

Memorandum 87-75

Subject: Study L-1011 - Opening Estate Administration (Continued
Review of Comments on Tentative Recommendation)

Attached to this memorandum is a redrafted version of the recommendation relating to opening estate administration, revised to reflect Commission decisions made at the July meeting in Irvine. We need to complete our review of comments received concerning the tentative recommendation before we are in a position to approve a final recommendation for submission to the Legislature.

We will continue our review of the draft where we left off in July, at Section 8405 (form of letters) on page 29. The letters referred to in Notes following the sections were attached to Memorandum 86-201 and its supplements. If you need additional copies of the letters, please let us know.

Besides the material not yet reviewed (Section 8405 and following), the staff has a few additional Notes concerning some of the sections previously dealt with.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Staff Draft
RECOMMENDATION
Relating To
OPENING ESTATE ADMINISTRATION

The provisions of the proposed law governing the opening of estate administration generally follow both the organization and substance of existing law. The proposed law accomplishes some reorganization¹ and also makes many simplifications and technical and clarifying changes.² Minor substantive changes are noted in the Comments to the specific provisions of the proposed law; major changes are described below.

Filing of will with court. Existing law requires the custodian of a will to deliver the will to the named executor within 30 days of being informed of the testator's death.³ The proposed law requires instead that the custodian file the will with the court clerk and mail a copy to the executor or, if none, a beneficiary. This will ensure

1. For example, existing law provides two parallel though not identical procedures for probating a will and appointing a personal representative. The proposed law reorganizes these procedures in a single uniform proceeding for opening estate administration. This is consistent with current practice through consolidated Judicial Council forms.

2. Terminology has been simplified. The proposed law replaces existing references to executors, administrators, administrators with the will annexed, and special administrators, with a single reference to "personal representative," unless a special reference to one particular type is called for. References in existing law to granting of letters, granting of administration, admission as executor, and other varieties of terminology intended to refer to court appointment of a personal representative have been standardized to refer to "appointment of a personal representative." References to the "trust" of the personal representative have been replaced by references to the office of the personal representative. Removal from office is the standardized phrase for such variants as revocation or annulment of letters.

3. Prob. Code § 320.

that the will is kept safe and available when needed by interested persons.

Time for probate of will. Under existing law a will may be admitted to probate at any time after the testator's death.⁴ To ensure some finality in probate proceedings, the proposed law precludes probate of a will to the extent the will affects property that has previously been distributed under court order in estate administration.

Setting petition for hearing. Existing law provides a minimum 10 days before a petition for administration of a decedent's estate may be heard.⁵ The proposed law increases the minimum hearing time to 15 days in recognition of the fact that interested persons may require additional time to prepare for the initial hearing in the administration of the estate.⁶

Notice of hearing. In the interest of simplicity and economy, the proposed law consolidates in a single form the various notices of hearing to open probate administration, whether served or published. Suggestions have been made for changes in the existing law governing publication of notice; the Commission has not received information sufficient to persuade it of the need for change in this area.⁷

4. Prob. Code § 323. Admission of a will to probate and failure to contest a will do not preclude probate of a subsequent will. Prob. Code § 385; Estate of Moore, 180 Cal. 570, 182 P. 285 (1919).

5. Prob. Code § 327.

6. Likewise, the proposed law requires that interested persons receive 15 days actual notice, in order to allow sufficient time to prepare for the hearing.

7. Recent revisions of the publication statute require that, absent a more appropriate paper, publication may be in a newspaper of general circulation published nearest the county seat of the county where the decedent resided and circulated where the decedent resided. See Prob. Code § 333, as amended by 1986 Cal. Stats. ch. 711, § 1. This revision renders posting no longer necessary as a backup where there is no appropriate paper; the proposed law accordingly eliminates the posting provisions.

Will contest. Existing statutes appear to put the burden of proof on a will contestant rather than on a will proponent,⁸ but lack detail on the specific burdens and order of proof in will contests.⁹ The proposed law provides useful detail in this area.¹⁰

In a will contest a jury determination may be had of a number of issues involving the validity of the will.¹¹ The jury trial scheme has been criticized not only because it is erratic in the issues it leaves to the jury,¹² but also because jury verdicts upholding a contest are reversed on appeal in the great majority of cases.¹³

8. Prob. Code § 371. This seems to conflict with the general rule that, "The party affirming is plaintiff and the one denying or avoiding is defendant." Prob. Code § 1230.

9. The cases have resolved this statutory ambiguity by imposing the burden of proof of due execution on the proponent of the will, and the burden of proof of lack of testamentary capacity or undue influence on the contestant.

10. The detail is drawn from Uniform Probate Code Section 3-407.

11. Probate Code Section 371 provides for a jury trial of the following issues:

- (1) Competency of the decedent to make a will.
- (2) Freedom of the decedent from duress, menace, fraud, and undue influence.
- (3) Due execution and attestation of the will.
- (4) Any other question substantially affecting the validity of the will.

12. Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 616 (1931). Simes, The Function of Will Contests, 44 Mich. L. Rev. 503 (1946), notes that a majority of American states provide for a jury trial for largely historical reasons, relating to ejection in land title cases, and concludes that "the issues of fact would seem to be of a sort which could better be dealt with by a court than by a jury." 44 Mich. L. Rev. at 557.

13. See, e.g., discussion in Estate of Mann, 184 Cal. App. 3d 593 (1986):

It is no secret that instructions such as this are repeatedly ignored. In 1892 our Supreme Court unhappily observed that "juries lean against wills which to them seem unequal or unjust." In several later cases decided before the turn of the century the Supreme Court again noted, with apparently increasing distress, that "[t]he upsetting of wills is a growing evil", and that "quite a number of people have come to think that the right to dispose of property by will has but little significance, and may be legally

Jury trial in probate matters is not constitutionally required,¹⁴ and there is a substantial waste of time and resources in going through the jury trial, appeal, and reversal process. Moreover, the whole process has the effect of postponing enjoyment of the estate for several years, which gives unmeritorious contestants leverage to obtain compromise settlements to which they should not be entitled. For these reasons, the proposed law leaves questions of fact in will contests to the judge rather than the jury.

In the case of a will contest after probate (i.e., a proceeding to revoke the probate of a will), existing law requires an award of costs against an unsuccessful contestant and, if the contest is successful, gives the court discretion to award costs either against the person who resisted the contest or against the estate.¹⁵ The proposed law removes the mandatory award of costs against an unsuccessful contestant. Mutuality requires that the court have discretion to award costs against any party, as justice may require.

Existing law apparently allows a minor or incompetent person to commence a proceeding to revoke the probate of a will at any time, even after final distribution of the estate and discharge of the

disregarded whenever the testator has not disposed of his property in a manner which suits the views of a jury." The Supreme Court more recently adverted to this problem in Estate of Fritschi, where it pointed out that a "legion" of appellate decisions have been necessary in order to "strike down attempts of juries to invalidate wills upon the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their properties." 184 Cal. App. 3d at 610 (citations omitted).

See also Note, Will Contests on Trial, 6 Stan. L. Rev. 91 (1953); Breidenbach, Will Contests, in 2 California Decedent Estate Administration §§ 21.139-.141 (Cal. Cont. Ed. Bar 1975).

14. See, e.g., Estate of Beach, 15 Cal. 3d 623, 542 P.2d 994, 125 Cal. Rptr. 570 (1975).

15. Prob. Code § 383.

personal representative.¹⁶ In order to provide assurance of finality in probate proceedings, the proposed law precludes revocation of probate after entry of an order for final distribution.

Competence of person appointed personal representative. Existing law requires that a person appointed as personal representative be an adult, resident of the United States, and have sufficient understanding and integrity, among other qualifications.¹⁷ The governing statutes do not, however, include a conflict of interest among the grounds for disqualification of a personal representative even though the conflict of interest would require removal of the personal representative from office upon appointment.¹⁸ The proposed law cures this problem by adding as a ground for disqualification that the person would be removed from office if appointed. This will save needless court proceedings, as well as substantial amounts of time, and will avoid unnecessary problems and complications in the administration of the estate.

Priority for appointment as administrator. The priority of persons for appointment as administrator of the estate of a decedent corresponds to their priority for inheriting the estate of the decedent under the laws governing intestate succession.¹⁹ Recent changes in the law governing intestate succession²⁰ have rendered the appointment priority scheme inconsistent. The proposed law conforms

16. Prob. Code § 384. The only statutory limit is four months after the end of the person's legal disability.

17. Prob. Code §§ 401, 420. The United States residency requirement applies to administrators but not executors. The proposed law eliminates some of the existing grounds for disqualification such as "drunkenness," "improvidence," and conviction of an "infamous crime", in favor of the general ground that the person is incapable of executing or is otherwise unfit to execute the duties of the office.

18. See, e.g., Estate of Backer, 164 Cal. App. 3d 1159, 211 Cal. Rptr. 163 (1985).

19. Cf. Prob. Code § 422.

20. See Prob. Code §§ 6400-6414.

the priority for appointment as administrator to the current law governing intestate succession.

Priority of surviving spouse. Ordinarily the surviving spouse of the decedent has first priority for appointment as personal representative.²¹ However, where there was pending litigation to dissolve the marriage and the spouses were living apart from each other at the time of the decedent's death, the surviving spouse may have a lower priority, depending upon whether the surviving spouse has waived the right to petition for a determination that property passes to the surviving spouse without administration.²² The proposed law does not distinguish between a surviving spouse who waives the right to petition and one who does not. Any surviving spouse who was involved in a pending proceeding to dissolve the marriage and who was living apart from the decedent is likely to have a conflict of interest with the decedent's heirs and should have lower priority.

Appointment of disinterested person as personal representative. If two persons of equal rank seek appointment as personal representative and are unable to agree, the court is faced with the difficult choice of appointing a person whose interests are antagonistic to those of another person equally entitled to appointment. In this situation, appointment of a disinterested person would be beneficial. The proposed law authorizes the court to make such an appointment.

If no person entitled to higher priority seeks appointment as personal representative, a creditor may be appointed personal representative, but if another creditor objects, the court may appoint a third person instead.²³ The proposed law broadens court discretion to allow appointment of a neutral party whether or not a creditor objects. This may be important for the protection of the estate or other interested parties, as well as for the protection of creditors

21. Prob. Code § 422(a)(1).

22. Prob. Code § 422(a)(6).

23. Prob. Code §§ 422(a)(11), 425.

who may not have received notice of the pendency of the administration proceedings.

Administrator with the will annexed. Because an administrator with the will annexed was not selected by the testator to execute the testator's will, the law does not permit the administrator with the will annexed to exercise discretionary powers granted to an executor by the will.²⁴ In some circumstances exercise of a discretionary power would be desirable and beneficial for the estate and persons interested in the estate. For this reason the proposed law enables the court in its discretion to authorize exercise of discretionary powers by the administrator with the will annexed.

Special administrator. Existing statutes provide for appointment of a special administrator where there are problems of delay in appointing a general personal representative, where there is a vacancy in the office of the personal representative, or for a number of other causes.²⁵ The statutory listing of grounds is unduly restrictive, since there may be other situations where temporary appointment of a special administrator would be beneficial to the estate and interested parties. For example, it may be desirable to liquidate some of the estate assets immediately for tax purposes or to prevent foreclosure, even though a general personal representative will eventually be appointed in due course. The proposed law permits the court to appoint a special administrator to exercise such powers as may be appropriate under the circumstances for the preservation of the estate, if immediate appointment appears necessary. Likewise, the proposed law makes clear that a special administrator may be appointed for a specific purpose or with specific powers and duties,²⁶ or may be granted general powers of a personal representative where it appears to the court proper to grant such powers.²⁷

24. Prob. Code § 409.

25. Prob. Code § 460.

26. This provision is drawn from Uniform Probate Code Section 3-617.

27. Existing statutes are unduly rigid in this respect, listing limited situations where a general grant of authority is proper and requiring, rather than permitting, a general grant of authority in these situations. See Prob. Code § 465.

Upon termination of the special administrator's appointment, the special administrator must deliver the estate assets immediately to the general personal representative and render an account.²⁸ In some cases it may be desirable for the special administrator to retain control during the transitional period, for example to complete a transaction. The proposed law enables the court to authorize this. It may also be wasteful for the special administrator to render a separate account where the same person is appointed general personal representative. In this situation, the proposed law permits the special account to be combined with the first general account of the general personal representative.²⁹

Nonresident personal representative. A nonresident personal representative remains subject to the jurisdiction of the probate court and must maintain a current address with the Secretary of State for service of process.³⁰ Nonetheless, for practical purposes a nonresident may be effectively beyond the reach of the court and interested persons. As a partial remedy for this problem, the proposed law adds express authority for the court to require a bond where appropriate.

Bond of personal representative. A recent addition to existing law requires the court to excuse the filing of a bond if all beneficiaries waive the bond in writing,³¹ but permits the court to require a bond for good cause.³² The proposed law enables the court

28. Prob. Code §§ 466-467.

29. The fees of the special administrator would not be allowed until the final account (unless agreed to by the general personal representative); this would conform the law to statewide practice. The proposed law also conforms the award of attorney's fees for extraordinary services to the general rules on such awards, and recognizes agreements among interested persons on splitting fees between special and general administrations.

30. Prob. Code §§ 405.1-405.6.

31. Prob. Code § 541(b).

32. Prob. Code § 543.

in its discretion to require a bond in any case, whether or not good cause is demonstrated; the bond is inexpensive insurance that the court should be allowed to require notwithstanding waiver by the beneficiaries.

Existing law gives the court discretion to fix the amount of the bond of the personal representative based on the estimated value of personal property in the estate and the probable annual gross income of the estate.³³ The proposed law makes clear that the court has authority to prescribe a minimum bond regardless of the value of property and the income of the estate, but the bond should not exceed the estimated value and income. This approach will provide greater guidance to the court, will be simpler to administer, and will adequately protect persons interested in the estate.

Existing law allows the personal representative the cost of the bond, not exceeding one half of one percent of the amount of the bond.³⁴ The Commission is informed that although bond costs vary around the state, the cost of a personal representative's bond is generally less than the statutory allowance. If bond costs were to exceed the statutory allowance, it would be appropriate to allow the excess cost where reasonable. Surety bond premiums are controlled by the marketplace, not by the statutory allowance. For these reasons, the proposed law eliminates the specific statutory allowance in favor of a general provision allowing recovery of the reasonable cost of the bond.

The guardianship and conservatorship law provides a three-year statute of limitations for recovery on a bond,³⁵ but the law governing administration of decedents' estates includes no comparable provision. The proposed law provides a four-year statute of limitations for recovery on the bond for both decedents' and guardianship estates, running from the close of administration. This

33. Prob. Code § 541(a).

34. Prob. Code § 541.5. In the case of a bond in an amount less than \$4,000 the amount allowed is \$50.

35. Prob. Code § 2333.

is consistent with the general statute of limitations for written instruments.³⁶

Informing personal representative of duties. The proposed law includes a requirement that the personal representative acknowledge receipt of a statement of duties and liabilities of the office before letters are issued. The statement of duties and liabilities is in general terms, derived from comparable statements used in a number of probate courts around the state.³⁷ The statement should be helpful in giving the personal representative a basic understanding of the responsibilities involved in the office.

Suspension of powers of personal representative. Existing law enables the court to restrain the personal representative from taking actions adverse to the interests of interested persons in limited situations, such as where probate of a lost or destroyed will is pending.³⁸ This provision is useful, but is unduly restricted.³⁹ The proposed law includes a general provision to enable the court to suspend the powers of the personal representative either generally or as to specific property or duties.⁴⁰ In order to protect against abuse, the proposed law also authorizes the court to award attorney's fees where a petition to suspend powers is brought unnecessarily.

Removal of personal representative. The existing statute specifies a number of grounds for removal of a personal representative, including such causes as embezzlement, mismanagement, and removal from the state.⁴¹ This statutory statement is obsolete

36. Code Civ. Proc. §§ 337, 996.450.

37. See, e.g., Los Angeles County Superior Court, Probate Department, General Instructions to Estate Representatives (PR 042/R 5-80); Santa Clara County Superior Court, General Instructions to Personal Representatives (Post-Record Catalog #527/New 3-08-85).

38. Prob. Code § 352; see also Prob. Code § 550.

39. See, e.g., Evans, Comments on the Probate Code of California, 19 Cal. L. Rev. 602, 616 (1931).

40. This provision is drawn from Uniform Probate Code Section 3-607.

41. Prob. Code §§ 521, 524.

in two respects--(1) nonresidents may now serve as personal representatives; and (2) other grounds developed by the cases such as having an adverse interest or engaging in hostile acts are not reflected in the statute. The proposed law restates the grounds for removal consistent with existing law.

Removal of a personal representative may be ordered without cause upon petition of a person having higher priority for appointment.⁴² Automatic removal may be inappropriate in some cases, however, as where administration is nearly complete at the time of the petition. For this reason the proposed law gives the court discretion to deny the petition for removal where to grant the petition would be contrary to the sound administration of the estate.

