

Memorandum 86-55

Subject: Study L-1037 - Estate and Trust Code (Estate Management)

Attached is the draft statute portion of a Tentative Recommendation Relating to Estate Management. The preliminary portion of this Tentative Recommendation will be sent to you later.

The draft statute has been revised to reflect decisions made at the last meeting. Although many sections and Comments required revisions to reflect Commission decisions, we have noted under the relevant sections only those provisions that require special review by the Commission. We urge you, however, to read the entire statute, since we hope to send it out to interested persons for review and comment after the meeting.

§§ 9830-9837 Compromise of Claims and Actions; Extension, Renewal, or Modification of Obligations.

The Commission has not previously reviewed the portion of the draft statute relating to compromise of claims and actions and extension, renewal, and modification of obligations. See Sections 9830-9837 (pages 54-62 of draft statute). This material was submitted as a separate memorandum at the last meeting, but the Commission did not have time to consider the material at that meeting.

Existing statutory provisions authorize the personal representative to compromise or settle claims and actions and extend, renew, and modify obligations "with the approval of the court." The California courts have held, however, that under earlier versions of these provisions the personal representative may, but is not required to, obtain court approval.

The provisions included in the draft statute limit the authority the personal representative appears to have under existing law to compromise claims and actions without court approval. Although there is no general requirement of court approval imposed by the draft statute, the draft statute requires that certain matters receive prior

court approval before the personal representative may compromise or settle the claim, action, or proceeding, or extend, renew, or modify the obligation. This new scheme is drawn from the guardianship-conservatorship law.

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association submitted comments on the provisions prepared for the last meeting, and those comments have been taken into consideration in preparing the provisions of the draft statute relating to compromise of claims and actions and extension, renewal, and modification of obligations. The relevant comments of the Executive Committee are set out under the section to which the comment relates.

§ 9762. Personal representative continuing as partner in decedent's partnership.

At the last meeting, the Commission revised the provisions requiring court authorization if the personal representative is to continue for more than six months the operation of a partnership in which the decedent was a general partner. Recognizing that a limited partnership is an investment rather than an active management activity by the limited partner, the Commission decided to limit the requirement of court approval to the case where the decedent was a general partner.

In accordance with the Commission's decision, the staff has revised Section 9761 (pages 39-40) of the draft statute to limit its application to the case where the decedent was a general partner. This section requires the settlement of the affairs of the partnership unless otherwise ordered by the court pursuant to Section 9762.

Section 9762 contains a provision, taken from existing law, that the personal representative may be authorized to act as a limited partner only if the decedent at the time of death was either (1) a general partner or (2) a limited partner as described in Chapter 2 (commencing with Section 15501) or Chapter 3 (commencing with Section 15611) of Title 2 of the Corporations Code. To be consistent with the decision made at the last meeting, this provision of existing law should not be continued.

The staff recommends that Section 9762 of the draft statute be revised to read as follows:

§ 9762. Personal representative continuing as partner in decedent's partnership

9762. (a) Subject to subdivisions (b), (c), (d), and (e), and ~~(f)~~, after authorization by order of court upon a showing that it would be to the advantage of the estate and in the best interests of the interested persons, the personal representative may continue as a partner in any partnership in which the decedent was a partner at the time of death.

(b) The personal representative may not be authorized to continue as a partner if that would be inconsistent with the terms of any written partnership agreement signed by all of the partners prior to the decedent's death unless all surviving partners consent.

(c) The personal representative may be authorized to act as a general partner only if the decedent was a general partner at the time of death.

~~(d) The personal representative may be authorized to act as a limited partner only if the decedent at the time of death was either (1) a general partner or (2) a limited partner as described in Chapter 2 (commencing with Section 15501) or Chapter 3 (commencing with Section 15611) of Title 2 of the Corporations Code.~~

(e) (d) If there is a written partnership agreement, the personal representative has all the rights, powers, duties, and obligations provided in the written partnership agreement, subject ~~to the written approval of all of the surviving partners~~ and to such restrictions specified in the order as the court determines to be for the advantage of the estate and in the best interest of the interested persons and to which all the surviving partners give their written approval.

