terminated. The account shall be verified.

5. Section 11002. Contest of account.

This section provides that one of the matters that can be contested at the hearing of an account is "the value of property in the inventory and appraisal."

In many cases, an accounting may not be filed for a year or more following the obtaining and filing of the inventory. During that time, the federal estate tax return may have been filed based on the inventory values of property, income tax returns will have been filed showing gain, loss or depreciation based on the inventory value of the property, and the inventory values of property may have been used for numerous other purposes, including determining the amount of a family allowance, determining the ability of the estate to pay creditor's claims, and determining the sale price of assets belonging to the estate.

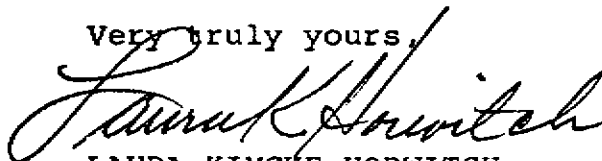
In view of the foregoing, we believe that the filing of an account is not the proper time to contest the inventory value of property. In order to give an interested person the opportunity to review the inventory values and to make any objections thereto while, at the same time, allowing the personal representative the opportunity to proceed with the administration of the estate without the uncertainty that would exist if the inventory values could be contested at a much later time, it is suggested that a new subsection be added to §8804, in the Inventory section of the Code, to provide that the personal representative may give an advice of the proposed filing, or notice of the filing, of an Inventory and Appraisement, together with a copy of said Inventory, to any person interested in the estate and that any objections not made within twenty (20) days after receipt of said advice or notice would be barred.

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If the above suggestion is adopted, subsection (b)(2) of Section 11002 should then be revised to read as follows:

"(2) The value of property in the inventory and appraisal, unless advice of the proposed filing, or notice of the filing, of said inventory was given to the interested person and no objections were made or presented pursuant to the provisions of §8804."

Very truly yours,



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

LKH:ip
cc: Ralph Palmieri, Chairperson

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FILE NO.

KATHRYN A. BALLSUN
PAUL L. STANTON
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FEDERAL EXPRESS

April 7, 1987

James Quillinan, Esq.
444 Castro Street, #900
Mountain View, CA 94041

Re: Memorandum 87-1, Accounts

Dear Jim:

On April 7, 1987, Team 4 (Harley Spitler, Jim Willet and I) discussed Memorandum 87-1, Accounts. Team 4's comments regarding the above-referenced Memorandum are as follows:

1. Section 10902. Production of Supporting Documents.

Team 4 disagrees with the suggestion of the Legislative Committee of the Estate Planning, Probate and Trust Section of the Beverly Hills Bar Association ("Legislative Committee") that the clause "or upon request by an interested person" be deleted.

In its January 12, 1987 letter to the Law Revision Commission, Team 4 requests that the section should be restated as follows:

"Upon request by an interested person, the personal representative shall produce those documents supporting the account that have been specified in the request."

A copy of the January 12, 1987 letter is attached for your convenience.

2. Section 10950. Court Ordered Account.

Team 4 disagrees with the revision of Section 10950(c) suggested by the Legislative Committee.

James Quillinan, Esq.
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As Team 4 said in its January 12, 1987 letter, Subsection (c) should be restated as follows:

"If an interested person files a petition requesting the personal representative to file an account, and no accounting has been filed for a period of one year, the court shall order the personal representative within a specified time."

3. Section 10952. Account After Authority Terminated.

Although Team 4 agrees with several suggestions made by the Legislative Committee, Team 4 believes that: 1) the Special Administrator procedure should not be adopted; 2) the fees paid for the accounting of a deceased, absconding or incompetent representative should not be paid from the statutory fee; and 3) the 90-day period for filing the account should not be adopted.

Team 4 agrees that the legal representative should report to the extent that information or records are available, and that the account should not be verified.

4. Section 11002. Contest of Account.

Team 4 believes that a procedure should be devised so that an interested person can bring to the court's attention an Inventory item that the interested person believes is incorrectly valued. Team 4 believes that the personal representative should have the option of giving notice of the filing of the Inventory and that an interested person should have an opportunity to object.

Team 4 does not believe that: 1) the period for objecting should be limited; 2) that an advise is the proper procedure for raising the objection. The purpose of an advise is to make the noticed persons take a position and, therefore, forestall subsequent challenges. The need to determine Inventory values is not subject to the same restraints.

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If Team 4 may be of further assistance, please do not hesitate to contact us.

Hope all is well.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
A Member of
STANTON AND BALLSUN
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Jim Devine, Esq.
Jim Opel, Esq.
Keith Bilter, Esq.

