

## Memorandum 87-81

Subject: Study L-1048 - Rules of Procedure in Probate (Review of  
Comments on Tentative Recommendation)

This memorandum reviews the comments we have received on the *Tentative Recommendation Relating to Rules of Procedure in Probate* (July 1987) which was distributed for comment this summer. Comments directed to specific sections are discussed following each relevant provision in the attached revised recommendation. Copies of letters commenting on specific sections are attached as exhibits to this memorandum. The letters of several persons who approved of the tentative recommendation in its entirety, without mentioning a particular section or issue, have not been reproduced here.

At the meeting, we plan to consider only those sections that someone wishes to discuss or that we have received comments about. After reviewing the comments, we hope that the Commission will be able to approve this recommendation for printing, subject to any needed revisions.

References in the revised recommendation to "AB 708" should be read as references to "Chapter 923 of the Statutes of 1987, operative July 1, 1988."

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

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August 13, 1987

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

Re: Tentative Recommendation relating to  
Rules of Procedure in Probate - July 1987

Gentlemen:

Here are my comments.

It is not clear that at Section 1021 verification is required on (1) a will contest, or (2) a response to will contest. Such verifications are not required under present law and should not be included in the legislation to be recommended to the Legislature in 1988.

Neither Probate Code §370 nor §380 requires that the contest document be verified. (CALIFORNIA DECEDENT ESTATE ADMINISTRATION, Volume II, 1975, CEB)

Very truly yours,



Myron W. Curzon

MWC/sg

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August 18, 1987

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303

**Tentative Recommendations  
Rules of Procedure In Probate  
July 1987**

Dear John:

These comments seek to persuade the Commission to the point of view that particularly with Rules of Procedure it is important to have uniformity among counties. It is a constant source of needless delay and expense to have to cope with the varying court rules of every county. It is a constant source of frustration to be told the local rules are in the process of revision and the judge's clerk will prescribe what are the local rules. If it is the policy of the Commission to expedite probate procedures and to reduce the costs of probate, then I can think of nothing more important than abolition of local rules.

I do not know how the Commission can accomplish uniformity other than by having the statute mandate uniformity.

It is a substantial problem to remove the right to a jury trial for issues of fact. I disagree with the policy discussion. For example, a jury will be an important element in a will contest. It is particularly important in small counties where the superior court judge (probate) may not change for many years. Also, it is important to recognize that there can be situations where the use of a jury may be socially more important as an element of causing the community to believe in the essential fairness of the system. In my opinion, the issues of removal of a jury should be debated widely among lawyers. In addition, as a matter of policy, in my opinion the right to jury trial should be expanded, especially in view of the fact that there are many suits that can be filed against estates under the legislation proposals of the Commission. The

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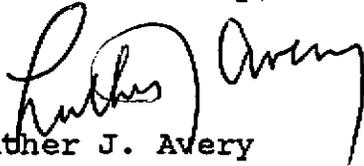
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Mr. John H. DeMouilly  
August 18, 1987  
Page 2

concept of expanding the jurisdiction of the probate court but at the same time eliminating a right to jury on factual issues is bad policy.

In my opinion, the contents of the judgment roll should be left to the Judicial Council rule and should not be a function of court rule. Again, it is important to recognize the value of uniformity and the need for concern about economics of judicial proceedings.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Luther J. Avery". The signature is written in dark ink and is positioned above the typed name.

Luther J. Avery

LJA:cet/3



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**COUNTY OF ORANGE**

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SEP 03 1987

September 1, 1987

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

Ladies and Gentlemen:

Thank you for sending me your tentative recommendations relating to accounts, abatement, rules of procedure in probate, and litigation involving decedents.

My comments on matters of special interest follow. As with my previous comments to you, please note that these are my individual views. I do not write here as a representative of the Orange County Counsel, the Orange County Public Administrator/Public Guardian, or the County of Orange.

I. Recommendations Relating To Accounts:

- A. Proposed Section 10900: I do not support the proposed change. In the particular case of the Orange County Public Administrator/Public Guardian, it would probably cost money to change the form of accounts as allowed by the proposed law, due to modifications that would be needed in the computer system. Of more general interest, I do not think an account which only summarizes categories of receipts, disbursements, etc., generally gives interested persons sufficient information about how an estate has been managed. If an account only lists, for example, the amount of rents received, but not the specific payments, this will only engender more calls and questions from interested persons. While 10901 would provide a procedure to obtain the supporting documentation, I believe it would be fairer to require the party presenting the account to list all receipts therein, rather than to require the recipient of the account to pursue the information under 10901. After all, the preparer had to have the individual receipts available when preparing the account, so as to provide the total.

This matter is perhaps most important where the recipient of an account will be the successor administrator. The Public Administrator fairly often succeeds a personal representative who has mismanaged an estate or absconded. The accounting by the former administrator or his attorney is often the starting point for determining a surcharge and for

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**SHARON LOWSEN**

DEPUTIES

determining what needs to be done to close the estate. In receiving such an account, I, as attorney for the successor, would want to know, for example, not just the total of rents received but exactly which months' rent the predecessor did collect. This may be something I would need to know promptly, and it should be a part of the account.

- B. Proposed Sections 10952 and 10953: I support these changes. It will be helpful to have the sixty-day time limit. In the past, it sometimes takes the predecessor representative too long to present his account. This, of course, delays the administration of the estate and collection of any surcharge.
- C. Proposed Section 11000(c): I support this change. Perhaps a note should clarify whether the exact amount of fees must be set forth.
- D. Proposed Section 11002: I support the discontinuance of a jury trial being available in a contest of an allowed claim.
- E. Proposed Section 11005(b): I support the proposed change.

II. Recommendations Relating to Abatement:

- A. Proposed Section 21402: The explicit preference for specific gifts over general gifts makes the statute comply with the case law as I understand it.
- B. Proposed Section 21403: I support this, as it seems to be the most likely way to carry out implied testamentary intent.
- C. Proposed Section 21405: I support the addition of (b). This sets forth a solution that not only can help a beneficiary, but can make the eventual distribution as much as possible the way the testator wanted it.

III. Recommendations Relating To Rules Of Procedure In Probate:

- A. Proposed Section 7050(b): I support this provision.
- B. Proposed Section 7200: I support this provision.
- C. Proposed Section 7240(a): I think it is helpful to have this explicit provision that orders granting or revoking letters of special administration are not appealable.
- D. Proposed Section 7241(b): I support this addition.

IV. Recommendations Relating To Litigation Involving Decedent:

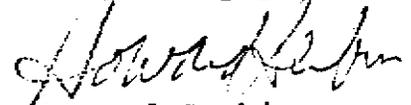
A. Proposed Section 505: I am not certain of all the ramifications of the proposed change, but in general the proposal appears to me to be a good one. Expanding the procedure to estates that do not qualify under 13100 seems particularly well-taken.

B. Proposed Section 9103(a): I support this addition.

V. General Comment:

The Commission may recall that I appeared at one of your recent meetings and commented in opposition to one of your proposals. I did not then also take the opportunity to indicate that I have supported the vast majority of your proposals and have found a number of them helpful in my work. Let me use this occasion to thank you for your good work.

Very truly yours,



Howard Serbin  
Deputy County Counsel

HS:mm

cc: William A. Baker, Public Administrator/Public Guardian  
Carol Gandy, Asst. Public Administrator/Public Guardian  
Dwight G. Tipping, Jr., Supv. Deputy Public Administrator  
Laurence M. Watson, Assistant County Counsel  
James F. Meade, Deputy County Counsel  
Nicholas S. Chrisos, Deputy County Counsel

CHAMBERS OF  
**The Superior Court**  
VENTURA, CALIFORNIA  
ROBERT R. WILLARD, JUDGE

September 1, 1987

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

Gentlemen:

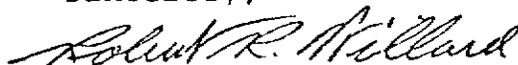
I have reviewed the tentative recommendations dated July 1987 relating to the Probate Code. In my opinion they have substantial merit in both clarification and improvement of the statutes involved.

Following are a few specific comments and questions.

1. Section 1043(b). I particularly like this provision. Quite frequently interested parties appear in court without attorneys and orally object to certain aspects of an account or to the amount of requested fees. Almost as frequently the petitioner's attorney asks that such oral and unverified objections be disregarded. I have never refused to consider such objections, and would welcome statutory justification for a common sense approach.
2. Section 11002. When a hearing is called on a contested account the parties frequently seek to have their opponents go forward and assume the burden of producing evidence. It is my practice to require the objector to specify objections, with the petitioner then having the burden of producing evidence with regard to the specified items. It would be helpful to have a statutory uniform procedure, subject to modification in the discretion of the court.
3. Section 10,954. A problem frequently arises concerning the base for statutory fees where accounting has been waived. It has been my practice to limit the fee base to the referee's appraisal, or in the alternative to require a detailed accounting of increases in the fee base and a specific representation that there have been no losses.
4. Section 10,900. I like this section, particularly item (a) (2). Many accounts presented to me group all money received as receipts without distinguishing between income and the collection or sale of inventoried items. It is not uncommon for petitions to duplicate such items in the base for statutory fees.

Thank you for letting me review these tentative recommendations.

Sincerely,



Robert R. Willard  
Judge of the Superior Court

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September 2, 1987

California Law Revision Commission  
 4000 Middlefield Road, Suite D-2  
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Attention: John H. DeMouilly  
 Executive Secretary

Re: Tentative Recommendations Regarding Probate Code

Dear Mr. DeMouilly:

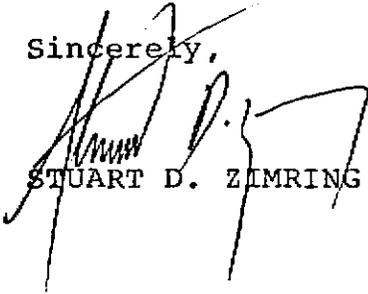
Once again thank you for inviting me to comment on the tentative recommendations.

As in the past, I find myself in general agreement with most of the proposed changes. I have the following comments and suggestions:

1. C.C.P. §385: I do not believe it should be necessary to bring a motion to substitute the Representative for the Decedent in an existing action. Assuming the Representative has been properly appointed, the function of the trial court is ministerial at best, since the Court cannot deny the Representative's standing to represent the interests of the Decedent. Thus, it seems some summary ex-parte procedure would be appropriate. Perhaps the a procedure similar to the one utilized in amending a complaint to substitute the names of "Doe" defendants could be adapted.

2. C.C.P. §7241: It does not appear there is any bonding requirement by the Appellant. Given the fact that a stay is automatic, I believe that this is a serious oversight.

Sincerely,



STUART D. ZIMRING

SDZ:mpa



# CALIFORNIA CONTINUING EDUCATION OF THE BAR

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September 3, 1987

John H. DeMouilly, Esq.  
Executive Director  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: **Study L-1048: RULES OF PROCEDURE  
IN PROBATE**

Dear John:

I have a number of comments regarding the tentative recommendation.