~~(f)~~ (e) If there is no written partnership agreement, subject to the written consent of the surviving partners, the personal representative shall have all the rights, powers, duties, and obligations that the court specifies in its order.

(g) (f) To obtain an order pursuant to this section, the personal representative or any interested person shall file a petition showing that the order requested would be to the advantage of the estate and in the best interests of the interested persons. Notice of the hearing on the petition shall be given for the period and in the manner provided by Section [1200.5]. In addition, unless the court otherwise orders, not less than 10 days before the hearing the petitioner shall cause notice of hearing and a copy of the petition to be mailed to each of the surviving general partners at his or her last known address.

Comment. Section 9762 replaces a portion of the first sentence and all of the second sentence of former Section 572 without substantive change except as indicated below:

PART 5. ESTATE MANAGEMENT

CHAPTER 1. GENERAL PROVISIONS

Article 1. Duties and Liabilities of Personal Representative

- § 9600. Duty to manage estate using ordinary care and diligence
- § 9601. Measure of liability for breach of fiduciary duty
- § 9602. Measure of liability for interest
- § 9603. Other remedies not affected
- § 9604. Enforceability of promise of personal representative personally to answer in damages or to pay debts of decedent

Article 2. Court Supervision

- § 9610. Extent of court supervision
- § 9611. Instructions from or confirmation by court
- § 9612. Effect of court authorization or approval

Article 3. Summary Determination of Disputes

- § 9620. Submission of dispute to temporary judge
- § 9621. Submission of dispute to arbitration

Article 4. Joint Personal Representatives

- § 9630. Authority of joint personal representatives to act
- § 9631. Liability of joint personal representative for breach of duty by another personal representative

Article 5. Independent Administration

- § 9640. Independent administration authority not limited

CHAPTER 2. ESTATE MANAGEMENT GENERALLY

- § 9650. Possession and management of decedent's estate
- § 9651. Profit or loss to the estate
- § 9652. Duty to keep cash invested
- § 9653. Duty to recover property transferred in fraud of creditors
- § 9654. Action by heirs or devisees for possession or to quiet title to real property
- § 9655. Voting rights with respect to corporate shares or memberships or property
- § 9656. Abandonment of valueless tangible personal property
- § 9657. Insuring estate assets; insuring personal representative against liability

CHAPTER 3. DEPOSIT OF MONEY AND PERSONAL PROPERTY
WITH FINANCIAL INSTITUTIONS

- § 9700. Savings accounts
- § 9701. Deposit of personal property with trust company
- § 9702. Deposit of securities in securities depository
- § 9703. Accounts and deposits withdrawable only upon court order
- § 9704. Direct distribution by depository
- § 9705. Interest on deposits by trust company

CHAPTER 4. INVESTMENTS AND PURCHASE OF PROPERTY

- § 9730. Investments permitted without prior court authorization
- § 9731. Investment in federal or state securities with court authorization
- § 9732. Investment of money as provided in will
- § 9733. Purchase of annuity granted in will
- § 9734. Exercise of restricted stock options
- § 9735. Purchase of securities or commodities sold short

CHAPTER 5. OPERATION OF DECEDENT'S BUSINESS

- § 9760. Operation of decedent's business other than partnership
- § 9761. Settlement of affairs of partnership in which decedent was a general partner
- § 9762. Personal representative continuing as partner in decedent's partnership

CHAPTER 6. BORROWING, REFINANCING, AND ENCUMBERING PROPERTY

- § 9800. Borrowing money, refinancing, and encumbering property
- § 9801. Acting jointly with other owners of interests in estate property
- § 9802. Petition
- § 9803. Notice of hearing
- § 9804. Hearing; order
- § 9805. Liability of personal representative
- § 9806. Effectiveness of encumbrance
- § 9807. Deficiency in case of foreclosure or sale under security interest or deed of trust

CHAPTER 7. ACTIONS AND PROCEEDINGS BY OR AGAINST
PERSONAL REPRESENTATIVE

- § 9820. Authority to sue and defend
- § 9821. Effect of death on causes of action
- § 9822. Action on bond of former personal representative
- § 9823. Partition actions
- § 9824. Dispensable parties

*05/28/86

PART 5. ESTATE MANAGEMENT

CHAPTER 1. GENERAL PROVISIONS

Min. 5/86-jd

*05/28/86

Article 1. Duties and Liabilities of Personal Representative

§ 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:

(1) Shall exercise a power to the extent that ordinary care and diligence requires that the power be exercised.