Effect of Reversal of Appointment of Personal Representative

Existing law provides that where the appointment of an executor or administrator is reversed on appeal for error, lawful acts of the executor or administrator are as valid as though the order had been confirmed.⁴³ This rule is ambiguous and can be misleading. The proposed law limits this rule to the determination of rights of persons dealing with the personal representative.⁴⁴

42. Prob. Code §§ 450, 452.

43. Prob. Code § 1298. This rule does not apply where the order is reversed for lack of jurisdiction. Estate of Schwartz, 87 Cal. App. 2d 569, 573, 197 P.2d 223 (1948); Security-First Nat'l Bank v. Superior Court, 100 Cal. App. 702, 704-06, 280 P. 995 (1929).

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

Outline

PART 2. OPENING ESTATE ADMINISTRATION

CHAPTER 1. COMMENCEMENT OF PROCEEDINGS

- § 8000. Petition
- § 8001. Failure of person named executor to petition
- § 8002. Contents of petition
- § 8003. Setting and notice of hearing
- § 8004. Opposition
- § 8005. Hearing
- § 8006. Court order
- § 8007. Determination of jurisdiction conclusive

CHAPTER 2. NOTICE OF HEARING

Article 1. Contents

- § 8100. Form of notice

Article 2. Service of Notice

- § 8110. Persons on whom notice served
- § 8111. Service on Attorney General
- § 8112. Notice to creditors and public entity claimants
- § 8113. Notice involving foreign citizen

Article 3. Publication

- § 8120. Publication required
- § 8121. Publication of notice
- § 8122. Good faith compliance with publication requirement
- § 8123. Type size
- § 8124. Affidavit of publication
- § 8125. Contents of subsequent published notice

CHAPTER 3. PROBATE OF WILL

Article 1. Production of Will

- § 8200. Filing of will
- § 8201. Order for production of will
- § 8202. Will detained outside California

Article 2. Proof of Will

- § 8220. Evidence of subscribing witness
- § 8221. Proof where no subscribing witness available
- § 8222. Proof of holographic will

- § 8223. Proof of lost or destroyed will
- § 8224. Subsequent admissibility of testimony
- § 8225. Admission of will to probate
- § 8226. Effect of admission of will to probate

Article 3. Contest of Will

- § 8250. Summons
- § 8251. Responsive pleading
- § 8252. Trial
- § 8253. Evidence of execution
- § 8254. Judgment

Article 4. Revocation of Probate

- § 8270. Petition for revocation
- § 8271. Summons
- § 8272. Revocation
- § 8273. Costs and attorney's fees

CHAPTER 4. APPOINTMENT OF PERSONAL REPRESENTATIVE

Article 1. General Provisions

- § 8400. Appointment necessary
- § 8401. Deposit in controlled account
- § 8402. Qualifications
- § 8403. Oath
- § 8404. Statement of duties and liabilities
- § 8405. Form of letters
- § 8406. Suspension of powers of personal representative
- § 8407. Claims against personal representative
- § 8408. Selection of attorney
- § 8409. Effect of reversal of appointment of personal representative

Article 2. Executors

- § 8420. Right to appointment as personal representative
- § 8421. Executor not specifically named
- § 8422. Power to designate executor
- § 8423. Successor trust company as executor
- § 8424. Minor named as executor
- § 8425. When fewer than all executors appointed

Article 3. Administrators With Will Annexed

- § 8440. Appointment
- § 8441. Priority for appointment
- § 8442. Authority of administrator with will annexed

Article 4. Administrators

- § 8460. Appointment of administrator
- § 8461. Priority for appointment
- § 8462. Priority of relatives
- § 8463. Surviving spouse
- § 8464. Minors and incompetent persons
- § 8465. Nominee of person entitled to appointment
- § 8466. Priority of creditor
- § 8467. Equal priority
- § 8468. Administration by any competent person

Article 5. Bond

- § 8480. Bond required
- § 8481. Waiver of bond
- § 8482. Amount of bond
- § 8483. Reduction of bond by deposit of assets
- § 8484. Excessive bond
- § 8485. Substitution or release of sureties
- § 8486. Cost of bond
- § 8487. Law governing bond
- § 8488. Limitation as to sureties on bond

Article 6. Removal from Office

- § 8500. Procedure for removal
- § 8501. Revocation of letters
- § 8502. Grounds for removal
- § 8503. Removal at request of person with higher priority
- § 8504. Subsequent probate of will
- § 8505. Contempt

Article 7. Changes in Administration

- § 8520. Vacancy in office
- § 8521. Vacancy where other personal representatives remain
- § 8522. Vacancy where no personal representatives remain
- § 8523. Interim protection of estate
- § 8524. Successor personal representative
- § 8525. Effect of vacancy

Article 8. Special Administrators

- § 8540. Grounds for appointment
- § 8541. Procedure for appointment
- § 8542. Issuance of letters
- § 8543. Waiver of bond
- § 8544. Special powers, duties, and obligations
- § 8545. General powers, duties, and obligations
- § 8546. Termination of authority
- § 8547. Fees and commissions

Article 9. Nonresident Personal Representative

- § 8570. "Nonresident personal representative" defined
- § 8571. Bond of nonresident personal representative
- § 8572. Secretary of State as attorney
- § 8573. Statement of address
- § 8574. Manner of service
- § 8575. Proof of service
- § 8576. Effect of service
- § 8577. Noncompliance

PART 2. OPENING ESTATE ADMINISTRATION

CHAPTER 1. COMMENCEMENT OF PROCEEDINGS

§ 8000. Petition

8000. At any time after a decedent's death, any interested person may commence proceedings for administration of the estate of the decedent by a petition to the court for an order determining the date and place of the decedent's death and for either or both of the following:

(a) Appointment of a personal representative.

(b) Probate of the decedent's will. A petition for probate of the decedent's will may be made regardless of whether the will is in the petitioner's possession or is lost, destroyed, or beyond the jurisdiction of the state.

Comment. Section 8000 restates former law without substantive change. See, e.g., former Section 323 (petition for probate of will). The court having jurisdiction is the superior court of the proper county. Sections 7050 (jurisdiction in superior court), 7051 (venue), and 7070-7072 (transfer of proceedings).

CROSS-REFERENCES

Appointment of public administrator § 7641

Definitions

Interested person § 48

Personal representative § 58

Will § 88

§ 8001. Failure of person named executor to petition

8001. Unless good cause for delay is shown, if a person named in a will as executor fails to petition the court for administration of the estate within 30 days after the person has knowledge of the death of the decedent, the person may be held to have waived the right to appointment as personal representative.

Comment. Section 8001 restates former Section 324 without substantive change. If the person named as executor is held to have waived the right to appointment, the court may appoint another competent person as personal representative. See Section 8440 (administrators with the will annexed).

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Will § 88

Note. This section by its terms applies when a person learns of the decedent's death, whether or not the person is aware of the decedent's will naming the person as executor. If a 30-day cut-off of the person's right is to be imposed, perhaps it should be 30 days after learning of being named executor in the will.

A larger question is whether this section even represents desirable policy. Suppose a person dies leaving everything to a surviving spouse and naming the surviving spouse executor. The surviving spouse simply takes the property, but more than 30 days later it becomes apparent that administration of the decedent's estate would be desirable for one reason or another. Should the surviving spouse be precluded from acting as executor?

§ 8002. Contents of petition

8002. (a) The petition shall contain all of the following information:

(1) The facts referred to in Section 8005(b)(1)(A).

(2) The street number, street, and city, or other address, and the county of the decedent's residence at the time of death.

(3) The name, age, address, and relation to the decedent of each heir and devisee of the decedent, so far as known to or reasonably ascertainable by the petitioner.

(4) The character and estimated value of the property in the estate.

(5) The name of the person for whom appointment as personal representative is petitioned.

(b) If the decedent left a will:

(1) The petitioner shall attach to the petition a photographic copy of the will. In the case of a holographic will, the petitioner shall also attach a typed copy of the will.

(2) If the will is in a foreign language, the petitioner shall attach an English language translation. Upon admission of the will to probate, the court shall certify to a correct translation into English, and the certified translation shall be filed with the will.

(3) The petition shall state whether the person named as executor in the will consents to act or waives the right to appointment.

Comment. Section 8002 supersedes portions of former Sections 326 (petition for probate of will), 332 (admission of will to probate), and 440 (petition for letters of administration). It substitutes the address for the residence of heirs and devisees, adds an express requirement that a copy of the will be attached, and provides for notice to heirs and devisees reasonably ascertainable by the petitioner. For general provisions governing the signing of this and other petitions, see Section 1020 (petitions, reports, accounts).

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Person § 56

Personal representative § 58

Property § 62

Will § 88

Verification required § 1021

§ 8003. Setting and notice of hearing

8003. (a) The hearing on the petition shall be set for a day not less than 15 nor more than 30 days after the petition is filed. At the request of the petitioner made at the time the petition is filed, the hearing on the petition shall be set for a day not less than 30 nor more than 45 days after the petition is filed.

(b) The petitioner shall serve and publish notice of the hearing in the manner prescribed in Chapter 2 (commencing with Section 8100).

Comment. Section 8003 restates former Sections 327 (probate of will) and 441 (application for letters), except that the 10-day minimum period is increased to 15 days and the petitioner rather than the clerk has the duty of giving notice.

CROSS-REFERENCES

Clerk to set matter for hearing § 1041

§ 8004. Opposition

8004. (a) If appointment of the personal representative is contested, the grounds of opposition may include a challenge to the competency of the personal representative or the right to appointment. If the contest asserts the right of another person to appointment as personal representative, the contestant shall also file a petition and serve notice in the manner provided in Article 2 (commencing with Section 8110) of Chapter 2, and the court shall hear the two petitions together.

(b) If a will is contested, the applicable procedure is that provided in Article 3 (commencing with Section 8250) of Chapter 3.

Comment. Subdivision (a) of Section 8004 restates portions of former Sections 370, 407, and 442 without substantive change. See also Sections 1043 (response or objection) and 1045 (continuance or postponement). Subdivision (b) is included as a cross-reference.

CROSS-REFERENCES

Definitions

Interested person § 48

Person § 56

Personal representative § 58

Will § 88

Verification required § 1021

§ 8005. Hearing

8005. (a) At the hearing on the petition, the court may examine and compel any person to attend as a witness concerning any of the following matters:

(1) The time, place, and manner of the decedent's death.

(2) The place of the decedent's domicile and residence at the time of death.

(3) The character and value of the decedent's property.

(4) Whether or not the decedent left a will.

(b) The following matters shall be established:

(1) The jurisdictional facts, including:

(A) The date and place of the decedent's death and that the decedent was domiciled in this state or left property in this state at the time of death.

(B) The publication of notice pursuant to Article 3 (commencing with Section 8120) of Chapter 2.

(2) The existence or nonexistence of the decedent's will.

(3) That notice of the hearing was served as provided in Article 2 (commencing with Section 8110) of Chapter 2.

Comment. Section 8005 restates former Section 443 and a portion of the first sentence of former Section 407 with the addition of the references to notice. See also Section 1046 (hearing and order).

CROSS-REFERENCES

Definitions

Property § 62

Will § 88

§ 8006. Court order

8006. (a) If the court finds that the matters referred to in Section 8005(b)(1) exist, the court shall make an order determining the time and place of the decedent's death and the jurisdiction of the court. Where appropriate and upon satisfactory proof, the order shall admit the decedent's will to probate and appoint a personal representative. The date the will is admitted to probate shall be included in the order.

(b) If through defect of form or error the matters referred to in Section 8005(b)(1) are incorrectly stated in the petition but actually exist, the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error makes void an order admitting the will to probate or appointing a personal representative or an order made in any subsequent proceeding.

Comment. Subdivision (a) of Section 8006 is new. For the minute order admitting a will to probate, see Section 8225.

Subdivision (b) restates the last paragraph of former Sections 326 and 440 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

§ 8007. Determination of jurisdiction conclusive

8007. (a) Except as provided in subdivision (b), an order admitting a will to probate or appointing a personal representative, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked.

(b) Subdivision (a) does not apply in either of the following cases:

(1) The presence of fraud in the procurement of the court order.

(2) The court order is based on the erroneous determination of the decedent's death.

Comment. Section 8007 restates former Section 302 without substantive change and extends it to cover probate of a will as well as appointment of a personal representative. This has the effect of codifying the rule in Estate of Sanders, 40 Cal. 3d 607 (1985).

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

CHAPTER 2. NOTICE OF HEARING

Article 1. Contents

§ 8100. Form of notice

8100. The notice of hearing of a petition for administration of a decedent's estate, whether served pursuant to Article 2 (commencing with Section 8110) or published pursuant to Article 3 (commencing with Section 8120), shall state substantially as follows:

NOTICE OF PETITION TO ADMINISTER

ESTATE OF _____, ESTATE NO. _____

To all heirs, beneficiaries, creditors, and contingent creditors of _____ and persons who may be otherwise interested in the will or estate, or both:

A petition has been filed by _____ in the Superior Court of California, County of _____, requesting that _____ be appointed as personal representative to administer the estate of _____ [and for probate of the decedent's will, which is available for examination in the court file].

[The petition requests authority to administer the estate under the Independent Administration of Estates Act. This will avoid the need to obtain court approval for many actions taken in connection with the estate. However, before taking certain actions, the personal representative will be required to give notice to interested persons unless they have waived notice or have consented to the proposed action. The petition will be granted unless good cause is shown why it should not be.]

The petition is set for hearing in Dept. No. _____
at _____
(Address)

on _____ at _____
(Date of hearing) (Time of hearing)

IF YOU OBJECT to the granting of the petition, you should appear at the hearing and state your objections or file written objections with the court before the hearing. Your appearance may be in person or by your attorney.

IF YOU ARE A CREDITOR or a contingent creditor of the deceased, you must file your claim with the court and mail a copy to the personal representative appointed by the court within four months from the date of first issuance of letters as provided in Section 9100 of the California Probate Code. The time for filing claims will not expire before four months from the date of the hearing noticed above.

YOU MAY EXAMINE the file kept by the court. If you are interested in the estate, you may request special notice of the filing of an inventory and appraisal of estate assets or of any petition or account as provided in Section 1250 of the California Probate Code.

(Name and address of petitioner,
or petitioner's attorney)

Comment. Section 8100 restates the second sentence of former Section 328 and former Section 333(b), except that reference to notice of the decedent's death is eliminated from the caption, the type size is not specified, and a reference to the decedent's will is added. Cf. Section 8123 (type size). Section 8100 also restates the last sentence of former Section 441 without substantive change and incorporates the substance of Section 10451(c). Section 8100 consolidates the published notice with the general notice served on heirs or beneficiaries, so that there is a single form of notice.

Article 2. Service of Notice

§ 8110. Persons on whom notice served

8110. At least 15 days before the hearing of a petition for administration of a decedent's estate, the petitioner shall serve notice of the hearing on all of the following persons:

(a) Each heir of the decedent, so far as known to or reasonably ascertainable by the petitioner.

(b) Each devisee and executor named in any will being offered for probate.

Comment. Section 8110 restates the first part of the first sentence of former Section 328 and a portion of the second sentence of former Section 441, with the extension of the notice period from 10 days to 15 and limitation of service to known heirs. See also Section 1202 (additional notice on court order). Cf. Section 9050 (notice to creditors).

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Person § 56

Will § 88

§ 8111. Service on Attorney General

8111. If the decedent's will involves or may involve a testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee resident in this state, or involves or may involve a devise for charitable purposes without an identified devisee, notice of hearing accompanied by a copy of the petition and of the will shall be served upon the Attorney General.

Comment. Section 8111 restates the second paragraph of former Section 328 without substantive change. See also Section 1209 (notice to state).

CROSS-REFERENCES

Definitions

Devise § 32
Devisee § 34
Will § 88

§ 8112. Notice to creditors and public entity claimants

8112. A general personal representative shall give notice of administration of the estate of the decedent to creditors under Chapter 2 (commencing with Section 9050), and to public entities under Chapter 5 (commencing with Section 9200), of Part 4.

Comment. Section 8112 is intended for cross-referencing purposes.

§ 8113. Notice involving foreign citizen

8113. (a) If a citizen of a foreign country dies without leaving a will or leaves a will without naming an executor, or if it appears that property will pass to a citizen of a foreign country, notice shall be given to the consul of the foreign country.

(b) Notice under this section is required only if the particular foreign country has consul representation in the United States and the United States has treaty rights with that country.

Comment. Section 8113 is drawn from Section 7.06 of the Los Angeles County Probate Policy Memorandum (1985). Whether a country has consul representation in the United States and the United States has treaty rights with the country may be ascertained from the United States Department of State.

Article 3. Publication

§ 8120. Publication required

8120. In addition to service of the notice of hearing as provided in Article 2 (commencing with Section 8110), notice of hearing of a petition for administration of a decedent's estate shall also be published before the hearing in the manner provided in this article.

