

Memorandum 87-102

Subject: Study L-1010 - Opening Estate Administration (Suggested Changes)

We have received the letter from the State Bar attached to this memorandum as Exhibit 1, relating to the Commission's recommendation on opening estate administration. Although the Commission has already approved the recommendation to print and submit to the Legislature, it is not too late to incorporate any additional changes the Commission believes are necessary. The State Bar's suggested changes are indicated below.

§ 8000. Petition

Section 8000 provides for the petition to commence estate administration:

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

(a) Appointment of a personal representative.

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

The State Bar would make the underscored language into a separate section. "Otherwise practitioners may not note the significance of this sentence."

§ 8001. Failure of person named executor to petition

Section 8001 provides:

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

Existing law requires that in addition to having knowledge of the death of the decedent, a person must also have knowledge of being named executor before a waiver will be implied. Section 324. The State Bar believes this provision should be restored. "Without the latter requirement, a potential executor must immediately ascertain the contents of the will of any decedent who could have named the person as executor."

The staff agrees with this observation. We do not recall how this omission occurred. In fact, as the Bar points out, the Comment to the section states that there is no change in law. The missing provision should be restored.

§ 8002. Contents of petition

The State Bar notes misspelling in subdivision (a)(2): "The street number, street, and city, or other address, and the county , of the decedent's residence at the time of death." The staff would add the comma as indicated.

§ 8005. Hearing

The State Bar would revise subdivision (b)(1), which requires that the petitioner for administration establish the jurisdictional facts, as follows.

- (b) The following matters shall be established:
 - (1) The jurisdictional facts, including:
 - (A) The date and place of the decedent's death ~~and that~~ ,
 - (B) That the decedent was domiciled in this state or left property in this state at the time of death.
 - ~~(B)~~ (C) The publication of notice under Article 3 (commencing with Section 8120) of Chapter 2.

The reason for this suggestions is that the court must find that (A) and (C) "occurred" and that (B) is "true", "two very different kinds of findings." The staff has no problem with this revision, though references back in other sections must be adjusted accordingly.

§ 8100. Form of notice

The State Bar suggests that the provisions in this chapter requiring service of notice should refer back to Section 8100, the form of notice. The staff will add this reference in the cross-references following each section.

§ 8200. Delivery of will

This section requires the custodian of a will to deliver it to the court clerk and mail a copy to the executor or beneficiary. The State Bar would clarify mailing requirement:

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

The staff agrees with this change.

§ 8201. Order for production of will

The State Bar suggests the following clarification:

8201. If, on petition to the superior court of the county in which the estate of the decedent may be administered alleging that a person has possession of a decedent's will, the court is satisfied that the allegation is true, the court shall order the person to produce the will.

The staff believes this change is sound, although we might want to add or the court in which the estate is being administered to cover that eventuality. Actually, the author of this memorandum likes a general definition of court that would simplify drafting and avoid problems such as this, along the following lines:

"Court" means the superior court of the county in which the decedent's estate may be administered or, if administration of the decedent's estate has commenced, the court in which the estate is being administered.

However, the Commission has previously rejected a staff draft such as this as unnecessary.

§ 8202. Will detained outside California

This section provides that if the original of a will is detained in a court of another jurisdiction and cannot be produced for probate here, a certified photographic copy may be admitted here. The State Bar asks whether the copy can be proved by incorporation in the will of an attestation clause that the witnesses signed. The answer to this question is yes, since Section 8202 provides that, "The same proof shall be required as if the original will were produced." We will expand the comment to refer to proof by incorporation of an attestation clause.

§ 8223. Proof of lost or destroyed will

The State Bar would revise this section:

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

The Bar explains that "This wording implies that the wording of the will need not be offered to the court in a verified pleading. These words were included in a previous section that also contained the procedures for proving the will by witnesses. Since new section 8224 and the comment establishes that the contemplated proof by witnesses is permissive, allegation by verified pleading of the terms of the will should be required."

The staff agrees with this suggestion.

§ 8253. Evidence of execution

The State Bar would revise the last sentence of the Comment to read, "The court may admit proof of the handwriting of the testator and of any of the subscribing witnesses as evidence of the due execution of the will where no witness is available. Section 8221 (proof where no subscribing witness available)." This is fine with the staff.

§ 8270. Petition for revocation

The State Bar would revise the second sentence of the Comment to read, "A will is admitted to probate when it is recorded in the minutes by the clerk pursuant to Section 822. Section 8225 (admission of will to probate)." They note that the date of the entry of the minute order may differ from the entry of the court order--a classic trap for the unwary.

§ 8402. Qualifications

One disqualification of a person from acting as personal representative is that the person is incapable of executing, or is otherwise unfit to execute, the duties of the office. The State Bar raises the issue of whether appointment of a conservator of a person's estate should preclude the person from acting as a personal

representative, or perhaps create a presumption that the person is not qualified to serve as a personal representative. The staff believes appointment of a conservator should preclude a person from acting as personal representative, without further inquiry; a person who cannot manage his or her own affairs should not be entrusted with the affairs of others.