Staff DraftTentative Recommendation
relating to

ACCOUNTS

The provisions of existing law governing accounts¹ are generally restated in the new code without substantive change. There are a few specific changes worthy of note:

Contents of account. The existing probate account includes a number of items that are of limited value and fails to require some information that would make the account a more descriptive and useful document. The new code revises the account contents somewhat to make the probate account more analogous to a standard type of balance sheet.²

The account will include a summary statement of the significant aspects of the administration.³ The summary will be supported by schedules that break down each summary item into its component parts. For instance, the summary item of receipts might be broken down into the totals of interest income, dividend income, royalties received, and miscellaneous receipts. The exact breakdown will vary, depending

1. Prob. Code §§ 920-933.

2. The concepts are derived from Craig, California Probate Accounting Procedures, 39 So. Cal. L. Rev. 316 (1966).

3. The summary includes, in addition to property in the estate and disposition of creditor claims, the amount of receipts and disbursements and the gains and losses on disposition of property.

on the nature of the estate. It will be unnecessary to show in the summary more than the total amount of each component part making up the total.⁴

This scheme encourages the use of sound bookkeeping practices. It will also save the time and expense of a narrative report of the details of each transaction. In case greater detail is required by a beneficiary or other interested person, the court is authorized by the new code to require the personal representative to submit documents supporting the account for inspection and audit.

Contest of account. In a contest of an account an interested person may except to settlement of an allowed claim; existing law permits a jury trial on issues of fact in the contest.⁵ The new code eliminates the jury trial provision. A jury trial on such a matter is an unnecessary imposition on the parties, the courts, and the persons required to served as jurors, as well as an unwarranted expense.

The new code also makes clear the right of an interested person to obtain court review of actions by the personal representative through a contest of an account, in the interest of procedural efficiency.

4. For illustrative material, see American College of Probate Counsel, National Fiduciary Accounting Standards (1980).

5. Prob. Code § 928.

OUTLINE OF STATUTE

PART 8. ACCOUNTS

CHAPTER 1. GENERAL PROVISIONS

- § 10900. Duty to account
- § 10901. Contents of account
- § 10902. Production of supporting documents

CHAPTER 2. WHEN ACCOUNT REQUIRED

- § 10950. Court ordered account
- § 10951. Final account
- § 10952. Account after authority terminated
- § 10953. Account where personal representative dies or becomes incompetent
- § 10954. Waiver of account

CHAPTER 3. SETTLEMENT OF ACCOUNT

- § 11000. Setting account for settlement
- § 11001. Notice of hearing
- § 11002. Contest of account
- § 11003. Hearing on account
- § 11004. Settlement of claim not paid in full
- § 11005. Settlement of claim not properly made or allowed
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CHAPTER 4. COMPELLING ACCOUNT

- § 11050. Sanction for failure to account
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PART 8. ACCOUNTS

CHAPTER 1. GENERAL PROVISIONS

§ 10900. Duty to account

10900. The personal representative shall account for all of the property in the decedent's estate that comes into the personal representative's possession and for all the income, issues, and profits of the property.

Comment. Section 10900 restates the first portion of the first sentence of former Section 920 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. *State Bar Team 4 (Exhibit 4) believes the language of this section is archaic and would revise it to read: "The personal representative has a duty to account as hereinafter provided in this part." The staff agrees with this suggestion, with the omission of the word "hereinafter."*

§ 10901. Contents of account

10901. An account shall be verified, shall include a report of the administration, and shall show all of the following:

(a) A summary statement, together with supporting schedules, of:

(1) The property in the inventory, including property in any supplemental inventory.

(2) The amount of receipts, excluding capital items.

(3) Gains on sales, or other disposition of property.

(5) The amount of disbursements.

(6) Losses on sales, or other disposition of property.

(7) The amount of property remaining.

(b) Creditor claims, including the name of each claimant, the nature and due date of the claim, and the action of the personal representative on the claim.

(c) All other matters necessary to show the condition of the estate.

Comment. Section 10901 supersedes the first sentence of former Section 921.

Subdivision (a) is based on concepts developed in Craig, California Probate Accounting Procedures, 39 So. Cal. L. Rev. 316 (1966). In the accounting, each schedule should contain a breakdown of the summary item into its component parts. For instance, the summary item of receipts might be broken down into the totals of interest income, dividend income, royalties received, and miscellaneous receipts. The exact breakdown would vary, depending on the nature of the estate. It would be unnecessary to show in the summary more than the total amount of each component part making up the total. For illustrative material, see American College of Probate Counsel, National Fiduciary Accounting Standards (1980).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. A conforming change will be made in the provisions governing the account in a guardianship or conservatorship proceeding. The staff is investigating whether this provision may also appropriately be applied to trusts.