Comment. Section 8120 is new. It is intended for organizational purposes.

§ 8121. Publication of notice

8121. (a) Notice shall be published for at least 10 days. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient.

(b) Notice shall be published in a newspaper of general circulation in the city where the decedent resided at the time of death, or where the decedent's property is located if the court has jurisdiction pursuant to Section 7052. If there is no such newspaper, the decedent did not reside in a city, or the property is not located in a city, then notice shall be published in a newspaper of general circulation in the county which is circulated within the area of the county in which the decedent resided or the property is located. If there is no such newspaper, notice shall be published in a newspaper of general circulation published in the State of California nearest to the county seat of the county in which the decedent resided or the property is located, and which is circulated within the area of the county in which the decedent resided or the property is located.

(c) For purposes of this section, "city" means a charter city as defined in Section 34101 of the Government Code or a general law city as defined in Section 34102 of the Government Code.

Comment. Section 8121 restates subdivision (a) of former Section 333 but omits the posting provision, which is no longer necessary. The former reference to the "community" where the decedent resided is replaced by a reference to the "area of the county", since some decedents do not reside in communities.

CROSS-REFERENCES

Definitions

Property § 62

§ 8122. Good faith compliance with publication requirement

8122. The Legislature finds and declares that, to be most effective, notice of hearing should be published in compliance with Section 8121. However, the Legislature recognizes the possibility that in unusual cases due to confusion over jurisdictional boundaries or oversight such notice may inadvertently be published in a newspaper that does not satisfy Section 8121. Therefore, to prevent a minor error in publication from invalidating what would otherwise be a proper

proceeding, the Legislature further finds and declares that notice published in a good faith attempt to comply with Section 8121 is sufficient to provide notice of hearing and to establish jurisdiction if the court expressly finds that the notice was published in a newspaper of general circulation published within the county and widely circulated within a true cross-section of the area of the county in which the decedent resided or the property was located in substantial compliance with Section 8121.

Comment. Section 8122 restates former Section 334 without substantive change.

CROSS-REFERENCES

Definitions

Property § 62

§ 8123. Type size

8123. The caption of a notice under this article shall be in 8-point type or larger and the text shall be in 7-point type or larger.

Comment. Section 8123 restates the introductory portion of subdivision (b) of former Section 333 without substantive change. See also Code Civ. Proc. § 1019 (type size variations).

§ 8124. Affidavit of publication

8124. A petition for administration of a decedent's estate shall not be heard by the court unless an affidavit showing due publication of the notice of hearing has been filed with the court. The affidavit shall contain a copy of the notice and state the date of its publication.

Comment. Section 8124 restates subdivision (c) of former Section 333 without substantive change.

§ 8125. Contents of subsequent published notice

8125. Notwithstanding Section 8100, after the notice of hearing is published and an affidavit filed, any subsequent publication of the notice may omit the information for creditors and contingent creditors.

Comment. Section 8125 restates former Section 333(d) without substantive change.

CHAPTER 3. PROBATE OF WILL

Article 1. Production of Will

§ 8200. Filing of will

8200. (a) Unless a petition for probate of the will is earlier filed, the custodian of a will shall, within 30 days after having knowledge of the death of the testator, do both of the following:

(1) File the will with the clerk of the superior court of the county in which the estate of the decedent may be administered.

(2) Mail a copy of the will to the person named in the will as executor, if the person's whereabouts are known, or if not, to a person named in the will as a beneficiary, if the person's whereabouts are known.

(b) A custodian of a will who fails to comply with the requirements of this section is liable for all damages sustained by any person injured by the failure.

(c) The clerk shall release a copy of a will filed pursuant to this section for attachment to a petition for probate of the will or otherwise on receipt of a court order for production of the will and payment of the required fee.

Comment. Section 8200 supersedes former Section 320. Section 8200 requires filing of the original will in all cases, and adds a procedure for production of the filed will.

CROSS-REFERENCES

Defined terms

Beneficiary § 24

Person § 56

Will § 88

Note. Subdivision (a) requires the custodian of a will to file the will with the court clerk and mail a copy to the named executor or beneficiary. It might be more appropriate to require the custodian simply to notify the executor or beneficiary that the will has been filed, rather than imposing on the custodian the added burden of reproducing and mailing the will.

Subdivision (c) provides for release by the clerk of copies of the will on court order. The court order requirement seems burdensome; copies might be made available on request and payment of the required fee.

§ 8201. Order for production of will

8201. If, on petition alleging that a person has possession of a decedent's will, the court is satisfied that the allegation is true, the court shall order the person to produce the will.

Comment. Section 8201 restates a portion of former Section 321. The court or judge has general authority to enforce the production of wills and the attendance of witnesses. See Section 7060 (authority of court or judge).

CROSS-REFERENCES

Definitions

Person § 56

Will § 88

§ 8202. Will detained outside California

8202. If the will of a person who was domiciled in this state at the time of death is detained in a court of any other state or country and cannot be produced for probate in this state, a certified photographic copy of the will may be admitted to probate in this state with the same force and effect as the original will. The same proof shall be required as if the original will were produced.

Comment. Section 8202 restates former Section 330 with clarifications that domicile, rather than residence, is the determining factor and that a certified, rather than authenticated, copy of the will is necessary. Proof of a certified copy may be made in the same manner as proof of an original will. Thus the court may authorize a copy to be presented to the witnesses and the witnesses may be asked the same questions with respect to the copy as if the original will were present. See Article 2 (commencing with Section 8220) (proof of will).

CROSS-REFERENCES

Definitions

Person § 56

State § 74

Will § 88

Article 2. Proof of Will

§ 8220. Evidence of subscribing witness

8220. Unless there is a contest of a will:

(a) The will may be proved on the evidence of one of the subscribing witnesses only, if the evidence shows that the will was executed in all particulars as prescribed by law.

(b) Evidence of execution of a will may be received by an affidavit of a subscribing witness to which there is attached a photographic copy of the will, or by an affidavit in the original will that includes or incorporates the attestation clause.

(c) If no subscribing witness resides in the county, but the deposition of a witness can be taken elsewhere, the court may direct the deposition to be taken. On the examination, the court may authorize a photographic copy of the will to be made and presented to the witness, and the witness may be asked the same questions with respect to the photographic copy as if the original will were present.

Comment. Section 8220 restates the first two sentences of former Section 329 and the last sentence of former Section 1233 without substantive change.

CROSS-REFERENCES

Definitions

Will § 88

§ 8221. Proof where no subscribing witness available

8221. If no subscribing witness is available as a witness within the meaning of Section 240 of the Evidence Code, the court may, if the will on its face conforms to all requirements of law, permit proof of the will by proof of the handwriting of the testator and one of the following:

(a) Proof of the handwriting of any one subscribing witness.

(b) Receipt in evidence of one of the following documents reciting facts showing due execution of the will:

(1) A writing in the will bearing the signatures of all subscribing witnesses.

(2) An affidavit of a person with personal knowledge of the circumstances of the execution.

Comment. Section 8221 restates the fourth sentence of former Section 329, except that the writing need not appear "at the end" of the will. The signatures of subscribing witnesses no longer must appear at the end. Section 6110 (execution). If the subscribing witnesses are competent at the time of attesting the execution, their subsequent incompetency, from whatever cause, will not prevent the probate of the will, if it is otherwise satisfactorily proved. Cf. Evid. Code § 240 ("unavailable as a witness").

CROSS-REFERENCES

Definitions

Will § 88

§ 8222. Proof of holographic will

8222. A holographic will may be proved in the same manner as other writings.

Comment. Section 8222 restates former Section 331 without substantive change. See Evid. Code §§ 1400-1454 (authentication and proof of writings).

§ 8223. Proof of lost or destroyed will

8223. The petition for probate of a lost or destroyed will shall include or be accompanied by a written statement of the testamentary words or their substance. If the will is proved, the provisions of the will shall be set forth in the order admitting the will to probate.

Comment. Section 8223 restates the first two sentences of former Section 351 except that the requirement that the order admitting the will to probate be "set forth at length in the minutes" is omitted.

CROSS-REFERENCES

Definitions

Will § 88

§ 8224. Subsequent admissibility of testimony

8224. The testimony of each witness in a proceeding concerning the execution or provisions of a will, the testamentary capacity of the decedent, and other issues of fact, may be reduced to writing, signed by the witness, and filed, whether or not the will is contested. The testimony so preserved, or an official reporter's transcript of the testimony, is admissible in evidence in any subsequent proceeding concerning the will if the witness has become unavailable as a witness within the meaning of Section 240 of the Evidence Code.

Comment. Section 8224 restates and broadens former Section 374 (will contests) and the last sentence of former Section 351 (proof of lost or destroyed will). The former provisions were treated as permissive rather than mandatory in practice and by case law. Cf. Section 8220 (evidence of subscribing witness).

CROSS-REFERENCES

Definitions

Will § 88

§ 8225. Admission of will to probate

8225. When the court admits a will to probate, that fact shall be recorded in the minutes by the clerk and the will shall be filed.

Comment. Section 8225 supersedes the first sentence of former Section 332. See also Section 8002(b) (contents of petition).

CROSS-REFERENCES

Definitions

Will § 88

§ 8226. Effect of admission of will to probate

8226. (a) If no person contests the validity of a will or petitions for revocation of probate of the will within the time provided in this chapter, admission of the will to probate is conclusive, subject to Section 8007.

(b) A will may be admitted to probate notwithstanding prior admission to probate of another will or prior distribution of property in the proceeding. The will may not affect property previously distributed, but the court may determine how any provision of the will affects property not yet distributed and how any provision of the will affects provisions of another will.

Comment. Subdivision (a) of Section 8226 restates the first portion of former Section 384 without substantive change. The time within which a contest must be made is before or at the hearing (Section 8004), and the time within which revocation of probate may be sought is 120 days after the will is admitted or, in the case of a minor or incompetent person, before the close of estate administration (Section 8270). The conclusive effect of admission of a will to probate is subject to jurisdictional defects. See, e.g., Estate of Sanders, 40 Cal. 3d 607 (1985) (extrinsic fraud); Section 8007 (determination of jurisdiction conclusive).

Subdivision (b) supersedes former Section 385. It is consistent with Estate of Moore, 180 Cal. 570, 182 P. 285 (1919) (admission of will does not preclude probate of another will). If more than one will is admitted to probate, the court should resolve any conflicts in provisions, including what provisions control nomination of an executor. Admission of a will to probate may not affect property previously distributed, but the court may order adjustments of gifts in light of a will later admitted to probate. The court may not, however, rescind a distribution once made.

One effect of subdivision (b) is to preclude probate of a will after close of administration as a general rule. In the case of after-discovered property, however, a later will would be admissible under subdivision (b) to govern distribution of the after-discovered property, notwithstanding Section 11641 (distribution and discharge).

CROSS-REFERENCES

Definitions

Person § 56

Property § 62

Will § 88

Article 3. Contest of Will

§ 8250. Summons

8250. (a) When an objection is made pursuant to Section 8004, the court clerk shall issue a summons directed to the persons required by Section 8110 to be served with notice of hearing of a petition for administration of the decedent's estate. The summons shall contain a direction that the persons summoned file with the court a written pleading in response to the contest within 30 days after service of the summons. Failure of a person to respond to the summons precludes the person from further participation in the contest, but does not otherwise affect the person's interest in the proceeding or the estate.

(b) A person named as executor in the will is under no duty to defend a contest until the person is appointed personal representative.

Comment. Section 8250 restates the last portion of the first sentence of former Section 370, but replaces the citation with a summons. Service of the summons must be made in the manner provided by law for service of summons in a civil action. Section 1000 (general rules of practice). Section 8250 does not limit the persons to be notified, and thus requires notice to all affected persons wherever residing, including minors and incompetents.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Will § 88

Note. At the July 1987 meeting the Commission requested further information concerning whether a summons, citation, or notice of hearing would be appropriate for a will contest. Although existing law requires a citation, it is clear that this is not a true probate citation. The general probate citation states that "You are hereby cited and required to appear at a hearing in this court." This must be contrasted with the will contest citation (copy of the Los Angeles version provided to the staff by Commissioner Stodden), which merely states that "you are hereby directed to plead to said contest within thirty days after service of this citation."

The staff believes a notice of hearing would also be appropriate. Notice of other important hearings in estate administration is accomplished by mailed notice rather than by service of summons,

including opening probate, settlement of accounts, and ordering distribution. The mailed notice is as appropriate for contest of a will as it is for these other types of probate hearings. True, existing law requires a jury trial in a will contest; but that should not control the manner of notice. Other matters for which a jury trial is required by existing law (contest of allowed claim, determination of heirship) involve mailed notice of hearing rather than a summons; moreover, the Commission is recommending elimination of jury trial in all these matters.

§ 8251. Responsive pleading

8251. (a) The petitioner and any other interested person may jointly or separately answer the objection or demur to the objection within the time prescribed in the summons.

(b) Demurrer may be made upon any of the grounds of demurrer available in a civil action. If the demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 15 days, within which to amend the objection. If the demurrer is overruled, the petitioner and other interested persons may, within 15 days thereafter, answer the objection.

Comment. Section 8251 restates the second, third, and fourth sentences of former Section 370, but does not make receipt of written notice a condition for time to answer after a demurrer is overruled. Failure of a person to respond precludes the person from further participating in the contest but does not otherwise affect the person's interest. Section 8250 (summons).

CROSS-REFERENCES

Definitions

Interested person § 48

§ 8252. Trial

8252. (a) At the trial, the proponents of the will have the burden of proof of due execution. The contestants of the will have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. If the will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later is entitled to probate.

(b) The court shall try and determine any contested issue of fact that affects the validity of the will.

Comment. Section 8252 supersedes former Section 371. Subdivision (a) is drawn from Uniform Probate Code Section 3-407. Nothing in subdivision (a) precludes consolidation for trial of two wills offered for probate.

Subdivision (b) eliminates jury trial in will contests. Jury trial is not constitutionally required. There is a high percentage of reversals on appeal of jury verdicts, with the net result that the whole jury and appeal process serves mainly to postpone enjoyment of the estate, enabling contestants as a practical matter to force compromise settlements to which they would not otherwise be entitled. See Recommendation Relating to Opening Estate Administration, __ Cal. L. Revision Comm'n Reports __ (1987).

CROSS-REFERENCES

Definitions

Court § 29

Will § 88

§ 8253. Evidence of execution

8253. At the trial, each subscribing witness shall be produced and examined. If no subscribing witness is available as a witness within the meaning of Section 240 of the Evidence Code, the court may admit the evidence of other witnesses to prove the due execution of the will.

Comment. Section 8253 restates former Section 372 but does not continue the limitation on production of witnesses outside the county. See Section 1000 (general rules of practice); Code Civ. Proc. § 1989 (compelling attendance of witnesses). The court may admit proof of the handwriting of the testator and of any of the subscribing witnesses as evidence of the due execution of the will. Section 8221 (proof where no subscribing witness available).

CROSS-REFERENCES

Definitions

Will § 88

§ 8254. Judgment

8254. The court may make appropriate orders, including orders sustaining or denying objections, and shall render judgment either admitting the will to probate or rejecting it, in whole or in part, and appointing a personal representative.

Comment. Section 8254 supersedes former Section 373.

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

Article 4. Revocation of Probate

§ 8270. Petition for revocation

8270. (a) Within 120 days after a will is admitted to probate, any interested person, other than a party to a will contest and other than a person who had actual notice of a will contest in time to have joined in the contest, may petition the court to revoke the probate of the will. The petition shall include objections setting forth written grounds of opposition.

(b) Notwithstanding subdivision (a), a person who was a minor or who was incompetent and had no guardian or conservator at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before entry of an order for final distribution.

Comment. Subdivision (a) of Section 8270 restates the first and second sentences of former Section 380 but omits reference to some of the specific grounds of opposition. A will is admitted to probate when it is recorded in the minutes by the clerk. Section 8225 (admission of will to probate).

Subdivision (b) supersedes the last portion of former Section 384. It limits the previously indefinite right of minors and incompetents to petition for revocation.

CROSS-REFERENCES

Definitions

Interested person § 48
Person § 56
Will § 88

§ 8271. Summons

8271. (a) Upon the filing of the petition, the clerk shall issue a summons directed to the personal representative and to the heirs and devisees of the decedent, so far as known to the petitioner. The summons shall contain a direction that the persons summoned file with the court a written pleading in response to the petition within 30 days after service of the summons. Failure of a person to respond to the summons precludes the person from further participation in the revocation proceeding, but does not otherwise affect the person's interest in the proceeding or the estate.

(b) The summons shall be served and proceedings had as in the case of a contest of the will.

