

#L-1020

0028L
6/7/85

Fourth Supplement to Memorandum 85-13

Subject: Study L-1020 - Probate Code (Powers and Duties of Executors
and Administrators)

This Supplement disposes of three sections located with the accounting provisions in existing law (Prob. Code §§ 920, 920.3, 920.5), but which more appropriately relate to powers and duties of personal representatives. Exhibit 1 shows where these provisions would go in the new code. Exhibit 2 conforms the rule in the guardianship-conservatorship law concerning liability for act or omissions of a co-fiduciary to the proposed new rule for personal representatives (see proposed Section 7560(d)). Exhibit 3 shows the disposition of the three existing sections.

This Supplement presents two policy questions:

Liability for Act or Omission of Co-Fiduciary

Existing law provides that a personal representative is not liable "for the act or negligence of a coexecutor or coadministrator, except for collusion or gross negligence." Prob. Code § 920. This is not an accurate statement of the law. In In re Osborn, 87 Cal. 1, 25 P. 157 (1890), one of two executors turned estate property over to his co-executor and left the state. The court found him liable, saying that he had not acted with reasonable prudence and discretion.

As currently drafted, the trust provision makes a trustee who consents to the act or omission of a co-trustee, or negligently enables the co-trustee to act or omit to act, the consenting trustee is liable for the other's act or omission that would be a breach of fiduciary duty if committed by him or her. In the guardianship-conservatorship law, the statute itself is silent, but the Comment makes clear that the rule of In re Osborn, supra, is the rule for guardians and conservators.

The staff proposes to add a new subdivision (d) to Section 7560 in the basic Memo to apply the trust standard to personal representatives. (See Exhibit 1.) This will replace the restrictive

and inaccurate statement in existing Section 920. The staff will revise subdivision (d) of Section 7560 further if the trust standard is further revised. The staff also proposes to conform guardianship-conservatorship law (see Exhibit 2).

Rate of Interest When Trust Company Deposits Estate Funds in Its Own Company

Existing law provides that if the personal representative is a trust company and, in the exercise of reasonable judgment, deposits estate funds with itself, it is chargeable with interest at the rate prevailing on such deposits among banks in the locality. Prob. Code § 920.5. The State Bar thinks the rate of interest "perhaps should be modified to refer to money market rates or other higher rates rather than the normal passbook rate." The L.A. County Bar disagrees:

We don't agree that there is a need to change the reference to the rate of interest. The present statutory language seems sufficiently broad to cover current conditions. For example, the statutory phrase "interest prevailing among banks of the locality" would appear sufficient to require deposit of larger sums in money market accounts, which generally earn interest comparable to the U.S. Treasury Bill rate.

The staff would keep existing law for a different reason: To provide a higher rate of interest than is generally payable on accounts of that kind would impose a penalty on the trust company, even though the trust company acted reasonably. Thus proposed Section 7574 keeps the interest rule of existing Section 920.5.

Respectfully submitted,

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Exhibit 1

§ 7551. Possession of decedent's estate

7551. (a) Subject to subdivisions (c) and (d), the personal representative:

(1) Shall take into possession all the estate of the decedent, and shall collect all debts due to the decedent or the estate. The personal representative is not accountable for any debts which remain uncollected without his or her fault.

. . . .

Comment. . . . The second sentence of paragraph (1) of subdivision (a) continues a portion of the first sentence of former Section 920.

[Note. The Commission considered Section 7551 at the May 1985 meeting and directed the staff substantially to revise the section.]

§ 7551.3. Profit or loss to the estate

7551.3. The personal representative shall not make profit by the increase, nor suffer loss by the decrease or destruction without his or her fault, of any part of the estate.

Comment. Section 7551.3 continues the second sentence of former Section 920. See also Sections 59 ("personal representative" defined), 8253 (property sold for more or less than appraisement).

§ 7551.7. Duty to keep cash invested

7551.7. (a) Except as provided in subdivisions (b) and (c), the personal representative shall keep all cash in his or her possession invested in interest-bearing accounts or other investments authorized by law.

(b) Subdivision (a) does not apply to such amounts of cash as are reasonably necessary for orderly administration of the estate.

(c) Subdivision (a) does not apply to the extent the testator's will so provides.

Comment. Section 7551.7 continues former Section 920.3 without substantive change. For the provisions concerning investments authorized by law, see Sections 7570, 7660, 7661, 7663. See also Sections 59 ("personal representative" defined), ____ (duty to show investment upon accounting).

[Note. Further thought should be given to the interrelation between Section 7551.7 and Section 7663 (investment of surplus money as provided in will).]

§ 7560. Joint personal representatives

7560. (a) When there are two or more personal representatives, the act of a majority is valid.