(2) Shall not exercise a power to the extent that ordinary care and diligence requires that the power not be exercised.

Comment. Section 9600 is comparable to Section 2401 (guardianship and conservatorship) 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) (personal representative "required to exercise the degree of care and prudence that an ordinary person would employ in handling his or her own affairs").

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. Section 9600 applies to all powers and duties of the personal representative, whether or not prior court authorization is required. But see Section 9612 (effect of court authorization or approval).

Subdivision (b) of Section 9600 makes clear that ordinary care and diligence may require that the personal representative exercise a power. For example, the personal representative has the duty to take all steps reasonably necessary for the protection and preservation of the estate property, and this duty requires that the personal

representative obtain and maintain insurance on the estate property to the extent reasonably necessary. See Section 9657. At the same time, subdivision (b) also makes clear that the extent to which a power should be exercised is limited to what is required by the exercise of ordinary care and diligence under all the circumstances. Thus, for example, the personal representative is not authorized to obtain and maintain more insurance on the estate property than is reasonably necessary.

CROSS-REFERENCES

Definitions

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2401

Min. 5/86-jd

*05/28/86

§ 9601. Measure of liability for breach of fiduciary duty

9601. (a) If a personal representative breaches a fiduciary duty, the personal representative is chargeable with any one or more of the following that are appropriate under the circumstances:

(1) Any loss or depreciation in value of the decedent's estate resulting from the breach of duty, with interest.

(2) Any profit made by the personal representative through the breach of duty, with interest.

(3) Any profit that would have accrued to the decedent's estate if the loss of profit is the result of the breach of duty.

(b) If the personal representative has acted reasonably and in good faith under the circumstances as known to the personal representative, the court, in its discretion, may excuse the personal representative in whole or in part from liability under subdivision (a) if it would be equitable to do so.

Comment. Section 9601 is drawn from and is consistent with Section 16440 (trustee's liability). Section 9601 is in general accord with prior law. See former Probate Code § 920 (personal representative chargeable for estate); In re Estate of Elizalde, 182 Cal. 427, 435, 188 P. 560 (1920) (liability for misappropriated funds plus interest, barring receipt of a larger profit); Estate of Gerber, 73 Cal. App. 3d 96, 114, 140 Cal. Rptr. 577 (1977) (liability for interest due to delay in payment of estate taxes); Estate of Guiol, 28 Cal. App. 3d 818, 105 Cal. Rptr. 35 (1972) (breach of duty for turning estate assets over to attorney and failing to protect assets); Estate of McSweeney, 123 Cal. App. 2d 787, 792-93, 268 P.2d 107 (1954) (liability for using estate funds for individual needs) (dictum); Estate of Pardue, 57 Cal. App. 2d

918, 920-21, 135 P.2d 394 (1943) (liability for rental value of property). See also Section 9631 (liability of joint personal representative for breach of duty by another personal representative). The reference to "profit made by the personal representative" in paragraph (2) of subdivision (a) refers to personal profit rather than profit to the estate.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

COMPARABLE PROVISION

Trustee's liability § 16440 [A.B. 2652]

Note. Section 16440 (Trusts) should be conformed to Section 9601 (add phrase "any one or more" in introductory portion of section).

Min. 5/86-jd

*05/28/86

§ 9602. Measure of liability for interest

9602. If the personal representative is liable for interest pursuant to Section 9601, the personal representative is liable for the greater of the following amounts:

(a) The amount of interest that accrues at the legal rate on judgments.

(b) The amount of interest actually received.