Subdivision (a)(2) of this section distinguishes between receipts and other capital items. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5) points out that some items may be considered both income receipts and principal. "For example, dividends and interest accrued at death are reported on the inventory and appraisal yet they are also items of income. How are they to be reported under Section 10901(a)?" State Bar Team 4 (Exhibit 6) believes this is a good point and has no ready answer. One approach they suggest would be to make an adjustment in the final item required on an account, i.e., property remaining on hand. The staff believes a simpler and better solution would be to require the account to list "receipts, excluding property included in the inventory."

Irving Kellogg of Beverly Hills (Exhibit 3) has written to the Commission urging the Commission to consider the development of a standard format for probate accounts. "The benefits of such a standard are inestimable:

"(1). All probate courts or divisions could apply computerized review and court training could be simplified. Therefore, court administration would be expedited.

"(2). Lawyers would not be wildly creative or ignorantly deficient, thereby causing delays and costs in administration.

"(3). Beneficiaries could refer to a standard or confer with their CPAs who would learn the statutory standard.

"(4). CPAs could assist executors in accounting matters, reducing expenses of administration. The same benefit would apply to paralegals who would have a statutory form to rely on.

"(5). Communication between probate court reviewers and attorneys would be expedited."

Mr. Kellogg analogizes the benefits or advantages to those derived from the Principal and Income Law, which "brought order out of chaos in that area " He suggests that if the Commission proceeds in this area, it should seek the aid of experts in fiduciary accounting. To help evaluate his suggestion for uniform fiduciary accounting in California, he sends the chapter entitled "Fiduciary Accounting" from his book on financial statements.

The staff notes that the Commission has already decided to go part way down the road suggested by Mr. Kellogg in the current draft of the accounting provisions. The Commission draft incorporates more standard general accounting requirements, and in the Comment refers to the National Fiduciary Accounting Standards that are elaborated in Mr. Kellogg's book. Does the Commission wish to go farther in this direction? One possibility, without actually writing accounting standards into law, is to direct or encourage the Judicial Council to develop forms, including detailed instructions. The State Bar Team (Exhibit 4) believes the Commission should continue to develop uniform standards for fiduciary accounting.

The State Bar Team also suggests a redrafting of Section 10901 as follows:

10901. An account shall be verified, ~~shall include a report of the administration,~~ and shall show all of the following:

(a) A summary statement, together with supporting schedules, of:

(1) ~~The property in the inventory, including property in any supplemental inventory.~~ Property in all inventories.

(2) ~~The amount of receipts~~ Receipts, excluding capital principal items.

(3) ~~Gains on sales, or other disposition of property.~~

(4) Other acquisitions of property.

(5) ~~The amount of disbursements~~ Disbursements.

(6) ~~Losses on sales, or other disposition.~~

(7) Other dispositions of property.

~~(7) The amount of property~~ (8) Property remaining.

(b) Creditor claims, including the name of each claimant, the nature and due date of the claim, and the action of the personal representative on the claim.

(c) All Any other matters necessary to show the condition of the estate.

The staff has no substantive problem with this revision. However, we would reorganize it somewhat to list property acquisitions and dispositions adjacent to each other and to list gains and losses on sales adjacent to each other. We also note that this revision omits the "report of administration", which the Commission has in the past felt to be an important part of the account.

§ 10902. Production of supporting documents

10902. On court order, or on request by an interested person, the personal representative shall submit the documents supporting an account for inspection and audit by the court or the interested person.

Comment. Section 10902 is new.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Note. State Bar Team 4 (Exhibit 4) would revise this section to read: "Upon request by an interested person, the personal representative shall produce those documents supporting the account that have been specified in the request." This revision omits the ability of the court on its own motion to obtain supporting documentation, a matter that was important to the Commission in the past.

The State Bar Team (Exhibit 6) generally prefers a less formal approach than either appears in the Commission's draft or than is advocated by other bar groups from which we received comments. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5) would require greater court involvement. They believe it would be preferable to require production of documents "upon order of the court on its own motion or pursuant to a petition filed by an interested person."

The Legislative Committee of the Estate Planning, Probate and Trust Law Section of the Beverly Hills Bar Association (Exhibit 7) would go even further and eliminate the ability of the personal representative to request or petition for information altogether. They believe "there are too many cases in which this provision will lead to a 'fishing expedition' and will result in harassment of the personal representative, not to mention unnecessary cost to the estate, especially when there may be a hostile relationship between the representative and the beneficiaries." They would require production of documents only on court order and not on demand by the personal representative "in view of the fact that the Court can and will order the personal representative to submit supporting documents when an account is not sufficiently itemized or when the Court believes that there is a sufficient basis for objections presented prior to or at the time of the hearing."

CHAPTER 2. WHEN ACCOUNT REQUIRED

§ 10950. Court ordered account

10950. (a) The court may order an account at any time upon its own motion or upon petition of an interested person.