Comment. Subdivision (a) of Section 8271 supersedes former Section 381, substituting a summons for the citation. The former requirement that the summons be issued within the time allowed for filing the petition is not continued. The summons must be directed to the devisees mentioned in the will as to which revocation of probate is sought, as well as to heirs and any personal representative appointed by the court. The summons may be directed to minors or incompetent persons, or to the personal representative of a deceased person.

Subdivision (b) restates the first sentence of former Section 382, except that the provision for a jury trial is not continued. See Section 7200 (trial by jury). For the burden of proof on proponents and contestants of the will, see Section 8252 (trial).

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Personal representative § 58

Will § 88

Note. As to the propriety of a summons, citation, or notice of hearing under this section, see discussion under Section 8250 (will contest).

§ 8272. Revocation

8272. (a) If it appears upon satisfactory proof that the will should be denied probate, the court shall revoke the probate of the will.

(b) Revocation of probate of a will terminates the powers of the personal representative. The personal representative is not liable for any otherwise proper act done in good faith before the revocation, nor is any transaction void by reason of the revocation if entered into with a third person dealing in good faith and for value.

Comment. Section 8272 restates the second, third, and fourth sentences of former Section 382, except that the references to jury trial and invalidity of the will are not continued. See Section 7200 (trial by jury). Section 8272 also adds protection for bona fide purchasers and encumbrancers for value.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Will § 88

CHAPTER 4. APPOINTMENT OF PERSONAL REPRESENTATIVE

Article 1. General Provisions

§ 8400. Appointment necessary

8400. (a) A person has no power to administer the estate until the person is appointed personal representative and the appointment becomes effective. Appointment of a personal representative becomes effective when the person appointed is issued letters.

(b) Subdivision (a) applies whether or not the person is named executor in the decedent's will, except that a person named executor in the decedent's will may, before the appointment is made or becomes effective, pay funeral expenses and take necessary measures for the maintenance and preservation of the estate.

Comment. Section 8400 restates former Section 400 without substantive change. Letters may not be issued until the person appointed takes the oath of office and gives any required bond. See Section 8403 (oath) and Article 5 (commencing with Section 8480) (bond). It should be noted that a petitioner for appointment as personal representative may deliver or deposit property of the decedent in the petitioner's possession in a controlled account. See Section 8401. A person named executor in the will is under no duty to defend a contest of the will until appointment as executor. Section 8250 (summons).

CROSS-REFERENCES

Appointment of public administrator § 7621

Definitions

Letters § 52

Person § 56

Personal representative § 58

Will § 88

§ 8401. Deposit in controlled account

8401. (a) Notwithstanding Section 8400, a petitioner for appointment as personal representative may deliver money, securities, or personal property in the petitioner's possession to a financial institution, or allow a financial institution to retain money, securities, and personal property already in its possession, for deposit in an insured account in the financial institution.

(b) The petitioner shall obtain and file with the court a written receipt including the agreement of the financial institution that the money, securities, or other personal property, including any earnings

thereon, shall not be allowed to be withdrawn except on order of the court.

(c) In receiving and retaining money, securities, or other personal property under this section, the financial institution is protected to the same extent as though it had received the money, securities, or other personal property from a person who had been appointed personal representative.

Comment. Section 8401 restates the second paragraph of former Section 541.1 without substantive change. See also Section 2328 (guardianship and conservatorship).

CROSS-REFERENCES

Definitions

Financial institution § 40
Insured account in a financial institution § 46
Personal representative § 58
Security § 70

§ 8402. Qualifications

8402. (a) Notwithstanding any other provision of this chapter, a person is not competent to act as personal representative in any of the following circumstances:

- (1) The person is under the age of majority.
- (2) The person is incapable of executing, or is otherwise unfit to execute, the duties of the office.
- (3) There are grounds for removal of the person from office under Section 8502.
- (4) The person is not a resident of the United States.
- (5) The person is a surviving partner of the decedent and an interested person objects to the appointment.

(b) Paragraphs (4) and (5) of subdivision (a) do not apply to a person named as executor or successor executor in the decedent's will.

Comment. Paragraph (a)(1) of Section 8402 restates a provision of former Section 401 without substantive change. Paragraph (a)(2) supersedes the remainder of former Section 401.

Paragraph (a)(3) is new; it enables the court to deny appointment of a personal representative if the personal representative would be subject to removal, for example for a conflict of interest that is sufficient to require removal. This would reverse the result in cases such as Estate of Backer, 164 Cal. App. 3d 1159, 211 Cal. Rptr. 163 (1985).

Paragraph (a)(4) and subdivision (b) restate former Section 420 without substantive change. Paragraph (a)(5) and subdivision (b) restate former Section 421 without substantive change. See Estate of Kaussen, 190 Cal. App. 3d 1644 (1987).

For contest of appointment, see Section 8004.

CROSS-REFERENCES

Definitions

Interested person § 48
Person § 56
Personal representative § 58
Will § 88

§ 8403. Oath

8403. (a) Before letters are issued, the personal representative shall take and subscribe an oath to perform, according to law, the duties of the office. The oath may be taken and dated on or after the time the petition for appointment as personal representative is signed, and may be filed with the clerk at any time after the petition is granted.

(b) The oath constitutes an acceptance of the office and shall be attached to or endorsed upon the letters.

Comment. Section 8403 restates former Section 540 but permits the oath to be signed at the time the petition is signed. Cf. Adams v. Sharp, 61 Cal. 2d 775, 394 P.2d 943, 40 Cal. Rptr. 225 (1964) (oath taken out of state). The requirement of an oath may be satisfied by a written affirmation. Code Civ. Proc. § 2015.6.

CROSS-REFERENCES

Definitions

Letters § 52
Personal representative § 58

§ 8404. Statement of duties and liabilities

8404. (a) Before letters are issued, the personal representative, other than a trust company, shall file an acknowledgment of receipt of a statement of duties and liabilities of the office in substantially the following form:

DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVE

When you have been appointed a personal representative of an estate by the court, you become an officer of the court and assume certain duties and obligations. An attorney is best qualified to advise you regarding these matters. You should clearly understand the following:

1. You must manage the estate's assets with the care of a prudent person dealing with someone else's property. This means you must be cautious and you may not make any speculative investments.

2. You must keep the money and property of this estate separate from anyone else's, including your own. When you open a bank account for the estate, it must be in the name of the estate. Estate accounts must generally earn interest. Never deposit estate funds in your personal account or otherwise commingle them with anyone else's property. The securities of the estate must also be held in the name of the estate.

3. There are many restrictions on your authority to deal with the estate's property. You should not spend any of the estate's money until you have received either permission from the court or if so advised by an attorney. You may reimburse yourself for official court costs paid by you to the County Clerk and for the premium on your bond. You may not pay fees to your attorney, if any, or to yourself without prior order of the court. If you do not obtain the court's permission when it is required, you may be removed as personal representative and/or you may be surcharged, i.e., you may have to reimburse the estate from your own personal funds. You should consult with an attorney concerning the legal requirements affecting sales, leases, mortgages, and investments of estate property.

4. You must attempt to locate and take possession of all the decedent's property. You must arrange to have a court-appointed referee determine the value of the property unless this is waived by the court. (You, rather than the referee, must determine the value of certain "cash items"; an attorney can advise you as to this procedure.) Within three months after your appointment as personal representative you must file with the court an inventory of all the assets in the estate and within six months you must file an appraisal of the assets.

5. You must mail notice of administration to each known creditor of the decedent within four months after your appointment as personal representative. If the decedent received MediCal assistance you must notify the State Director of Health Services within 90 days after appointment.

6. You should determine that there is appropriate and adequate insurance covering the assets and risks of the estate. Maintain the insurance in force during the entire period of the administration.

7. You must keep complete and accurate records of each financial transaction affecting the estate. You will have to prepare an account of all money and property you have received, what you have spent, and the date of each transaction. You must describe in detail what you have left after the payment of expenses. Your account will be reviewed by the court. Save your receipts because the court may ask to review them. If you do not file your accounts as required, the court will issue an order for you to do so.

You may be removed as personal representative if you fail to comply.

This statement of duties and liabilities is a summary and is not a complete statement of the law. Your conduct as a personal representative is governed by the law itself and not by this summary.

If you have an attorney, you should cooperate with the attorney at all times. You and your attorney are responsible for completing the estate administration as promptly as possible. When in doubt, contact your attorney.

(b) The court may by local rule require the acknowledgment of receipt of the statement of duties and liabilities to include the personal representative's social security number and driver's license number, if any, provided that the court ensures their confidentiality.

(c) The statement of duties and liabilities in this section does not supersede the law upon which it is based. If the Judicial Council prescribes the form of the statement, the Judicial Council form must be used.

Comment. Section 8404 is new. It is drawn from general instructions given to personal representatives by a number of courts. The statement of duties and liabilities need not conform precisely to the listing in this section, and may be more inclusive. If the Judicial Council prescribes the form of the statement, the Judicial Council form supersedes the form provided in this section. See Section 1001 (Judicial Council and local court rules).

CROSS-REFERENCES

Definitions

Letters § 52
Personal representative § 58
Trust company § 83

§ 8405. Form of letters

8405. Letters shall be signed by the clerk under the seal of the court and shall include:

(a) The county from which the letters are issued.

(b) The name of the person appointed as personal representative and whether the personal representative is an executor, administrator, administrator with the will annexed, or special administrator.

(c) Whether the personal representative is authorized to act under the Independent Administration of Estates Act, and whether the authority includes or excludes sale, exchange, or granting an option to purchase real property under the Act.

Comment. Section 8405 supersedes former Sections 500, 501, and 502. The Judicial Council may prescribe the form of letters. Section 7201.

CROSS-REFERENCES

Appointment of public administrator § 7621

Definitions

Letters § 52

Person § 56

Personal representative § 58

Real property § 68

§ 8406. Suspension of powers of personal representative

8406. (a) On petition of an interested person, the court may suspend the powers of the personal representative in whole or in part, for a time, as to specific property or circumstances or as to specific duties of the office, or may make any other order to secure proper performance of the duties of the personal representative, if it appears to the court that the personal representative otherwise may take some action that would jeopardize unreasonably the interest of the petitioner. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within 10 days unless the parties agree otherwise. Notice as the court directs shall be given to the personal representative and attorney of record, if any, and to any other parties named in the petition.

(c) The court may, in its discretion, if it determines that the petition was brought unreasonably and for the purpose of hindering the personal representative in the performance of the duties of the office, assess attorney's fees against the petitioner and make the assessment a charge against the interest of the petitioner.

Comment. Section 8406 restates and broadens former Sections 352 and 550. It is drawn from Section 3-607 of the Uniform Probate Code. The provision for assessment of attorney's fees is new. Section 8406 includes but is not limited to the situation where the personal representative is appointed before or pending probate of a will, or pursuant to a previous will, or where there is litigation over the bond of the personal representative and it is alleged that the estate is being wasted.

CROSS-REFERENCES

Definitions

Interested person § 48

Person § 56

Personal representative § 59

Property § 62

Note. This section may be relocated to powers and duties.

Charles E. Ogle of Morro Bay (Exhibit 23 to Memorandum 86-201) endorses this section, and specifically the authority of the court to award attorney fees when a petition to suspend is brought unnecessarily.

§ 8407. Claims against personal representative

8407. Appointment of a person as personal representative does not discharge the person from any claim the decedent has against the person. The personal representative is liable for the claim as for so much money in the possession or control of the personal representative when the claim becomes due.

Comment. Section 8407 restates portions of former Section 602 and extends the provisions from executors to all personal representatives. See also Section 8801 (contents of inventory).

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Note. This provision was erroneously included among the creditor claims provisions. It belongs either here or with general provisions on personal representative liability.

§ 8408. Selection of attorney

8408. In the selection of an attorney, the personal representative shall consider the relationship of the attorney to the beneficiaries or other interested persons.

Comment. Section 8408 is new. It may be appropriate to select an attorney who has a relationship with the beneficiaries, or to avoid selection of an attorney who has an interest adverse to the estate (for example because of alleged improper conduct in the prior representation of the decedent).

CROSS-REFERENCES

Definitions

Beneficiary § 24

Interested person § 48

Personal representative § 58

Note. The staff does not necessarily recommend this section or one like it. It is included merely to present issues raised in two letters commenting on the tentative recommendation. Irving Kellogg of Beverly Hills (Exhibit 10 to Memorandum 86-201) notes a problem where a corporate fiduciary chooses 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." He cites a recent case in San Diego in which the court confirmed the fiduciary's right to choose its attorney but in which the beneficiaries were "justifiably outraged by the fiduciary's blatant backscratching."

Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 33 to Memorandum 86-201) carries this argument one step further by noting that the attorney may have an interest actively adverse to the beneficiaries. "A disgruntled heir may allege improper conduct by the attorney with respect to the attorney's representation of the deceased. If so, an issue arises with respect to whether the attorney must be removed entirely." He points out that if the personal representative retains another attorney, then fee allocation problems arise. "I don't have a solution for this, but perhaps someone else does."

State Bar Team 3 (Fourth Supplement to Memorandum 86-201) strongly recommends against inclusion of a Section like 8408. They note that this is an administrative matter properly left to the judgment of the personal representative, and to allow beneficiaries to play a role would thwart the decedent's intent in naming a personal representative in whom the decedent had confidence. They also wonder what liabilities and enforcement devices would be involved.

§ 8409. Effect of reversal of appointment of personal representative

8409. If an order appointing a personal representative is reversed on appeal for error, the person appointed is not liable for any otherwise proper act done in good faith before the reversal if entered into with a third person dealing in good faith and for value.

Comment. Section 8409 replaces former Section 1298 and parallels Section 8272 (revocation). Section 8409 revises former Section 1298 by making clear that it is intended to protect third persons. See Estate of Gibson, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965) (interpreting the predecessor of former Section 1298). This provision does not apply where the appointment of the personal representative is reversed for lack of jurisdiction. See Estate of Schwartz, 87 Cal. App. 2d 569, 573, 197 P.2d 223 (1948). The reference in former Section 1298 to the time of qualification of the personal representative has been replaced by the reference to the time letters are issued. See Section 8400(a) (appointment of personal representative effective upon issuance of letters).

CROSS-REFERENCES

Definition

Letters § 52

Personal representative § 58

Article 2. Executors

§ 8420. Right to appointment as personal representative

8420. The person named as executor in the decedent's will has the right to appointment as personal representative.

Comment. Section 8420 is an express statement of the concept that the named executor has first priority for appointment as personal representative. Cf. former Section 407. Section 8420 does not apply if the person named is not qualified for appointment under Section 8401 (qualifications) or has waived the right to appointment.

CROSS-REFERENCES

Definitions

Person § 56
Personal representative § 58
Will § 88

§ 8421. Executor not specifically named

8421. If a person is not named as executor in a will but it appears by the terms of the will that the testator intended to commit the execution of the will and the administration of the estate to the person, the person is entitled to appointment as personal representative in the same manner as if named as executor.

Comment. Section 8421 restates former Section 402 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56
Personal representative § 58
Will § 88

§ 8422. Power to designate executor

8422. (a) The testator may by will confer upon a person the power to designate an executor or coexecutor, or successor executor or coexecutor. The will may provide that the persons so designated may serve without bond.

(b) A designation shall be in writing and filed with the court. Unless the will provides otherwise, if there are two or more holders of the power to designate, the designation shall be unanimous, unless one of the holders of the power is unable or unwilling to act, in which case the remaining holder or holders may exercise the power.

(c) Except as provided in this section, an executor does not have authority to name a coexecutor, or a successor executor or coexecutor.

Comment. Section 8422 restates former Section 403 without substantive change. Cf. Section 10 (singular and plural). An executor designated pursuant to this section must be appointed by the court. See Section 8400 (appointment necessary).

CROSS-REFERENCES

Definitions

Person § 56

Will § 88

§ 8423. Successor trust company as executor

8423. If the executor named in the will is a trust company that has sold its business and assets to, has consolidated or merged with, or is in any manner provided by law succeeded by, another trust company, the court may, and to the extent required by the Banking Law, Division 1 (commencing with Section 99) of the Financial Code, shall, appoint the successor trust company as executor.

Comment. Section 8423 restates former Section 404 without substantive change. A trust company is an entity that has qualified to engage in and conduct a trust business in this state. A trust company may act as an executor. See Sections 83, 300; Fin. Code § 1580.

CROSS-REFERENCES

Definitions

Trust company § 83

Will § 88

§ 8424. Minor named as executor

8424. (a) If a person named as executor is under the age of majority and there is another person named as executor, the other person may be appointed and may administer the estate until the majority of the minor, who may then be appointed as coexecutor.

(b) If a person named as executor is under the age of majority and there is no other person named as executor, another person may be appointed as personal representative, but the court may revoke the appointment on the majority of the minor, who may then be appointed as executor.

Comment. Section 8424 restates without substantive change the portion of former Section 405 that related to a minor named as executor. The court may exercise its discretion under this section.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

§ 8425. When fewer than all executors appointed

8425. If the court does not appoint all the persons named in the will as executors, those appointed have the same authority to act in every respect as all would have if appointed.