(b) When two or more personal representatives have been appointed and one or more are absent from the state or legally disqualified from serving, the act of the other or others is effectual for all purposes.

(c) If upon any hearing it appears that one or more of the personal representatives were absent from the state or legally disqualified from serving, the court may so find in its order or judgment [and the finding is conclusive of the authority of those acting].

(d) When two or more personal representatives have been appointed and one consents to the act or omission of another, or negligently enables another to act or omit to act, the personal representative is liable for the other's acts or omissions that would be a breach of fiduciary duty if committed by him or her.

Comment. . . . Subdivision (d) supersedes the last portion of the first sentence of former Section 920 (personal representative not liable for act or negligence of coexecutor or coadministrator except for collusion or gross negligence). Subdivision (d) is consistent with case law and with the law applicable to trustees. See In re Estate of Osborn, 87 Cal. 1, 25 P. 157 (1890); Prob. Code § 952. For the rule in guardianship-conservatorship proceedings, see Section 2105.

[Note. If subdivision (d) is to be added, should we conform guardianship-conservatorship law?]

§ 7574. Interest on deposits by trust company

7574. When a trust company is a personal representative and in the exercise of reasonable judgment deposits money of the estate in any department of the corporation or association of which it is a part, it is chargeable with interest thereon at the rate of interest prevailing among banks of the locality on such deposits.

Comment. Section 7574 continues former Section 920.5 without substantive change. The reference in Section 7574 to an "association" is new. See Fin. Code § 1502. See also Sections 59 ("personal representative" defined), 830 (trustee's power to deposit trust

funds), 7550 (duty of personal representative to manage estate using ordinary care and diligence).

§ 8253. Sale for more or less than appraisement

8253. (a) If any part of the estate is sold for more than the appraisement, the personal representative shall account for the excess.

(b) If any part of the estate is sold for less than the appraisement and the sale has been justly made, the personal representative is not responsible for the loss.

Comment. Section 8253 continues the last sentence of former Section 920. See also Sections 59 ("personal representative" defined), 7551.3 (personal representative shall not profit from increase, nor suffer loss from decrease or destruction without fault).

Exhibit 2

CONFORMING REVISION

§ 2105 (amended). Joint guardians or conservators

2105. (a) The court, in its discretion, may appoint for a ward or conservatee:

- (1) Two or more joint guardians or conservators of the person.
- (2) Two or more joint guardians or conservators of the estate.
- (3) Two or more joint guardians or conservators of the person and estate.

(b) When joint guardians or conservators are appointed:

(1) Each shall qualify in the same manner as a sole guardian or conservator.

(2) The act of a majority of the joint guardians or conservators is valid.

(c) If one of the joint guardians or conservators dies or is removed or resigns, the powers and duties continue in the remaining joint guardians or conservators until further appointment is made by the court.

(d) Where joint guardians or conservators have been appointed and one or more are absent from the state or legally disqualified from serving, the court may, by order made with or without notice, authorize the remaining joint guardians or conservators to act as to all matters embraced within its order.

(e) Where joint guardians or conservators have been appointed and one consents to the act or omission of another, or negligently enables another to act or omit to act, the guardian or conservator is liable for the other's acts or omissions that would be a breach of fiduciary duty if committed by him or her.

Comment. Section 2105 is amended to add subdivision (e) and is consistent with prior case law. See W. Johnstone, G. Zillgitt & S. House, California Conservatorships § 1.16, at 13-14 (2d ed., Cal. Cont. Ed. Bar 1983); cf. In re Estate of Osborn, 87 Cal. 1, 25 P. 157 (1890) (co-executors). Subdivision (e) is also consistent with the rule applicable to trustees (Section 952) and to personal representatives (Section 7560).

Exhibit 3

DISPOSITION OF EXISTING SECTIONS

§ 920 (repealed). Property accountable for; liability of joint personal representative; profit or loss to the estate

Comment. The first portion of the first sentence of former Section 920 is continued in Section 8500 (duty to account). The middle portion of the first sentence is continued in the second sentence of paragraph (1) of subdivision (a) of Section 7551 (uncollected debts). The last portion of the first sentence is superseded by subdivision (d) of Section 7560 (liability of joint personal representative).

The second sentence of former Section 920 is continued in Section 7551.3. The third sentence of former Section 920 is continued in Section 8253 (sale for more or less than appraisement).

§ 920.3 (repealed). Duty to keep cash invested

Comment. Former Section 920.3 is continued in Sections 7551.7 (duty to keep cash invested) and ____ (duty to show investment upon accounting).

§ 920.5 (repealed). Interest on deposits by trust company

Comment. Former Section 920.5 is continued in Section 7574.