

Memorandum 82-25

Subject: Study L-610 - Probate Law (Absentees)

Two statutes were enacted in 1972 to deal with the needs of families of persons who were missing in action or prisoners of war in Southeast Asia. One of these acts, the P.O.W.-M.I.A Family Relief Act of 1972 (1972 Cal. Stats ch. 988) was continued in Probate Code Sections 3700-3708 as part of the Commission's revision of guardianship and conservatorship law. (A copy of Sections 3700-3708 is attached to this memorandum as Exhibit 3.)

The other relief act (1972 Cal. Stats. ch. 632) is codified at Probate Code Sections 295-295.4; this statute was not revised in connection with the guardianship and conservatorship study. (A copy of Sections 295-295.4 is attached hereto as Exhibit 2.) A staff draft of proposed Probate Code Sections 3710-3720 and some conforming changes is attached to this memorandum as Exhibit 1. This draft would continue the substance of the other 1972 relief act and locate it with the other similar provisions in Part 8, entitled "Other Protective Proceedings," of Division 4 of the Probate Code.

The two statutes deal with the same problem in different ways:

(1) The nonjudicial (affidavit) procedure in existing Sections 295-295.4 is available only if the absentee owns no real property in California and has no more than \$5,000 worth of personal property in this state.

(2) Under the judicial procedure provided by Sections 3700-3708, personal property worth up to \$20,000 may be set aside for the use of the absentee's family regardless of whether the absentee owns real property in this state or has personal property of a value exceeding such amount. Until raised to \$20,000 by the Commission's revision of guardianship and conservatorship law, the court could set aside only \$5,000 worth of personal property. See former Section 1780.

There are quite a few other differences between these two statutes, but the staff recommends against attempting a wholesale revision of these procedures merely for the sake of consistency. These procedures apply to a very limited number of cases, particularly at this point in history, and we are unaware of any problems that have arisen under them. Accordingly, we recommend approval of the staff draft set forth in Exhibit 1.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

STAFF DRAFT

ABSENTEE PROVISIONS - PROBATE CODE §§ 3710-3720

Probate Code - heading for Chapter 5 (commencing with Section 3700) of Part 8 of Division 4 (technical amendment)

SEC. . The heading of Chapter 5 (commencing with Section 3700) of Part 8 of Division 4 of the Probate Code is amended to read:

CHAPTER 5. PERSONAL PROPERTY OF ~~ABSENTEES~~
ABSENT FEDERAL PERSONNEL

Probate Code - heading for Article 1 (commencing with Section 3700) of Chapter 5 of Part 8 of Division 4 (added)

SEC. . A heading is added immediately preceding Section 3700 of the Probate Code, to read:

Article 1. Definitions

40307

Probate Code § 3700 (technical amendment). Definitions

SEC. . Section 3700 of the Probate Code is amended to read:
3700. As used in this chapter:

(a) "Absentee" is defined in Section 1403.

(b) "Certificate of missing status" means the official written report complying with Section 1283 of the Evidence Code and showing the determination of the secretary of the military department or the head of the department or agency concerned or the delegate of the secretary or head that the absentee is in missing status.

~~(b)~~ (c) "Eligible spouse" means the spouse of an absentee who has not commenced an action or proceeding for judicial or legal separation, divorce, annulment, adjudication of nullity, or dissolution of the marriage of the spouse and the absentee.

~~(e)~~ (d) "Family of an absentee" means an eligible spouse, if any, or if no eligible spouse, the child or children of an absentee, equally, or if no child or children, the parent or parents of an absentee, equally, provided these persons are dependents of the absentee as defined in Section 401 of Title 37 of the United States Code, and the guardian of

the estate or conservator of the estate of any person bearing such relationship to the absentee.

~~(d)~~ (e) "Secretary concerned" is defined in Section 1440.

Comment. Subdivision (b) of Section 3700 continues the substance of former Section 295(2) and a provision formerly set out in Section 3703(b). Subdivision (d) is amended to continue a limitation provided by former Section 295(4) and apply it to the procedure set out in Article 2 (commencing with Section 3701).