(b) The court shall order an account upon petition of an interested person made more than one year after the last account was filed or, if no previous account has been filed, made more than one year after issuance of letters to the personal representative.

Comment. Section 10950 supersedes portions of the first sentences of former Sections 921 and 922.

CROSS-REFERENCES

Actions in chambers § 166
Defined terms
Interested person § 48
Letters § 52
Personal representative § 58

Note. State Bar Team 4 (Exhibit 4) states that this section should be subject to no waiver having been filed. In fact, it is subject to no waiver having been filed. See Section 10954 (waiver of account). It may be useful to emphasize the point in the Comment or even in the section.

The State Bar Team would limit the section to a showing of reasonable cause, and would not allow the court to order an account more than two years after entry of the order for final distribution.

The State Bar Team would also restate subdivision (b) as follows: "If an interested person files a petition requesting the personal representative to file an account, and no accounting has been filed for a period of one year, the court shall order the personal representative within a specified time." The staff does not believe this restatement is as clear as the existing Commission draft, although it does add the concept of a "specified time" in the court order, which may be worth incorporating in any redraft.

The Legislative Committee of the Estate Planning, Probate and Trust Law Section of the Beverly Hills Bar Association (Exhibit 7) would add to subdivision (b) a provision that a federal estate tax return is required, an account may not be required until more than 18 months after issuance of letters. This would be consistent with the provisions of existing Section 1025.5 (requirement of petition for final distribution or report of status of administration). The State Bar Team (Exhibit 8) disagrees with this proposal, but gives no reasons.

§ 10951. Final account

10951. The personal representative shall file a final account and petition for an order for final distribution of the estate when the estate is in a condition to be closed.

Comment. Section 10951 supersedes the second sentence of former Section 922; it is consistent with Section 11640 (petition and order for final distribution).

CROSS-REFERENCES

Definitions
Personal representative § 58

Note. State Bar Team 4 (Exhibit 4) states that this section should be subject to no waiver having been filed. In fact, it is subject to no waiver having been filed. See Section 10954 (waiver of account). It may be useful to emphasize the point in the Comment or even in the section.

§ 10952. Account after authority terminated

10952. Upon petition of a successor personal representative, the court may order a personal representative who resigns, is removed from office or whose authority is otherwise terminated to file an account. The account shall be filed within 90 days after the court order unless the time is extended by the court. If the personal representative fails to so file the account, the court may compel the account pursuant to Chapter 4 (commencing with Section 11050).

Comment. Section 10952 supersedes former Section 923. For an account where the personal representative dies or becomes incompetent, see Section 10953.

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. State Bar Team 4 (Exhibit 4) states that this section should be subject to no waiver having been filed. In fact, it is subject to no waiver having been filed. See Section 10954 (waiver of account). It may be useful to emphasize the point in the Comment or even in the section.

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5) suggests that an account in this situation should not be discretionary with the court upon petition, but should be automatically required whenever a personal representative leaves office. "It is precisely this type of situation when an account should be required. After all, when an estate is closed the personal representative is required under proposed Section 10951 to file a final account."

This position is echoed by the Legislative Committee of the Estate Planning, Probate and Trust Law Section of the Beverly Hills Bar Association (Exhibit 7), which can conceive of only a limited number of cases in which a personal representative whose authority has terminated would not be required to file an account. Requiring the successor personal representative to file a petition simply adds unnecessary delay and expense. They would require an account automatically, within 90 days after receipt of notice of appointment of a successor, "unless otherwise ordered by the court." Although this would require notification of appointment of a successor, "we believe that such requirement is much less burdensome than the requirement of a petition imposed by the current language of the proposed section."

State Bar Team 4 (Exhibit 6) takes a contrary position. They believe in many instances a formal accounting may not be necessary, and thus would limit the requirement to cases ordered by the court, on petition. In addition, the Bar Team (Exhibit 4) notes one case where the personal representative should never be required to account. "If the authority of the personal representative is terminated by court order, then the personal representative should not thereafter have to account." The reasoning behind this suggestion is not clear to the staff.

§ 10953. Account where personal representative dies or becomes incompetent

10953. (a) As used in this section, "legal representative" means the personal representative of a deceased personal representative or the conservator of the estate of an incompetent personal representative.

(b) If the personal representative dies or becomes incompetent, the account shall be filed by the legal representative. Upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the legal representative to file an account of the administration of the personal representative, and shall settle the account as in other cases.

(c) If the personal representative dies or becomes incompetent and there is no legal representative appointed, or the personal representative absconds, the court may compel the attorney for the absconding, deceased, or incompetent personal representative or attorney of record in the estate proceeding to file an account of the administration of the absconding, deceased or incompetent personal representative to the extent that the attorney has information or records available for the purpose. The account of the attorney need not be verified. A fee shall be allowed to the attorney by the court for this extraordinary service.