Comment. Section 8425 restates former Section 408 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56

Will § 88

Note. This provision will be reviewed in connection with powers and duties of personal representatives.

Article 3. Administrators With Will Annexed

§ 8440. Appointment

8440. An administrator with the will annexed shall be appointed as personal representative if no executor is named in the will or if the sole executor or all the executors named in the will have waived the right to appointment or are for any reason unwilling or unable to act.

Comment. Section 8440 supersedes former Section 406. A person named as an executor may be unwilling or unable to act because the person is dead or incompetent, renounces or fails to petition for appointment, fails to appear and qualify, or dies or is removed from office after appointment and before the completion of administration.

No executor of a deceased executor is, as such, authorized to administer the estate of the first testator. Section 8522 (vacancy where no personal representatives remain). However, the deceased executor may have the power to designate a successor executor. See Section 8422 (power to designate executor). And the executor of the deceased executor may qualify independently for appointment as an administrator with the will annexed pursuant to this section.

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

§ 8441. Priority for appointment

8441. (a) Except as provided in subdivision (b), persons are entitled to appointment as administrator with the will annexed in the same order of priority as for appointment of an administrator.

(b) A person who takes under the will has priority over a person who does not, and a person who takes more than 50 percent of the value of the estate under the will has priority over other persons who take under the will.

Comment. Section 8441 restates without substantive change the second sentence and supersedes the third sentence of former Section 409. Subdivision (b) gives priority to devisees, who need not be entitled to succeed to all or part of the estate under the law of succession in order to have priority. For appointment of the nominee of a person entitled to priority, see Section 8465.

CROSS-REFERENCES

Definitions

Person § 56
Will § 88

Note. *George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21 to Memorandum 86-201) note that this section does not expressly provide for appointment of a nominee, but only by implication from the provisions on appointment of administrators. The staff believes the statute should be clear on this matter and would add a specific reference to nominees in the section. State Bar Team 3 (Fourth Supplement to Memorandum 86-201) agrees.*

Montgomery and Kreider's main concern, however, is that subdivision (b) does not appear to allow several beneficiaries whose interests total 50% to jointly act or to nominate a person to act for them. It is arguable that the statute does authorize several beneficiaries to act together, since the singular includes the plural. Section 10. However, it would be a simple matter to add a sentence making clear that beneficiaries whose interests total 50% may act jointly. State Bar Team 3 (Fourth Supplement to Memorandum 86-201) agrees.

These changes would resolve the problems raised in the recent case of Estate of Kaussen, 190 Cal. App. 3d 671 (1987), which involved devisees who were not United States residents.

§ 8442. Authority of administrator with will annexed

8442. (a) Subject to subdivision (b), an administrator with the will annexed has the same authority over the decedent's estate as an executor named in the will would have.

(b) If the will confers a discretionary power or authority upon an executor that is not conferred by law, the power or authority shall not be deemed to be conferred upon an administrator with the will annexed, but the court in its discretion may authorize the exercise of the power or authority.

Comment. Section 8442 restates the first sentence of former Section 409, with the addition of court discretion to permit exercise of a discretionary power or authority. The acts of the administrator with the will annexed are as effectual for all purposes as the acts of an executor would be.

CROSS-REFERENCES

Definitions

Will § 88

Note. *George F. Montgomery, II, and Dena Burnham Kreider of San Francisco (Exhibit 21 to Memorandum 86-201) point out that a will may confer a discretionary power or authority upon any personal representative, not just one named in the will, and this should be recognized by statute. The staff will add language to recognize this exception to subdivision (b). State Bar Team 3 (Fourth Supplement to Memorandum 86-201) agrees.*

Article 4. Administrators

§ 8460. Appointment of administrator

8460. (a) If the decedent dies intestate, the court shall appoint an administrator as personal representative.

(b) The court may appoint one or more persons as administrator.

Comment. Section 8460 restates the introductory portion of former Section 422(a) without substantive change.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Note. *As drawn, this section raises the prospect that in a partial intestacy there may be two personal representatives--an executor and an administrator. One person could fulfill both functions, perhaps, although there might be a conflict of interest between testate and intestate beneficiaries.*

§ 8461. Priority for appointment

8461. Subject to the provisions of this article, the following persons are entitled to appointment as administrator in the following order of priority:

- (a) Surviving spouse.
- (b) Children.
- (c) Grandchildren.
- (d) Other issue.
- (e) Parents.
- (f) Brothers and sisters.
- (g) Grandparents.
- (h) Issue of grandparents.
- (i) Children of a predeceased spouse.
- (j) Other next of kin.
- (k) Relatives of a predeceased spouse.
- (l) Conservator or guardian of the estate of the decedent acting in that capacity at the time of death.
- (m) Public administrator.
- (n) Creditors.
- (o) Any other person.

Comment. Section 8461 restates subdivision (a) of former Section 422, with the addition of subdivisions (d), (g), and (h) and (i) to reflect changes in the law governing intestate succession. See Section 6402. The general order of priority prescribed in Section 8461 is subject to limitation in the succeeding sections of this article. See, e.g. Sections 8462 (priority of relatives), 8463 (estranged spouse). A person appointed must be legally competent. Section 8401 (qualifications).

CROSS-REFERENCES

Definitions

- Child § 26
- Issue § 50
- Parent § 54
- Person § 56
- Predeceased spouse § 59
- Surviving spouse § 78

Note. *Irving Kellogg of Beverly Hills (Exhibit 10 to Memorandum 86-201) points out a problem in the first two priorities--the inherent and latent conflict of interest between a spouse of a later marriage and the decedent's children of a former marriage. "This is one of the more troublesome areas in both estate planning and decedents' administration." He offers no suggested solutions.*

David B. Flinn of San Francisco (Exhibit 9 to Memorandum 86-201) has a problem with priority (m)--the public administrator. "I would like to see the Public Administrator further down the list. If there is a genuine next-of-kin who is going to inherit the property, his or her interest in an efficient administration is certainly prior to that of a Public Administrator's office." The staff doesn't understand this

comment. It seems to us that the public administrator is about as far down the list as it can get.

§ 8462. Priority of relatives

8462. The surviving spouse of the decedent, a relative of the decedent, or a relative of a predeceased spouse of the decedent, has priority under Section 8461 only if one of the following conditions is satisfied:

(a) The surviving spouse or relative is entitled to succeed to all or part of the estate.

(b) The surviving spouse or relative either takes under the will of, or is entitled to succeed to all or part of the estate of, another deceased person who is entitled to succeed to all or part of the estate of the decedent.

Comment. Section 8462 restates former Section 422 with the addition of language recognizing the priority of relatives of a predeceased spouse and the expansion of subdivision (b) to include any relative of the decedent who satisfies the prescribed conditions.

CROSS-REFERENCES

Definitions

Predeceased spouse § 59
Surviving spouse § 78
Will § 88

Note. *Charles A. Triay of Oakland (Exhibit 32 to Memorandum 86-201) is concerned that this section appears to require an heirship determination prior to appointment of a personal representative in the case of conflicting petitions for appointment. The staff believes that it is the nature of a priority scheme to require this; we do not understand the concern.*

§ 8463. Surviving spouse

8463. If the surviving spouse is a party to an action for separate maintenance, annulment, or dissolution of the marriage of the decedent and the surviving spouse, and was living apart from the decedent on the date of the decedent's death, the surviving spouse has priority next after brothers and sisters.

Comment. Section 8463 supersedes subdivision (a)(6) and the second paragraph of subdivision (a)(1) of former Section 422. There is an inherent conflict of interest between the surviving spouse and other heirs of the decedent in the situation described in this section.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

Note. David B. Flinn of San Francisco (Exhibit 9 to Memorandum 86-201) agrees with this provision. Charles A. Triay of Oakland (Exhibit 32 to Memorandum 86-201) believes this section should state expressly that it supersedes the priority schedule of Section 8461; this is easily done, and the staff will do it.

Beryl A. Bertucio of Matthew Bender (Exhibit 3 to Memorandum 86-201) suggests that this section be tempered to provide more fairly for the surviving spouse in the case of an amicable dissolution. She suggests a couple of options:

(1) Simply disqualify the surviving spouse on the same basis as anyone else in a potential conflict. See Section 8502 (removal for protection of estate or interested persons).

(2) Limit this section to situations where the dissolution is contested.

She points out that even in conflict situations, the surviving spouse may know more about the decedent's affairs than anyone else, and a solution other than reduction of priority could avoid added delay and expense.

State Bar Team 3 (Fourth Supplement to Memorandum 86-201) disagrees with Ms. Bertucio. They believe disqualification of the surviving spouse in this situation is necessary, and that it should be automatic. Otherwise there will be conflict even before the probate is opened, which is not a good way to start.

§ 8464. Minors and incompetent persons

8464. If a person otherwise entitled to appointment as administrator is a person under the age of majority or a person for whom a guardian or conservator of the estate has been appointed, the court in its discretion may appoint the guardian or conservator or another person entitled to appointment.

Comment. Section 8464 restates former Section 426 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56

§ 8465. Nominee of person entitled to appointment

8465. (a) The court may appoint as administrator a person nominated by a person otherwise entitled to appointment or by the guardian or conservator of the estate of a person otherwise entitled to appointment. The nomination shall be made in writing and filed with the court.

(b) If a person making a nomination for appointment of an administrator is the surviving spouse, child, grandchild, other issue, parent, brother or sister, or grandparent of the decedent, the nominee has priority next after those in the class of the person making the nomination.

(c) If a person making a nomination for appointment of an administrator is other than a person described in subdivision (b), the court in its discretion may appoint either the nominee or a person of a class lower in priority to that of the person making the nomination, but other persons of the class of the person making the nomination have priority over the nominee.

Comment. Section 8465 restates without substantive change provisions found in former Sections 409 and 423 and a portion of subdivision (a)(1) of former Section 422. "Grandparent" and "issue" have been added to subdivision (b) consistent with Section 8461. The nominee is not entitled to appointment unless legally competent. Section 8401 (qualifications).

CROSS-REFERENCES

Definitions

Child § 26
Issue § 50
Parent § 54
Person § 56
Surviving spouse § 78

§ 8466. Priority of creditor

8466. If a creditor claims appointment as administrator, the court in its discretion may deny the appointment and appoint another person.

Comment. Section 8466 restates the last portion of former Section 425 but omits the requirement that there be a request of another creditor before the court may appoint another person. Any person appointed pursuant to this section must be legally competent. Section 8401 (qualifications).

CROSS-REFERENCES

Definitions

Person § 56

Note. *State Bar Team 3 (Fourth Supplement to Memorandum 86-201) notes that if a relative entitled to priority is also a creditor, that priority should be preserved nonetheless.*

§ 8467. Equal priority

8467. If several persons have equal priority for appointment as administrator, the court may appoint one or more of them, or if such persons are unable to agree, the court may appoint a disinterested person.

Comment. Section 8467 restates the first portion of former Section 425, with the addition of authority to appoint a disinterested person where there is a conflict between persons of equal priority. The public administrator is a disinterested person within the meaning of this section.

CROSS-REFERENCES

Definitions

Person § 56

Note. *The Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17 to Memorandum 86-201) disagrees with the proposal to appoint a disinterested person. "Admittedly, it may be a difficult decision for the court to choose one of two competitors who are of equal priority under the statute, particularly when the ability to administer is approximately equal. However, that should not be a reason for the appointment of a disinterested person, which would be a result unlikely to have been favored by the decedent. This is an area in which the appointment of a disinterested person could become the routine solution in some courts."*

State Bar Team 3 (Fourth Supplement to Memorandum 86-201) proposes as an alternative instead of appointment of a disinterested person, an appointment in the next class of priority, "a better result perhaps."

§ 8468. Administration by any competent person

8468. If persons having priority fail to claim appointment as administrator, the court may appoint any person who claims appointment.

Comment. Section 8468 restates former Section 427 without substantive change. A person appointed pursuant to this section must be legally competent. Section 8401 (qualifications).

CROSS-REFERENCES

Definitions

Person § 56

Article 5. Bond

§ 8480. Bond required

8480. (a) Except as otherwise provided by statute, every person appointed as personal representative shall, before letters are issued, give a bond approved by the court. If two or more persons are appointed, the court may require either a separate bond from each or a joint and several bond.

(b) The bond shall be for the benefit of interested persons and shall be conditioned on the personal representative's faithful execution of the duties of the office according to law.

(c) If the person appointed as personal representative fails to give the required bond, letters shall not be issued. If the person appointed as personal representative fails to give a new, additional, or supplemental bond, or to substitute a sufficient surety, pursuant to court order, the person may be removed from office.

Comment. Subdivisions (a) and (b) of Section 8480 restate without substantive change former Section 410, the first sentence of subdivision (a) of former Section 541, and former Section 544. Subdivision (c) continues the effect of a portion of former Section 549; it is a special application of Code of Civil Procedure Section 996.010. For statutory exceptions to the bond requirement, see Sections 301 (bond of trust company) and 8481 (waiver of bond).

CROSS-REFERENCES

Appointment of public administrator § 7621

Definitions

Interested person § 48

Letters § 52

Person § 56

Personal representative § 58

Judge in chambers may approve bond, Code Civ. Proc. § 166

Note. *Robert H. Faust and Julia Kingsbury of Arcadia (Exhibit 12 to Memorandum 86-201) suggest that if an estate is fully protected by bond, an estate representative should be given unlimited power of administration.*

§ 8481. Waiver of bond

8481. (a) The will may waive the requirement of a bond.

(b) If all beneficiaries have waived in writing the requirement of a bond and the written waivers are attached to the petition for appointment of a personal representative, the court may direct that no bond be given. This subdivision does not apply if the will requires a bond.

(c) Notwithstanding the waiver of a bond by a will or by all the beneficiaries, on petition of any interested person the court may for good cause require that a bond be given, either before or after issuance of letters. If a beneficiary requests a bond, the request is in itself good cause to require a bond in an amount not less than the amount the court determines is sufficient to secure the interest of the beneficiary.

Comment. Subdivision (a) of Section 8481 restates without substantive change portions of former Section 462(c) and former Section 541(a). Subdivision (b) supersedes subdivision (b) of former Section 541; the former provision made excuse of the bond by the court mandatory rather than permissive where all beneficiaries had waived the bond. Subdivision (c) restates former Section 543 without substantive change. For provisions on reduction or increase of the amount of the bond, see Code Civ. Proc. §§ 996.010-996.030 (insufficient and excessive bonds).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Interested person § 48
Letters § 52
Personal representative § 58
Will § 88
Verification required § 1021

Note. One of the most controversial proposals in the tentative recommendation was to allow the court, in its discretion and without a showing of good cause, to require a bond even though bond has been waived by all beneficiaries. Subdivision (b). This proposal was approved by the Western Surety Company (Exhibit 14 to Memorandum 86-201), John G. Lyons of San Francisco (Exhibit 15 to Memorandum 86-201), and Charles E. Ogle of Morro Bay (Exhibit 23 to Memorandum 86-201). Mr. Lyons believes this is a very desirable proposal because, "A waiver may be given under pressure in some cases." The Western Surety Company believes a bond is inexpensive insurance and points out that the State Bar's 1973 analysis and critique of the Uniform Probate Code criticizes the UPC for excusing bond as a routine matter in informal cases.

On the other hand, the proposal was opposed by The San Mateo County Bar Association Probate Section (Exhibit 1 to Memorandum 86-201), Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7 to Memorandum 86-201), David B. Flinn of San Francisco (Exhibit 9 to Memorandum 86-201), Ian D. McPhail of Santa Cruz (Exhibit 16 to Memorandum 86-201), Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17 to Memorandum 86-201), and Michael Patiky Miller of Palo Alto (Exhibit 19 to Memorandum 86-201). There were a number of common concerns expressed by these commentators:

(1) The matter should not be left to the discretion of the court. See, e.g. Flinn ("I see no reason why an arbitrary judge should be able to require a bond."); McPhail ("To give the Court discretion to require a bond in these cases is legislative and judicial arrogance, overriding the wishes of the testator and/or all beneficiaries of the estate."); Miller ("We should do all that we can to prevent arbitrary and capricious decisions from occurring, and giving them legislative sanction is not wise."); Strathmeyer ("If there is to be freedom in this society, it must include the freedom to be stupid in those instances where the good of the public is not involved. Second, it is the function of courts to apply the law to facts--not issue arbitrary fiats for the administration of the local fiefdom. For both reasons, I strongly object to a provision which allows courts in their whimsy to require a bond which has been waived.").

(2) A likely consequence is that courts by local rule or otherwise will require a bond automatically in every case. See, e.g., *Flinn* ("The result will be a probate judge in one or more counties who simply sets it upon himself that there is going to be a bond in every estate, even when the beneficiaries feel comfortable.").