## Section 1001. Judicial Council and local court rules

The grant of rule making power is greatly excessive and too vague. The annual CEB publication of local probate rules now exceeds 1300 pages. Most of the rules are out of date, many are substantive--raising constitutional problems due to the fact that local rules committees are acting like mini-legislatures in violation of separation of powers concepts, and the situation is a mess. What is needed is a statute which carefully circumscribes rule-making power to that needed to expedite the workload of the court.

## 1002. Costs

To the extent that this statute appears to permit the Judicial Council to legislate in the area of court costs, it is probably unconstitutional.

## 1004. Lis Pendens

Isn't this statute unnecessary?

1020-1021. It is inconsistent to provide that an attorney can verify a petition for a client when necessary, but cannot sign the petition for the client. There should be a provision allowing attorneys to sign petitions in emergencies in the absence of the client. Also, it is inconsistent to require verification of objections when objections can be made orally.

Ltr. to John H. DeMouilly, dtd 9-3-87, cont'd.

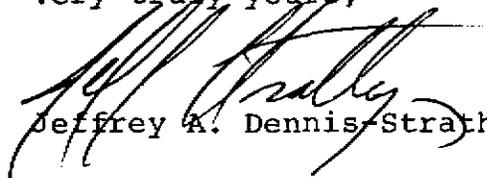
7241. Stay on Appeal.

I do not see any reason why the rules for stays should be different in probate matters than they are in civil matters. The proposed rule commands that trial and appellate courts cannot exercise discretion, thus dictating that the most frivolous of claimants can bring everything to a halt without posting bond, etc.

7260-7263 Orders and Transactions affecting real property.

I would delete all of this. If, for example, the executor leases the back 40 for three months for cattle grazing, I see no reason why the legislature should care less whether or not the lease is recorded. Just because this is in the guardianship law doesn't mean its needed here. (It probably isn't needed there either, although there may be some different considerations where there is a ward who might attempt to act on his or her own behalf. Besides, what is the effect here of failure to comply? Putting the attorney in jail?

Very truly yours,

  
Jeffrey A. Dennis-Strathmeyer

JAD-S:dp

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September 3, 1987

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Gentlemen:

Thank you for permitting me to review Tentative Recommendations #L-1025, #L-1027, #H-408 and #L-1038.

TR #L-1025 entitled "LITIGATION INVOLVING DECEDENT" is excellent. Hopefully, the legislature will follow your recommendations.

(NOTE: Reference is made in the footnote on page 8 to "Claim covered by insurance §9354". At page 10 reference is made to §9354 in §554 (b). I have trouble with these references. There is no §9354 in my Probate Code; there is no §9354 in AB 708 [Harris]; in your January 1987 Blue Book entitled RECOMMENDATIONS relating to Probate Law (received in my office July 13, 1987) I can find no §9354 in Part 4, Creditors Claims. To further complicate this matter, the July 1986 TR Study L 1025 at page 23 contains a comment which reads as follows: "Comment §9354 continues formal Probate Code §732 without substantive change". I agree. On the other hand, §732 relates to "Converting Attachment Lien to Judgement Lien"!? WHERE DO I GO FROM HERE?)

TR #L-1027 entitled "ACCOUNTS" embodies the procedures followed in my office. May I offer two suggestions?

First: when I report the reasons for the delay in distribution of an estate as required by §1025.5 of the Probate Code, I include an interim account. In my opinion, this should be mandatory;

Second: in almost every probate it is necessary, after final distribution, to file a brief account supplemental to the final account to pick up additional interest, refunds, unused closing expenses, etc. which cannot be determined until several weeks or months after actual distribution. I suggest this be required by statute. In the absence of a request by an interested distributee, no hearing need be held nor approval sought from the court with respect to such supplemental account.

California Law Revision Commission  
September 3, 1987  
Page No. 2

With respect to TR #H-408 relating to "UNIFORM DORMANT MINERAL INTERESTS ACT", I have no comment. I have never had occasion, in my practice, to get involved in this problem. On the other hand I am happy to know that the California statutes offer guidance.

With respect to TR #L-1038 entitled "ABATEMENT", locating the new provisions with the other rules of construction of wills, trusts, and other instruments is appropriate.

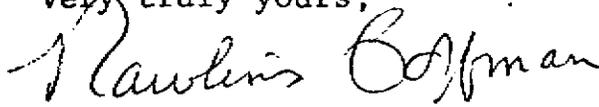
With respect to TR #L-1048 entitled "RULES OF PROCEDURE IN PROBATE", the new limitations on jury trials in the probate court met with my approval. As a matter of fact I would hope that §1081 could be amended to deny jury trials in 1080 proceedings.

I agree that contents of the judgment rule should be left to Judicial Council rule. This in turn should eliminate §1050.

Section 1020 requires the signature of all petitioners; §1021 requires verification by only one of several petitioners. Why the inconsistency?

Please keep me on your mailing list.

Very truly yours,



RAWLINS COFFMAN

RC:mm

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**



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September 11, 1987

Mr. James V. Quillinan  
Attorney at Law  
444 Castro Street, Suite 900  
Mountain View, California 94041

Re: LRC Tentative Recommendation Relating  
to Rules of Procedure in Probate

Dear Jim:

Jim Goodwin, Owen Fiore, Bill Plageman and I discussed the above tentative recommendation. We have both a general observation and some specific comments.

First, the general observation. This tentative recommendation proposes to repeal and reenact some of the sections contained in AB 708. We fail to see any compelling reason for making those changes. If the provisions contained in AB 708 are defective, they should have been deleted from that bill. Constantly drafting and redrafting statutes is a disservice to the public; change for the sake of change reduces the ability of the lawyers, the courts and others who must deal with the laws to assimilate all the changes. It is our recommendation that any legislation enacted by AB 708 be left intact.

A specific problem caused by unending tinkering with the statute is exemplified by Sections 7261 and 7262 of this tentative recommendation. Representatives of the State Bar have previously discussed with the Law Revision Commission the matter of recording documents affecting real property. In those discussions, we raised with the Law Revision Commission the fact that many landlords do not wish to record leases, because recorded leases create clouds on title after the lease expires. The matter of recording a lease should be left to private negotiations between the landlord and tenant. Similarly, recording a court order authorizing a lease clouds title. In response

Mr. James V. Quillinan  
September 11, 1987  
Page 2

to our concerns, the Commission redrafted Section 1292 as contained in AB 708 to provide that the court order will be recorded if the transaction affects title to real property. Proposed Sections 7261 and 7262 as contained in this tentative recommendation omit the word title and would therefore require that a certified copy of an order authorizing the lease be recorded. The proposal would undo the good work of AB 708.

We assume that the omission of the word title in Sections 7261 and 7262 was not intentional. (We would be upset if it were intentional.) But the inadvertent omission underscores our concern: the more these statutes are tinkered with, the greater the chance of something slipping through that will create a substantive error.

For years we have been seeing comments from attorneys to the effect that "if it ain't broke, don't fix it." The Commission has already "fixed" many unbroken parts of the Probate Code in an effort to clean up ambiguities, and to provide a sense of order to the Code. The Commission has done a good job, but it is time to stop fixing things that are already fixed. I am reminded of a truism that has application here: It really doesn't matter whether we drive on the right side of the road or on the left side. What is important is that we don't change too often.

We recommend that the staff start over on this tentative recommendation. We can accept renumbering code sections if necessary; but rewriting statutes that have been recently enacted is counter-productive and should be resisted.

Let me now address some specifics. The second sentence of Section 1043(b) is ambiguous. Presumably the sentence is intended to establish two alternatives, one of which the court must do. The sentence as written implies that the court may in its discretion refuse to hear the response and refuse to grant a continuance. We suggest that the sentence be redrafted as follows: "The court in its discretion shall either hear and determine the response or objection at the hearing, or grant a continuance for the purpose of making a response or objection in writing."

Article 3, commencing with Section 7070, allows for a transfer of a proceeding to an adjoining county if

Mr. James V. Quillinan  
September 11, 1987  
Page 3

there is no judge of the court in which the proceeding is pending who is qualified to act. We wonder whether or not, for convenience of the parties, it might be useful to permit the transfer to a county in which property is located or to a county in which the personal representative resides.

Very truly yours,



Kenneth M. Klug

STATE OF CALIFORNIA  
California Law Revision Commission

*Staff Draft*

RECOMMENDATION  
*relating to*  
RULES OF PROCEDURE IN PROBATE

October 1987

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

October \_\_, 1987

To: The Honorable George Deukmejian  
Governor of California and  
The Legislature of California

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The ultimate goal is to submit a new Probate Code to the Legislature. The new code will replace the existing Probate Code.

This recommendation sets forth the Commission's proposed revisions relating to general rules of procedure in the Probate Code.

The explanatory text of this recommendation explains the principal revisions it would make in existing law. Additional changes are noted in the comments following the sections of the proposed legislation. The comment gives the source of the section and indicates the nature of the changes the section would make in existing law.

The proposed legislation is drafted as a part of the new code. In some cases, you will find a reference to other parts of the new code that are still being prepared and are not yet available.

Comments showing the disposition of each section of existing law that would be repealed in the proposed legislation can be found at the end of this recommendation.

Respectfully submitted,

Ann E. Stodden  
Chairperson

## RECOMMENDATION

*relating to*

## RULES OF PROCEDURE IN PROBATE

Introduction

This recommendation proposes general procedural provisions. Most of these provisions are redrafted and reorganized versions of sections in the existing Probate Code. Included in this recommendation are general rules that apply to the entire code and some additional rules that apply only to the new division governing decedent estate administration.<sup>1</sup> The following discussion notes important changes and policy issues that are involved in the proposed legislation. Minor and technical changes are noted in the comments following the proposed sections.

Pleadings

The proposed law provides as a general rule that petitions, reports, and accounts are to be in writing and signed by the persons filing the paper. This rule generalizes provisions found in several procedures in the Probate Code.<sup>2</sup> As a general rule, responses and

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1. See Division 7 (commencing with Section 7000). Much of Division 7 is included in the Commission's 1987 probate bill, 1987 Cal. Stat. ch. 923, (operative July 1, 1988). The remainder of the material to be included in Division 7 is planned to be introduced in the 1988 legislative session. A new Division 3 (commencing with Section 1000) will be composed of general provisions including proposed Sections 1000-1049 and 1210 included in this recommendation and the general notice provisions set out in Sections 1200-1265 which are included in 1987 Cal. Stat. ch. 923 (operative July 1, 1988).

2. See, e.g., Prob. Code §§ 380 (will contest after probate), 440 (petition for letters of administration), 522 (removal of personal representative), 921 (filing of verified account), 1025.5 (report of status of administration).

objections may also be made in writing at or before a hearing.<sup>3</sup> The proposed law also recognizes that the court has discretion to hear an oral response or objection and determine it at the hearing or, in the alternative, to continue the hearing so that the response or objection may be reduced to writing. This proposal is generally consistent with some local court rules.<sup>4</sup>

#### Guardian ad Litem

General provisions in the Code of Civil Procedure provide for the appointment of a guardian ad litem to represent the interests of a minor, an incompetent person, or a person for whom a conservator has been appointed.<sup>5</sup> A guardian ad litem may also be appointed to represent the interests of unknown persons, persons not in being, or persons in a class that is unascertained.<sup>6</sup> These general provisions are applicable to appointment of a guardian ad litem in estate administration proceedings and in other proceedings under the Probate Code except for proceedings relating to trusts. For many years, the statutes governing trust administration have provided separate statutory authority for appointment of a guardian ad litem.<sup>7</sup>

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3. See, e.g., Prob. Code §§ 370 (written grounds of opposition to probate of will), 442 (opposition to petition for administration), 927 (written exceptions to account), 1041 (written objection to delivery of estate of nonresident).