09031

Probate Code - heading for Article 2 (commencing with Section 3701) of Chapter 5 of Part 8 of Division 4 (added)

SEC. . A heading is added immediately preceding Section 3701 of the Probate Code, to read:

Article 2. Court Proceeding to Set Aside
Personal Property of Absentee

40308

Probate Code § 3703 (technical amendment). Contents of petition

SEC. . Section 3703 of the Probate Code is amended to read:

3703. (a) The petition shall contain all of the following:

- (1) A statement that the petition is filed under this chapter.
- (2) In its caption, the last known military rank or grade and the social security account number of the absentee.
- (3) A specific description and estimate of the value of all of the absentee's property, wherever situated (including all sums due the absentee from the United States).
- (4) A designation of the property to be set aside, and the facts establishing that setting aside the property is necessary and in the best interest of the absentee.
- (5) If the property is to be set aside for the benefit of the spouse of the absentee, an allegation that the spouse is an eligible spouse.
- (6) So far as known to the petitioner, the names and residences of all persons comprising the family of the absentee, and an allegation whether a guardian of the estate or a conservator of the estate of any member of the family of the absentee has been appointed.

(b) There shall be attached to the petition a certificate ~~complying~~ with Section 1283 of the Evidence Code showing the determination of the secretary of the military department or the head of the department or agency concerned or the delegate of the secretary or head that the absentee is in of missing status. The certificate of missing status shall be received as evidence of that fact and the court shall not determine the status of the absentee inconsistent with the status shown in the certificate.

Comment. The requirements for the certificate formerly set forth in subdivision (b) of Section 3703 are continued in the definition provided by Section 3700(b).

40309

Probate Code §§ 3710-3712 (added)

SEC. . Article 3 (commencing with Section 3710) is added to Chapter 5 of Part 8 of Division 4 of the Probate Code, to read:

Article 3. Management and Disposition of Personal
Property of Absentee Without Court Proceeding

40310

§ 3710. Disposition of personal property of absentee

3710. The family of an absentee may collect, receive, dispose of, or engage in any transaction relating to the absentee's personal property situated in California without any judicial proceeding if all the following conditions are satisfied:

(a) The absentee owns no real property situated in California.

(b) The aggregate value of all of the absentee's personal property situated in California is five thousand dollars (\$5,000) or less, excluding any money owed the absentee by the United States.

(c) The family of the absentee needs to dispose of such personal property to provide for shelter, food, health care, education, transportation, or the maintenance of a reasonable and adequate standard of living for the family of the absentee.

Comment. Section 3710 continues the substance of the first paragraph of former Section 295.1.

CROSS-REFERENCES

Defined terms

Absentee § 3700(a)

Family of an absentee § 3700(d)

40312

§ 3711. Procedure; discharge of third persons

3711. (a) If the conditions set forth in Section 3710 are satisfied, the family of the absentee may have any evidence of interest, indebtedness, or right attributable to the absentee's personal property transferred to the family of the absentee, or transferred to the person to whom the property is to be sold or transferred by the family of the absentee, upon furnishing the person (including any governmental body) having custody of the property both of the following:

(1) A certificate of missing status.

(2) An affidavit stating under oath that the provisions of this chapter are applicable and that the aggregate value of all property received pursuant to this affidavit, together with all other property previously received under this chapter, does not exceed five thousand dollars (\$5,000).

(b) The receipt of a certificate of missing status and affidavit under subdivision (a) constitutes sufficient acquittance for any payment of money or delivery of property made pursuant to this chapter and fully discharges the recipient from any further liability concerning the money or property without the necessity of inquiring into the truth of any of the facts stated in the affidavit.

Comment. Subdivision (a) of Section 3711 continues the substance of the second paragraph of former Section 295.1. Subdivision (b) continues the substance of former Section 295.2.

CROSS-REFERENCES

Defined terms

Absentee § 3700(a)

Certificate of missing status § 3700(b)

Family of an absentee § 3700(d)

40314

§ 3712. Action by absentee

3712. The time within which an absentee may commence an action against any person who executes an affidavit and receives property

pursuant to this chapter commences to run on the earlier of the following dates:

(a) Ninety days after the absentee returns to the continental United States after the termination of the condition that caused the classification of an absentee.

(b) Two years after the termination of the condition that caused the classification of an absentee.

Comment. Section 3712 continues the substance of former Section 295.3.