(3) It imposes an unnecessary expense on beneficiaries. See, e.g., *Kern County* ("The decedent should continue to be permitted to save the estate the expense of a bond and the beneficiaries should be able to save themselves that expense if the will does not waive bond."). One resolution to this problem is suggested by McPhail--"If a beneficiary requests a bond where the will waives the bond, the Court should only be given discretion to require a bond if the beneficiary agrees that the premium or premiums will be charged against that beneficiary's share of the estate."

State Bar Team 3 (Fourth Supplement to Memorandum 86-201) believes that a bond may be necessary for protection of creditors, even if waived by beneficiaries. For this purpose, they believe subdivision (c) (court may require bond for good cause notwithstanding waiver) is appropriate.

§ 8482. Amount of bond

8482. (a) Except as provided in Section 8481, the court in its discretion may fix the amount of the bond, including a fixed minimum amount, but the amount of the bond shall be not more than the sum of:

(1) The estimated value of the personal property.

(2) The probable annual gross income of the estate.

(3) If independent administration is granted as to real property, the estimated value of the real property.

(b) If the bond is given by personal sureties, the amount of the bond shall be twice the amount fixed by the court pursuant to subdivision (a).

(c) Before confirming a sale of real property the court shall require such additional bond as may be proper, not exceeding the maximum requirements of this section, treating the expected proceeds of the sale as personal property.

Comment. Subdivision (a) of Section 8482 supersedes the last sentence of former Section 541(a), making explicit the authority of the court to impose a fixed minimum bond. Subdivision (b) supersedes former Section 542.

CROSS-REFERENCES

Definitions

Personal property § 57

Real property § 68

Note. The Western Surety Company (Exhibit 14 to Memorandum 86-201) approves the authority of the court in subdivision (a) to fix a minimum bond.

§ 8483. Reduction of bond by deposit of assets

8483. (a) This section applies where property of the estate has been deposited in an insured account in a financial institution on condition that the property, including any earnings thereon, will not be withdrawn except on authorization of the court.

(b) In a proceeding to determine the amount of the bond of the personal representative (whether at the time of appointment or subsequently), on production of a receipt showing the deposit of property of the estate in the manner described in subdivision (a), the court may order that the property shall not be withdrawn except on authorization of the court and may, in its discretion, do either of the following:

(1) Exclude the property in determining the amount of the required bond or reduce the amount of the bond to be required in respect of the property to an amount the court determines is reasonable.

(2) If a bond has already been given or the amount fixed, reduce the amount to an amount the court determines is reasonable.

Comment. Section 8483 restates the first paragraph of former Section 541.1 without substantive change. See also Section 2328 (guardianship and conservatorship). For authority of a petitioner for appointment as personal representative to make a deposit described in this section, See Section 8401.

CROSS-REFERENCES

Definitions

Insured account in a financial institution § 46

Personal representative § 58

Property § 62

§ 8484. Excessive bond

8484. If a personal representative petitions to have the amount of the bond reduced, the petition shall include an affidavit setting forth the condition of the estate and notice of hearing shall be given as provided in Section 1220.

Comment. Section 8484 restates former Section 553.3 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 8485. Substitution or release of sureties

8485. A personal representative who petitions for substitution or release of a surety shall file with the petition an account as required by Section 921. The court shall not order a substitution or release unless the account is approved.

Comment. Section 8485 restates former Section 553.5 without substantive change. A copy of the petition and a notice of hearing must be served on the surety. Code Civ. Proc. § 996.110(c).

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 8486. Cost of bond

8486. The personal representative shall be allowed the reasonable cost of the bond for every year it remains in force.

Comment. Section 8486 supersedes former Section 541.5. Unlike the former provision, Section 8486 does not prescribe a fixed or maximum amount, but leaves the reasonableness of the amount to be determined by market forces.

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. *The Commission's recommendation eliminates the existing fee schedule for awarding the cost of the bond on the theory that bond fees are determined by the market, with bond premiums generally below the amount allowed; if the bond premiums are higher, it would be appropriate to award the higher amount if reasonable. This proposal was endorsed by the Western Surety Company (Exhibit 14 to Memorandum 86-201), which notes that "Bonds of this type currently cost approximately 1/2 of 1% of their face amount in every state in the country, and we do not believe competition would permit any substantial upward movement in that regard in California." Also included are figures relating to premiums received and losses paid by surety companies on personal representative bonds. See Exhibit 11 to Memorandum 86-201 (The Surety Association of America).*

State Bar Team 3 (Fourth Supplement to Memorandum 86-201) also appears to support the Commission's recommendation. "If the fee and the market rate become inconsistent (as we've seen with interest rates, etc.), it would generate a petition in every bonded probate until such time as the law can be amended. We have this often enough, it seems."

Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7 to Memorandum 86-201) believes further research might be appropriate before eliminating the bond fee schedule. "Many companies offer competitive rates, but the cheaper companies are also careful about the risks they select. Also, interest rates are dropping, so premiums may go up. Why not leave the schedule in, but add a provision authorizing the court to approve a higher premium if the representative shows he cannot obtain a bond at the statutory rate."

§ 8487. Law governing bond

8487. The provisions of the Bond and Undertaking Law, Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure, apply to a bond given under to this division, except to the extent this division is inconsistent.

Comment. Section 8487 is a specific application of existing law. See Code Civ. Proc. § 995.020 (application of Bond and Undertaking Law).

§ 8488. Limitation as to sureties on bond

8488. No action may be maintained against the sureties on the bond of the personal representative unless commenced within four years after the settlement of the accounts of the personal representative or the discharge of the personal representative, whichever occurs later.

Comment. Section 8488 is new. It is comparable to Section 2333 (guardianship and conservatorship law).

CROSS-REFERENCES

Definitions

Personal representative § 58

Note. A conforming change will be made to Section 2333 so that it is consistent.

Article 6. Removal from Office

§ 8500. Procedure for removal

8500. (a) Any interested person may apply by petition for removal of the personal representative from office. A petition for removal may be combined with a petition for appointment of a successor personal representative pursuant to Article 7 (commencing with Section 8520). The petition shall state facts showing cause for removal.

(b) Upon a petition for removal, or if the court otherwise has reason to believe from the judge's own knowledge or from other credible information, whether upon the settlement of an account or otherwise, that there are grounds for removal, the court shall issue a citation to the personal representative to appear and show cause why the personal representative should not be removed. The court may suspend the powers of the personal representative and may make such orders as are necessary to deal with the property pending the hearing.

(c) Any interested person may appear at the hearing and file written allegations showing that the personal representative should be removed or retained. The personal representative may demur to or answer the allegations. The court may compel the attendance of the personal representative and may compel the personal representative to answer questions, on oath, concerning the administration of the estate. Failure to attend and answer is cause for removal of the personal representative from office.

(d) The issues shall be heard and determined by the court. If the court is satisfied from the evidence that the citation has been duly served and cause for removal exists, the court shall remove the personal representative from office.

Comment. Section 8500 supersedes portions of former Section 451. Subdivision (b) restates portions of the first sentence of former Section 521 without substantive change. Subdivision (c) restates former Sections 522 and 523 without substantive change. The court may enforce its orders by any proper means, including contempt. Section 7050 (jurisdiction and authority of court or judge).

CROSS-REFERENCES

Citation §§ 1240-1242

Definitions

Interested person § 48

Personal representative § 58

Person § 56

§ 8501. Revocation of letters

8501. Upon removal of a personal representative from office, the court shall revoke any letters issued to the personal representative, and the authority of the personal representative ceases.

Comment. Section 8501 generalizes a provision found in former Section 549.

CROSS-REFERENCES

Definitions

Letters § 52

Personal representative § 58

§ 8502. Grounds for removal

8502. A personal representative may be removed from office for any of the following causes:

(a) The personal representative has wasted, embezzled, mismanaged, or committed a fraud upon the estate, or is about to do so.

(b) The personal representative is incapable of properly executing the duties of the office or is otherwise not qualified for appointment as personal representative.

(c) The personal representative has wrongfully neglected the estate, or has long neglected to perform any act as personal representative.

(d) Removal is otherwise necessary for protection of the estate or interested persons.

(e) Any other cause provided by statute.

Comment. Section 8502 restates former Section 524 and portions of the first sentence of former Section 521, except that permanent removal from the state is not continued as a ground for dismissal. See Article 9 (commencing with Section 8570) (nonresident personal representative). A conflict of interest may be ground for removal under subdivision (d); it should be noted, however, that not every conflict necessarily requires removal for protection of the estate, depending on the circumstances of the particular case. Other causes for removal are provided in this article and elsewhere by statute. See, e.g., Sections 8480 (bond required), 8577 (failure of nonresident personal representative to comply with Section 8573), 8500 (failure to attend and answer).

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Note. Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 33 to Memorandum 86-201) points out that the personal representative may have an interest adverse to the estate with respect to a very particular item of property or debt. "In contested estates, this may lead to efforts to disqualify the representative as a matter of spite or litigation strategy. I believe it would be appropriate to permit the court to appoint a special administrator for specific purposes without removing the personal representative completely." This sounds to the staff like an interesting concept--we would call it something like a

partial or temporary removal, suspension of specific powers, or the like. State Bar Team 3 (Fourth Supplement to Memorandum 86-201) questions, however, whether the administrative costs of such a mechanism justify it.

§ 8503. Removal at request of person with higher priority

8503. (a) Subject to subdivision (b), an administrator may be removed from office on the petition of the surviving spouse or a relative of the decedent entitled to succeed to all or part of the estate, or the nominee of the surviving spouse or relative, if such person is higher in priority than the administrator.

(b) The court in its discretion may refuse to grant the petition:

(1) Where the petition is of a person or the nominee of a person who had actual notice of the proceeding in which the administrator was appointed and an opportunity to contest the appointment.

(2) Where to do so would be contrary to the sound administration of the estate.

Comment. Subdivision (a) of Section 8503 supersedes former Sections 450 and 452. Subdivision (b)(1) restates former Section 453 without substantive change. Subdivision (b)(2) is new; it is intended to cover the situation, for example, where administration is nearly complete and replacement of the administrator inappropriate. A petition pursuant to this section should be accompanied by a petition for appointment of a successor who has higher priority than the existing personal representative.

CROSS-REFERENCES

Definitions

Surviving spouse § 78

Note. *The San Diego County Bar Association Subcommittee for Probate, Trust and Estate Planning Legislation (Exhibit 6 to Memorandum 86-201) approved the provision of this section making removal discretionary with the court, as did David B. Flinn of San Francisco (Exhibit 9 to Memorandum 86-201). Mr. Flinn adds the comment that "There should, perhaps, be a time provision." We are not certain what he means by this; perhaps the court would deny removal after administration has been going for more than, say, 4 months?*

§ 8504. Subsequent probate of will

8504. (a) After appointment of an administrator on the ground of intestacy, the personal representative shall be removed from office on the later admission to probate of a will.

(b) After appointment of an executor or administrator with the will annexed, the personal representative shall be removed from office on admission to probate of a later will.

Comment. Section 8504 restates the first portion of the first sentence of former Section 510 without substantive change. Cf. Section 8226 (effect of admission of will to probate).

CROSS-REFERENCES

Definitions

Personal representative § 58
Will § 88

§ 8505. Contempt

8505. (a) A personal representative may be removed from office if the personal representative is found in contempt for disobeying an order of the court.

(b) Notwithstanding any other provision of this article, a personal representative may be removed from office pursuant to this section by a court order reciting the facts and without further showing or notice.

Comment. Section 8505 restates former Section 526, omitting the requirement of 30 days custody. See also Sections 8501 (revocation of letters) and 8524 (successor personal representative).

CROSS-REFERENCES

Definitions

Personal representative § 58

Article 7. Changes in Administration

§ 8520. Vacancy in office

8520. A vacancy occurs in the office of a personal representative who resigns, dies, or is removed from office pursuant to Article 6 (commencing with Section 8500), or whose authority is otherwise terminated.

Comment. Section 8520 generalizes provisions found in various parts of former law. A personal representative who resigns is not excused from liability until accounts are settled and property is delivered to the successor. Section 8525(b) (effect of vacancy).

CROSS-REFERENCES

Definitions

Personal representative § 58

§ 8521. Vacancy where other personal representatives remain

8521. (a) Unless the will provides otherwise or the court in its discretion orders otherwise, if a vacancy occurs in the office of fewer than all personal representatives, the remaining personal representatives shall complete the administration of the estate.

(b) The court, upon the filing of a petition alleging that a vacancy has occurred in the office of fewer than all personal representatives, may order the clerk to issue appropriate amended letters to the remaining personal representatives.

Comment. Section 8521 restates former Section 511 without substantive change.

CROSS-REFERENCES

Definitions

Letters § 52

Will § 88

Verification required § 1284

§ 8522. Vacancy where no personal representatives remain

8522. (a) If a vacancy occurs in the office of a personal representative and there are no other personal representatives, the court shall appoint a successor personal representative.

(b) Appointment of a successor personal representative shall be made upon petition and service of notice on interested persons in the manner provided in Article 2 (commencing with Section 8110) of Chapter 2, and shall be subject to the same priority as for an original appointment of a personal representative. The personal representative of a deceased personal representative is not, as such, entitled to appointment as successor personal representative.

Comment. Section 8522 restates former Section 512 and a portion of former Section 451 without substantive change, and generalizes the first sentence of former Section 406.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

§ 8523. Interim protection of estate

8523. The court may make orders that are necessary to deal with the property between the time a vacancy occurs in the office of personal representative and appointment of a successor. Such orders may include appointment of a special administrator.

Comment. Section 8523 supersedes the second sentence of former Section 520.

CROSS-REFERENCES

Definitions

Property § 62

§ 8524. Successor personal representative

8524. (a) A successor personal representative is entitled to demand, sue for, recover and collect all the property of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the former personal representative before the vacancy.

(b) No notice, process, or claim given to or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative.

(c) Except as provided in subdivision (b) of Section 8442 (authority of administrator with will annexed) or as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had.

Comment. Subdivision (a) of Section 8524 restates and broadens the application of a portion of former Section 466 and the second sentence of former Section 510. Subdivisions (b) and (c) are drawn from Section 3-613 of the Uniform Probate Code.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Property § 62

§ 8525. Effect of vacancy

8525. (a) The acts of the personal representative before a vacancy occurs are valid to the same extent as if no vacancy had later occurred.

(b) The liability of a personal representative whose office is vacant, or of the surety on the bond, is not discharged, released, or affected by the vacancy or by appointment of a successor, but continues until settlement of the accounts of the personal representative and delivery of all the property to the successor personal representative or other person appointed by the court to receive it. The personal representative shall render an account of the administration within such time as the court directs.

Comment. Subdivision (a) of Section 8525 restates former Section 525 without substantive change. The first sentence of subdivision (b) restates the third sentence of former Section 520 without substantive change. The second sentence of subdivision (b) restates the last portion of the first sentence of former Section 510 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Article 8. Special Administrators

§ 8540. Grounds for appointment

8540. (a) If the circumstances of the estate require the immediate appointment of a personal representative, the court may appoint a special administrator to exercise such powers as may be appropriate under the circumstances for the preservation of the estate.

(b) The appointment may be for a specified term, to perform particular acts, or on such other terms as the court may direct.

Comment. Subdivision (a) of Section 8540 supersedes the first clause of former Section 460 and generalizes provisions of former Sections 465 and 520. Under subdivision (a), grounds for appointment of a special administrator would include situations where (1) no application is made for appointment of a personal representative, (2) there is delay in appointment of a personal representative, (3) a sufficient bond is not given as required by statute or letters are otherwise granted irregularly, (4) the personal representative dies, resigns, or is suspended or removed from office, (5) an appeal is taken from an order revoking probate of a will, or where (6) for any other cause the personal representative is unable to act. Appointment may be made upon the court's own motion or upon petition of an interested person.

Subdivision (b) is drawn from Section 3-617 of the Uniform Probate Code. See also Section 8544 (special powers, duties, and obligations).

A judge may appoint a special administrator in chambers. Code Civ. Proc. § 166 (actions in chambers). The public administrator may serve as special administrator. Section 8541.

CROSS-REFERENCES

Actions in chambers § 7061

Definitions

Personal representative § 58

Note. Jeffrey A. Dennis-Strathmeyer of CEB (Exhibit 7 to Memorandum 86-201) would like to see a more specific and direct approach for dealing with the problem of the appointment of a special administrator to perform a single act. He suggests an express provision for combining the request for approval of the act in the petition, clarifying when the approval may be given ex parte, and making clear that such a special administrator does not incur any fiduciary duty to take other acts to protect the estate. The court would also have authority to act, if necessary, to remedy errors made in the appointment.

§ 8541. Procedure for appointment

8541. (a) Appointment of a special administrator may be made at any time without notice or upon such notice to interested persons as the court deems reasonable.

(b) In making the appointment, the court shall ordinarily give preference to the person entitled to appointment as personal representative. The court may appoint the public administrator.

(c) The appointment of a special administrator is not appealable.

