

Memorandum 85-50

Subject: Study L-1028 - Probate Code (Independent Administration)

Attached to this memorandum is a draft statute relating to independent administration. This draft supersedes existing Probate Code Sections 591-591.7.

The draft statute generally continues existing law with a number of significant changes. The policy issues raised by the draft are noted in the "Draftsman's Note" which follows the text and Comment to various sections in the draft. At the meeting, we will consider the draft section by section.

Attached as Exhibit 1 are Comments showing the disposition of the existing sections that would be superseded by the attached draft.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Outline of Draft Statute

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 5. ESTATE MANAGEMENT

CHAPTER 12. INDEPENDENT ADMINISTRATION OF ESTATES

Article 1. General Provisions

- § 8350. Citation of chapter
- § 8351. "Court supervision" defined
- § 8352. Chapter not applicable if will so provides
- § 8353. Special administrator
- § 8354. Application of chapter

Article 2. Granting or Revoking Independent
Administration Authority

- § 8360. Petition for order granting independent administration authority
- § 8361. Notice of hearing
- § 8362. Hearing; order; endorsement on letters
- § 8363. Increase in amount of bond
- § 8364. Revocation of independent administration authority

Article 3. Administration Under Independent
Administration Authority

- § 8365. Administration without court supervision
- § 8366. Matters requiring court supervision
- § 8367. Specific independent administration powers

Article 4. Advice of Proposed Action

- § 8370. Giving advice of proposed action
- § 8371. Actions requiring advice of proposed action
- § 8372. Persons to whom advice of proposed action must be given
- § 8373. Consent to proposed action
- § 8374. Waiver of advice of proposed action
- § 8375. Form and contents of advice of proposed action
- § 8376. Delivery or mailing of advice of proposed action
- § 8377. Objection to proposed action
- § 8378. Restraining order
- § 7389. Court supervision required if objection made
- § 8380. Effect of failure to object to proposed action
- § 8381. Protection of persons dealing in good faith with personal representative

Article 5. Forms

- § 8390. Judicial Council form
- § 8391. Form for advice of proposed action

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 5. ESTATE MANAGEMENT

CHAPTER 12. INDEPENDENT ADMINISTRATION OF ESTATES

Article 1. General Provisions

§ 8350. Citation of chapter

8350. This chapter shall be known and may be cited as the Independent Administration of Estates Law.

Comment. Section 8350 continues former Section 591.

§ 8351. "Court supervision" defined

8351. As used in this chapter, "court supervision" includes judicial authorization, approval, confirmation, and instructions.

Comment. Section 8351 continues the substance of a portion of the second sentence of subdivision (a) of former Section 591.2.

§ 8352. Chapter not applicable if will so provides

8352. The personal representative may not be granted authority to administer the estate under this chapter if the decedent's will provides that the estate shall not be administered under this chapter.

Comment. Section 8352 continues the substance of the first part of the first sentence of former Section 591.1.

CROSS-REFERENCES

Definitions

Personal representative § 59

Will § 88

§ 8353. Special administrator

8353. A special administrator may not be granted authority to administer the estate under this chapter unless the special administrator is appointed with the powers of a general administrator.

Comment. Section 8353 supersedes the last sentence of former Section 591.1. Former Section 591.1 provided that the independent administration provisions did not apply to special administrators. Section 8353 permits independent administration authority to be granted to a special administrator if the special administrator is appointed with the powers of a general administrator. See Section [465]. This new authority will be useful, for example, in an estate with a lengthy will contest where virtually all of the administration is handled by the special administrator, and the only act which occurs after the final resolution of the will contest is the distribution of the estate assets. In such a case, the special administrator may obtain independent administration authority unless good cause is shown why the authority should not be granted.

DRAFTSMAN'S NOTE. Letters from the Estate Planning, Trust and Probate Law Section of the State Bar (November 5, 1984) and from the Probate and Trust Law Section of the Los Angeles County Bar Association (December 27, 1984) support the change made in Section 8353.

§ 8354. Application of chapter

8354. This chapter applies to any case where authority to administer the estate is granted under this chapter or where authority to administer the estate was granted under former Sections 591.1 to 591.7, inclusive.

Comment. Section 8354 is a new provision that makes clear that this chapter applies to a pending proceeding where independent administration authority was granted under the former provisions that governed independent administration authority.

DRAFTSMAN'S NOTE. Section 8354 presents the policy issue whether the new code provisions relating to independent administration should apply to all cases after the operative date of the new code. To avoid the need for lawyers and judges to refer to old law after the new code becomes operative, this chapter is made applicable to pending proceedings on and after the operative date of the new code.

Article 2. Granting or Revoking Independent Administration Authority

§ 8360. Petition for order granting independent administration authority

8360. (a) To obtain authority to administer the estate under this chapter, the personal representative shall petition the court for that authority either in the petition for his or her appointment or in a separate petition filed in the estate proceedings.

(b) A petition under this chapter may request either of the following:

(1) Authority to administer the estate under this chapter.

(2) Authority to administer the estate under this chapter without authority to do either of the following under the authority of this chapter:

(A) Sell or exchange real property.