4. The usual practice is to grant a continuance if an objection is made orally at a hearing. See, e.g., Probate Policy Memorandum, Los Angeles County, 3.05, in California Local Probate Rules 19-13 (8th ed. Cal. Cont. Ed. Bar 1987); Probate Policy Memorandum, Orange County, 1.04, *id.* at 30-18; Probate Policy Memoranda, Riverside County, 6.0105, *id.* at 33-11; Probate Rules, Santa Barbara County, 414.J, *id.* at 42-11. Some local court rules appear to allow consideration of oral objections at the hearing. See, e.g., Rules of Probate Practice, Marin County, 107, *id.* at 21-5.

5. Code Civ. Proc. § 372.

6. Code Civ. Proc. § 373.5.

7. See former Prob. Code §§ 1120 (as amended by 1963 Cal. Stat. ch. 863, § 1) (testamentary trusts), 1138.7 (as added by 1970 Cal. Stat. ch. 849, § 2) (living trusts), 1215.3 (as added by 1974 Cal. Stat. ch. 171, § 1) (notice in trust proceedings). These provisions are generally restated without substantive change in the new Trust Law. Prob. Code § 17208.

The proposed law generalizes the guardian ad litem provision as it has developed in the area of trust law and applies it to the entire Probate Code. This is largely a technical revision, but it has the effect of making probate practice consistent. The special Probate Code section would apply in place of the general provisions in the Code of Civil Procedure. Thus, the rules relating to minors who are 14 years of age or older, and to minors who are under 14 years old,<sup>8</sup> would not apply in probate proceedings.

#### Jurisdiction and Power of Court

The proposed law continues the rule that proceedings for administration of decedents' estates are within the jurisdiction of the superior court.<sup>9</sup> While recognizing the power of a superior court to organize in distinct departments to handle different types of cases, the proposed law eliminates any question as to the equitable powers of the court when it considers questions relating to estate administration.<sup>10</sup>

#### Jury Trial

The proposed law continues the general rule in estate administration that there is no right to a jury trial unless the right

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8. Code Civ. Proc. § 373. These rules are made inapplicable by Probate Code Section 17208 (as well as by its predecessor sections) for the purpose of trust proceedings. There does not appear to be any reason to treat a 14-year-old differently in trust proceedings than in probate proceedings generally.

9. See Prob. Code §§ 300, 301.

10. This proposal is consistent with Probate Code Section 17001 in the Trust Law. For additional background, see *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 575-82 (1986); see also Goldberg, *The Sterilization of Incompetents and the "Late Probate Court" in California: How Bad Law Makes Hard Cases*, 18 Pac. L.J. 1, 7-15 (1986).

is expressly granted by statute.<sup>11</sup> For a jury trial to be available under the proposed law, however, a particular proceeding must expressly provide for a jury trial. The proposed law does not continue the rule that a jury trial is available by virtue of the provision applying the rules of practice in civil actions in any case where the Probate Code provides for issues of fact to be framed.<sup>12</sup>

The proposed law thus rejects the line of cases that found the framing of factual issues to be an independent statutory ground for requiring a jury trial. This change is in line with the reasoning of *Estate of Beach*<sup>13</sup> and *Heiser v. Superior Court*<sup>14</sup> which applied a stricter standard for determining whether factual issues required a jury trial under former Probate Code Section 1230. This revision is also consistent with other recent probate legislation.<sup>15</sup>

#### Appealable Orders

Under existing law, there is no right to appeal an order in proceedings involving a decedent's estate unless specifically so provided.<sup>16</sup> Appealable orders are listed in Probate Code Section 1297 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988). The proposed

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11. *Estate of Beach*, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); *Heiser v. Superior Court*, 88 Cal. App. 3d 276, 278-80, 151 Cal. Rptr. 745 (1979); see generally, 7 B. Witkin, *California Procedure Trial* §§ 82-83, at 84-85, §§ 87-88, at 87-88, § 96, at 94-95 (3d ed. 1985).

12. See Prob. Code § 1230 (continued in Prob. Code § 1280, 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988); see, e.g., *Budde v. Superior Court*, 97 Cal. App. 2d 615, 218 P.2d 103 (1950).

13. 15 Cal. 3d 623, 642-44, 542 P.2d 994, 125 Cal. Rptr. 570 (1975).

14. 88 Cal. App. 3d 276, 279-81, 151 Cal. Rptr. 745 (1979).

15. See Prob. Code §§ 1452 (guardianships and conservatorships), 17006 (trusts). The Uniform Probate Code limits jury trials to cases where they are constitutionally required. See Uniform Probate Code § 1-306 (1982).

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

law continues this approach but makes several revisions in the list of appealable orders.

The proposed law makes clear that an order granting or revoking letters of administration with the will annexed is appealable and that an order granting or revoking letters of special administration or special administration with general powers is not appealable.<sup>17</sup>

The authority to appeal an order granting or modifying a family allowance<sup>18</sup> is expanded in the proposed law to permit appeal of an order terminating a family allowance. This is consistent with the appealability of an order modifying a family allowance or refusing to grant a family allowance.<sup>19</sup>

Existing law permits the appeal of an order directing or authorizing the grant of an option to purchase real property.<sup>20</sup> The proposed law extends the provision to options to purchase personal property since the basic considerations are the same.

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17. Probate Code Section 1297(a) (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988) (restating former Prob. Code § 1240(a)) refers simply to granting or revoking letters. The more detailed provision in the proposed law codifies rules provided in the cases and in other sections. See *Estate of Smith*, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of order appointing public administrator as administrator with the will annexed); *Estate of Hughes*, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); Prob. Code §§ 461, 465.

18. Prob. Code § 1240(e) (continued in Prob. Code § 1297(e), 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988).

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

20. Prob. Code § 1240(g) (continued in Prob. Code § 1297(g), 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988).

Existing law permits the appeal of an order fixing an inheritance tax or determining that none is due.<sup>21</sup> The proposed law omits this provision in view of the repeal of the inheritance tax.<sup>22</sup>

### Stay on Appeal

The proposed law provides general rules governing stay on appeal that are drawn from guardianship and conservatorship law.<sup>23</sup> Existing statutes relating to administration of decedents' estates do not provide special stay rules. Instead, reliance must be placed on general rules in the Code of Civil Procedure<sup>24</sup> and in the cases.<sup>25</sup> The proposed law does not attempt to revise the substance of this law, but makes it more accessible to probate practitioners.

### Judgment Roll

An appeal may be made on the papers in the judgment roll.<sup>26</sup> The contents of the judgment roll for purposes of the Probate Code are specified by statute.<sup>27</sup> The proposed law adds the statement of

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21. Prob. Code § 1240(p) (continued in Prob. Code § 1297(p), 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988).

22. A transitional provision will provide for appeals under the law prior to June 8, 1982, when the inheritance tax was repealed by an initiative.

23. See Prob. Code § 2751.

24. See Code Civ. Proc. §§ 916-917.9.

25. See, e.g., Estate of Hultin, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947) (order appointing executor); Estate of Sam Lee, 26 Cal. 2d 295, 296, 158 P.2d 193 (1945) (order appointing public administrator); Estate of Gibson, 233 Cal. App. 2d 125, 127-30, 43 Cal. Rptr. 302 (1965) (order appointing administrator).

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

27. Prob. Code § 1242 (continued in Prob. Code § 1299, 1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988). The contents of the judgment roll in civil proceedings generally are specified in Code of Civil Procedure Section 670.

decision to the judgment roll; this reflects the practice in probate courts.<sup>28</sup>

### Liability for Costs

Several provisions of existing law deal in general terms with the liability of a personal representative for costs of litigation.<sup>29</sup> Probate Code Section 719 makes the personal representative personally liable for costs, but permits reimbursement from the estate unless the suit or proceeding in which costs were awarded was prosecuted or defended "without just cause." On the other hand, Probate Code Section 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988, restating Probate Code Section 1232) provides for costs to be paid by a party to proceedings or out of assets of the estate "as justice may require."

The new code adopts the general rule provided in Probate Code Section 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988, restating Probate Code Section 1232) in preference to the rule of Probate Code Section 719. This eliminates the inconsistency under existing law and adopts the more general of the two rules. As under

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28. The proposed law also omits the provision in Probate Code Section 1299 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988) that the papers making up the judgment roll need not be attached together. Until 1939, Code of Civil Procedure Section 670 required that the papers constituting the judgment roll be attached together. See 1939 Cal. Stat. ch. 733, § 1. This nonattachment provision derives from a cautious transitional provision apparently intended to make clear that the attachment requirement was in fact repealed. By now, it can safely be assumed that court clerks have become accustomed to the new practice of not attaching the judgment roll papers together; consequently, this provision is surplus.

29. See Code Civ. Proc. § 1026; Prob. Code §§ 719 (1987 Cal. Stat. ch. 923, § 38, operative July 1, 1988), 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988). Special provisions govern the liability for costs in certain circumstances. See, e.g., Prob. Code §§ 383 (costs in probate revocation), 9653 (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988) (costs in action to recover fraudulently conveyed property), 9257 (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988) (disallowed creditor's claim by representative), 9255 (1987 Cal. Stat. ch. 923, § 93, operative July 1, 1988) (costs not allowed where creditor contests amount allowed in satisfaction of claim unless creditor prevails), 1002 (costs on preliminary distribution), 6544 (costs of proceedings for family allowance).

existing law,<sup>30</sup> the general statutory rule is subject to any contrary rule provided by statute or court rule.

Code of Civil Procedure Section 1026, as it applies to executors, administrators, and trustees, makes the estate liable for costs unless the court directs costs to be paid by the fiduciary personally "for mismanagement or bad faith in the action or defense." The new code retains this rule without substantive change.<sup>31</sup>

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30. See Prob. Code § 1282 (1987 Cal. Stat. ch. 923, § 60, operative July 1, 1988) (restating former Prob. Code § 1232).

31. Section 1026 also applies to persons "expressly authorized by statute" to prosecute or defend an action. Section 1026 would be amended to add guardians and conservators to the list of fiduciaries covered by the section.

Outline

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§ 7280. United States as interested person

CONFORMING REVISIONS  
AND COMMENTS TO REPEALED SECTIONS

DIVISION 3. GENERAL PROVISIONS OF A PROCEDURAL NATURE

PART 1. GENERAL PROVISIONS

CHAPTER 1. RULES OF PRACTICE

§ 1000. General rules of practice

1000. Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions apply to and constitute the rules of practice in proceedings under this code.