Comment. Section 8541 restates former Section 461 and the last clause of former Section 460 without substantive change. The public administrator may no longer be directed by the court to "take charge" of the estate but may be appointed as special administrator. Appointment of a special administrator may be made by the judge in chambers. Code Civ. Proc. § 166 (actions in chambers).

CROSS-REFERENCES

Definitions

Interested person § 48

Person § 56

§ 8542. Issuance of letters

8542. (a) The clerk shall issue letters to the special administrator after both of the following conditions are satisfied:

(1) The special administrator gives such bond as may be required by the court pursuant to Section 8480.

(2) The special administrator takes the usual oath indorsed on the letters.

(b) This section does not apply to the public administrator.

Comment. Section 8542 restates subdivisions (a) and (b) of former Section 462 without substantive change. The bond must be conditioned that the special administrator will faithfully execute the duties of the office according to law. Section 8480 (bond required). The judge may approve the bond in chambers. Code Civ. Proc. § 166 (actions in chambers).

CROSS-REFERENCES

Definitions
Letters § 52

§ 8543. Waiver of bond

8543. If the will waives the requirement of a bond for the executor and the person named as executor in the will is appointed special administrator, the court shall, subject to Section 8481, direct that no bond be given.

Comment. Section 8543 restates a portion of subdivision (c) of former Section 462 without substantive change. For additional provisions on waiver of the bond of a special administrator, see Section 8481 (waiver of bond).

CROSS-REFERENCES

Definitions
Person § 56
Will § 88

§ 8544. Special powers, duties, and obligations

8544. (a) Except to the extent the order appointing a special administrator prescribes terms, the special administrator has the power to do all of the following:

(1) Take possession of all of the real and personal property of the decedent and preserve it from damage, waste, and injury.

(2) Collect all claims, rents, and other income belonging to the estate.

(3) Commence and maintain or defend suits and other legal proceedings.

(4) Sell perishable property.

(5) Borrow money, or lease, mortgage, or execute a deed of trust upon real property, in the same manner as an administrator. This power may be exercised only by court order.

(6) Pay the interest due on all or any part of an obligation secured by a mortgage, lien, or deed of trust on property in the estate, where there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation. This power may be exercised only by court order, made upon petition of the special administrator or any interested person, with such notice as the court deems proper, and shall remain in effect until appointment of a successor personal representative. The order may also direct that interest not yet accrued be paid as it becomes due, and the order shall remain in effect and cover the future interest unless and until for good cause set aside or modified by the court in the same manner as for the original order.

(7) Exercise other powers that are conferred by order of the court.

(b) Except where the powers, duties, and obligations of a general personal representative are granted pursuant to Section 8545, the special administrator is not liable to an action by a creditor on a claim against the decedent.

Comment. Section 8544 restates former Section 463 without substantive change and supersedes a portion of former Section 460. Subdivision (a)(6) restates former Section 464, with the addition of a provision that the order remains in effect until appointment of a successor. Among the other powers that the court may grant the special administrator is the power to disclaim.

CROSS-REFERENCES

Definitions

Interested person § 48
Personal representative § 58
Property § 62
Real property § 68

§ 8545. General powers, duties, and obligations

8545. (a) Notwithstanding Section 8544, the court may grant a special administrator the same powers, duties, and obligations as a general personal representative where to do so appears proper.

(b) The court may require as a condition of the grant that the special administrator give such additional bond as the court deems proper. From the time of approving and filing any required additional bond, the special administrator shall have the powers, duties, and obligations of a general personal representative.

(c) If a grant is made pursuant to this section, the letters shall recite that the special administrator has the powers, duties, and obligations of a general personal representative.

Comment. Section 8545 supersedes former Section 465. Instances where it might be proper to grant general powers, duties, and obligations include situations where:

(1) The special administrator is appointed pending determination of a will contest or pending an appeal from an order appointing or removing the personal representative.

(2) After appointment of the special administrator a will contest is instituted.

(3) An appeal is taken from an order revoking probate of a will.

CROSS-REFERENCES

Definitions

Letters § 52

Personal representative § 58

Note. Professor Benjamin D. Frantz (Exhibit 36 to Memorandum 86-201) suggests that "letters of special administration" be used to refer to all types of letters of special administration; if letters conferring general powers are to be referred to specifically, it should be done by reference to letters of special administration with general powers. This makes sense to the staff, and we plan to do this. State Bar Team 3 (Fourth Supplement to Memorandum 86-201) agrees.

One problem we have noted in connection with other matters is that times for various acts (e.g., creditor claims) runs from appointment of a personal representative with general powers, but there is no requirement that notice be given. The staff plans to add to this section, "Notwithstanding Section 8541, if letters have not previously been issued to a general personal representative, the grant shall be on the same notice required for appointment of a general personal representative." The Comment will refer to Sections 8100 et seq. (notice of opening estate administration). State Bar Team 3 (Fourth Supplement to Memorandum 86-201) agrees.

Florence J. Luther of Fair Oaks (Exhibit 35 to Memorandum 86-201) states that a special administrator, even a special administrator granted general powers, may not make a distribution of the estate. In this she is supported by the most recent CEB text, which states "Neither preliminary nor final distribution may be made by a special administrator. Even when distribution is the only remaining step, a general administrator or executor must be appointed for that purpose. Estate of Davis (1917) 175 C 198, 165 P 525; Estate of Welch (1895) 106 C 427, 39 P 805." 1 California Decedent Estate Practice § 7.31 (1986).

The staff disagrees with this analysis. These cases pre-date the concept of special administration with general powers, which was first added to the law in 1920's. The concept of special administration with general powers specifically and statutorily includes all powers of general administration. Cases decided since the enactment of the general powers concept have distinguished the earlier cases outright and held that a special administrator with general powers does have the powers of a general administrator and may make distributions. "In this connection appellant makes the further contention that 'having

appointed a special administrator, the court was without power to make a partial distribution.' In making this contention appellant fails to appreciate that the special administrator was appointed 'with general powers' pursuant to section 465, Probate Code....Since general administration is provided for by such an appointment, the probate court clearly had jurisdiction to determine a previously filed petition for partial distribution. The cases relied on by appellant are not helpful since they did not involve special administrators with general powers appointed pending an appeal from an order removing an executor....Thus the deficiency pointed out in the Welch case, viz., the absence of general administration, was supplied in the instant matter by clothing the special administrator with general powers pursuant to the authority of Probate Code, section 465." Estate of Buchman, 132 Cal.App.2d 81, 281 P.2d 608 (1955).

The most the staff would do here is make a reference in the Comment to the applicability of the Buchman case and the inapplicability of the Davis case. The Comment may be useful because of the apparent confusion concerning the law on this matter. The staff would not want to add language to the statute, however, that might tend to encourage distributions. It is our impression that most special administrators with general powers are appointed because of prolonged will contests and other disputes among interested persons, and distribution will frequently be inappropriate. State Bar Team 3 (Fourth Supplement to Memorandum 86-201) agrees with this approach.

§ 8546. Termination of authority

8546. (a) The powers of a special administrator cease upon issuance of letters to a general personal representative or as otherwise directed by the court.

(b) The special administrator shall forthwith deliver to the general personal representative:

(1) All property in the possession of the special administrator. The court may authorize the special administrator to complete a sale or other transaction affecting property in the possession of the special administrator.

(2) A listing of all creditors' claims of which the special administrator has knowledge. The listing shall show the name and address of each creditor, the amount of the claim, and what action has been taken with respect to the claim. A copy of the listing shall be filed in the court.

(c) The special administrator shall render a verified account of the proceedings in the same manner as a general personal representative is required to do. If the same person acts as both special

administrator and general personal representative, the account of the special administrator may be combined with the first account of the general personal representative.

Comment. Subdivisions (a) and (b) of Section 8546 restate former Section 466, with the addition of language expressly permitting court authorization of the special administrator to complete ongoing transactions. The personal representative may prosecute to final judgment any suit commenced by the special administrator. Section 8524 (successor personal representative). Subdivision (c) restates the first sentence of former Section 467, with the addition of language permitting a consolidated account where the special administrator and general personal representative are the same person.

CROSS-REFERENCES

Definitions

Letters § 52

Person § 56

Personal representative § 59

Property § 62

§ 8547. Fees and commissions

8547. (a) Subject to the limitations of this section, the court shall fix the commission and allowances of the special administrator and the fees of the attorney of the special administrator.

(b) The commission and allowances of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's commission and allowances or the court in its discretion so allows. The total commission paid and extra allowances made to the special administrator and general personal representative shall not, together, exceed the sums provided in this division for commission and extra allowances for the services of a personal representative. If the same person does not act as both special administrator and general personal representative, the commission and allowances shall be divided in such proportions as the court deems just or as may be agreed to by the special administrator and general personal representative.

(c) The total fees paid to the attorneys both of the special administrator and the general personal representative shall not, together, exceed the sums provided in this division as compensation for the ordinary and extraordinary services of attorneys for personal

representatives. When the same attorney does not act for both the special administrator and general personal representative, the fees shall be divided between the attorneys in such proportions as the court deems just or as agreed to by the attorneys.

(d) Fees of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative, except that the award of fees to the attorney may be made upon settlement of the final account of the special administrator.

Comment. Subdivisions (a)-(c) of Section 8547 restate former Sections 467-468, with the addition of provisions limiting payment of the special administrator until close of administration and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions. Subdivision (d) supersedes former Section 469. See Section ____ (extraordinary fees).

CROSS-REFERENCES

Definitions

Personal representative § 59

Note. This section will be reviewed in connection with fees and commissions, and the Comment expanded to explain how the system of awarding fees works.

Article 9. Nonresident Personal Representative

§ 8570. "Nonresident personal representative" defined

8570. As used in this article, "nonresident personal representative" means a nonresident of the state appointed as personal representative, or a resident of the state appointed as personal representative who later removes from and resides without the state.

Comment. Section 8570 is new. It is intended as a drafting aid.

CROSS-REFERENCES

Definitions

Personal representative § 59

§ 8571. Bond of nonresident personal representative

8571. Notwithstanding any other provision of this chapter and notwithstanding a prior waiver of a bond, the court in its discretion may require a nonresident personal representative to give a bond in such amount as the court determines is proper.

Comment. Section 8571 is new. It is a specific application of subdivision (c) of Section 8481 (waiver of bond).

CROSS-REFERENCES

Definitions

Nonresident personal representative § 8570

Note. The Probate and Estate Planning Section of the Kern County Bar Association (Exhibit 17 to Memorandum 86-201) felt that the authority of the court to require a bond should be limited to situations in which there is a specific reason for the bond. "Our committee again felt that, in some courts, this might lead to a situation in which the court would decide that a bond was appropriate in every such case."

State Bar Team 3 (Fourth Supplement to Memorandum 86-201) suggests that "determines" be replaced by "finds" in this section. Generally, we do not require findings.

§ 8572. Secretary of State as attorney

8572. (a) Acceptance of appointment by a nonresident personal representative is equivalent to and constitutes an irrevocable and binding appointment by the nonresident personal representative of the Secretary of State to be the attorney of the personal representative for the purpose of this article. Such appointment also applies to any personal representative of a deceased nonresident personal representative.

(b) All lawful processes, and notices of motion under Section 385 of the Code of Civil Procedure, in an action or proceeding against the nonresident personal representative with respect to the estate or founded upon or arising out of the acts or omissions of the nonresident personal representative in that capacity may be served upon the Secretary of State as the attorney of the nonresident personal representative.

Comment. Section 8572 restates former Section 405.1 without substantive change.

CROSS-REFERENCES

Definitions

Nonresident personal representative § 8570

§ 8573. Statement of address

8573. A nonresident personal representative shall sign and file with the court a statement of the permanent address of the nonresident personal representative. If the permanent address is changed, the

nonresident personal representative shall forthwith file in the same manner a statement of the change of address.

Comment. Section 8573 restates former Section 405.2, with the omission of the acknowledgment requirement.

CROSS-REFERENCES

Definitions

Nonresident personal representative § 8570

§ 8574. Manner of service

8574. (a) Service of process or notice of a motion under Section 385 of the Code of Civil Procedure in any action or proceeding against the nonresident personal representative shall be made by delivering to and leaving with the Secretary of State two copies of the summons and complaint or notice of motion and either of the following:

(1) A copy of the statement by the nonresident personal representative pursuant to Section 8573.

(2) If the nonresident personal representative has not filed a statement pursuant to Section 8573, a copy of the letters issued to the nonresident personal representative together with a written statement signed by the party or attorney of the party seeking service that sets forth an address for use by the Secretary of State.

(b) The Secretary of State shall forthwith mail by registered mail one copy of the summons and complaint or notice of motion to the nonresident personal representative at the address shown on the statement delivered to the Secretary of State.

(c) Personal service of process, or notice of motion, upon the nonresident personal representative wherever found shall be the equivalent of service as provided in this section.

Comment. Section 8574 restates former Section 405.3 without substantive change.

CROSS-REFERENCES

Definitions

Letters § 52

Nonresident personal representative § 8570

§ 8575. Proof of service

8575. Proof of compliance with Section 8574 shall be made in the following manner:

(a) In the event of service by mail, by certificate of the Secretary of State, under official seal, showing the mailing. The certificate shall be filed with the court from which process issued.

(b) In the event of personal service outside the state, by the return of any duly constituted public officer qualified to serve like process, or notice of motion, of and in the jurisdiction where the nonresident personal representative is found, showing the service to have been made. The return shall be attached to the original summons, or notice of motion, and filed with the court from which process issued.

Comment. Section 8575 restates former Section 405.4 without substantive change.

CROSS-REFERENCES

Definitions

Nonresident personal representative § 8570

§ 8576. Effect of service

8576. (a) Except as provided in this section, service made pursuant to Section 8574 has the same legal force and validity as if made personally in this state.

(b) A nonresident personal representative served pursuant to Section 8574 may appear and answer the complaint within 30 days from the date of service.

(c) Notice of motion shall be served upon a nonresident personal representative pursuant to Section 8574 not less than 30 days before the date of the hearing on the motion.

Comment. Section 8576 restates former Section 405.5 without substantive change.

CROSS-REFERENCES

Definitions

Nonresident personal representative § 8570

§ 8577. Noncompliance

8577. (a) Failure of a nonresident personal representative to comply with Section 8573 is cause for removal from office.

(b) Nothing in this section limits the liability of, or the availability of any other remedy against, a nonresident personal representative who is removed from office pursuant to this section.

Comment. Subdivision (a) of Section 8577 restates former Section 405.6 without substantive change. Subdivision (b) is new.

CROSS-REFERENCES

Definitions

Nonresident personal representative § 8570

COMMENTS TO REPEALED SECTIONS

Article 2. Probate of Wills

§ 320 (repealed)

Comment. Former Section 320 is superseded by Section 8200 (filing of will).

§ 321 (repealed)

Comment. Former Section 321 is restated in Sections 8201 (order for production of will), 7060 (authority of court or judge), and 7375 (enforcement of order).

§ 322 (repealed)

Comment. Former Section 322 is [relocated to Division 6 (wills and intestate succession)].

§ 323 (repealed)

Comment. Former Section 323 is restated in Section 8000 (petition) without substantive change.

§ 324 (repealed)

Comment. Former Section 324 is restated in Section 8001 (failure of person named executor to petition) without substantive change.

§ 326 (repealed)

Comment. The first portion of former Section 326 is restated in Section 8002 (contents of petition), which substitutes the address for the residence of heirs and devisees and adds an express requirement that a copy of the will be attached. The last portion is restated in Section 8006(b) (court order) without substantive change.

§ 327 (repealed)

Comment. Former Section 327 is restated in Section 8003 (setting and notice of hearing), except that the 10 day minimum hearing period is increased to 15 days and the petitioner rather than the clerk has the duty of giving notice.

§ 328 (repealed)

Comment. The first sentence of the first paragraph of former Section 328 is restated in Sections 8110 (persons on whom notice served), 7300 (service), and 7302 (mailing), with the addition of a provision limiting service to known heirs. The second sentence is restated in Section 8100 (form of notice).

The second paragraph is restated in Sections 8111 (service on Attorney General) and 7302 (mailing) without substantive change. The third paragraph is generalized in Section 7302 (mailing).

§ 328.3 (repealed)

Comment. Former Section 328.3 is restated in Section 6104 (will or revocation procured by duress, menace, fraud, or undue influence) without substantive change.

§ 328.7 (repealed)

Comment. Former Section 328.7 is restated in Section 6132 (conditional will) without substantive change.

§ 329 (repealed)

Comment. The first two sentences of former Section 329 are restated in Section 8220 (evidence of subscribing witness) without substantive change. The third sentence is not continued because it is unnecessary. See Comment to Section 8221 (proof where no subscribing witness available). See also Evidence Code § 240 ("unavailable as witness"). The fourth sentence is restated in Section 8221 (proof where no subscribing witness available), with the exception of the language relating to a writing "at the end" of the will. The signatures of subscribing witnesses no longer must appear at the end. Section 6110 (execution).