(B) Grant an option to purchase real property.

Comment. Subdivision (a) of Section 8360 continues the substance of a portion of the first sentence of former Section 591.1. Subdivision (b) is a new provision that permits the petitioner either (1) to request authority to administer the estate under this chapter (this authority permits the personal representative to administer the estate using the full authority that may be granted under this chapter) or (2) to request authority to administer the estate under this chapter without independent administration authority with respect to real property transactions. The petitioner might request the limited authority that excludes real property transactions in order to avoid the need for an increased bond to cover the estimated net proceeds of real property transactions (see Section 8363). Or the petitioner may request the limited authority because no real property transactions will take place in the course of administration of the estate. Of course, the personal representative is not required to exercise independent administration authority with respect to a particular transaction merely because he or she has been granted that authority. The personal representative, despite the grant of independent administration authority, may seek court supervision of the transaction. See Section 8365(b). Hence, for example, even though the personal representative has been granted independent administration authority that does not exclude real property transactions, the personal representative may sell real property under the statutory provisions that govern real property sales when independent administration authority has not been granted. Likewise, the personal representative may seek court approval or instructions concerning a transaction rather than using independent administration authority because there is a lack of agreement as to the desirability of the transaction among the persons interested in the estate or because some of the heirs or devisees who receive an advice of proposed action lack the capacity to object to the proposed action (see subdivision (c) of Section 8380) or for some other reason.

A special administrator may not be granted independent administration authority unless the special administrator is appointed with the powers of a general administrator. See Section 8353. Authority to administer the estate under this chapter may not be granted where the decedent's will provides that the estate shall not be administered under this chapter. See Section 8352.

CROSS-REFERENCES

Definitions

Personal representative § 59

Real property § 68

Verification of petition § _____

DRAFTSMAN'S NOTE. The provision of Section 8360 that permits the petitioner to request independent administration authority that excludes authority with respect to real property transactions was approved at the March 1985 meeting of the Commission. Such limited independent administration authority may be desired in order to avoid having to provide a bond that includes the estimated net proceeds of the real property transaction. At the meeting, it was suggested that the staff consider whether the petitioner should be permitted to request independent administration authority with respect only to one or more types of transactions or with respect to a particular transaction or to request independent administration authority subject to specified limitations, restrictions, or conditions. Upon reviewing the matter, the staff recommends against including such a provision in the statute for two reasons. First, the provision is not necessary because the personal representative is not required to exercise independent administration authority with respect to a particular transaction; the personal representative can seek court authorization, approval, confirmation, or instructions concerning a particular transaction even though the personal representative has been granted independent administration authority that would include that transaction. Second, and this is the reason for the staff recommendation, provisions that would permit granting of authority subject to specific limitations or only authority with respect to a specific transaction or other variations of authority would make the Judicial Council forms much more complicated and would make the letters more complicated (since the letters must be endorsed with the independent administration authority granted) and would make it more difficult for persons dealing with the personal representative to determine whether the particular transaction is authorized under independent administration authority. In view of this complexity and because the complexity serves no purpose (since the personal representative is not required to use the authority), the staff draft does not attempt to do more than to permit the petitioner to exclude real property transactions from the independent administration authority, a limitation that is useful since it may in some cases avoid the need for an increase in the amount of the bond.

§ 8361. Notice of hearing

8361. (a) If the authority to administer the estate under this chapter is requested in the petition for appointment of the personal representative, notice of the hearing on the petition shall be given to the persons and in the manner prescribed in Chapter 2 (commencing with Section 7230) of Part 2 of Division 7 and shall be included in the notice of hearing required by that chapter.

(b) Where proceedings for the administration of the estate are pending at the time a petition is filed under Section 8360, notice of the hearing on the petition shall be given in the manner prescribed in Section [1200.5].

(c) The notice of hearing, whether included in the petition for appointment or in a separate petition, shall include the substance of the following statement: "The petition requests authority to administer under the Independent Administration of Estates Law. This authorizes estate transactions without obtaining otherwise required judicial authorization, approval, confirmation, or instructions. The petition will be granted unless good cause is shown why it should not be."

Comment. Section 8361 continues the substance of the second, third, and fourth sentences of former Section 591.1 except as indicated below. The requirement that notice of the hearing on the petition be given in the manner prescribed in Section [1200.5] is substituted in subdivision (b) of Section 8361 for the requirement of former Section 591.1 that notice of hearing on a separate petition be posted as provided in former Section 1200 (now Section _____) and be mailed at least 10 days before the date set for the hearing to all devisees and to all known heirs of the decedent, and to all persons who have requested special notice. Accordingly, notice under subdivision (b) of Section 8361 is given only to those heirs and devisees who have requested special notice or have appeared in the pending proceeding and to other persons who have requested special notice or have appeared in the proceeding.

Subdivision (c) of Section 8361 continues the substance of the fourth sentence of former Section 591.1 except that subdivision (c) requires that the notice of hearing contain the substance of the statement set out in the statute concerning the nature of the petition.