CROSS-REFERENCES

Defined terms

Absentee § 3700(a)

67706

Probate Code § 3720 (added)

SEC. . Article 4 (commencing with Section 3720) is added to Chapter 5 of Part 8 of Division 4 of the Probate Code, to read:

Article 4. Absentee's Power of Attorney

67720

§ 3720. Power of attorney

3720. If an absentee executed a power of attorney that expires during the period that occasions absentee status, the power of attorney continues in full force and effect until 30 days after the absentee status is terminated. Any person who acts in reliance upon the power of attorney when accompanied by a copy of a certificate of missing status is not liable for relying or acting upon the power of attorney.

Comment. Section 3720 continues the substance of former Section 295.4, but eliminates unnecessary language.

CROSS-REFERENCES

Defined terms

Absentee § 3700(a)

Certificate of missing status § 3700(b)

Durable power of attorney, Civil Code §§ 2400-2407

Termination of power of attorney generally, Civil Code §§ 2356, 2357

EXHIBIT 2

Text of Probate Code Sections 295-295.4
(To Be Repealed)

295. As used in this chapter:

(1) "Absentee" means either (a) a member of a uniform service covered by United States Code, Title 37, Chapter 10, who is determined thereunder by the secretary concerned or his delegate to be in missing status, as missing status is defined therein; or (b) an employee of the United States government or an agency thereof covered by United States Code, Title 5, Chapter 55, Subchapter VII, who is determined thereunder by the head of the department or agency concerned or his delegate to be in missing status as missing status is defined therein.

(2) "Certificate" means the official written report complying with Section 1283 of the Evidence Code, showing the determination of the secretary of the military department or the head of the department or agency concerned or his delegate, as the case may be, that the absentee is in missing status.

(3) "Eligible spouse" means the spouse of an absentee, which spouse has not commenced any action or proceeding for judicial or legal separation, divorce, annulment, adjudication of nullity, or dissolution of the marriage of such spouse and the absentee.

(4) "Family of an absentee" means an eligible spouse, if any, or if no eligible spouse, the child or children of an absentee, equally, or if no child or children, the parent or parents of an absentee, equally, provided such persons are dependents of the absentee as defined in Section 401 of Title 37 of the United States Code, and the conservator or guardian of the estate of any person bearing such relationship to the absentee.

(5) "Secretary concerned" has the same meaning as defined in Section 101 of Title 37 of the United States Code.

Comment. The substance of former Section 295 is continued in Section 3700.

295.1. If an absentee owns no real property situated in California, and the aggregate value of all of the personal property of the absentee situated in California is five thousand dollars (\$5,000) or less, excluding therefrom any moneys owed the absentee by the United States, the family of the absentee may collect, receive, dispose of or engage in any transaction relating to such personal property, if necessary to provide for shelter, food, health care, education, transportation, or the maintenance of a reasonable and adequate standard of living for the family of the absentee, without any judicial proceeding.

In such case the family of the absentee shall have any evidences of interest, indebtedness or right attributable to such items of personal property transferred to them, upon furnishing the person (including any governmental body) having custody of such property or the person (including any governmental body) to whom the property is to be sold or transferred by the family of the absentee, with a certificate as defined in Section 295, together with an affidavit

stating under oath that the provisions of this section are applicable and that the aggregate value of all property received pursuant to this affidavit, together with all other property previously received under this section, does not exceed five thousand dollars (\$5,000).

Comment. The first paragraph of former Section 295.1 is continued in Section 3710. The substance of the second paragraph is continued in Section 3711(a).

295.2. The receipt of such certificate and affidavit shall constitute sufficient acquittance for any payment of money or delivery of property made pursuant to the provisions of this chapter and shall fully discharge such person, representative, corporation, officer, or body from any further liability with reference thereto, without the necessity of inquiring into the truth of any of the facts stated in the affidavit.

Comment. The substance of former Section 295.2 is continued in Section 3711(b).

295.3. The time in which an absentee, as defined in Section 295, shall have to commence any action against any person who executes an affidavit and receives property pursuant to Section 295.1 shall commence to run on the earlier of the following: (a) 90 days after the absentee returns to the continental United States after the termination of the condition which caused his classification as an absentee; or (b) two years after the termination of the condition which caused his classification as an absentee.

Comment. The substance of former Section 295.3 is continued in Section 3712.