Comment. Section 1000 replaces the first through the fourth sentences of former Section 1280 [AB 708] and the first paragraph of former Section 1283 [AB 708]. This section provides a default rule that applies in circumstances where there is no special rule applicable in probate proceedings. For example, the general rules of practice apply to discovery, trials, new trials, appeals, and other matters of procedure. General rules of the Code of Civil Procedure do not apply, however, where this code provides a special rule. For example, jury trials are strictly limited in proceedings under this code. See Sections 1452 (jury trials in guardianship and conservatorship proceedings), 7200 (jury trials in estate administration), 17006 (jury trials in trust administration). The right to make a motion for a new trial in proceedings for administration of a decedent's estate is limited in Section 7220. The right to appeal in decedent estate administration is limited to the orders set out in Section 7240. Many other limitations are provided in this chapter and in other provisions throughout this code. This general rule is also subject to the rulemaking power of the courts. See Section 1001.

Note. *Kenneth M. Klug, on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 8), objects in general terms to this recommendation:*

*This tentative recommendation proposes to repeal and reenact some of the sections contained in AB 708. We fail to see any compelling reason for making those changes. If the provisions contained in AB 708 are defective, they should have been deleted from that bill. Constantly drafting and redrafting statutes is a disservice to the public; change for the sake of change reduces the ability of the lawyers, the courts and others who must deal with the laws to assimilate all the changes. It is our recommendation that any legislation enacted by 708 be left intact.*

*For the most part, the general provisions located at Sections 1280-1299 in AB 708 were not reviewed for substantive defects. The only reason these provisions were included in AB 708 was to provide room for the general provisions on notice (Sections 1200-1265). The recommendation supporting the notice provisions states the following:*

This recommendation also contains general provisions relating to rules of procedure, orders, and appeals. For the most part, these provisions merely renumber existing Probate Code Sections 1230-1242 which need to be moved in order to make room for the new provisions relating to notice.

Recommendation Relating to Notice in Probate Proceedings, 19 Cal. L. Revision Comm'n Reports 357, 366 (1988).

There was not sufficient room (barring use of decimal section numbers which the State Bar also finds unacceptable) for the revised notice provisions between Section 1200 and the start of the then existing general provisions at Section 1230. The alternative to temporarily relocating the general provisions was to later renumber the notice provisions, locate notice provisions somewhere else, temporarily renumber the provisions starting at Section 1100, or postpone the revision of the notice sections. The general rules of procedure could not be located at Section 1000 et seq. because distribution and discharge remained to be revised. If memory serves, the bar urged the Commission to proceed with the 1987 revisions in full recognition that some conforming adjustments would have to be made when the final revisions of Division 3 were proposed in 1988. Without reviewing all of the reasons for the course taken, there is sufficient justification for proceeding as we have. It was never suggested that the general rules of procedure had been revised and put in their final resting place. In the grand scheme of things, the temporary renumbering of a handful of sections does not seem to be a matter of great consequence. The suggestion that the Commission is "constantly drafting and redrafting statutes" and thereby performing a "disservice" misrepresents reality. An instructive remedial exercise would be to count all the Probate Code sections enacted on Commission recommendation during the past 4 or 5 years and then to see how many of them have been renumbered by a later bill.

To the extent that Mr. Klug's criticism relates to renumbering and reorganization done in the course of preparing a recommendation, the staff can only state that we do what we can to keep renumbering down to a minimum. The task of tracking renumbered draft sections is probably a greater annoyance to us than to anyone else. Renumbering is unavoidable, however, in the process of preparing an initial draft, implementing Commission policy decisions in a revised draft, considering later comments of members of the bar and other interested persons in preparing a tentative recommendation, and then in preparing a final recommendation to the Legislature.

§ 1001. Judicial Council and local court rules

1001. (a) The Judicial Council may provide by rule for the practice and procedure under this code. Unless disapproved by the Judicial Council, a court may provide by local rule for the practice and procedure under this code. Judicial Council and local court rules shall be consistent with the applicable statutes.

(b) The Judicial Council may prescribe the form of the

applications, notices, orders, and other documents required by this code. Any such form prescribed by the Judicial Council is deemed to comply with this code.

Comment. Section 1001 is consistent with the fourth paragraph of Section 6 of Article 6 of the California Constitution and with Government Code Section 68511. Cf. Section 1456 (guardianship and conservatorship).

Note. Luther J. Avery (Exhibit 2) urges the Commission to abolish local rules in probate:

*These comments seek to persuade the Commission to the point of view that particularly with Rules of Procedure it is important to have uniformity among counties. It is a constant source of needless delay and expense to have to cope with the varying court rules of every county. It is a constant source of frustration to be told the local rules are in the process of revision and the judges clerk will prescribe what are the local rules. If it is the policy of the Commission to expedite probate procedures and to reduce the costs of probate, then I can think of nothing more important than abolition of local rules.*

*I do not know how the Commission can accomplish uniformity other than by having the statute mandate uniformity.*

Jeffrey A. Dennis-Strathmeyer (Exhibit 6) also criticizes the rulemaking power:

*The grant of rule making power is greatly excessive and too vague. The annual CEB publication of local probate rules now exceed 1300 pages. Most of the rules are out of date, many are substantive--raising constitutional problems due to the fact that local rules committees are acting like mini-legislatures in violation of separation of powers concepts, and the situation is a mess. What is needed is a statute which carefully circumscribes rule-making power to that needed to expedite the workload of the court.*

*The recommendation attempts to collect general procedural rules applicable to the entire Probate Code and also some more limited rules that apply to Division 7 relating to decedent estate administration. Complete uniformity is impossible. Draft Section 1001 does require that the local rules be consistent with applicable statutes and also makes clear that the Judicial Council may disapprove a local rule. In theory, this should encourage a more nearly uniform procedure. Total abolition of local rules would be too drastic a step. However, it is startling when one first encounters the 2 $\frac{1}{4}$ -inch thick volume of local court rules published by CEB. This tome is larger than the Probate Code itself! It is difficult to believe that circumstances vary so drastically from county to county that many of these special rules are needed. Some technical matters are appropriate for local determination, such as where papers should be filed and when the probate court will answer the telephone. But why should local court rules be setting substantive policy or varying statutory procedures?*

Some rules have taken on the appearance of a code and practice guide, perhaps making it unnecessary to consult the statutes. Ideally, the Judicial Council would adopt uniform rules governing technical procedural details and supersede most of these local rules. Local rules that restate or overlap statutory provisions could also be abolished. Important policies should either be codified in the statutes or, in appropriate cases, adopted by the Judicial Council as statewide rules. Such a reform would be a massive undertaking, and would require the cooperation of the Judicial Council and the probate court personnel. It is not something that can be done simply or quickly using this recommendation as a vehicle. Jeff Strathmeyer's suggestion that the statute should limit the rulemaking power to what is needed to expedite the workload of the court is appealing as an interim measure, but it might not be very effective, and could leave the status of many local rules in doubt.

#### § 1002. Costs

1002. Unless it is otherwise provided by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.

Comment. Section 1002 restates former Section 1282 [AB 708] without substantive change. For special provisions relating to costs, see, e.g., Sections 383 (costs in probate revocation), 1002 (costs on preliminary distribution), 6544 (costs of proceedings for family allowance), 9255 [AB 708] (costs where creditor contests amount of allowed claim), 9257 [AB 708] (disallowed creditor's claim by representative), 9653 [AB 708] (costs in action to recover fraudulently conveyed property). See also Code Civ. Proc. § 1026 (costs in actions involving fiduciary estate).

Note. Jeffrey A. Dennis-Strathmeyer (Exhibit 6) writes that "[t]o the extent that this statute appears to permit the Judicial Council to legislate in the area of court costs, it is probably unconstitutional." It is not clear to the staff that this is unconstitutional, but in any event, it has been the law since Probate Code Section 1232 was amended in 1945.

#### § 1003. Appointment of guardian ad litem

1003. (a) The court may, on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person, appoint a guardian ad litem at any stage of a proceeding to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise

would be inadequate:

- (1) A minor.
- (2) An incapacitated person.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(c) The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner.

Comment. Section 1003 is a new provision that generalizes former Section 17208 (guardian ad litem in trust proceedings). Section 1003 is also comparable to Section 1-403(4) of the Uniform Probate Code (1982). The general provisions for appointment of a guardian ad litem in Code of Civil Procedure Sections 372-373.5 do not apply to the appointment of a guardian ad litem under this code. See Section 1000 (general rules of civil practice apply unless this code provides a different rule). A guardian ad litem may be appointed in situations where a guardian or conservator has already been appointed, if the need for a guardian ad litem exists. See Section 1455 (guardianship and conservatorship law does not limit authority to appoint guardian ad litem). This section is not intended to limit any power the court may have to appoint an attorney to represent the interests of an incapacitated person. If a beneficiary has an interest in only part of an estate, the court may not charge expenses to the whole estate, but only to the beneficiary's interest. See Estate of Corotto, 125 Cal. App. 2d 314, 325, 270 P.2d 498 (1954).

#### GROSS-REFERENCES

##### Definitions

Interested person § 48

Person § 56

#### § 1004. Lis pendens

1004. If a proceeding affects the title to or the right of possession of real property, notice of the pendency of the proceeding may be filed pursuant to Section 409 of the Code of Civil Procedure.

Comment. Section 1004 is new provision that generalizes former Sections 2523 (guardianship and conservatorship) and 9863 [AB 708] (claims of title in estate administration). Section 1004 does not

refer to proceedings that "concern" title or the right of possession of real property, as does Code of Civil Procedure Section 409, and thus provides a more restrictive rule than would otherwise apply through the incorporation provision of Section 1000. Other provisions of the Code of Civil Procedure applicable to lis pendens apply under this code by virtue of Section 1000 (general rules of practice). See, e.g., Code Civ. Proc. § 409.1 (expunging lis pendens).

#### CROSS-REFERENCES

##### Definitions

Real property § 68

*Note.* Jeffrey A. Dennis-Strathmeyer (Exhibit 6) asks whether this section isn't unnecessary. The Commission considered omitting this provision, but decided that it is useful because it is more precise than the general lis pendens provision in the Code of Civil Procedure. This is explained in the Comment to Section 1003.

#### CHAPTER 2. PETITIONS AND OTHER PAPERS

##### § 1020. Petitions, reports, accounts

1020. A petition, report, or account shall be in writing, signed by all of the petitioners or by all of the persons making the report or account, and filed with the court clerk.

*Comment.* Section 1020 generalizes several former provisions. See, e.g., former Sections 380 (will contest after probate), 440 (petition for letters of administration), 522 (removal of personal representative), 921 (filing of verified account), 1025.5 (report of status of administration). See also Section 9630 [AB 708] (authority of joint personal representatives to act).

##### § 1021. Verification required

1021. (a) All of the following shall be verified:

- (1) A petition, report, or account filed pursuant to this code.
- (2) An objection or response filed pursuant to this code to a petition, report, or account.

(b) Except as provided in subdivision (c), the verification shall be made as follows:

(1) A petition shall be verified by the petitioner or, if there are two or more parties joining in the petition, by any of them.

(2) A report or account shall be verified by the person who has the duty to make the report or account or, if there are two or more persons having a duty to make the report or account, by any of them.