CROSS-REFERENCES

Clerk to set petition for hearing § 7142

Definitions

Personal representative § 59

DRAFTSMAN'S NOTE. As the Comment to Section 8361 notes, where a separate petition is filed in a pending proceeding, the section adopts the general notice of hearing requirement for a petition filed in a pending proceeding. This avoids the need to give notice to heirs and devisees who were given notice of the petition for probate of the will or appointment of the personal representative and did not appear in the proceeding or request special notice.

At the suggestion of one commissioner at the March 1985 meeting, Section 8361 specifies the substance of a statement that is required to be included in the notice of hearing. This statement gives the person receiving the notice more information concerning the nature of the petition, but it may increase the cost of publication because it adds four or five lines to the material that must be published.

§ 8362. Hearing; order; endorsement on letters

8362. (a) Any interested person may appear and object to the granting of authority to administer the estate under this chapter by filing a written statement setting forth the objection.

(b) Unless the court determines that the objecting party has shown good cause why the authority requested in the petition should not be granted, the court shall grant the requested authority.

(c) The letters testamentary or of administration shall be endorsed to the effect that the letters are issued under this chapter and, if the authority granted excludes authority to sell or exchange real property or grant options to purchase real property under this chapter, that limitation shall be included in the endorsement.

Comment. Section 8362 continues the substance of the fifth and sixth sentences of former Section 591.1 except that subdivision (c) of Section 8362 recognizes that independent administration authority may exclude real property transactions. See Section 8360(b).

CROSS-REFERENCES

Definitions

Interested person § 48

Real property § 68

§ 8363. Increase in amount of bond

8363. If the personal representative is otherwise required to file a bond and the court determines that real property of the estate will be sold without court supervision pursuant to the authority granted under this chapter, the court in its discretion may fix the amount of the bond at not less than the estimated value of the personal property, the estimated net proceeds of the real property that will be sold under this article, and the estimated value of the probable annual gross income of all the property belonging to the estate, or, if the bond is given by personal sureties, at not less than twice that amount.

Comment. Section 8363 is a new provision that makes clear that if real property is to be sold under the independent administration authority, when the court determines the amount of the bond (in a case where a bond is otherwise required), the amount of the bond includes the estimated net proceeds of the real property that will be sold under the independent administration authority.

DRAFTSMAN'S NOTE. The Commission approved the substance of this section at the March 1985 meeting. This section should be referred to under the section that specifies how the amount of the bond is to be determined.

CROSS-REFERENCES

Definitions

Court supervision § 8351
Personal property § 58
Personal representative § 59
Property § 62
Real property § 68

§ 8364. Revocation of independent administration authority

8364. (a) Any interested person who objects to continued administration of the estate under this chapter may file a petition setting forth the basis for revoking the authority of the personal representative to continue administration of the estate under this chapter.

(b) Notice of the hearing on the petition shall be served on the personal representative in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure or in such manner as may be authorized by the court.

(c) If the court determines that good cause has been shown, the court shall make an order revoking the authority of the personal representative to continue administration of the estate under this chapter.

(d) Upon the making of an order under this section, new letters testamentary or letters of administration shall be issued without the endorsement described in subdivision (c) of Section 8362.

Comment. Section 8364 continues the substance of former Section 591.7.

CROSS-REFERENCES

Clerk sets petition for hearing § 7142

Definitions

Interested person § 48
Personal representative § 59
Verification of petition § _____

Article 3. Administration Under Independent Administration Authority

§ 8365. Administration without court supervision

8365. (a) Except as provided in this article, and subject to Article 4 (commencing with Section 8370), a personal representative who has been granted authority to administer the estate under this chapter may:

(1) Administer the estate without court supervision as provided in this chapter, but in all other respects the personal representative shall administer the estate in the same manner as a personal representative who has not been granted authority to administer the estate under this chapter.

(2) Sell property of the estate either at public auction or private sale, and with or without notice, for such price and upon such terms and conditions as the personal representative may determine, and need not obtain court approval of the compensation for the services to the estate of the agent, if any, used for the sale.

(b) Notwithstanding subdivision (a), the personal representative may obtain court supervision as provided in this code of any action taken by him or her during administration of the estate.

(c) All publications of notice required by this code shall continue to be given except when no hearing is required because the personal representative does not seek court supervision of an action or proposed action.

Comment. Paragraph (1) of subdivision (a) of Section 8365 continues the substance of the first and second sentences of subdivision (a) of former Section 591.2. See also Section 8351 (defining "court supervision"). Paragraph (2) of subdivision (a) is a new provision designed to make clear that sales under independent administration authority are not subject to the statutory requirements that apply to sales made under court supervision. Thus, the commission of the realtor who lists or obtains the purchaser of real property sold under independent administration authority is not subject to the approval of the court. Nor does the 90-percent-of-appraised-value requirement apply when a sale is under independent administration authority. Publication of notice of sale is not required where there will be no court hearing because the sale is made under independent administration authority.

Subdivision (b) of Section 8365 continues the first sentence of subdivision (b) of former Section 591.2. Subdivision (c) supersedes the second sentence of subdivision (b) of former Section 591.2, and the language of the former provision has been revised to make clear that publication is not required where no hearing is required because the personal representative does not seek court supervision of the action or proposed action.