§ 330 (repealed)

Comment. The first two sentences of former Section 330 are restated in Section 8202 (will detained outside California) without substantive change. The last sentence is superseded by Section 8220 and provisions following governing proof of will.

§ 331 (repealed)

Comment. Former Section 331 is restated in Section 8222 (proof of holographic will) without substantive change.

§ 332 (repealed)

Comment. The first sentence of former Section 332 is superseded by Section 8225 (admission of will to probate). The second sentence is superseded by Section 8002(b) (contents of petition).

§ 333 (repealed)

Comment. Subdivision (a) of former Section 333 is restated in Section 8121 (publication of notice), but the posting provision is omitted because it is no longer necessary.

The introductory portion of subdivision (b) is restated in Section 8123 (type size) without substantive change. The remainder of subdivision (b) is restated in Section 8100 (form of notice), except that reference to notice of the decedent's death is eliminated from the caption and a reference to the decedent's will is added to the notice.

Subdivision (c) is restated in Section 8124 (affidavit of publication) without substantive change.

Subdivision (d) is not continued because it is no longer necessary.

§ 334 (repealed)

Comment. Former Section 334 is restated in Section 8122 (good faith compliance with publication requirement) without substantive change.

Article 3. Lost or Destroyed Wills

§ 351 (repealed)

Comment. The first two sentences of former Section 351 are restated in Section 8223 (proof of lost or destroyed will), except that the requirement that the order admitting the will to probate be "set

forth at length in the minutes" is omitted. The last sentence is restated and broadened in Section 8224 (subsequent admissibility of testimony).

§ 352 (repealed)

Comment. Former Section 352 is restated and broadened in Section 8406 (suspension of powers of personal representative).

Article 4. Foreign Wills

§ 360 (repealed)

Comment. [Disposed of in connection with nonresident decedents.]

§ 361 (repealed)

Comment. [Disposed of in connection with nonresident decedents.]

§ 362 (repealed)

Comment. [Disposed of in connection with nonresident decedents.]

CHAPTER 2. CONTESTS OF WILLS

Article 1. Contests Before Probate

§ 370 (repealed)

Comment. The first portion of the first sentence of former Section 370 is superseded by Sections 1043 (response or objection) and 8004 (opposition). The last portion of the first sentence is restated in Section 8250 (summons), except that the citation is replaced with a summons.

The second, third, and fourth sentences are restated in Section 8251 (responsive pleading), except that the time to answer after a demurrer is overruled is not conditioned on receipt of written notice.

§ 371 (repealed)

Comment. Former Section 371 is superseded by Section 8252 (trial), which does not continue the provision for jury trial.

§ 372 (repealed)

Comment. Former Section 372 is restated in Section 8253 (evidence of execution), except that the limitation on production of witnesses outside the county is not continued. See also Section 7200 (general rules of practice govern) and Code Civ. Proc. § 1989 (compelling attendance of witnesses).

§ 372.5 (repealed)

Comment. Former Section 372.5 is restated in Section 6112(d) without substantive change.

§ 373 (repealed)

Comment. Former Section 373 is superseded by Section 8254 (judgment). The provision for the special verdict of a jury is not continued because it is no longer necessary. See Section 8252 and Comment thereto (jury trial not continued).

§ 374 (repealed)

Comment. Former Section 374 is restated and broadened in Section 8224 (subsequent admissibility of testimony).

Article 2. Contests After Probate

§ 380 (repealed)

Comment. Former Section 380 is restated in subdivision (a) of Section 8270 (petition for revocation), but reference to some of the specific grounds of opposition are omitted.

§ 381 (repealed)

Comment. Former Section 381 is superseded by Section 8271 (summons), which substitutes a summons for the citation.

§ 382 (repealed)

Comment. Former Section 382 is superseded by Section 8271(b) (summons) and 8272 (revocation). The provision for a jury trial is not continued. See Section 7204 (trial by jury).

§ 383 (repealed)

Comment. Former Section 383 is superseded by Section 1002 (costs).

§ 384 (repealed)

Comment. The first portion of former Section 384 is restated in Section 8226(a) (effect of admission of will to probate) without substantive change. The last portion is superseded by Section 8270(b) (petition for revocation).

§ 385 (repealed)

Comment. Former Section 385 is superseded by Section 8226(b) (effect of admission of will to probate).

**CHAPTER 3. APPOINTMENT OF EXECUTORS AND OF
ADMINISTRATORS WITH THE WILL ANNEXED**

§ 400 (repealed)

Comment. Former Section 400 is restated in Section 8400 (appointment necessary) without substantive change.

§ 401 (repealed)

Comment. Former Section 401 is superseded by Section 8402 (qualifications).

§ 402 (repealed)

Comment. Former Section 402 is restated in Section 8421 (executor not specifically named) without substantive change.

§ 403 (repealed)

Comment. Former Section 403 is restated in Section 8422 (power to designate executor) without substantive change.

§ 404 (repealed)

Comment. Former Section 404 is restated in Section 8423 (successor corporation as executor) without substantive change.

§ 405 (repealed)

Comment. The portion of former Section 405 that related to a minor named as executor is restated in Section 8424 (minor named as executor) without substantive change. The portion relating to a person absent from the state is not continued. See Section 8570 et seq. (nonresident personal representative).

§ 405.1 (repealed)

Comment. Former Section 405.1 is restated in Section 8572 (Secretary of State as attorney) without substantive change.

§ 405.2 (repealed)

Comment. Former Section 405.2 is restated in Section 8573 (statement of address) with the omission of the acknowledgment requirement.

§ 405.3 (repealed)

Comment. Former Section 405.3 is restated in Section 8574 (manner of service) without substantive change.

§ 405.4 (repealed)

Comment. Former Section 405.4 is restated in Section 8575 (proof of service) without substantive change.

§ 405.5 (repealed)

Comment. Former Section 405.5 is restated in Section 8576 (effect of service) without substantive change.

§ 405.6 (repealed)

Comment. Former Section 405.6 is restated in Section 8577 (noncompliance) without substantive change.

§ 406 (repealed)

Comment. The first sentence of former Section 406 is restated and generalized in Section 8522 (vacancy where no personal representatives remain). The second sentence is superseded by Section 8440 (appointment of administrator with will annexed).

§ 407 (repealed)

Comment. The first sentence of former Section 407 is restated in Sections 1043 (response or objection), 1046 (hearing and order), 8004 (opposition), and 8005 (hearing) without substantive change. The second sentence is superseded by Section 8420 (right to appointment as personal representatives).

§ 408 (repealed)

Comment. Former Section 408 is restated in Section 8425 (when fewer than all executors appointed) without substantive change.

§ 409 (repealed)

Comment. The first sentence of former Section 409 is restated in Section 8442 (authority of administrator with will annexed), with the addition of court discretion to permit exercise of a discretionary

power or authority. The second sentence is restated in Section 8441 (priority for appointment) without substantive change. The third sentence is superseded by Section 8441.

§ 410 (repealed)

Comment. Former Section 410 is restated in Section 8480 (bond required) without substantive change.

CHAPTER 4. APPOINTMENT OF ADMINISTRATORS

Article 1. Competency and Priority

§ 420 (repealed)

Comment. Former Section 420 is restated in Section 8402 (qualifications) without substantive change.

§ 421 (repealed)

Comment. Former Section 421 is restated in Section 8402 (qualifications) without substantive change.

§ 422 (repealed)

Comment. Former Section 422 is restated in Sections 8461 (priority for appointment), 8462 (priority of relatives), and 8463 (estranged spouse), with the addition of provisions to reflect changes in the law governing intestate succession and language recognizing the priority of relatives of a predeceased spouse, and expansion to include any lineal relative of the decedent who satisfies prescribed conditions.

§ 423 (repealed)

Comment. Former Section 423 is restated in Section 8465 (nominee of person entitled to appointment).

§ 424 (repealed)

Comment. Former Section 424 is not continued. Wholeblood relatives are no longer preferred over halfblood relatives. Section 6406.

§ 425 (repealed)

Comment. The first clause of former Section 425 is restated in Section 8467 (equal priority) with the addition of authority to appoint a disinterested person where there is a conflict between persons of equal priority. The second clause is restated in Section 8466 (priority of creditor) but the requirement that there be a request of another creditor before the court may appoint another person is omitted.

§ 426 (repealed)

Comment. Former Section 426 is restated in Section 8464 (minors and incompetent persons) without substantive change.

§ 427 (repealed)

Comment. Former Section 427 is restated in Section 8468 (administration by any competent person) without substantive change.

Article 2. Application for Letters

§ 440 (repealed)

Comment. The first portion of former Section 440 is superseded by Section 1020 (petitions, reports, accounts). The last paragraph is restated in Section 8006(b) (court order) without substantive change.

§ 441 (repealed)

Comment. The first two sentences of former Section 441 are restated in Sections 8003 (setting and notice of hearing), 8110 (persons on whom notice served), and 7202 (clerk to set matters for hearing), except that the 10 day minimum notice period is increased to 15 days and the petitioner rather than the clerk has the duty of giving notice. See also Sections 7300 (service), 7302 (mailing), 7304 (notice to persons whose address is unknown). The third sentence is restated in Section 8100 (form of notice) without substantive change.

§ 442 (repealed)

Comment. Former Section 442 is restated in Sections 1043 (response or objection) and 8004 (opposition) without substantive change.

§ 443 (repealed)

Comment. Former Section 443 is restated in Section 8005 (hearing) without substantive change.

Article 3. Revocation of Letters

§ 450 (repealed)

Comment. Former Section 450 is superseded by Section 8503(a) (removal at request of person with higher priority) and Article 7 (commencing with Section 8520) (changes in administration) of Chapter 4 of Part 2 of Division 7.

§ 451 (repealed)

Comment. Former Section 451 is superseded by Section 8500 (procedure for removal) and Article 7 (commencing with Section 8520) (changes in administration) of Chapter 4 of Part 2 of Division 7.

§ 452 (repealed)

Comment. Former Section 452 is superseded by Section 8503(a) (removal at request of person with higher priority).

§ 453 (repealed)

Comment. Former Section 453 is restated in Section 8503(b) (removal at request of person with higher priority) without substantive change.

CHAPTER 5. SPECIAL ADMINISTRATORS

§ 460 (repealed)

Comment. The first clause of former Section 460 is superseded by Sections 8540 (grounds for appointment) and 8544 (special powers, duties, and obligations). The last clause is restated in Section 8541 (procedure for appointment) without substantive change.

§ 461 (repealed)

Comment. Former Section 461 is restated in Section 8541 (procedure for appointment) without substantive change.

§ 462 (repealed)

Comment. Subdivisions (a) and (b) of former Section 462 are restated in Section 8542 (issuance of letters) without substantive change. Subdivision (a)(1) is restated in Section 8481 (waiver of bond) without substantive change. Subdivision (a)(2) is restated in Section 8543 (waiver of bond) without substantive change.

§ 463 (repealed)

Comment. Former Section 463 is restated in Section 8544 (special powers, duties, and obligations) without substantive change.

§ 464 (repealed)

Comment. Former Section 464 is restated in Section 8544(a)(6) (special powers, duties, and obligations) with the addition of a provision that the order remains in effect until appointment of a successor.

§ 465 (repealed)

Comment. Former Section 465 is superseded by Section 8545 (general powers, duties, and obligations).

§ 466 (repealed)

Comment. Former Section 466 is restated in Sections 8546(a)-(b) (termination of authority) and 8524 (successor personal representative), with the addition of language expressly permitting court authorization of the special administrator to complete ongoing transactions.

§ 467 (repealed)

Comment. The first sentence of former Section 467 is restated in Section 8546(c) (termination of authority), with the addition of language expressly permitting a consolidated account where the special administrator and general personal representative are the same person. The second sentence is restated in Section 8547(a)-(c) (fees and commissions), with the addition of provisions limiting payment of the special administrator until close of administration and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions.

§ 468 (repealed)

Comment. Former Section 468 is restated in Section 8547(b)-(c) (fees and commissions), with the addition of provisions limiting payment of the special administrator until close of administration and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions.

§ 469 (repealed)

Comment. Former Section 469 is superseded by Section 8547(d) (fees and commissions).

CHAPTER 6. LETTERS, GENERALLY, AND CHANGES IN ADMINISTRATION

Article 1. Trust Companies

§ 480 (repealed)

Comment. Former Section 480 is restated in Sections 83 ("trust company" defined) and 300 (appointment of trust company) without substantive change.

§ 481 (repealed)

Comment. Former Section 481 is restated in Sections 83 ("trust company" defined) and 301 (oath and bond of trust company) without substantive change.

Article 2. Form of Letters

§ 500 (repealed)

Comment. Former Section 500 is superseded by Section 8405 (form of letters).

§ 501 (repealed)

Comment. Former Section 501 is superseded by Sections 8405 (form of letters) and 7201 (Judicial Council to prescribe forms).

§ 502 (repealed)

Comment. Former Section 502 is superseded by Sections 8405 (form of letters) and 7201 (Judicial Council to prescribe forms).

Article 3. Disability and Substitution

§ 510 (repealed)

Comment. The first sentence of former Section 510 is restated in Sections 8504 (subsequent probate of will) and 8525(b) (effect of vacancy) without substantive change. The second sentence is restated and broadened in Section 8524 (successor personal representative).

§ 511 (repealed)

Comment. Former Section 511 is restated in Section 8521 (vacancy where other personal representatives remain) without substantive change.

§ 512 (repealed)

Comment. Former Section 512 is restated in Section 8522 (vacancy where no personal representatives remain) without substantive change.

Article 4. Resignation, Suspension and Removal

§ 520 (repealed)

Comment. The first sentence of former Section 520 is restated in Sections 8520 (vacancy in office) and 8525(b) (effect of vacancy) without substantive change. The second sentence is superseded by Section 8523 (interim protection of estate). The third sentence is restated in Section 8525(b) (effect of vacancy) without substantive change.

§ 521 (repealed)

Comment. The substance of the first sentence of former Section 521 is restated in Sections 8500(b) (procedure for removal) and 8502 (grounds for removal), with the exception of the provision relating to permanent removal from the state, which is not continued. See Section 8570 et seq. (nonresident personal representative). The second sentence is not continued; it was impliedly repealed by former Section 1207 (service of citation), which is continued as Section 1242.

§ 522 (repealed)

Comment. Former Section 522 is restated in Section 8500(c) (procedure for removal) without substantive change.

§ 523 (repealed)

Comment. Former Section 523 is restated in Section 8500(c) (procedure for removal) without substantive change.

§ 524 (repealed)

Comment. Former Section 524 is restated in Section 8502 (grounds for removal) without substantive change. See also Section 8500 (procedure for removal).

§ 525 (repealed)

Comment. Former Section 525 is restated in Section 8525 (effect of vacancy) without substantive change.

§ 526 (repealed)

Comment. Former Section 526 is restated in Sections 8505 (contempt) and 8501 (revocation of letters), omitting the requirement of 30 days custody.

CHAPTER 7. OATHS AND BONDS

§ 540 (repealed)

Comment. Former Section 540 is restated in Section 8403 (oath) without substantive change.

§ 541 (repealed)

Comment. The first sentence of subdivision (a) of Section 541 is restated in Sections 8480 (bond required), 8481(a) (waiver of bond), and 7061(a)(5) (actions at chambers) without substantive change. The second sentence is superseded by Section 8482(a) (amount of bond), which makes explicit the authority of the court to impose a fixed minimum bond.

Subdivision (b) is superseded by Section 8481(b) (waiver of bond) without substantive change.

§ 541.1 (repealed)

Comment. Former Section 541.1 is restated in Sections 8401 (deposit in controlled account) and 8483 (reduction of bond by deposit of assets) without substantive change.

§ 541.5 (repealed)

Comment. Former Section 541.5 is superseded by Section 8486 (cost of bond).

§ 542 (repealed)

Comment. Former Section 542 is superseded by Section 8482(b) (amount of bond).

§ 543 (repealed)

Comment. Former Section 543 is restated in Section 8481(c) (waiver of bond) without substantive change.

§ 544 (repealed)

Comment. Former Section 544 is restated in Section 8480 (bond required) without substantive change.

§ 549 (repealed)

Comment. The effect of former Section 549 is continued in Sections 8480 (bond required) and 8501 (revocation of letters). See also Section 8520 et seq. (changes in administration).

§ 550 (repealed)

Comment. Former Section 550 is restated and broadened in Section 8406 (suspension of powers of personal representative).

§ 553.3 (repealed)

Comment. Former Section 553.3 is restated in Section 8484 (excessive bond) without substantive change.

§ 553.5 (repealed)

Comment. Former Section 553.5 is restated in Section 8485 (substitution or release of sureties) without substantive change.

§ 1298 (repealed)

Comment. Former Section 1297 is replaced by Section 8409. See the Comment to Section 8409.