(3) An objection or response shall be verified by the objector or respondent or, if there are two or more parties joining in the objection or response, by any of them.

(c) If a petitioner, objector, or respondent is absent from the county or for some other cause is unable to make a verification, the petition, objection, or response may be verified by the attorney for the petitioner, objector, or respondent.

Comment. Section 1021 restates former Section 1284 [AB 708] without substantive change. Subdivision (a) is comparable to Sections 1450 (guardianship and conservatorship law) and 17201(a) (trust law).

Subdivision (b) restates former Section 1284(b) without substantive change. In the case of a corporate fiduciary, a responsible person, such as a corporate officer, should verify a report or account.

Subdivision (c) permits verification by a party's attorney in limited circumstances. This provision is drawn in part from Code of Civil Procedure Section 446, but provides a different rule governing the situations where an attorney may make a verification in place of a party. The manner of verification, however, is governed by Code of Civil Procedure Section 446.

For an exception to this requirement, see Section [ ] (account by attorney for deceased personal representative).

Note. Jeffrey A. Dennis-Strathmeyer (Exhibit 6) notes that it is "inconsistent to provide that an attorney can verify a petition for a client when necessary, but cannot sign the petition for the client. There should be a provision allowing attorneys to sign petitions in emergencies in the absence of the client." This inconsistency has been noted in Commission meetings, but it is accepted because of the strength of the policy that petitioners should sign the petition. Does the Commission wish to reconsider this policy?

Jeffrey A. Dennis-Strathmeyer (Exhibit 6) also argues that "it is inconsistent to require verification of objections when objections can be made orally." Compare Section 1021 with Section 1043(b). The staff does not think it is inconsistent. When a person appears before the court, there would seem to be little need for verification.

Note. Myron W. Curzon (Exhibit 1) notes that the comment to Section 1021 does not cite will contests and responses to will contests as situations where verification is not required and writes that verification should not be required in these cases. The cross-references to will contest matters are not included in the last paragraph of the comment because this subject has not yet been considered by the Commission. At an appropriate point, the staff will review the code to see what petitions should be exempt from this requirement.

#### § 1022. Affidavit or verified petition as evidence

1022. An affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code.

Comment. Section 1022 generalizes the first sentence of the second paragraph of former Section 1283 [AB 708]. The declaration of an attorney is admissible as an affidavit under this section. Proceedings under this code include proceedings relating to the administration of estates of decedents and proceedings relating to the administration of estates of persons for whom a guardian or conservator has been appointed. See also Code Civ. Proc. § 2009 (affidavit may be used to establish record of birth).

### CHAPTER 3. HEARINGS AND ORDERS

#### § 1040. General hearing procedure

1040. The provisions of this chapter govern the hearing of all matters under this code, except where the statute that provides for the hearing of the matter prescribes a different procedure.

Comment. Section 1040 is new. It is intended to simplify the procedural statutes of this code and eliminate duplication and unnecessary variances by prescribing a uniform hearing procedure.

#### § 1041. Clerk to set matters for hearing

1041. When a petition, report, account, or other matter that requires a hearing is filed with the court clerk, the clerk shall set the matter for hearing.

Comment. Section 1041 restates former Section 1285 [AB 708] without substantive change.

#### § 1042. Notice of hearing

1042. A hearing under this code shall be on notice unless the statute that provides for the hearing dispenses with notice.

Comment. Section 1042 is new. For provisions permitting ex parte hearings, see, e.g., Sections 203 (proceedings to establish fact of death), 461 (appointment of special administrator), 9735 [AB 708] (purchase of securities or commodities sold short), 10200 [AB 708] (sale or surrender for redemption or conversion of securities). See also Section 1220(f) [AB 708] (mailed notice dispensed with for good cause).

#### § 1043. Response or objection

1043. (a) An interested person may appear and make a response or objection in writing at or before the hearing.

(b) An interested person may appear and make a response or

objection orally at the hearing. The court in its discretion may hear and determine the response or objection at the hearing or may grant a continuance for the purpose of making the response or objection in writing.

(c) A request for a continuance for the purpose of making a written response or objection shall not itself be considered as a response or objection, nor shall the failure to make a response or objection during the time allowed be considered as a response or objection.

Comment. Section 1043 supersedes a number of former provisions. See, e.g, former Sections 370 (written grounds of opposition to probate of will), 442 (opposition to petition for administration), 927 (written exceptions to account), 1041 (written objection to delivery of estate of nonresident). Section 1043 does not apply where a particular statute provides a different procedure. See Section 1040.

Subdivision (c) is a new provision. In the context of a will contest, this provision means that potential contestant is not deemed to have contested the will merely because of a request for a continuance for the purpose of determining whether to contest the will.

Note. Judge Robert R. Willard (Exhibit 4) approves of subdivision (b) of Section 1043 in the following terms:

*I particularly like this provision. Quite frequently interested parties appear in court without attorneys and orally object to certain aspects of an account or to the amount of requested fees. Almost as frequently the petitioner's attorney asks that such oral and unverified objections be disregarded. I have never refused to consider such objections, and would welcome statutory justification for a common sense approach.*

Note. Kenneth M. Klug, on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 8), finds the second sentence of subdivision (b) to be

*ambiguous. Presumably the sentence is intended to establish two alternatives, one of which the court must do. The sentence as written implies that the court may in its discretion refuse to hear the response and refuse to grant a continuance. We suggest that the sentence be redrafted as follows: "The court in its discretion shall either hear and determine the response or objection at the hearing, or grant a continuance for the purpose of making a response or objection in writing."*

*The staff thinks that this suggestion is an improvement and we would make this change.*

Note. Subdivision (c) is a new provision that implements a decision made with regard to will contests at the July 1987 meeting.

**§ 1044. Plaintiff and defendant**

1044. The petitioner or other party affirming is the plaintiff and the party objecting or responding is the defendant.

**Comment.** Section 1044 restates the second sentence of former Section 1280 [AB 708] without substantive change.

**§ 1045. Continuance or postponement**

1045. The court may continue or postpone any hearing, from time to time, in the interest of justice.

**Comment.** Section 1045 continues former Section 1286 [AB 708] without change.

**§ 1046. Hearing and order**

1046. The court shall hear and determine any matter at issue and any response or objection presented and shall make appropriate orders.

**Comment.** Section 1046 restates former Section 1287 [AB 708] without substantive change.

**§ 1047. Recital of jurisdictional facts unnecessary**

1047. Except as otherwise provided in this code, an order made in a proceeding under this code need not recite the existence of facts, or the performance of acts, upon which jurisdiction depends, but need only contain the matters ordered.

**Comment.** Section 1047 restates former Section 1290 [AB 708] without substantive change. For an exception to this section, see Section [8006] (jurisdictional facts in court order opening probate).

**§ 1048. Entry and filing**

1048. (a) Except as provided in subdivision (b), orders shall be either entered at length in the minute book of the court or signed by the judge and filed.

(b) An order for distribution shall be entered at length in a judgment book or other permanent record of the court.

**Comment.** Section 1048 restates former Section 1291 [AB 708] and part of the fourth sentence of former Section 1280 [AB 708] without substantive change.

**Note.** We asked the court clerk's association for their opinion on this section. The Alameda County Clerk telephoned the staff on behalf

*of the association and said that the preference is to retain the section as drafted. Accordingly, the staff recommends no change in this section.*

**§ 1049. Enforcement of order**

1049. An order may be enforced as provided in Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure.

**Comment.** Section 1049 restates part of the last sentence of former Section 1280 [AB 708] without substantive change. It elaborates one aspect of Section 1000 (general rules of practice govern).

**§ 1050. Judgment roll**

1050. The judgment roll in a proceeding under this code consists of the following papers, where applicable:

(a) In all cases:

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

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

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

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

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

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

(7) Any letters of the personal representative.

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

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

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

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

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

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

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

(1) The will.

(2) The order admitting the will to probate.

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

Comment. Section 1050 restates former Section 1299 [AB 708] without substantive change. However, the former provision stating that the papers constituting the judgment roll need not be attached together is omitted as unnecessary. The reference to the statement of decision in subdivision (a)(6) is new. The reference in subdivision (d) to partial and ratable distributions has been replaced by a reference to preliminary distributions.

#### CROSS-REFERENCES

##### Appealable orders

Decedent's estate administration § 7240

Guardianship and conservatorship § 2750

Insurance or employee benefit trust § 6327

Trust administration § 17207

##### Definitions

Letters § 52

Personal representative § 58

Will § 88

Note. We asked the court clerk's association for their opinion on this section. The Alameda County Clerk telephoned the staff on behalf of the association and said that the preference is to retain the section. The staff believes that this provision should be retained as revised. As long as the contents of the judgment roll are provided for general purposes in the Code of Civil Procedure, it would not do to eliminate this section which interprets the general provision for purposes of the Probate Code.

Luther J. Avery (Exhibit 2) writes that the contents of the judgment roll should be left to the Judicial Council rule and should not be a function of court rule. It is not clear whether Mr. Avery would keep the statutory provision. The staff assumes that the contents of the judgment roll are not subject to variance by local rule, but if this is the situation, it should not be so.

Rawlins Coffman (Exhibit 7) writes that the contents of the judgment roll should be left to Judicial Council rule and that draft Section 1050 should be eliminated. As indicated above, the staff is inclined to this view as an abstract matter, but at this stage it is impractical to attempt to reform this detailed area of the law.

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. PASSAGE OF DECEDENT'S PROPERTY

§ 7000. Passage of decedent's property

7000. Subject to Section 7001, title to a decedent's property passes upon the decedent's death to the person to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession.

Comment. Section 7000 restates the first part of former Section 300 without substantive change. The decedent's heirs are determined as provided in Part 2 (commencing with Section 6400) of Division 6 (intestate succession). The rule stated in Section 7000 is subject to limitations. See Section 7001 and the Comment thereto.

CROSS-REFERENCES

Definitions

- Devise § 32
- Heirs § 44
- Person § 56
- Property § 62
- Will § 88

§ 7001. Limitations on passage of decedent's property

7001. The decedent's property is subject to administration under this code, except as otherwise provided by law, and is subject to the rights of beneficiaries, creditors, and other persons as provided by law.

Comment. Section 7001 restates the substance of the last part of former Section 300. Administration of the decedent's estate includes possession by the personal representative, control by the court, sale and other disposition of the property, charges of administration, and payment of debts and family allowance. The requirement of administration is subject to exceptions. See, e.g., Sections 160 (contract rights), 5100-5407 (multiple party accounts), 13000-13660 (disposition without administration), 15000-18201 (trusts), and the law governing joint tenancy. For provisions relating to the rights of beneficiaries, creditors, and others, see, e.g., Sections 100-105 (effect of death of married person on community and quasi-community property), 260-295 (disclaimers), 6146-6147 (lapsed gifts), 6510-11 (exempt property), 6520-6528 (probate homestead), 6540-6545 (family

allowance), 6560-6573 (omitted spouse and children), 6600-6615 (small estate set-aside), [21000 *et seq.*] (abatement).