CROSS-REFERENCES

Definitions

Court supervision § 8351

Personal representative § 59

DRAFTSMAN'S NOTE. Subdivision (a)(2) is a new provision the substance of which was approved by the Commission at its March 1985 meeting. The substance of subdivision (c) as revised in the draft was approved by the Commission at its March 1985 meeting.

§ 8366. Matters requiring court supervision

8366. A personal representative who has obtained authority to administer the estate under this chapter is, nevertheless, required to obtain court supervision, in the manner provided in this code, for any of the following actions:

(a) Allowance of commissions of the personal representative

(b) Allowance of attorney's fees.

(c) Settlement of accountings.

(d) Preliminary and final distributions and discharge.

(e) Sale or exchanges of real property and grant of options to purchase real property if the authority of the personal representative granted under this chapter specifically excludes the authority to take such actions under the authority of this chapter.

Comment. Section 8366 continues a portion of subdivision (a) of former Section 591.2, with the addition of subdivision (e) which reflects the addition of subdivision (b) to Section 8360.

CROSS-REFERENCES

Definitions

Court supervision § 8351

Personal representative § 59

§ 8367. Specific independent administration powers

8367. Unless restricted by the will and subject to Section 8366, a personal representative who has been granted authority to administer the estate under this chapter has all of the following powers, in addition to any other powers granted by this code, which powers can be exercised in the manner provided in this chapter:

(a) To manage, control, convey, divide, exchange, partition, and to sell for cash or on credit; to lease for any purpose, including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases; and to grant options to purchase real property for a period within or beyond the administration of the estate.

(b) To invest and reinvest money of the estate in deposits in banks and insured savings and loan association accounts, in units of a common trust fund described in Section [585.1], and in eligible securities for the investment of surplus state moneys as provided for in Section 16430 of the Government Code, and to invest and reinvest any surplus moneys in his or her hands in any manner provided by the will.

(c) To borrow; and to place, replace, renew or extend any encumbrance upon any property in the estate.

(d) To abandon worthless assets or any interest therein.

(e) To make ordinary or extraordinary repairs or alterations in buildings or other property.

(f) To vote a security, in person or by general or limited proxy.

(g) To sell or exercise stock subscription or conversion rights.

(h) To hold a security in the name of a nominee or in any other form without disclosure of the estate, so that title to the security may pass by delivery, but the personal representative is liable for any act of the nominee in connection with the security so held.

(i) To insure the assets of the estate against damage or loss and to insure the personal representative against liability with respect to third persons.

(j) To allow, pay, reject, contest, and compromise any claim by

or against the estate; to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible; and to institute, compromise, and defend actions and proceedings.

(k) To pay taxes, assessments, and other expenses incurred in the collection, care, and administration of the estate.

(l) To continue the operation of the decedent's business to the extent the personal representative determines that to be for the best interest of the estate and those interested therein.

(m) To pay a reasonable family allowance.

(n) To make a disclaimer.

(o) To grant an exclusive right to sell property, for a period not to exceed 90 days, where the personal representative determines that to be necessary and advantageous to the estate.

Comment. Section 8367 continues the substance of former Section 591.6. The personal representative must exercise the powers listed in this section in the manner provided in this chapter. Accordingly, if the action to be taken is one listed in Section 8371, the personal representative can take the action only if the requirements of Article 4 (commencing with Section 8370) (advice of proposed action) are satisfied. See Section 8370.

CROSS-REFERENCES

Definitions

Person § 56
Personal representative § 59
Property § 62
Real property § 68
Security § 70
Will § 88

DRAFTSMAN'S NOTE. The reference to Section 585.1 is added to subdivision (b) of Section 8367 to conform to subdivision (h) of Section 8371. Should a reference to the mutual funds referred to in subdivision (h) of Section 8371 be added to subdivision (b) of Section 8367?

Article 4. Advice of Proposed Action

§ 8370. Giving advice of proposed action

8370. (a) Prior to the consummation of any of the actions described in Section 8371, a personal representative who has been granted authority to administer the estate under this chapter shall give advice of proposed action as provided in this article.

(b) A personal representative who has been granted authority to administer the estate under this chapter may, but need not, give advice of proposed action prior to taking an action that is not described in Section 8371. Nothing in this subdivision authorizes a personal representative to take any action the personal representative is not otherwise authorized to take.

Comment. Subdivision (a) of Section 8370 continues the substance of the first sentence of subdivision (a) of former Section 591.3. Subdivision (b) is a new provision that permits a personal representative to use the procedure provided in this article with respect to an action that the personal representative proposes to take even though the action is not one for which advice of proposed action is required. For example, the personal representative may want to use the provision where the proposed action is the compromise of a claim by or against the estate (see Section 8367(j)). This action is one that ordinarily does not require an advice of proposed action. See Section 8371 (actions requiring advice of proposed action). If the procedure provided by this article is used with respect to the proposed action, those persons who receive the advice of proposed action and fail to object waive any right to have the court later review the action taken unless the person establishes that he or she did not actually receive the advice of proposed action before the time to object expired. See Section 8380. See also Section 8379(b) and the Comment to that section. Use of the advice of proposed action procedure avoids the need to petition the court for instructions on the proposed compromise in order to preclude a later challenge to the accounts of the personal representative.

