

## Memorandum 86-42

Subject: Study L-1032 - Estate and Trust Code (Estate Management---Costs)

Attached to this memorandum is a staff draft of material relating to the liability of the personal representative for costs. Three sections provide general rules on the personal representative's liability for costs:

Probate Code § 719. Personal representative's liability for costs

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

Probate Code § 1232. Costs under Probate Code

1232. When not otherwise prescribed 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.

Code of Civil Procedure § 1026. Costs in actions by or against fiduciaries

1026. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs may be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

These provisions are not consistent, and to some extent they overlap. Probate Code Section 1232 covers both the assessment of costs against the losing party and the question of ultimate liability for costs among the estate or its beneficiaries or representatives. Code of Civil Procedure Section 1026 provides similar rules, but applies to civil actions rather than proceedings in the probate court. However, the standards applicable under these two sections differ for no apparent reason. Probate Code Section 1232 allocates costs "as justice may require," whereas Code of Civil Procedure Section 1026 mandates assessment against the estate or beneficiary

unless the court directs the fiduciary to pay "for mismanagement or bad faith in the action or defense." The rule in Probate Code Section 1232 is also subject to different rules adopted by the Judicial Council.

Finally, Probate Code Section 719 makes the personal representative presumptively liable for costs, but provides for reimbursement from the estate unless the suit or proceeding was prosecuted or defended "without just cause." It is not clear whether Section 719 applies only to probate proceedings or also to civil actions. In *Stevens v. San Francisco & North Pacific Railroad Co.*, 103 Cal. 252, 254, 37 P. 146 (1894), the court glossed over the inconsistencies in this area and said that since costs had not been awarded in the action as provided in the Code of Civil Procedure (notwithstanding the word "must"), the predecessor of Probate Code Section 719 applied and the administrator was liable.

These three provisions have been in force since the 1850's, but do not appear to have caused much difficulty, if we can judge from the reported cases. Perhaps the expense of appealing issues relating to costs has inhibited litigants, but the application of Probate Code Section 719 as opposed to Probate Code Section 1232 could have significant consequences. In a case where the representative has not acted improperly and the estate is insufficient to pay the costs, the personal representative would bear the burden under Section 719, but not under Section 1232 (or Code of Civil Procedure Section 1026).

As for costs in proceedings under the Estate and Trust Code, the staff draft attached to this memorandum would eliminate the existing inconsistency by continuing the substance of Section 1232 and not continuing Section 719.

The draft does not alter the rule applicable to civil actions under Code of Civil Procedure Section 1026. Thus, in actions between the estate and a third person, the estate is liable for costs unless the fiduciary is guilty of mismanagement or bad faith. Should this rule be altered?

Respectfully submitted,

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Staff DraftLiability for Costs

Several provisions of existing law deal in general terms with the liability of a personal representative for costs of litigation.<sup>1</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 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 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 existing law,<sup>2</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>3</sup>

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1. See Code Civ. Proc. § 1026; Prob. Code §§ 719, 1232. Special provisions govern the liability for costs in certain circumstances. See, e.g., Prob. Code §§ 383 (costs in probate revocation), 580 (costs in action to recover fraudulently conveyed property), 703 (disallowed creditor's claim by representative), 717 (costs not allowed where creditor contests amount allowed in satisfaction of claim unless creditor prevails), 718 (authority to adjudge costs in reference proceedings), 1002 (costs on preliminary distribution), 6544 (costs of proceedings for family allowance).

2. See Prob. Code §1232.

3. 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 the section.

Proposed Cost Statute

*Note.* The following provision would be included in the new Estate and Trust Code.

§[    ]. Costs in proceedings under this code

[    ]. Except as otherwise provided in this code or by rules adopted by the Judicial Council, in any proceeding under this code, either the superior court or the court on appeal, may, in its discretion, order costs to be paid by any party to the proceeding, or out of the assets of the estate, as justice may require.

*Comment.* Section [    ] restates former Probate Code Section 1232 without substantive change. For special provisions relating to costs, see, e.g., Sections [383] (costs in probate revocation), [580] (costs in action to recover fraudulently conveyed property), [703] (disallowed creditor's claim by representative), [717] (costs not allowed where creditor contests amount allowed in satisfaction of claim unless creditor prevails), [718] (authority to adjudge costs in reference proceedings), [1002] (costs on preliminary distribution), [6544] (costs of proceedings for family allowance). See also Code Civ. Proc. § 1026 (costs in actions involving fiduciary estate).

Conforming Revision

*Note.* Code of Civil Procedure Section 1026 should also be revised as follows:.

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

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, except that the 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 divided into subdivisions 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 non-substantive change. See Est. & Trust Code § 58 ("personal representative" defined). For provisions governing liability for costs in proceedings under the Estate and Trust Code, see Est. & Trust Code § [ ] and the Comment thereto.

#### Comments to Repealed Probate Code Sections

##### Probate Code § 719. Personal representative's liability for costs

Comment. Former Section 719 is not continued. See Est. & Trust Code § [ ] (costs under Estate and Trust Code); see also Code Civ. Proc. § 1026 (costs in actions by or against fiduciaries).

##### Probate Code § 1232. Costs under Probate Code

Comment. Former Section 1232 is restated in Estate and Trust Code Section [ ] without substantive change.