#### CROSS-REFERENCES

##### Definitions

Beneficiary § 24

Property § 62

## CHAPTER 2. JURISDICTION AND COURTS

### Article 1. Jurisdiction and Venue

#### § 7050. Jurisdiction and authority of court or judge

7050. (a) The superior court has jurisdiction of proceedings under this code concerning the administration of the decedent's estate.

(b) The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including but not limited to the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Subdivision (a) of Section 7050 restates a provision of former Section 300 and the introductory part of former Section 301 without substantive change. Subdivision (a) is comparable to Section 2200 (jurisdiction of guardianship and conservatorship proceedings). Proceedings concerning administration of a decedent's estate include the probate of wills (Sections [8200 *et seq.*]), appointment of personal representatives (Sections [8400 *et seq.*]), and estate management (Sections 9600-10382 [AB 708]). Where appropriate, the reference to the superior court in subdivision (a) means the department or judge of the court that deals with probate matters.

Subdivision (b) expands a provision of former Section 321 (the judge may make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses) and abandons the former rule that the superior court "sitting in probate" was a court of limited jurisdiction. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 233-34, at 5741-43 (8th ed. 1974). Subdivision (b) makes clear that the probate court, when considering cases brought before it under this division, has all the powers of the superior court exercising its general jurisdiction. Hence, while preserving the division of business among different departments of the superior court, this section rejects the limitation on the powers of the probate court that has been cited in appellate decisions. See, e.g., *Copley v. Copley*, 80 Cal. App. 3d 97, 106, 145 Cal. Rptr. 437 (1978). See also Section 17001 (full-power court under Trust Law).

Note. Howard Serbin, Deputy County Counsel, Orange County (Exhibit 3) writes that he supports subdivision (b) of this section.

**§ 7051. Venue in case of domiciliary**

7051. If the decedent was domiciled in this state at the time of death, the proper county for proceedings concerning administration of the decedent's estate is the county in which the decedent was domiciled, regardless of where the decedent died.

**Comment.** Section 7051 restates without substantive change the venue provisions of former Section 301 applicable to domiciliaries. The substitution of "domicile" for "residence" codifies existing law. See, e.g., Estate of Phillips, 269 Cal. App. 2d 656, 659, 75 Cal. Rptr. 301 (1969); Estate of Brace, 180 Cal. App. 2d 797, 802, 4 Cal. Rptr. 683 (1960); Estate of Glassford, 114 Cal. App. 2d 181, 186-87, 249 P.2d 908 (1952).

**CROSS-REFERENCES**

Petition for administration of estate § 7500

**§ 7052. Venue in case of nondomiciliary**

7052. If the decedent was not domiciled in this state at the time of death, the proper county for proceedings under this division is one of the following:

(a) The county in which the decedent died, if property of the decedent is located in that county.

(b) Any county in which property of the decedent is located, if the decedent died in a county in which the decedent did not own any real property or if the decedent did not die in this state. If property of the decedent is located in more than one county, the proper county is the county in which a petition for administration of the decedent's estate is first filed, and the court of that county has jurisdiction of the administration of the estate.

**Comment.** Section 7052 restates the nondomiciliary venue provisions of former Section 301 without substantive change. The substitution of "domicile" for "residence" codifies existing law. See the Comment to Section 7051.

**CROSS-REFERENCES**

Petition for administration of estate § 7500

**Article 2. Disqualification of Judge**

**§ 7060. Disqualification of judge**

7060. (a) In addition to any other ground provided by law for disqualification of a judge, a judge is disqualified from acting under

this division, except to order the transfer of a proceeding as provided in Article 3 (commencing with Section 7070), in any of the following cases:

- (1) The judge is interested as a beneficiary or creditor.
- (2) The judge is named as executor or trustee in the will.
- (3) The judge is otherwise interested.

(b) A judge who participates in any manner in the drafting or execution of a will, including acting as a witness to the will, is disqualified from acting in any proceeding prior to and including the admission of the will to probate or in any proceeding involving its validity or interpretation.

Comment. Section 7060 is the same in substance as the first paragraph of former Section 303. For general provisions on disqualification, see Code Civ. Proc. §§ 170-170.8.

#### CROSS-REFERENCES

#### Definitions

Beneficiary § 24

### Article 3. Transfer of Proceedings

#### § 7070. Grounds for transfer

7070. The court or judge shall order a proceeding under this division transferred to another county if there is no judge of the court in which the proceeding is pending who is qualified to act. This section does not apply if a judge qualified to act is assigned by the chairman of the Judicial Council to sit in the county and hear the proceeding.

Comment. Section 7070 restates part of the second paragraph of former Section 303 without substantive change. Transfer of a proceeding pursuant to this article is in the same manner and with the same effect as transfer of actions and proceedings pursuant to the Code of Civil Procedure. See Section 1000 (general rules of practice govern); Code Civ. Proc. § 399 (transmittal of papers; jurisdiction of receiving court). These provisions supersede parts of former Sections 303 and 305.

#### § 7071. Place of transfer

7071. Transfer of a proceeding pursuant to this article shall be to another county in which property of the decedent is located or, if there is no other county in which property of the decedent is located, to an adjoining county.

Comment. Section 7071 is new. The provision for transfer to an adjoining county continues a provision of the second paragraph of former Section 303.

Note. Kenneth M. Klug, on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 8), asks whether "for the convenience of the parties, it might be useful to permit the transfer to a county in which property is located or to a county in which the personal representative resides." Mr. Klug mischaracterizes this provision as requiring transfer to an adjoining county. Section 7071 provides first for a transfer to a county where property of the decedent is located, and only if there is no such county, to an adjoining county. As drafted, this section is consistent with the venue provisions set out in Sections 7051 and 7052, which do not refer to the place of residence of the personal representative. The Commission should consider whether the county of the personal representative's residence should be afforded a priority in this section ahead of an adjoining county.

#### § 7072. Retransfer

7072. Upon petition of an interested person before the administration of the estate is closed, a proceeding transferred pursuant to this article may be retransferred to the court in which the proceeding was originally commenced if the court determines that both of the following conditions are satisfied:

(a) Another person has become judge of the court where the proceeding was originally commenced who is not disqualified to act in the administration of the estate.

(b) The convenience of the parties interested would be promoted by the retransfer.

Comment. Section 7072 is the same in substance as part of former Section 305.

#### CROSS-REFERENCES

Definition

Interested person § 48

### CHAPTER 3. RULES OF PROCEDURE

#### Article 1. Trial by Jury

#### § 7200. Trial by jury

7200. Except as otherwise expressly provided in this division, there is no right to a jury trial in proceedings under this division.

Comment. Section 7200 continues the general rule under prior law that there is no right to a jury in probate proceedings unless that right is granted by statute. Estate of Beach, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); Heiser v. Superior Court, 88 Cal. App. 3d 276, 278-80, 151 Cal. Rptr. 745 (1979). This section supersedes the third and fourth sentences of former Section 1280 [AB 708] as applicable to estate administration proceedings. [Some provisions of this division specifically grant the right to trial by jury. See Sections 371, 382, 928, 1081.] See also Sections 1452 (guardianship and conservatorship) and 17006 (trusts).

Note. Luther J. Avery (Exhibit 2) is critical of this provision:

*It is a substantial problem to remove the right to a jury trial for issues of fact. I disagree with the policy discussion. For example, a jury will be an important element in a will contest. It is particularly important in small counties where the superior court judge (probate) may not change for many years. Also, it is important to recognize that there can be situations where the use of a jury may be socially more important as an element of causing the community to believe in the essential fairness of the system. In my opinion, the issues of removal of a jury should be debated widely among lawyers. In addition, as a matter of policy, in my opinion the right to jury trial should be expanded, especially in view of the fact that there are many suits that can be filed against estates under the legislation proposals of the Commission. The concept of expanding the jurisdiction of the probate court but at the same [time] eliminating a right to jury on factual issues is bad policy.*

For the purpose of this recommendation, the policy is the same as the existing policy, with one exception. The cases where the right to a jury trial will be provided by statute will be determined as the Commission considers the relevant procedure. Mr. Avery specifically mentions juries in will contests. The Commission has tentatively decided not to recommend continuation of the jury trial right in will contests. The other situations remain to be considered. The exception referred to above relates to the general language in existing law concerning factual issues generally. (See the discussion on page 4 of the recommendation.) Apparently, Mr. Avery would preserve (and make effective?) this ground for requesting a jury trial

Howard Serbin, Deputy County Counsel, Orange County (Exhibit 3) supports this provision.

Rawlins Coffman (Exhibit 7) approves this section and adds "I would hope that § 1081 could be amended to deny jury trials in 1080 proceedings."

## Article 2. New Trials

### § 7220. New trial

7220. A motion for a new trial may be made only in the following cases:

(a) Contest of a will or revocation of probate of a will.

(b) Cases in which a right to jury trial is expressly granted, whether or not the case was tried by a jury.

Comment. Section 7220 restates former Section 1281 [AB 708] without substantive change. The provision for new trial in proceedings to determine heirship and interests in estates is no longer necessary, since such proceedings are no longer under this division and therefore are no longer subject to the new trial limitation of Section 7220. See Sections 320-324. There is no right to a jury trial unless expressly provided by statute. See Section 7200 (trial by jury).

### Article 3. Appeals

#### § 7240. Appealable orders and refusals to make orders

7240. An appeal may be taken from the making of, or the refusal to make, any of the following orders:

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

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

(c) Setting aside a small estate under Section 6609.

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

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

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

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

(h) Adjudicating the merits of a claim under Chapter 11 (commencing with Section 9860) of Part 5 of Division 7.

(i) Allocating debts under Chapter 3 (commencing with Section 11440) of Part 9 of Division 7.

(j) Settling an account of a personal representative.

(k) Instructing or directing a personal representative.

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

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

(n) Distributing property.

(o) Determining that property passes to, or confirming that property belongs to, the surviving spouse under Section 13656.

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

Comment. Section 7240 restates former Section 1297 [AB 708] without substantive change, except as follows:

(1) Subdivision (a) codifies the former rules that orders granting or revoking letters of administration with the will annexed are appealable, but that letters of special administration or letters of special administration with general powers are not. See Estate of Smith, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of order appointing public administrator as administrator with the will annexed); Estate of Hughes, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); former Sections 461, 465.

(2) Language in subdivision (e) permitting the appeal of an order terminating a family allowance is new.

(3) The right to appeal from an order relating to determination of heirship provided in subdivision (m) of former Section 1297 is replaced by Section 325 (appeal of order determining membership in a class).

(4) Subdivision (g) relating to options is not limited to real property options as was former subdivision (g).

(5) Subdivision (o) is not limited to orders determining that property is community property passing to the surviving spouse as was former subdivision (o).

(6) Former subdivision (p) relating to appeals concerning inheritance tax is replaced by Section \_\_\_\_ (transitional provision).

#### CROSS-REFERENCES

##### Definitions

Community property § 28  
Devise § 32  
Family allowance § 38  
Probate homestead § 60  
Property § 62  
Surviving spouse § 78  
Will § 88  
Guardian ad litem § 1003  
Judgment roll contents § 1050

Note. With regard to subdivision (a), Howard Serbin, Deputy County Counsel, Orange County (Exhibit 3) writes: "I think it is helpful to have this explicit provision that orders granting or revoking letters of special administration are not appealable."

