

## Memorandum 85-93

Subject: Study L-1020 - Estates & Trusts Code (Standard of Care of Personal Representative)

Under existing case law, the standard of care required of a personal representative in administering the estate is virtually the same as the statutory standard for guardians and conservators, but is somewhat different from the standard proposed for trustees in the new trust law. The question is whether they should all be the same, or whether there is justification for different standards.

The standards applicable to the three kinds of fiduciaries may be summarized as follows:

(1) Personal representatives: "that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature." Estate of Beach, 15 Cal.3d 623, 631, 542 P.2d 994, 125 Cal. Rptr. 570 (1975). Accord, Lobro v. Watson, 42 Cal. App.3d 180, 189, 116 Cal. Rptr. 533 (1974) ("degree of care and prudence that an ordinary person would employ in handling his or her own affairs"). A professional personal representative is held to a greater standard of care than a lay person based on the professional's presumed expertise. Estate of Beach, supra at 635.

(2) Guardians and conservators: "The guardian or conservator, . . . in managing and controlling the estate, shall use ordinary care and diligence." Section 2401. Like the rule applicable to personal representatives, a professional guardian or conservator is held to a greater standard of care based on its presumed expertise. Comment to Section 2401.

(3) Trustees: The proposed new trust law (Section 16040) provides the following standard of care for trustees: "The trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument."

At the May 1985 meeting, the Commission tentatively decided that the standard of care of a personal representative should be the same as for trustees and for guardians and conservators. However, at that time the proposed new trust standard was not fully developed. As now drafted, the proposed new trust standard does not apply neatly to other fiduciaries because it requires resort to the trust instrument to determine the purposes of the trust.

The staff is inclined to recommend that we keep the existing ordinary care and diligence standard for guardians and conservators, and that we codify that standard for personal representatives, consistent with existing case law. For trustees, we would keep the new standard proposed in Section 16040. This would establish one standard ("ordinary care and diligence") for personal representatives, guardians, and conservators, and another standard ("prudent person acting in a like capacity and familiar with such matters") for trustees. If the Commission approves this recommendation, the Commission should approve the draft section set out in Exhibit 1 for personal representatives.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

Exhibit 1

§ 9600. Duty to manage estate using ordinary care and diligence

9600. (a) The personal representative has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate.

(b) The personal representative shall exercise a power to the extent that ordinary care and diligence requires that the power be exercised, and shall not exercise a power to the extent that ordinary care and diligence requires that the power not be exercised.

Comment. Section 9600 is the same in substance as Section 2401 (guardianship-conservatorship law) and is consistent with prior law. See, e.g. Estate of Beach, 15 Cal.3d 623, 631, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (executor required to exercise "that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature"); Lobro v. Watson, 42 Cal. App.3d 180, 189, 116 Cal. Rptr. 533 (1974) (administratrix "required to exercise the degree of care and prudence that an ordinary person would employ in handling his or her own affairs"). Compare Section 16040 (trustees).

In determining what constitutes ordinary care and diligence, a professional personal representative is held to a higher standard of care based on its presumed expertise than is a lay personal representative. Estate of Beach, *supra*, at 635. The term "personal representative" is defined in Section [59].