CROSS-REFERENCES

Definitions

Personal representative § 59

DRAFTSMAN'S NOTE. Section 8370 introduces a new concept into the independent administration statute. Subdivision (b) permits the personal representative to give notice of a proposed action even though the statute does not require that notice be given. Failure to object to the proposed action has the same effect as failure to object to a proposed action for which advice of proposed action is required. This procedure permits the personal representative to determine whether an interested person objects to the proposed action and protects the personal representative if no one objects. It also encourages the personal representative to keep persons interested in the estate informed of proposed actions and requires court review of a proposed action before it is taken if there is an objection.

§ 8371. Actions requiring advice of proposed action

8371. The actions requiring advice of proposed action are all of the following:

(a) Selling or exchanging real property.

(b) Granting options to purchase real property.

(c) Selling or exchanging personal property, except for securities sold upon an established stock or bond exchange and other assets referred to in [Sections 770 and 771.5] when sold for cash.

(d) Leasing real property for a term in excess of one year.

(e) Entering into any contract, other than a lease of real property, not to be performed within two years.

(f) Continuing for a period of more than six months from the date of appointment of the personal representative of an unincorporated business or venture in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of the decedent's death, or the sale or incorporation of such a business.

(g) The first payment, the first payment for a period commencing 12 months after the death of the decedent, and any increase in the payments, of a family allowance.

(h) Investing funds of the estate, except depositing funds in banks and investing in insured savings and loan association accounts, in units of a common trust fund described in Section [585.1], in direct obligations of the United States maturing not later than one year from the date of investment or reinvestment, and in mutual funds which are comprised of (1) those obligations, or (2) repurchase agreements with respect to any obligation, regardless of maturity, in which the fund is authorized to invest.

(i) Completing a contract entered into by the decedent to convey real or personal property.

(j) Borrowing money or executing a mortgage or deed of trust or giving other security.

(k) Determining third-party claims to real and personal property if the decedent died in possession of, or holding title to, the property, or determining the decedent's claim to real or personal property title to or possession of which is held by another.

Comment. Section 8371 continues the substance of subdivision (b) of former Section 591.3.

CROSS-REFERENCES

Definitions

Personal property § 58
Personal representative § ____
Real property § 68
Security § 70

§ 8372. Persons to whom advice of proposed action must be given

8372. Except as provided in Sections 8373 and 8374, advice of proposed action shall be given to all of the following:

(a) Each devisee whose interest in the estate is affected by the proposed action.

(b) The heirs of the decedent if the estate is an intestate estate.

(c) Each person who has filed a request for special notice pursuant to Section [1202].

(d) The State of California if any portion of the estate is to escheat to it.

Comment. Section 8372 continues the substance of a portion of the second sentence of subdivision (a) of former Section 591.3.

CROSS-REFERENCES

Consent to transaction § 8373

Definitions

Devisee § 34
Heirs § 44
Person § 56

Waiver of right to receive advice of proposed action § 8374

§ 8373. Consent to proposed action

8373. Advice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

Comment. Section 8373 is a new provision that codifies a practice under prior law. See McCarroll, 1 California Decedent Estate Administration Supplement § 7.130, at 202 (Cal. Cont. Ed. Bar 1984). The section provides a method that can be used to avoid the delay that otherwise would result from the requirement that a person given advice of proposed action be allowed a specified period of time--see Section 8375(d)--within which to object to the proposed action.

CROSS-REFERENCES

Definitions

Person § 56

DRAFTSMAN'S NOTE. Section 8373 is a provision recommended by the staff in Memorandum 85-46, prepared for the April 1985 meeting of the Law Revision Commission. The consent and waiver provisions are included at the suggestion of lawyer Jeffrey Dennis-Strathmeyer who states: "I think we need a provision permitting the beneficiary to waive compliance with the time and mailing requirements for giving advice of a proposed action. If the executor needs to act quickly, but wants to bind the beneficiaries, it should be sufficient for them to sign a waiver--even after the fact. I didn't worry until I found out that we have some courts that require the filing of the advice and proof of service with the court. See Los Angeles Probate Policy Memorandum 9.01(3)."

§ 8374. Waiver of advice of proposed action

8374. (a) The advice of proposed action need not be given to any person who waives it in writing. The waiver may waive the giving of advice of proposed action for all proposed actions generally, for a particular proposed action, or for a class or type of proposed actions.

(b) A person entitled to advice of proposed action may waive particular procedural aspects of the giving of the advice of proposed action, such as the time requirement of Section 8375, the requirement of Section 8375 as to the contents of the advice, the requirement of Section 8376 as to the delivery or mailing of the advice, and the requirement of Article 5 (commencing with Section 8390) as to the form of the advice.

(c) The waiver may be executed at any time before or after the proposed action is taken.