Comment. Section 10953 restates former Section 932 without substantive change. The court referred to in this section is the court in which the estate of the original decedent is being administered.

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. Subdivision (b) requires the legal representative of a personal representative to file an account on petition of a successor personal representative, when ordered by the court. The Legislative Committee of the Estate Planning, Probate and Trust Law Section of the Beverly Hills Bar Association (Exhibit 7) believes that the filing should be automatic within 90 days without the need for a petition or court order, while State Bar Team 4 (Exhibit 8) believes it should be subject to court control. See discussion in connection with Section 10952 (account after authority terminated).

Subdivision (c) refers to an "absconding" personal representative. The State Bar Team (Exhibit 4) questions the meaning of this term. This is existing law. The staff assumes the term has its ordinary English meaning of stealing off with the money.

State Bar Team 4 (Exhibit 4), the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5), and the Legislative Committee of the Estate Planning, Probate and Trust Law Section of the Beverly Hills Bar Association (Exhibit 7) all note that the accounting duty of a legal representative under subdivision (b) is not limited to situations where the legal representative has information or records available for the purpose, whereas the duty of an attorney to account under subdivision (c) is so limited. The State Bar Team is also uncertain as to the meaning of "available" and is concerned about the extent of the lawyer's duty.

The Beverly Hills group seeks to give some meaning to the "available" information concept by imposing the same duty to investigate on the legal representative under subdivision (b) and the attorney under subdivision (c). They would require some degree of diligence in locating records and assets. Otherwise, it would be "meaningless" for the Court to order an account to be prepared on behalf of a deceased, incompetent, or absconding representative. Specifically, they suggest that the person preparing the account "shall take such actions as are reasonably required to enable him to prepare the required account and, as part of the account, shall inform the court of the actions taken in attempting to reconstruct the administration of the personal representative whose authority is terminated." They note that the competent probate attorney generally guides the client throughout the probate procedure and will have information available on from which an account can be constructed. "There appears to be no reason why the attorney of record ordered to prepare an account for his client should be under any lesser obligation than the legal representative." The State Bar Team (Exhibit 8) agrees that "the legal representative should report to the extent that information or records are available."

The three bar groups also note that subdivision (b) requires the account of the legal representative to be verified, while subdivision (c) excuses verification for the account of the attorney. All three groups believe the rule should be the same. However, the Beverly Hills group would require both accounts to be verified, while the State Bar Team (Exhibit 8) would require neither to be verified.

Subdivision (b) says nothing about the fee of the legal representative for preparing the account, whereas subdivision (c) allows the attorney extraordinary fees for this service. Again, the three bar groups believe the statute should be revised to provide the

same rule. The Beverly Hills group notes there is a question of who is to pay the cost of preparing the account. The estate for which the account is prepared should bear the cost, but they do not believe the estate should be surcharged with an extraordinary fee. They would thus allow the cost as a portion of the basic statutory commission for the estate. State Bar Team 4 (Exhibit 8) believes that the fee for the account should not be paid from the statutory commission. The Bar Team (Exhibit 4) would provide an extraordinary fee "based upon the level of compensation currently paid to practitioners in the area for similar services."

The Beverly Hills group would have the legal representative or attorney appointed a special administrator for purposes of preparing the account. They believe that this will give a context and structure so that the representative or attorney will have adequate powers to gather information needed to complete the account; it would also tie in with the notion that the account is part of the statutory commission structure, to be shared by persons who perform work for the estate. The Bar Team (Exhibit 8) believes that the special administrator procedure should not be adopted.

§ 10954. Waiver of account

10954. (a) The personal representative is not required to file an account if all persons entitled to distribution of the estate have executed and filed one of the following:

(1) A written waiver of account.

(2) A written acknowledgment that the person has received the share of the estate to which the person is entitled.

(b) The waiver or acknowledgment under subdivision (a) shall be executed by the following persons:

(1) If the distributee is an adult and competent, by the distributee.

(2) If the distributee is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver is executed by a guardian of the estate of the minor, the waiver may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

(3) If the distributee is a conservatee, by the conservator of the estate of the distributee. The waiver may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the distributee is a trust, by the trustee, but only if the named trustee's written acceptance of the trust is filed with the court.

(5) If the distributee is an estate, by the personal representative of the estate.

(c) Notwithstanding waiver of the account, the personal representative shall file a report at the time the account would otherwise have been required that includes the amount of fees or commission paid or payable to the personal representative and to the attorney and setting forth the basis for determining the amount.

(d) If any distributees of the estate are unascertained, an account cannot be waived.

Comment. Section 10954 restates former Section 933 without substantive change. The reference to a trustee's consent to act has been replaced by a reference to the trustee's written acceptance of the trust. See Section 15600 (acceptance of trust by trustee).