Comment. Section 9602 is drawn from and is consistent with Section 16441 (measure of liability for interest on breach of trust). See the Comment to Section 16441. See also Code Civ. Proc. § 685.010 (rate of interest on judgments). Section 9602 is consistent with the former case law rule that executors are liable for interest at the legal rate. See, e.g., In re Estate of Piercy, 168 Cal. 755, 757-58, 145 P. 91 (1914); In re Estate of Hilliard, 83 Cal. 423, 427, 23 P. 393 (1890); In re Estate of Holbert, 39 Cal. 597, 601 (1870) (liability for interest or profit, whichever greater); Estate of McSweeney, 123 Cal. App. 2d 787, 791-93, 268 P.2d 107 (1954); see also In re Estate of Guglielmi, 138 Cal. App. 80, 90, 31 P.2d 1078 (1934). Unlike the former case law rule, however, Section 9602 does not allow for annual compounding even where the personal representative is negligent. See also Section 9603 (liability for exemplary damages). In the absence of a breach of duty for which the personal representative is liable pursuant to Section 9601, a trust company is required to pay only the amount of interest on deposits accruing at the rate prevailing among financial institutions in the locality. See Section 9705.

CROSS-REFERENCES

Definitions

Personal representative § 58

COMPARABLE PROVISION
Trustee's liability § 16441 [A.B. 2652]

Min. 5/86-jd

*05/28/86

§ 9603. Other remedies not affected

9603. The provisions of Sections 9601 and 9602 for liability of a personal representative for breach of a fiduciary duty do not prevent resort to any other remedy available against the personal representative under the statutory or common law.

Comment. Section 9603 is drawn from and is consistent with Section 16442 (remedies against a trustee). The section makes clear that Sections 9601 and 9602 do not prevent resort to any other remedy available against the personal representative under the statutory or common law. The section merely retains remedies that existed before the enactment of the new Estate and Trust Code; it does not create any new remedies against a personal representative.

CROSS-REFERENCES

Definitions

Personal representative § 58

COMPARABLE PROVISION

Trustee's liability § 16442

Note. Section 16442 (trust law) should be conformed to Section 9603.

Min. 5/86-jd

*05/28/86

§ 9604. Enforceability of promise of personal representative personally to answer in damages or to pay debts of decedent

9604. No personal representative is chargeable upon a special promise to answer in damages for a liability of the decedent or to pay a debt of the decedent out of the personal representative's own estate unless the agreement for that purpose, or some memorandum or note thereof, is in writing and is signed by one of the following:

(1) The personal representative.

(2) Some other person specifically authorized by the personal representative in writing to sign the agreement or the memorandum or note.

Comment. Section 9604 restates former Probate Code Section 737 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Article 2. Court Supervision

Min. 5/86-jd

*05/28/86

§ 9610. Extent of court supervision

9610. Unless this part specifically provides a proceeding to obtain court authorization or requires court authorization, the powers and duties set forth in this part may be exercised by the personal representative without court authorization, instruction, approval, or confirmation. Nothing in this section precludes the personal representative from seeking court authorization, instructions, approval, or confirmation pursuant to Section 9611.

Comment. Section 9610 is new and is comparable to subdivision (a) of Section 2450 (guardianship-conservatorship law). The section is consistent with prior law under which personal representatives could perform many acts without prior court approval. See In re Estate of Fulmer, 203 Cal. 693, 697-98, 265 P. 920 (1928); Estate of Palm, 68 Cal. App. 2d 204, 212, 156 P.2d 62 (1945); Davis, Instructions, in 1 California Decedent Estate Administration §§ 19.1, 19.4, at 750, 752 (Cal. Cont. Ed. Bar 1971). As to the effect of court authorization or approval, see Section 9612. As to when the personal representative is to exercise a power and when the personal representative is not to exercise a power, see Section 9600(b).

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2450(a)

Min. 5/86-jd

*05/28/86

§ 9611. Instructions from or confirmation by court

9611. (a) In all cases where no other or no different procedure is provided by statute, upon petition of the personal representative, the court may authorize and instruct the personal representative, or approve and confirm the acts of the personal representative, in the administration, management, investment, disposition, care, protection,

operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided by Section [1200.5].

Comment. Section 9611 restates former Probate Code Section 588 using language drawn from Section 2403 (guardianship and conservatorship).