295.4. In the event an absentee as defined in Section 295 executed a general or special power of attorney which expires during the period which occasions such status, the general or limited power of attorney shall be continued in full force and effect until 30 days after such absentee status is terminated. Any person, representative, corporation, officer or body who acts in reliance upon any such power of attorney when accompanied by a copy of the written report or record issued by an employee of the United States as stated in Section 295 shall be relieved from any liability for relying and acting upon the power of attorney.

Comment. The substance of former Section 295.4 is continued in Section 3720.

EXHIBIT 3

Probate Code §§ 3700-3708**§ 3700. Definitions**

As used in this chapter:

(a) "Absentee" is defined in Section 1403.

(b) "Eligible spouse" means the spouse of an absentee who has not commenced an action or proceeding for judicial or legal separation, divorce, annulment, adjudication of nullity, or dissolution of the marriage of the spouse and the absentee.

(c) "Family of an absentee" means an eligible spouse, if any, or if no eligible spouse, the child or children of an absentee, equally, or if no child or children, the parent or parents of an absentee, equally, and the guardian of the estate or conservator of the estate of any person bearing such relationship to the absentee.

(d) "Secretary concerned" is defined in Section 1440.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

**Law Revision Commission Comment
1979 Addition**

Section 3700 continues the substance of former Section 1776.

§ 3701. Setting aside personal property of absentee

Upon petition as provided in this chapter, the court may set aside to the family of an absentee personal property of the absentee situated in this state for the purpose of managing, controlling, encumbering, selling, or conveying, or otherwise engaging in any transaction with respect to the property, if the court determines that to do so will be in the best interest of the absentee, including the interest of the absentee in providing for shelter, food, health care, education, transportation, or the maintenance of a reasonable and adequate standard of living for the family of the absentee. The absentee's interest in the property set aside shall not exceed twenty thousand dollars (\$20,000).

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

**Law Revision Commission Comment
1979 Addition**

Section 3701 continues the substance of former Section 1777 but increases the amount that may be set aside from \$5,000 to \$20,000 and makes clear that the court may set aside property of the absentee in order to provide for the support of the dependents of the absentee. This accomplishes the purpose of the legislation which is not only to avoid "prejudice to the estates of such missing persons" but also to avoid "difficulty and hardship to their families [caused] by their inability to consummate transactions, such

as to sell property, withdraw funds, cash checks, transfer securities and the like, upon which the families are dependent." 1972 Cal.Stats. ch. 988, § 9. Accord, C. Stephenson & G. Cole, Supplement to 1 California Decedent Estate Administration § 3.31, at 36 (Cal.Cont.Ed.Bar 1976) (intended to provide for support of dependents of absentee). See also Section 295.1 (administration of estate of absentee).

§ 3702. Persons authorized to petition

A petition that personal property of an absentee be set aside as provided in this chapter may be filed by any of the following persons:

(a) A person in whose favor the personal property of the absentee may be set aside.

(b) A person to whom the absentee has issued a general power of attorney while serving in the armed forces of the United States or while an employee of any agency or department of the United States, provided the power of attorney was valid and effective at the time issued, regardless whether it has expired or terminated.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

Law Revision Commission Comment 1979 Addition

Section 3702 continues the substance of a portion of the first sentence of former Section 1778.

§ 3703. Contents of petition

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

(1) A statement that the petition is filed under this chapter.

(2) In its caption, the last known military rank or grade and the social security account number of the absentee.

(3) A specific description and estimate of the value of all of the absentee's property, wherever situated (including all sums due the absentee from the United States).

(4) A designation of the property to be set aside, and the facts establishing that setting aside the property is necessary and in the best interest of the absentee.

(5) If the property is to be set aside for the benefit of the spouse of the absentee, an allegation that the spouse is an eligible spouse.

(6) So far as known to the petitioner, the names and residences of all persons comprising the family of the absentee, and an allegation whether a guardian of the estate or a conservator of the estate of any member of the family of the absentee has been appointed.

(b) There shall be attached to the petition a certificate complying with Section 1283 of the Evidence Code showing the determination of the secretary of the military department or the head of the

department or agency concerned or the delegate of the secretary or head that the absentee is in missing status. The certificate shall be received as evidence of that fact and the court shall not determine the status of the absentee inconsistent with the status shown in the certificate.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

**Law Revision Commission Comment
1979 Addition**

Section 3703 continues the substance of a portion of former Section 1778.