CROSS-REFERENCES

Definitions

Person § 56
Personal representative § 58
Trust § 82
Trustee § 84

Note. State Bar Team 4 (Exhibit 4) would revise subdivision (d) to read: "An accounting should not be waived until all distributees are ascertained, represented by a guardian ad litem or otherwise adequately represented."

CHAPTER 3. SETTLEMENT OF ACCOUNT

Note. State Bar Team 4 (Exhibit 4) believes this chapter heading should be reexamined because the chapter deals with other than just procedural matters.

§ 11000. Setting account for settlement

11000. When an account is filed, the clerk shall set the account for settlement by the court.

Comment. Section 11000 restates the first sentence of former Section 926 without substantive change.

§ 11001. Notice of hearing

11001. (a) The personal representative shall give notice of the hearing as provided in Section 1220 to all of the following persons:

(1) Each known heir whose interest in the estate is affected by the account.

(2) Each known devisee whose interest in the estate is affected by the account.

(3) The State of California, if any portion of the estate is to escheat to it and its interest is affected by the account.

(b) If the petition for approval of the account requests fees, the notice of hearing shall so state.

(c) If the account is a final account and is filed together with a petition for an order for final distribution of the estate, the notice of hearing shall so state.

Comment. Subdivision (a) of Section 11001 restates the third sentence of former Section 926 without substantive change. Subdivision (b) is new. Subdivision (c) restates the first portion of the second sentence without substantive change.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Person § 56

Personal representative § 58

Note. This draft deletes the reference in subdivision (a) to persons who have requested special notice. The new draft requires notice as provided in Section 1220, which prescribes the general manner of notice and adds that "Nothing in this section excuses compliance with the requirements for notice to a person who has requested special notice pursuant to Article 6 (commencing with Section 1250)."

The draft also alleviates concerns about lack of uniformity expressed by the Estate Planning, Probate and Trust Section of the Santa Clara County Bar Association (Exhibit 2) and State Bar Team 4 (Exhibit 4).

§ 11002. Contest of account

11002. (a) Any interested person may appear and contest an account by filing written exceptions to the account at or before the hearing.

(b) All matters may be contested for cause shown, including but not limited to:

(1) The validity of an allowed or approved claim not reported in a previous account and not established by judgment.

(2) The value of property in the inventory and appraisal.

(3) Actions taken by the personal representative not previously authorized or approved by the court.

(c) If, upon the hearing, the court determines the contest was made without reasonable cause and good faith, the court may order that the fees and costs of the personal representative and attorney incurred to defend the account are a charge against the contestant.

Comment. Section 11002 restates the first, second, and fourth sentences of former Section 927, with the addition of a provision making clear the right of an interested person to obtain court review of actions by the personal representative through a contest of an account.

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. Subdivision (a) requires written exceptions to an account. State Bar Team 4 (Exhibit 4) believes the provision should be clarified to permit oral exceptions as well as a reasonable time for written objections. The tentative approach the Commission has taken concerning this issue in other areas is to require objections to be written and to be made within the 15 day hearing time, but to make an express provision for the court to grant continuances. Thus a person who needs more time can request a continuance, and then get the objections filed in writing.

Subdivision (b)(2) allows a contest of the value of property in the inventory and appraisal at the time of settling an account. The Legislative Committee of the Estate Planning, Probate and Trust Law Section of the Beverly Hills Bar Association (Exhibit 7) believes that the filing of an account is not the proper time to contest the inventory value of property. They point out that in many cases an account may not be filed for a year or more following the filing of the inventory. During that time many actions may be taken based on the inventory values, e.g., estate tax return filed, income tax returns filed, family allowance made, creditor claims paid, and property sales made. They suggest that a personal representative should be able to cut off late contests by giving advice that an inventory has been filed and allowing 20 days to make objections.

State Bar Team 4 (Exhibit 8) does not believe there is a need to cut off challenges to inventory values, hence does not believe that the period for objection should be limited or that an advice procedure is the proper way to raise an objection. This is consistent with the Commission's position on a similar point raised in connection with the inventory and appraisal at the April meeting in Sacramento.

Subdivision (b)(3) permits a contest of actions taken by the personal representative that have not been previously sanctioned by the court. Both State Bar Team 4 (Exhibit 4) and the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5) believe this provision needs to be coordinated with the independent administration provisions for consenting to a proposed action. The staff would make this provision "subject to Section 10590", as suggested by the Bar Team.

Subdivision (c) provides for a grant of attorney's fees and costs if an account was contested in bad faith and without reasonable cause. The Bar Team would revise this provision as follows, omitting the bad faith requirement:

(c) If, upon hearing, the court rules against the exceptions and determines the exceptions were without reasonable cause, the court shall order that the fees and costs of the personal representative and attorney incurred to defend the account against the exceptions shall be charged against and paid for by the contestant.