Unlike Section 2403, Section 9611 permits a petition for instructions only where no other or no different procedure is provided by statute. Section 2403 is not so limited. If some other or different procedure is provided by statute but the personal representative is uncertain whether the statute providing the other or different procedure is applicable to the particular case, the personal representative may petition in the alternative, giving notice that is sufficient to satisfy the requirements both of Section 9611 and the other possibly applicable statute.

Section 9611 continues former Probate Code Section 588 insofar as that section authorized only the personal representative to petition for instructions. In this respect, the authorization is more limited than the authorization of the guardianship and conservatorship law, which authorizes a creditor or other interested person to file a petition for instructions (Section 2403). If an interested person believes that the personal representative should take some particular action or refrain from taking a particular action, the remedy is not to petition for instructions (since Section 9611 does not permit anyone other than the personal representative to petition for instructions) but instead the remedy is to petition for removal of the personal representative.

The words "from time to time," which appeared in former Section 588, have been omitted as unnecessary, since there is no limit on the number of times instructions or confirmations can be requested.

Subdivision (a) makes clear that the court may not only instruct the personal representative in advance, but may also confirm actions already taken. This is consistent with what appears to have been prior law. See Estate of Sidebotham, 138 Cal. App. 2d 412, 418, 291 P.2d 965 (1956). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Devisee § 34

Heirs § 44

Interested person § 48

Personal representative § 58

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISION

Guardianship-conservatorship § 2403

Note. Notice provisions of subdivision (b) of Section 9611 will be reviewed when the general notice provisions are drafted.

Min. 5/86-jd

***05/28/86**

§ 9612. Effect of court authorization or approval

9612. (a) When a judgment, order, or decree made pursuant to this division becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment, order, or decree. For the purposes of this section, "order" includes an order settling an account of the personal representative, whether an interim or final account.

(b) This section does not apply where the judgment, order, or decree is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment, order, or decree as to any material fact. For the purposes of this subdivision, misrepresentation includes but is not limited to, the omission of a material fact.

Comment. Section 9612 is a new provision drawn from Section 2103 (guardianship-conservatorship law). Under subdivision (b), the personal representative is not released from liability for transactions which are not fully disclosed to the court. Subdivision (b) codifies existing law. See *Estate of Anderson*, 149 Cal. App. 3d 336, 196 Cal. Rptr 782 (1983); 8 B. Witkin, *California Procedure Attack on Judgment in Trial Court* §§ 204-207, at 602.07 (3d ed. 1985). As to when a judgment, order, or decree made pursuant to this division becomes final, see Section [to be drafted].

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Order § 53

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2103

Note. Is the second sentence of subdivision (a) of Section 9612 inconsistent with the first sentence? Is the settling of an interim account a "final" order?

Note. Section 2103 (guardianship and conservatorship) should be conformed to Section 9612.

Article 3. Summary Determination of Disputes

Min. 5/86-jd

*05/28/86

§ 9620. Submission of dispute to temporary judge

9620. If there is a dispute between the personal representative and a third person concerning a claim by or against the decedent or the estate, the personal representative may do either of the following:

(a) Enter into an agreement in writing with the third person to refer the dispute a temporary judge designated in the agreement. The agreement shall be filed with the clerk, who shall thereupon, with the approval of the court, enter an order referring the matter to the designated person. The temporary judge shall proceed promptly to hear and determine the matter in controversy by summary procedure, without pleadings or discovery. The decision of the designated person shall be subject to Section 632 of the Code of Civil Procedure. Judgment shall be entered on the decision and shall be as valid and effective as if rendered by a judge of the court in an action against the personal representative commenced by ordinary process.

(b) Enter into an agreement in writing with the third person that a judge of the court, pursuant to the agreement and with the written consent of the judge, both filed with the clerk, may hear and determine the dispute pursuant to the procedure provided in subdivision (a).