§ 3704. Notice of hearing

(a) Notice of the nature of the proceedings and the time and place of the hearing shall be given by the petitioner at least 15 days before the hearing date by all of the following means:

(1) By mail, together with a copy of the petition, to all persons comprising the family of the absentee.

(2) By delivery by a method that would be sufficient for service of summons in a civil action, together with a copy of the petition, to the secretary concerned or to the head of the United States department or agency concerned.

(3) By publication pursuant to Section 6061 of the Government Code in a newspaper of general circulation in the county in which the proceedings will be held.

(b) Whenever notice to an officer or agency of this state or of the United States would be required under Section 1461 or Section 1822 upon petition for appointment of a conservator, like notice shall be given of the petition under this chapter.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

OFFICIAL FORMS

Notice of hearing, guardianship or conservatorship, see Form set out following § 1464.

**Law Revision Commission Comment
1979 Addition**

Section 3704 continues the substance of a portion of former Section 1779. The reference to appointment of a guardian of an incompetent person in former Section 1779 has been replaced by a reference in subdivision (b) to appointment of a conservator, and a specific reference to the relevant section of the conservatorship statute has been added.

§ 3705. Hearing and order

(a) Upon the hearing of the petition, any officer or agency of this state or the United States or the authorized delegate of the officer or agency, or any relative or friend of the absentee, may appear and support or oppose the petition.

(b) If the court determines that the allegations of the petition are true and correct, the court may order set aside to the family of the absentee personal property of the absentee situated in California (excluding any sums due the absentee from the United States) in which the absentee's interest does not exceed twenty thousand dollars (\$20,000). The property set aside shall be specified in the order.

(c) No bond shall be required of any person to whom property of the absentee has been set aside by order of the court pursuant to this chapter.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

**Law Revision Commission Comment
1979 Addition**

Subdivision (a) of Section 3705 supersedes the last sentence of former Section 1779. Subdivisions (b) and (c) continue the substance of former Section 1780 but the amount that may be set aside is increased from \$5,000 to \$20,000. Subdivision (b) also continues the substance of the requirement of former Section 1778 that the court find that the spouse is an eligible spouse.

§ 3706. Jurisdiction of court; amount

A determination by the court that the value of all of the absentee's property, wherever situated, exceeds twenty thousand dollars (\$20,000) or that the absentee owns or has an interest in real property, wherever situated, does not deprive the court of jurisdiction to set aside to the family of the absentee personal property of the absentee situated in California in which the absentee's interest does not exceed twenty thousand dollars (\$20,000), and the court shall order set aside such personal property to the family of the absentee if the court finds that all of the other provisions of this chapter have been complied with. The property set aside shall be specified in the order.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

**Law Revision Commission Comment
1979 Addition**

Section 3706 continues the substance of former Section 1781 but the amount has been increased from \$5,000 to \$20,000. See also Section 295.1 (administration of estate of absentee where estate consists of no real property and is \$5,000 or less).

§ 3707. Joint tenancy property

For the purposes of this chapter, any property or interest therein or lien thereon that the absentee holds as joint tenant shall be included in determining the property of the absentee and its value. The joint tenancy interest may be set aside to the family of the absentee as provided in this chapter but may only be set aside to a member of the absentee's family who was a joint tenant with the absentee in the property.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

**Law Revision Commission Comment
1979 Addition**

Section 3707 continues the substance of former Section 1782.

§ 3708. Accounting

(a) Within six months after the absentee has returned to the controllable jurisdiction of the military department or civilian agency or department concerned, or within six months after the determination of death of the absentee by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head, the former absentee or the personal representative of the deceased absentee may, by motion in the same proceeding, require the person or persons to whom the property of the absentee was set aside to account for the property and the proceeds, if any. The time of return to the controllable jurisdiction of the military department or civilian department or agency concerned or the determination of the time of death of the absentee shall be determined by the court under 37 United States Code, Section 556, or 5 United States Code, Section 5566. An official written report or record of the military department or civilian department or agency that the absentee has returned to its controllable jurisdiction or is deceased shall be received as evidence of that fact.

(b) This section does not in any manner derogate the finality and conclusiveness of any order, judgment, or decree previously entered in the proceeding.

(Added by Stats.1979, c. 726, p. 2335, § 3, operative Jan. 1, 1981.)

**Law Revision Commission Comment
1979 Addition**

Section 3708 continues the substance of former Section 1783.