Comment. Section 8374 is a new provision that codifies a practice under prior law. See McCarroll, 1 California Decedent Estate Administration Supplement § 7.130, at 202 (Cal. Cont. Ed. Bar 1984). Subdivision (b) permits a person entitled to advice of proposed action to execute a written waiver that permits notice of a proposed action to be given to the person by telephone so that the proposed action can be expeditiously completed if the person does not object. For example, if the person is agreeable to the sale of real property of the estate, the waiver under subdivision (b) could be drafted in terms that would permit the personal representative to call the person on the telephone to advise the person of an offer to buy the property and to permit the sale of the property at the price and on the terms offered if the person called is agreeable or at a price and on the terms of a counter-offer that is agreeable to the person called.

CROSS-REFERENCES

Definitions

Person § 56

DRAFTSMAN'S NOTE. Section 8374 is drawn from a provision included in Memorandum 85-46 prepared for the April 1985 meeting. The provision in Memorandum 85-46 has been revised in Section 8374. See the Draftsman's Note to Section 8373.

§ 8375. Form and contents of advice of proposed action

8375. (a) The advice of proposed action shall be in a form that satisfies the requirements of Article 5 (commencing with Section 8390).

(b) The advice of proposed action shall state all of the following:

(1) The name and mailing address of the personal representative.

(2) The person and telephone number to call to get additional information.

(3) The action proposed to be taken, with a reasonably specific description of the proposed action. If the proposed action involves the sale or exchange of real property, or the granting of an option to purchase real property, the description of the proposed action shall include the material terms of the transaction, including, if applicable, the sale price and the amount of or method of calculating any commission or compensation to be paid or to be paid in connection with the transaction.

(4) The date on or after which the proposed action is to be taken, which date shall not be less than 15 days after the personal delivery, or not less than 20 days after the mailing, of the advice of proposed action.

Comment. Section 8375 continues the substance of the second, third, and fourth sentences of former Section 591.4, with the addition of (1) the requirement that the advice satisfy the form requirements of Article 5 (see the Comment to Section 8390) and (2) the requirement that the advice state the amount of or method of calculating any commission or compensation paid or to be paid in connection with the transaction.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 59

Real property § 68

DRAFTSMAN'S NOTE. The Commission approved the additional requirements of this section at its March 1985 meeting.

§ 8376. Delivery or mailing of advice of proposed action

8376. The advice of proposed action shall be delivered personally to each person required to be given advice of proposed action or sent by first-class mail to the person at the person's last known address. If the advice of proposed action is mailed to a person who resides outside the United States, it shall be sent by air mail.

Comment. Section 8376 continues the substance of the first sentence of former Section 591.4

CROSS-REFERENCES

Definitions

Person § 56

DRAFTSMAN'S NOTE. When general provisions governing the manner of giving notice by mail are drafted this section should be reviewed.

§ 8377. Objection to proposed action

8377. A person given advice of proposed action who desires to object to the proposed action shall deliver or mail a written objection to the personal representative at the address stated in the advice of proposed action, so that the objection is received before the date specified in the advice of proposed action on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is the later time.

Comment. Section 8377 continues the substance of subdivision (a)(2) of former Section 591.5. Section 8377 applies whether the the advice of proposed action is given pursuant to subdivision (a) of Section 8370 (giving of advice mandatory) or under subdivision (b) of that section (giving of advice permissive). See Section 8380 (effect of failure to object). See _____ (mailing).

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 59

§ 8378. Restraining order

8378. Any person who is given advice of proposed action for a proposed action that would require court supervision if the personal representative had not been granted authority to administer the estate under this chapter and who objects to the taking of the proposed action without court supervision may apply to the court having jurisdiction over the proceeding for an order restraining the personal representative from taking the proposed action without court supervision under the provisions of this code dealing with court supervision of such action. The court shall grant the requested order without requiring notice to the personal representative and without cause being shown for the order. The person who obtained the order may serve it upon the personal representative in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in the manner authorized by the court.

Comment. Section 8378 continues the substance of subdivision (a)(1) of former Section 591.5. Section 8378 applies only where the personal representative is required to give advice of proposed action, not where the personal representative gives advice of proposed action in a case where the advice was not required.. See Section 8370(a).

CROSS-REFERENCES

Definitions

Court supervision § 8351

Person § 56

Personal representative § 59

§ 8379. Court supervision required if objection made

8379. (a) If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under this chapter and the personal representative has notice of a written objection made under Section 8377 or a restraining order issued under Section 8378, the personal representative shall, if he or she desires to take the proposed action, submit the proposed action to the court for approval following the provisions of this code dealing with court supervision of that kind of action and may take the proposed action only under such order as may be entered by the court.

(b) If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under this chapter but the personal representative has given advice of the proposed action and has notice of a written objection made under Section 8377 to the proposed action, the personal representative shall, if he or she desires to take the proposed action, request instructions from the court concerning the proposed action and may take the proposed action only under such order as may be entered by the court.

(c) Failure of the personal representative to comply with this section is a violation of his or her fiduciary duties and is grounds for removal from office.