#### § 7241. Stay on appeal

7241. (a) Except as provided in subdivision (b), an appeal pursuant to Section 7240 stays the operation and effect of the order.

(b) Notwithstanding that an appeal is taken from the order, for

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

Comment. Section 7241 is new and is drawn from Section 2751 (stay on appeal in guardianship and conservatorship law). Subdivision (a) is consistent with the case-law rule under former law that the appeal of an order appointing a personal representative suspends the powers of the personal representative and stays proceedings in the probate court. See *Estate of Hultin*, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947); *Estate of Gibson*, 233 Cal. App. 2d 125, 127-30, 43 Cal. Rptr. 302 (1965). However, the powers of a personal representative that are not the subject of an appeal are not affected by the appeal and may be exercised as appropriate. See also Code Civ. Proc. § 917.9 (discretion to require undertaking in case of automatic stay); Prob. Code § 9612 [AB 708] (effect of final order).

#### CROSS-REFERENCES

##### Definitions

Personal representative § 58

Property § 62

Note. *Howard Serbin, Deputy County Counsel, Orange County (Exhibit 3) supports subdivision (b) of this section.*

*Stuart D. Zimring (Exhibit 5) writes: "It does not appear that there is any bonding requirement by the Appellant. Given the fact that a stay is automatic, I believe that this is a serious oversight." In a similar vein, Jeffrey A. Dennis-Strathmeyer (Exhibit 6) writes:*

*I do not see any reason why the rules for stays should be different in probate matters than they are in civil matters. The proposed rule commands that trial and appellate courts cannot exercise discretion, thus dictating that the most frivolous of claimants can bring everything to a halt without posting bond, etc.*

*Perhaps the authority of the court to require a bond needs to be elevated from the comment to the section, since two persons who commented on this section object on the ground that bonding is excluded. Accordingly, this section should be specifically provided to be subject to Section 917.9 of the Code of Civil Procedure.*

#### Article 4. Orders and Transactions Affecting Property

##### § 7260. "Transaction" defined

7260. As used in this article, "transaction" means a transaction affecting title to property in the estate, including but not limited to

the following:

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

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

Comment. Section 7260 is a new provision drawn from Section 2111(a) (guardianship and conservatorship law). This section is intended to simplify drafting in the other sections of this article.

#### CROSS-REFERENCES

##### Definitions

Probate homestead § 60  
Property § 62  
Real property § 68

Note. Jeffrey A. Dennis-Strathmeyer (Exhibit 6) writes:

*I would delete all of this. If, for example, the executor leases the back 40 for three months for cattle grazing, I see no reason why the legislature should care less whether or not the lease is recorded. Just because this is in the guardianship law doesn't mean its needed here. (It probably isn't needed there either, although there may be some different considerations where there is a ward who might attempt to act on his or her own behalf. Besides what is the effect here of failure to comply? Putting the attorney in jail?*

*Does the Commission wish to reconsider this material?*

#### § 7261. Execution of instruments authorized or directed by court order

7261. If a transaction affecting real property in the estate is executed by the personal representative in accordance with the terms of a court order, the instrument shall include a statement that the transaction is made by authority of the order authorizing or directing the transaction and shall give the date of the order.

Comment. Section 7261 is drawn from Section 2111(c) (guardianship and conservatorship law) and is consistent with several provisions in other parts of the code. See Sections 9805 [AB 708] (execution of encumbrance), 9948 [AB 708] (execution of lease), 10314 [AB 708] (conveyance or assignment after confirmation).

## CROSS-REFERENCES

### Definitions

Personal representative § 58  
Property § 62  
Real property § 68  
Transaction § 7260

*Note.* Kenneth M. Klug, on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (Exhibit 8), objects to Sections 7261 and 7262 as follows:

A specific problem caused by unending tinkering with the statute is exemplified by Sections 7261 and 7262 of this tentative recommendation. Representatives of the State Bar have previously discussed with the Law Revision Commission the matter of recording documents affecting real property. In those discussions, we raised with the Law Revision Commission the fact that many landlords do not wish to record leases, because recorded leases create clouds on title after the lease expires. The matter of recording a lease should be left to private negotiations between the landlord and tenant. Similarly, recording a court order authorizing a lease clouds title. In response to our concerns, the Commission redrafted Section 1292 as contained in AB 708 to provide that the court order will be recorded if the transaction affects title to real property. Proposed Sections 7261 and 7262 as contained in this tentative recommendation omit the word title and would therefore require that a certified copy of an order authorizing the lease be recorded. The proposal would undo the good work of AB 708.

We assume that the omission of the word title in Sections 7261 and 7262 was not intentional. (We would be upset if it were intentional.) But the inadvertent omission underscores our concern: the more these statutes are tinkered with, the greater the chance of something slipping through that will create a substantive error.

Mr. Klug's characterization of the development of this section and the following is not in accord with the facts. Section 1292 is nearly identical to Section 1222. There was no attempt made to consider any substantive issue with regard to this section. As noted following Section 1000 above, the sole reason for these sections being in AB 708 was to make room for the revised notice sections. The Minutes for the February 1987 meeting record that these sections "should be revised to require recording of documents affecting title to real property." This was a general direction, not a decision to add the word "title" to this section. (The word "title" was added to the provision on *lis pendens*. See Section 1004.) The word "title" was never included in this section for the simple reason that it is not necessary in light of the definition of "transaction" in Section 7260. Further, the February Minutes record that the staff was to "review the existing law and propose language that would make clear which types of leases need to be recorded. Language should also be developed to permit recording of a transfer document or memorandum of lease in appropriate cases." When

this tentative recommendation was approved for distribution, the Commission considered the following report of the staff with regard to Section 7262:

The suggestion was made at the February meeting that the predecessor of this section include authority to record a memorandum of a lease or some other type of transfer document. The staff has not implemented this suggestion because it appears to be out of place. This provision, as well as existing Section 1222 and its successor in AB 708 (Section 1292), deals with the recordation of court orders, not the instrument that accomplishes the transfer. The general rules on what type of deeds, conveyances, transfer documents, memorandums, or other instruments may be recorded should not be altered in this code.

This explanation of the situation was discussed and accepted by the Commission and the draft section was approved for purposes of the tentative recommendation as set out.

#### **§ 7262. Recordation of order affecting real property**

7262. If a transaction affecting real property in the estate is executed by the personal representative in accordance with the terms of a court order, the personal representative shall record a certified copy of the order in the office of the county recorder in each county in which any portion of the real property is situated.

**Comment.** Section 7262 is drawn from Section 2111(c) (guardianship and conservatorship law) and replaces former Section 1292 (recordation of order affecting real property). This section applies to any transaction of an interest in real property of the estate that is accomplished pursuant to court authorization or direction. See Section 7260 ("transaction" defined). This section does not apply to a transaction, such as a lease pursuant to Section 9941 [AB 708], where court approval is not required. Recordation of an order for distribution of real property has the effect of a receipt by the distributee. Section [11751] (receipt for distributed property).

#### **CROSS-REFERENCES**

##### **Definitions**

Personal representative § 58  
Probate homestead § 60  
Property § 62  
Real property § 68  
Transaction § 7260

**Note.** See the Note under Section 7261.

#### **§ 7263. Transfer or conveyance of property pursuant to court order**

7263. A transaction executed by the personal representative in accordance with an order authorizing or directing the transaction has

the same effect as if the decedent were living at the time of the transaction and had carried it out in person while having legal capacity to do so.

Comment. Section 7263 is drawn from Section 2111(d) (guardianship and conservatorship) and is consistent with several provisions in other parts of the code. See also Sections 9806 [AB 708] (effectiveness of encumbrance), 9868 [AB 708] (effectiveness of order in proceedings involving property claimed by another), 9948 [AB 708] (effectiveness of lease), 10314 [AB 708] (conveyance or assignment after confirmation). Whether or not after-acquired title is passed by an instrument executed by the personal representative depends on the terms of the instrument. See generally 3 B. Witkin, *Summary of California Law Real Property* § 86, at 1840, § 160, at 1900-01 (8th ed. 1973).

#### CROSS-REFERENCES

##### Definitions

Personal representative § 58  
Property § 62  
Real property § 68  
Transaction § 7260

#### Article 5. United States as Interested Person

##### § 7280. United States as interested person

7280. Where compensation, pension, insurance, or other allowance is made or awarded by a department or bureau of the United States government to a decedent's estate, the department or bureau has the same right as an interested person to request special notice, to commence and prosecute an action on the bond of a personal representative, and to file written exceptions to a personal representative's account or contest the account.

Comment. Section 7280 restates former Section 1288 [AB 708] without substantive change. See Section 58 ("personal representative" defined).

Note. In order to improve the organization of this chapter, this section has been relocated from its earlier position as Section 7201.

CONFORMING REVISIONS AND REPEALS

Code of Civil Procedure § 153 (amended). Documents under seal

SEC. . Section 153 of the Code of Civil Procedure is amended to read:

153. Except as otherwise expressly provided by law, the seal of a court need not be affixed to any proceeding therein, or to any document, except to the following:

1. ~~To a writ;~~
2. ~~To a summons;~~
3. ~~To a warrant of arrest;~~
4. ~~To the certificate of probate of a will or of the appointment of an executor, administrator, guardian, or conservator.~~

(a) A writ.

(b) A summons.

(c) A warrant of arrest.

Comment. Section 153 is amended to delete the former reference to papers in probate. This provision was unnecessary, since the seal is expressly provided for in the relevant statutes in these cases. See Prob. Code §§ \_\_\_\_ (certificate of probate), \_\_\_\_ (letters of personal representative), \_\_\_\_ (letters of guardianship or conservatorship).

Code of Civil Procedure § 166 (amended). Matters in chambers

SEC. . Section 166 of the Code of Civil Procedure is amended to read:

166. (a) The judge or judges of the superior, municipal and justice courts may, at in chambers, in the matters within the jurisdiction of their respective courts:

(1) Grant all orders and writs which are usually granted in the first instance upon an ex parte application, and ~~may, at chambers,~~ hear and dispose of such orders and writs; ~~and may also, at chambers,~~ appoint appraisers, require and receive inventories and accounts to be filed, order notice of settlement of supplementary accounts, suspend the powers of ~~executors, administrators~~ personal representatives, guardians, or conservators in the cases allowed by law, appoint special administrators, ~~grant special letters of administration and~~ letters of

temporary guardianship or conservatorship, approve or reject claims, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate.

(2) Hear and determine all motions made pursuant to Section 657 or 663.

(3) Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court other than actions for dissolution of marriage, for legal separation, or for a judgment of nullity of the marriage, and except also applications for confirmation of sale of real property in probate proceedings.

(4) Hear and determine motions to tax costs of enforcing a judgment.

(5) Approve bonds and undertakings.

(b) A judge may, out of court, anywhere in the state, exercise all the powers and perform all the functions and duties conferred upon a judge as contradistinguished from the court, or which a judge may exercise or perform at in chambers.