§ 8404. Statement of duties and liabilities

The statement of duties and liabilities received by the personal representative must be "in substantially the form provided" in Section 8404 or, if the Judicial Council prescribes the form of the statement, "in the form prescribed by the Judicial Council." The State Bar is concerned that this could lead a practitioner to conclude that he or she may draw up his or her own form, as the Comment seems to indicate. The staff believes this implication is correct--a practitioner may draw up his or her own form, so long as it is substantially in the form set out in the statute. This would allow the attorney to include additional advice and warnings, or to fine-tune a statement of the law, if so inclined. The staff would alter neither the section nor the Comment.

§ 8465. Nominee of person entitled to appointment

The State Bar points out an incorrect cross-reference in the Comment, which the staff will correct.

§ 8468. Administration by any competent person

The State Bar points out an incorrect cross-reference in the Comment, which the staff will correct.

§ 8520. Vacancy in office

The State Bar notes that if appointment of a conservator of the estate is a disqualification from appointment as a personal representative, appointment of a conservator should also create a vacancy in the office of an existing personal representative.

§ 8544. Special powers, duties, and obligations

The State Bar notes that the powers of a special administrator listed in subdivision (a)(1)-(4) may be exercised without prior court authorization, whereas the powers listed in subdivision (a)(5)-(7) require a court order. The Bar suggests that the section be redrafted to group these two categories separately. The staff has no problem with this suggestion.

Respectfully submitted,

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**ESTATE PLANNING, TRUST AND
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Re: LRC Memo 87-74

Dear Jim:

On behalf of Team 3, I have reviewed LRC memo 87-74 in its final form and have the following comments:

1. Section 8000. The second sentence of subparagraph (b) should have its own section, perhaps with the heading "effect of lost will on petition for probate." Otherwise practitioners may not note the significance of this sentence.
2. Section 8001. The comment indicates that it restates section 324 without substantive change, but has deleted the requirement that the person have knowledge both of the decedent's death and that he is named as executor. Without the latter requirement, a potential executor must immediately ascertain the contents of the will of any decedent who could have named the person as executor.
3. Section 8002. In (a)(2), there is a punctuation problem. Obviously the address of the decedent is meant, but the section should

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read either "The street number, street, and city, or other address, of the decedent, and the county of the decedent's residence at the time of death," or "The street number, street, and city, or other address, and the county, of the decedent's residence at the time of death."

4. Sections 8005 through 8006. The subparts of (b)(1) should be restated so that later references in other sections are clearer. Part (A) should be broken into two parts, "(A) The date and place of the decedent's death" and "(B) That the decedent was domiciled in this state or left property in this state at the time of death," followed by the occurrence of publication in (C). This is because for jurisdiction the court must find that (A) and new (C) occurred and that (B) is true, two very different kinds of findings. Then the later reference in 8006 to a finding of the facts in (b)(1) "existing" should then be a reference to a finding that the matters referred to in (1)(A) and (C) occurred and that (B) is true.

5. Chapter 2, Article 2. Service of Notice. Each of these sections should refer to the form of notice prescribed by section 8100, or the cross-references should contain this reference.

6. Section 8200, filing of will. In (a)(2), we suggest "if the person's whereabouts are known to the custodian," and likewise the same addition for beneficiaries.

7. Section 8201. There should be a requirement that the petition be brought in the court with jurisdiction to probate the will, if produced. Cf. Section 8200 (a)(1).

8. Section 8202. Can a copy of a will be proved by incorporation in the will of an attestation clause that the witnesses signed? If so, we would like to see this set forth.

9. Section 8223. The words "or be accompanied by" should be deleted. This wording implies that the wording of the will need not be offered to the court in a verified pleading. These words were included in a previous section that also contained the procedures for proving the will by witnesses. Since new section 8224 and the comment establishes that the contemplated proof by witnesses is permissive, allegation by verified pleading of the terms of the will should be required.

10. Section 8253, comment. The last sentence is misleading. It is meant to indicate that where no witness is available, the procedure proceeded by Section 8221 is available in lieu of the evidence of other witnesses. This important qualification should be inserted.

11. Section 8270. Please insert "pursuant to Section 8225" at the end of the last line. The fact that the date of the entry of the minute order may differ from the entry of the court order is the classic trap for the unwary.

12. Section 8402. See comment to 8465 below.

13. Section 8404, comment: The comment could lead a practitioner to conclude that he or she may draw up his or her own form. Perhaps what was intended was "The statement of duties and liabilities need not conform precisely to the listing in this section, and may be more inclusive, provided that any statement that does not so conform is prescribed either by the Judicial Council or by the local rules established by the court in which the form is employed."

14. Section 8465. The cross reference to Section 8401 in the comment should be to Section 8402. Also, the appointment of a conservator is not a determination that a person is not legally competent. The comment should indicate that the appointment of a conservator of a person's estate

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tends to indicate that the person is incapable of executing the duties of the office under the standard of 8402. Alternatively, Section 8402 could provide that the appointment of a conservator of an estate is a conclusive determination that the person is not qualified to act as personal representative.

15. Section 8468: Correct cross reference is Section 8402.

16. Section 8500: If appointment of a conservator of an estate for a personal representative is made an express disqualification from initial appointment pursuant to the comment above, it should also create a vacancy within the meaning of Section 8520.

17. Section 8544: We suggest that the powers of the special administrator be presented in two categories: those that need no court order and those that may be exercised only upon order of court. Thus, subsection (a) would provide that the administrator could act under current subsections (1) through (4) without prior court approval, and (b) would provide that upon prior approval by the court the administrator could take the actions in (5) through (7).

Respectfully submitted,



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