Comment. Subdivision (a) of Section 8379 continues the substance of subdivision (b) of former Section 591.5. Subdivision (b) of Section 8379 is new and implements subdivision (b) of Section 8370. Subdivision (c) is a new provision designed to make clear that the personal representative may not take a proposed action without court approval if the personal representative has notice of an objection properly made by a person given advice of proposed action.

Subdivision (b) of Section 8370 permits a personal representative who has been granted independent administration authority to give advice of proposed action with respect to a proposed action that could be taken without giving advice of proposed action. The personal representative may give advice of proposed action (although not required to do so) in order that the person receiving the advice will waive the right to object to the proposed action if the person fails to object within the time allowed after receipt of the advice. However, if the personal representative determines to use this procedure for an action that could be taken without giving advice of proposed action, the personal representative may not go ahead with the proposed action if he or she has notice of an objection, and may only take the proposed action if authorized by the court upon hearing of a petition for instructions. The benefit of this procedure is that it permits a court review of the proposed action before it is taken if the personal representative has notice of an objection rather than having the objection first made after the action has been taken. For further discussion, see the Comment to Section 8370.

CROSS-REFERENCES

Definitions

Court supervision § 8351

Personal representative § 59

DRAFTSMAN'S NOTE. This section should be cross referred under the section listing the grounds for removal from office. Subdivision (b) presents a significant policy issue. See discussion in the Comment to Section 8379.

§ 8380. Effect of failure to object to proposed action

8380. (a) A person who has been given advice of proposed action as provided in Sections 8370 to 8376, inclusive, may object to the proposed action only by one or both of the following methods:

(1) Delivering or mailing a written objection as provided in Section 8377.

(2) Serving a restraining order obtained under Section 8378 before the date specified in the advice of proposed action on or after which the proposed action is to be taken, or before the proposed action is actually taken, whichever is the later time.

(b) The failure to object is a waiver of any right to have the court later review the action taken unless the person who fails to object establishes that he or she did not actually receive the advice of proposed action before the time to object expired.

(c) Notwithstanding subdivision (b), the court may review the action of the personal representative on its own motion where necessary to protect the interests of creditors of the estate or the interests of a heir or devisee who, at the time the advice was given, lacked capacity to object to the proposed action or was a minor or was unborn. The court may also review the action of the personal representative upon motion of a person who was entitled to receive advice of proposed action but did not receive the advice of proposed action before the time to object expired.

Comment. Subdivision (a) of Section 8380 continues the substance of the first sentence of subdivision (d) of former Section 591.5. Subdivision (b) continues the second sentence of subdivision (d) of former Section 591.5. Subdivision (c) supersedes the last sentence of subdivision (d) of former Section 591.5. Subdivision (c) narrows the situations where the court can review the action of the personal representative on its own motion to cases where necessary to protect the interests of creditors of the estate or a heir or devisee who was lacked capacity to object to the proposed action or was unborn. The court is not authorized to review the proposed action on motion of a person who consented to the proposed action (Section 8373) or waived the advice of proposed action (Section 8374). See the Comments to Sections 8373 and 8374.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Person § 56

Personal representative § __

DRAFTSMAN'S NOTE. Section 8380 modifies former law to limit the court's power of review on its own motion to cases involving the interests of creditors or beneficiaries who lack capacity or are unborn. The purpose of the advice of proposed action is to bind persons who receive it if they fail to object to the proposed action. Limiting the scope of review in this manner was suggested by lawyer Jeffrey Dennis-Strathmeyer in a letter and orally by others.

§ 8381. Protection of persons dealing in good faith with personal representative

8381. (a) The failure of the personal representative to comply with subdivision (a) of Section 8370, with Sections 8372, 8375, 8376, and 8379, and with Article 5 (commencing with Section 8390), and the taking of the action by the personal representative without such compliance, does not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers or the rights of third persons dealing in good faith with the personal representative who changed their position in reliance upon the action, conveyance, or transfer without actual notice of the failure of the personal representative to comply with those provisions.

(b) No person dealing with the personal representative has any duty to inquire or investigate whether or not the personal representative has complied with the provisions listed in subdivision (a).

Comment. Section 8381 continues the substance of the last two sentences of former Section 591.4 and subdivision (c) of former Section 591.5.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 59

Property § 62

Article 5. Forms

§ 8390. Judicial Council form

8390. If the Judicial Council prescribes a form for advice of proposed action, the form prescribed by the Judicial Council shall be used to give advice of proposed action.

Comment. Section 8390 is new. If the Judicial Council has not prescribed a form for advice of proposed action, the form prescribed by Section 8391 must be used.

§ 8391. Form for advice of proposed action.

8391. Unless the Judicial Council prescribes a form for advice of proposed action, the advice of proposed action shall be in substantially the following form:

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

Estate of _____

No. _____

deceased

ADVICE OF PROPOSED ACTION
(Probate Code Section 8391)

1. The personal representative of the estate of the deceased is:

(Name)

(Street or post office box)

(City, state, ZIP)

2. The personal representative has authority to administer the estate without court supervision under the Independent Administration of Estates Law (California Probate Code Sections 8350-8391).