This redraft strengthens the litigation expense provision by limiting court discretion in making an award.

In this connection, the Commission received a letter from Muncie D. Marder of Los Angeles (Exhibit 1) pointing out that when a beneficiary challenges an accounting or actions of the personal representative and seeks a surcharge, the beneficiary in effect funds the litigation, win or lose. This is because if the beneficiary loses, the beneficiary not only pays his or her own attorney's fees but pays the personal representative's attorney's fees as well because the estate that would otherwise go to the beneficiary is reduced to cover this expense. If the beneficiary wins, the personal representative cannot recoup attorney's fees out of the estate, but the beneficiary must still bear his or her own attorney's fees.

Mr. Marder notes that this is contrary to the general public policy that attorney's fee statutes are reciprocal in nature except in those cases where a public benefit is conferred. "I have had to explain this inequity to several of my clients, and have found that it has a very chilling effect on their willingness to challenge what they and I perceive to be a wrongful or negligent act of the personal representative. I believe this is something that could be remedied by appropriate legislation clarifying the source and extent of attorney's fees to be awarded in such cases. I, along with many other probate attorneys I have spoken to, would appreciate your Committee's consideration of these issues."

State Bar Team 4 (Exhibit 4) agrees with Mr. Marder that the common fund doctrine should be incorporated into the Probate Code. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5) also agrees with Mr. Marder's statement that there is no reciprocity. "We believe it would be appropriate to permit, as part of the surcharge against a personal representative, the recovery of a successful contestant's attorneys fees and costs." State Bar Team 4 (Exhibit 6) does not believe a personal representative should be surcharged for a successful contestant's attorney's fees and costs. "One consideration is that the Executive Committee feels that banks and other institutions would refuse to serve if a surcharge were to be imposed."

§ 11003. Hearing on account

11003. (a) At the hearing, the personal representative may be examined on oath concerning the account and the property in the estate of the decedent, and the disposition of the property.

(b) The court may appoint one or more referees to examine the account and make a report on the account, subject to confirmation by the court. The court may allow a reasonable compensation to the referee to be paid out of the estate.

(c) The court may make such orders as the court deems necessary to effectuate the provisions of this section.

Comment. Section 11003 restates the third and fifth sentences of former Section 927 without substantive change. The provision of former Section 928 for jury trial of a contest of an allowed claim is not continued. See Section 7202 (trial by jury).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. State Bar Team 4 (Exhibit 4) would end subdivision (a) after the word "oath."

The Bar Team also agrees that a jury trial should be eliminated on issues of fact in the contest.

§ 11004. Settlement of claim not paid in full

11004. If in an account it appears that the personal representative has paid a claim for less than its full amount, the personal representative shall have credit in the account only for the amount actually paid.

Comment. Section 11004 restates the last portion of the first sentence of former Section 583 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 11005. Settlement of claim not properly made or allowed

11005. If in an account it appears that a debt has been paid without a claim having been filed and established in the manner prescribed by statute, the court in settling the account shall allow the amount paid if all of the following are proven:

- (a) The debt was justly due.
- (b) The debt was paid in good faith.

(c) The amount paid was the true amount of the indebtedness over and above all payments and set-offs.

(d) The estate is solvent.

Comment. Section 11005 restates former Section 929 without substantive change.

Note. State Bar Team 4 (Exhibit 4) believes that practitioners are confused by this section and that clarification is required. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5) would clarify it by approving the payment only if the payment was made before expiration of the creditor claim period; payment should not be approved if made after the claim was barred by expiration of the period. This is consistent with the position the Commission has taken in its recommendation on creditor claims (AB 708). The Bar Team disagrees with this position. It is their consensus that the payment should be approved if it satisfies (a)-(d) of this section, even though the claim might have been barred by expiration of the creditor claim period.

§ 11006. Effect of order settling account

11006. (a) Except as provided in subdivision (b), the order settling an account is conclusive against all interested persons.

(b) A person under legal disability has the right, at any time before entry of an order for final distribution of the estate, to move for cause to reopen and examine the account or to proceed by action against the personal representative or the sureties on the bond. In the action the order settling the account is prima facie evidence of the correctness of the account.

Comment. Section 11006 restates former Section 931 without substantive change. As to the effect of fraud on the conclusiveness of the order, cf. Lazzarone v. Bank of America, 181 Cal. App. 3d 581 (1986) (trust account), and Bank of America v. Superior Court, 181 Cal. App. 3d 705 (1986) (guardianship account).