Comment. Section 166 is amended to provide additional probate matters that may be heard and determined in chambers. The added provisions restate former provisions of the Probate Code without substantive change. See former Prob. Code §§ 460-464 (appointment of special administrator), 613-615 (citation to account), 703, 710-713, 718 (rejection of claim), 921-922 (citation to account), 1020.5 (notice of settlement of supplementary accounts). Section 166 is also amended to change the phrase "at chambers" to "in chambers" in conformity with modern usage.

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

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

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

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for

issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.

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

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

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

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

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

(g) From an order appointing a receiver.

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

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

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

Comment. Subdivision (j) of Section 904.1 is revised to conform to the terminology of the Probate Code. See Prob. Code § 7240 (appealable orders or refusals to make orders).

**Code of Civil Procedure § 1026 (amended). Costs in actions by or against fiduciaries**

SEC. . Section 1026 of the Code of Civil Procedure is amended to read:

1026. ~~In~~ (a) Except as provided in subdivision (b), in an action prosecuted or defended by an--executor,--administrator a personal

representative, trustee of an express trust, guardian, conservator, or a person expressly authorized by statute, costs may be recovered as in an action by and or against a person prosecuting or defending in his the person's own right;—but—such—costs—must.

(b) Costs allowed under subdivision (a) shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same costs to be paid by the plaintiff—or defendant, fiduciary personally, for mismanagement or bad faith in the action or defense.

Comment. Section 1026 is subdivided and amended to cover actions prosecuted or defended by a guardian or a conservator. The former reference to an executor or administrator is replaced by a reference to a personal representative. This is a nonsubstantive change. See Prob. Code § 58 ("personal representative" defined). For provisions governing liability for costs in proceedings under the Probate Code, see Prob. Code § 1002 and the Comment thereto.

#### Probate Code §§ 300–305 (repealed). Jurisdiction

SEC. . Article 1 (commencing with Section 300) of Chapter 1 of Division 3 of the Probate Code is repealed.

#### Probate Code § 300 (repealed). Passage of decedent's property

Comment. The first clause of former Section 300 is restated in Section 7000 (passage of decedent's property) without substantive change. See also Sections 32 ("devise" defined), 44 ("heirs" defined), and 62 ("property" defined). The persons who succeed to the decedent's estate are prescribed in the laws governing intestate succession, Part 2 (commencing with Section 6400) of Division 6 of the Probate Code.

The last clause of former Section 300 is restated in Section 7001 (limitations on passage of decedent's property) without substantive change. See the Comment to Section 7001. Administration under the Probate Code includes possession by the personal representative, control by the court, sale and other disposition of the property, charges of administration, and payment of debts and family allowance. See Divisions 6 (commencing with Section 6100) and 7 (commencing with Section 7000) of the Probate Code.

#### Probate Code § 301 (repealed). Jurisdiction and venue

Comment. The introductory clause of former Section 301 is restated in Section 7050 (jurisdiction) without substantive change. The provision of former Section 301 relating to venue in cases involving domiciliaries is restated in Section 7051 (domiciliary venue) without substantive change. The provisions of former Section 301 relating to venue in cases involving nondomiciliaries are restated without substantive change in Section 7052 (nondomiciliary venue). See the Comment to Section 7052. The substitution of "domicile" for

"residence" in Sections 7051-7052 codifies existing law. See the Comment to Section 7051. The reference to "exclusive" jurisdiction in the last clause of former Section 301 is omitted as surplus. See Section 7052(b).

**Probate Code § 302 (repealed). Effect of order granting letters**

**Comment.** Former Section 302 is restated in Section 8007 (determination of jurisdiction conclusive), which extends it to cover probate of a will as well as appointment of a personal representative.

**Probate Code § 303 (repealed). Disqualification; transfer**

**Comment.** The first paragraph of former Section 303 is restated in Section 7060 (disqualification of judge) without substantive change.

The second paragraph is restated in Sections 7070 (grounds for transfer) and 7071 (place of transfer). See also Section 1000 (general rules of civil practice govern); Code Civ. Proc. § 399 (transmittal of papers; jurisdiction of receiving court).

**Probate Code § 304 (repealed). Right to letters upon transfer**

**Comment.** Former Section 304 is omitted as unnecessary.

**Probate Code § 305 (repealed). Retransfer**

**Comment.** Former Section 305 is restated in Section 7072 (retransfer), which makes retransfer permissive rather than mandatory. See also Section 1000 (general rules of civil practice); Code Civ. Proc. § 399 (transmittal of papers).

**Probate Code § 719 (repealed). Personal representative's liability for costs**

SEC. . Section 719 of the Probate Code is repealed.

~~719.---When---a---judgment---is---recovered,---with---costs,---against---any personal---representative---shall---be---individually---liable---for---such---costs, but---they---must---be---allowed---the---personal---representative---in---the administration---accounts,---unless---it---appears---that---the---suit---or---proceeding in---which---the---costs---were---taxed---was---prosecuted---or---defended---by---the personal---representative---without---just---cause.~~

**Comment.** Former Section 719 is not continued. See Prob. Code § 1002 (costs under Probate Code); see also Code Civ. Proc. § 1026 (costs in actions by or against fiduciaries).

**Probate Code § 1210 (added). Guardian or conservator acting for ward or conservatee**

SEC. . Section 1210 is added to the Probate Code, to read:

1210. If an interested person has a guardian or conservator of the estate who resides in this state, personal service on the guardian

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

**Comment.** Section 1210 restates former Section 1289 [AB 708] without substantive change. See Section 48 ("interested person" defined).

**Probate Code §§ 1280-1299 [AB 708] (repealed). Orders and procedure**

SEC. . Chapter 22.5 (commencing with Section 1280) of Division 3 of the Probate Code is repealed.

**Probate Code § 1280 [AB 708] (repealed). Trials**

**Comment.** The first sentence of former Section 1280 is superseded by Section 1000 (general rules of practice). See the Comment to Section 1000. The second sentence is restated in Section 1044 without substantive change.

The third and fourth sentences are superseded by Sections 1000 (general rules of practice), 1452 (jury trial under guardianship and conservatorship law), 7200 (jury trial in estate administration), and 17006 (jury trial under Trust Law). See also Code Civ. Proc. §§ 309 (court may submit issue to jury not defined by pleadings), 631 (jury trial waived if not demanded).

The last sentence is restated in Sections 1047 (entry and filing) and 1048 (enforcement of order).

**Probate Code § 1281 [AB 708] (repealed). New trials**

**Comment.** Former Section 1281 is restated in Section 7220 without substantive change. The provision for new trial in proceedings to determine heirship and interests in estates is no longer necessary, since such proceedings are no longer subject to the new trial limitation of Section 1046. See the Comment to Section 1046.

**Probate Code § 1282 [AB 708] (repealed). Costs**

**Comment.** Former Section 1282 is restated in Section 1002 without substantive change.

**Probate Code § 1283 [AB 708] (repealed). Rules of practice**

**Comment.** The first paragraph of former Section 1283 is superseded by Section 1000 (general rules of practice govern). See the Comment to Section 1000; see also Code Civ. Proc. § 2009 (affidavit may be used to establish record of birth). The first sentence of the second paragraph is superseded by Section 1022 (affidavit or verified petition as evidence) and Code of Civil Procedure Section 2009 (affidavit in

uncontested proceedings to establish record of birth). The second sentence is restated in Section 8220 (evidence of subscribing witness) without substantive change.

**Probate Code § 1284 [AB 708] (repealed). Verification required**

**Comment.** Former Section 1284 is restated in Section 1021 without substantive change.

**Probate Code § 1285 [AB 708] (repealed). Clerk to set matter for hearing**

**Comment.** Former Section 1285 is restated in Section 1041 without substantive change.

**Probate Code § 1286 [AB 708] (repealed). Continuance or postponement**

**Comment.** Former Section 1286 is continued in Section 1045 without change.

**Probate Code § 1287 [AB 708] (repealed). Hearing and order**

**Comment.** Former Section 1287 is restated in Section 1046 without substantive change.

**Probate Code § 1288 [AB 708] (repealed). United States as interested person**

**Comment.** Former Section 1288 is restated in Section 7280 without substantive change.

**Probate Code § 1289 [AB 708] (repealed). Guardian or conservator acting for ward or conservatee**

**Comment.** Former Section 1289 is restated in Section 1210 without substantive change.

**Probate Code § 1290 [AB 708] (repealed). Recital of jurisdictional facts**

**Comment.** Former Section 1290 is restated in Section 1047 without substantive change.

**Probate Code § 1291 [AB 708] (repealed). Entry and filing**

**Comment.** Former Section 1291 is restated in Section 1048 without substantive change.

**Probate Code § 1292 [AB 708] (repealed). Recordation of order affecting real property**

**Comment.** Former Section 1292 is restated in Sections 7260 ("transaction" defined) and 7262 (recordation of order affecting real property) without substantive change. See also Section 7263 (transfer or conveyance of property pursuant to court order).

**Probate Code § 1293 [AB 708] (repealed). Delivery to county treasurer**

**Comment.** Former Section 1293 is superseded by Section 11853.

**Probate Code § 1297 [AB 708]. Appealable orders**

**Comment.** Former Section 1297 is restated in Section 7240 without substantive change, except that the part of subdivision (m) relating to determination of heirship is superseded by Section 325 (appeal of order determining membership in a class). See the Comment to Section 7240.

Probate Code § 1299 [AB 708]. Judgment roll

Comment. Former Section 1299 is restated in Section 1050 without substantive change. However, the former provision to the effect that the papers constituting the judgment roll need not be attached together is omitted as unnecessary.

Probate Code § 2523 (repealed). Lis pendens in guardianship and conservatorship

SEC. . Section 2523 of the Probate Code is repealed.

~~2523. If the matter concerns real property, notice of the pendency of the proceeding may be filed pursuant to Section 409 of the Code of Civil Procedure.~~

Comment. Former Section 2523 is generalized in Section 1004.

Probate Code § 9863 (repealed). Lis pendens in proceedings involving property claimed by another person

SEC. . Section 9863 of the Probate Code, as added by [AB 708], is repealed.

~~9863. If the matter concerns real property, notice of the pendency of the proceeding may be filed pursuant to Section 409 of the Code of Civil Procedure.~~

Comment. Former Section 9863 [AB 708] is generalized in Section 1004.

Probate Code § 17208 (repealed). Appointment of guardian ad litem

SEC. . Section 17208 of the Probate Code is repealed.

~~17208. (a) The court may, on its own motion or on request of a trustee or other person interested in the trust, appoint a guardian ad litem at any stage of a proceeding concerning the trust to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate:~~

~~(1) A minor.~~

~~(2) An incapacitated person.~~

~~(3) An unborn person.~~

~~(4) An unascertained person.~~

~~(5) A person whose identity or address is unknown.~~

~~(6) A designated class of persons who are not ascertained or are not in being.~~

~~(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.~~

~~(c) The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of trust property or by the petitioner.~~

~~(d) Sections 372 to 373.5, inclusive, of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.~~

Comment. Section 17208 is restated without substantive change and generalized in Section 1003 which applies to the entire Probate Code.