3. On or after _____, 19__, the personal representative will take the following action:

(Describe proposed action in reasonably specific terms. If the proposed action involves a sale or exchange of real property or an option to purchase real property, include the material terms of the transaction, including any sale price and the amount of or method of calculating any compensation paid or to be paid in connection with the transaction.)

4. If you need more information, you may call:

(Name)

(Telephone number)

5. If you object to the proposed action, you may deliver or mail written objection to the personal representative at the address stated above. Your objection can be simply stated. All you need to do is state that you object to the proposed action (specifying the action you object to) and sign your name. Under some circumstances, you may also apply to the court for an order preventing the personal representative from taking the proposed action without court supervision.

6. Your objection must be received before the date specified above, or before the proposed action is taken, whichever is later. If you object, the personal representative may take the proposed action only under court supervision.

7. IF YOU DO NOT OBJECT, YOU WILL BE TREATED AS IF YOU CONSENTED TO THE PROPOSED ACTION. YOU MAY NOT OBJECT AFTER THE PROPOSED ACTION IS TAKEN.

Dated: _____

(Signature of personal representative or
attorney for personal representative)

Comment. Section 8391 is a new provision designed to provide the person receiving an advice of proposed action with the information the person needs in order to react to the advice. The form prescribed by this section may be superseded by a Judicial Council form. If the Judicial Council has prescribed a form for advice of proposed action, the Judicial Council form must be used instead of the form prescribed by this section. See Section 8390.

CROSS-REFERENCES

Definitions

Court supervision § 8351

Personal representative § 59

Real property § 68

DRAFTSMAN'S NOTE. The substance of Section 8391 was approved by the Commission at the March 1985 meeting.

DISPOSITION OF REPEALED PROBATE CODE SECTIONS

Probate Code § 591 (repealed). Short title

Comment. Former Section 591 is continued in Section 8350.

Probate Code § 591.1 (repealed). Petition for independent administration authority

Comment. The first portion of the first sentence of former Section 591.1 is continued in substance in Section 8352. The remainder of the first sentence is continued in substance in subdivision (a) of Section 8360. The second sentence is continued in substance in subdivision (a) of Section 8361. The third sentence is superseded by subdivision (b) of Section 8361. See the Comment to Section 8361. The requirement that the clerk set the petition for hearing is continued in Section 7142 which is a general provision. The fourth sentence is continued in substance in subdivision (c) of Section 8361 with the addition of a provision that requires that the notice of hearing contain the substance of a new statutory statement concerning the nature of the petition. The fifth sentence is continued in subdivision (a) of Section 8362. The sixth sentence is continued in subdivisions (b) and (c) of Section 8362. The last sentence is superseded by Section 8353. See the Comment to Section 8353.

Probate Code § 591.2 (repealed). Manner of administration; court supervision

Comment. The first two sentences of subdivision (a) of former Section 591.2 are continued in substance in paragraph (1) of subdivision (a) of Section 8365 except that the portion of the second sentence defining "court supervision" is continued in Section 8351. The portion of subdivision (a) stating the matters that require court supervision is continued in Section 8366. The first sentence of subdivision (b) is continued in subdivision (b) of Section 8365. The second sentence of subdivision (b) is superseded by subdivision (c) of Section 8365. See the Comment to Section 8365.

Probate Code § 591.3 (repealed). Advice of proposed action

Comment. The first sentence of former Section 591.3 is continued in subdivision (a) of Section 8370. The portion of the second sentence defining "advice of proposed action" is omitted as unnecessary since the term "advice of proposed action" is uniformly used in the new statutory provisions. The remainder of the second sentence is continued in Section 8372. Subdivision (b) of former Section 591.3 is continued in Section 8371.

Probate Code § 591.4 (repealed). Notice of proposed action

Comment. The first sentence of former Section 591.4 is continued in substance in Section 8376. The second, third, and fourth sentences are continued in substance in Section 8375 with some additions. See the Comment to Section 8375. The substance of the last two sentences is continued in Section 8381.

Probate Code § 591.5 (repealed). Objection to proposed action

Comment. The substance of subdivision (a)(1) of former Section 591.5 is continued in Section 8378. The substance of subdivision (a)(2) is continued in Section 8377, but the former provision is made applicable to any case where advice of proposed action is given, whether or not the proposed action is one for which advice of proposed action is required. The substance of subdivision (b) is continued in subdivision (a) of Section 8379. The substance of subdivision (c) is continued in Section 8381. The substance of the first sentence of subdivision (d) is continued in subdivision (a) of Section 8380. The substance of the second sentence of subdivision (d) is continued in subdivision (b) of Section 8380. The last sentence of subdivision (d) is superseded by subdivision (c) of Section 8380. See the Comment to Section 8380.

Probate Code § 591.6 (repealed). Independent administration powers

Comment. Former Section 591.6 is continued in substance in Section 8367.

Probate Code § 591.7 (repealed). Revocation of independent administration authority

Comment. Former Section 591.7 is continued in substance in Section 8364. The provision of former Section 591.7 requiring that the clerk set the petition for hearing is continued in Section 7142 which is a general provision.