CROSS-REFERENCES

Definitions

Interested person § 48

Note. Subdivision (b) is an exception to the finality of an order settling an account. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (Exhibit 5) states, "We seen no reason to give a person under a legal disability the limited right to reopen an accounting that has been settled by the court and that would be otherwise final, but for the disability of the beneficiary." State Bar Team 4 (Exhibit 4) disagrees. "If finality is desired for an interim accounting, then a Guardian Ad Litem can be appointed to represent a beneficiary under disability."

CHAPTER 4. COMPELLING ACCOUNT

§ 11050. Sanction for failure to account

11050. Subject to the provisions of this chapter, if the personal representative does not file a required account, the court shall compel the account by punishment for contempt.

Comment. Section 11050 restates the third sentence of former Section 922 without substantive change. This chapter may also be used to compel an account by a personal representative whose authority is terminated. Section 10952.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 11051. Citation

11051. (a) A citation shall be issued, served, and returned, requiring a personal representative who does not file a required account to appear and show cause why the personal representative should not be punished for contempt.

(b) If the personal representative purposefully evades personal service of the citation, the personal representative shall be removed from office.

Comment. Subdivision (a) of Section 11051 restates the last sentence of former Section 922 without substantive change. Subdivision (b) restates a portion of former Section 924 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 11052. Punishment for contempt

11052. If the personal representative does not appear and file a required account, after having been duly cited, the personal representative may be punished for contempt or removed from office, or both, in the discretion of the court.

Comment. Section 11052 restates the last sentence of former Section 921 and restates a portion of former Section 924 without substantive change. See also Section 8505 (removal from office for contempt).

CROSS-REFERENCES

Definitions

Personal representative § 58

Comments to Repealed Sections

ARTICLE 3. RENDERING OF EXHIBITS AND ACCOUNTS

Probate Code § 920 (repealed)

Comment. The first portion of the first sentence of former Section 920 is restated in Section 10900 (duty to account) without substantive change. [For disposition of the remainder of Section 920, see Appendix to 1987 probate legislation.]

Probate Code § 920.3 (repealed)

Comment. [For disposition of former Section 920.3, see Appendix to 1987 probate legislation.]

Probate Code § 920.5 (repealed)

Comment. [For disposition of former Section 920.5, see Appendix to 1987 probate legislation.]

Probate Code § 921 (repealed)

Comment. The first sentence of former Section 921 is restated in Sections 10950 (court ordered account), 166 (actions in chambers), and 10901 (contents of account). The last sentence is restated in Section 11052 (punishment for contempt) without substantive change.

Probate Code § 922 (repealed)

Comment. The first sentence of former Section 922 is restated in Sections 10950 (court ordered account) and 10901 (contents of account). The second sentence is superseded by Section 10951 (final account). The third sentence is restated in Section 11050 (sanction for failure to account) without substantive change. The last sentence is restated in Section 11051(a) (citation) without substantive change.

Probate Code § 923 (repealed)

Comment. Former Section 923 is superseded by Section 10952 (account after authority terminated).

Probate Code § 924 (repealed)

Comment. Former Section 924 is restated in Sections 11051(b) (citation) and 11052 (punishment for contempt) without substantive change.

Probate Code § 925 (repealed)

Comment. Former Section 925 is not continued. The voucher procedure was generally not used.

Probate Code § 926 (repealed)

Comment. The first sentence of former Section 926 is restated in Section 11000 (setting account for settlement) without substantive change. The second sentence is restated in Sections 11001(c) (notice of hearing), 11640 (order for final distribution), and 11750 (distribution pursuant to order). The third sentence is restated in Sections 11001 (notice of hearing) and 34 ("devisee" defined) without substantive change. The substance of the last sentence is restated in Sections 1215 and 1216 (mailing).

Probate Code § 927 (repealed)

Comment. The first and second sentences of former Section 927 are restated in Section 11001 (contest of account) without substantive change. The third and fifth sentences are restated in Section 11003(a) (hearing on account) without substantive change. The fourth sentence is restated in Section 11002 (contest of account) without substantive change. The last sentence is not continued because it is no longer necessary.

Probate Code § 928 (repealed)

Comment. Section 928 is not continued. See Section 7202 (trial by jury).

Probate Code § 929 (repealed)

Comment. Former Section 929 is restated in Section 11005 (settlement of claim not properly made or allowed) without substantive change.

Probate Code § 930 (repealed)

Comment. Former Section 930 is not continued. The voucher procedure was generally not used.

Probate Code § 931 (repealed)

Comment. Former Section 931 is restated in Section 11006 (effect of order settling account) without substantive change.

Probate Code § 932 (repealed)

Comment. Former Section 932 is restated in Section 10953 (account where personal representative dies or becomes incompetent) without substantive change.

Probate Code § 933 (repealed)

Comment. Former Section 933 is restated in Section 10954 (waiver of accounting) without substantive change.