Comment. Section 9620 restates and generalizes paragraph (2) of former Probate Code Section 718. Former Section 718 was limited to claims filed or presented, but Section 9620 applies to any dispute. Former Section 718 required a written decision; this requirement is replaced by a provision that adopts the statement of decision provision of Code of Civil Procedure Section 632. Summary proceedings under Section 9620 do not include a jury trial. See Section 7204 (trial by jury). The special provisions of former Section 718 that applied particularly to claims filed or presented are continued in Section 9307. The reference in paragraph (2) of former Probate Code Section 718 to "a commissioner or referee who is regularly attached to the court and designated in the agreement or to a judge pro tempore designated in the agreement" is replaced by a reference to "a temporary judge designated in the agreement." This substitution makes makes no substantive change in the law but makes the provision conform to the language used in Section 21 of Article 6 of the California Constitution ("On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause."). Accordingly, under Section 9620, any member of the State Bar (including

a court commissioner or referee) may be appointed as a temporary judge. See also Code Civ. Proc. § 259(5) (power of court commissioner to act as temporary judge). Section 9620 does not require that the temporary judge try the matter in a regular courtroom; the temporary judge may try the matter at his or her office or other place. Nothing in Section 9620 limits the alternative of reference and trial by a referee under Code of Civil Procedure Sections 638-645.1, and those provisions remain applicable to probate matters.

CROSS-REFERENCES

Definitions

Clerk § 27
Court § 29
Order § 53
Person § 56
Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2405

Note. Conforming changes should be made in Section 2405 (guardianship and conservatorship).

Note. Paragraph (1) of Section 718 and the last sentence of Section 718 should be compiled in the provisions relating to the filing or presenting of claims and actions thereon. The interrelationship between Section 9620 and the claims provisions needs to be studied.

Note. The Comment to Section 9620 has not been approved by the Commission.

Min. 5/86-jd

***05/28/86**

§ 9621. Submission of dispute to arbitration

9621. If there is a dispute between the personal representative and a third person concerning a claim by or against the decedent or the estate, the personal representative may enter into an agreement in writing with the third person to submit the dispute to arbitration under Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. The agreement is not effective unless it is first approved by the court and a copy of the approved agreement is filed with the court.

Comment. Section 9621 is a new provision. The section is drawn from Section 2406 (guardianship-conservatorship law). An arbitration award pursuant to this section is binding.

CROSS-REFERENCES

Definitions

Court § 29

Person § 56

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2406

Note. A conforming revision should be made in Section 2406 of the guardianship and conservatorship law.

Note. Consideration should be given to whether any modifications or additions to this section are necessary in view of the claims provisions.

Article 4. Joint Personal Representatives

Min. 5/86-jd

*05/28/86

§ 9630. Authority of joint personal representatives to act

9630. (a) Subject to subdivisions (b), (c) and (d):

(1) Where there are two personal representatives, both must concur to take action.

(2) Where there are more than two personal representatives, the act of a majority is valid.

(b) If one of the joint personal representatives dies or is removed or resigns, the powers and duties continue in the remaining joint personal representative or representatives until further appointment is made by the court.

(c) Where joint personal representatives 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 personal representatives to act as to all matters embraced within its order.

(d) Where there are two or more personal representatives, any of them may:

(1) Oppose a petition made under this division.

(2) Petition the court for an order requiring the personal representatives to take a specific action for the benefit of the estate or directing the personal representatives not to take a specific action. If this division provides a procedure for a petition to

authorize the specific action by the personal representatives, the petitioner shall file the petition under the provision relating to that procedure. Otherwise, the petitioner shall file the petition under Section 9611.

Comment. Section 9630 replaces former Probate Code Section 570. Paragraph (1) of subdivision (a) codifies case law. See *Bullis v. Security Pac. Nat'l Bank*, 21 Cal. 3d 801, 810, 582 P.2d 109, 148 Cal. Rptr. 22 (1978). Paragraph (2) of subdivision (a) restates the second sentence of former Section 570 without substantive change.

Subdivisions (b) and (c) replace the first sentence of former Probate Code Section 570 with language taken from Section 2105 (guardianship-conservatorship law). Under Section 9630, absence from the state does not suspend the power of a personal representative to act. See Sections [405.1-405.6]. And, absent a court order authorizing the remaining personal representatives to act, if one of several joint personal representatives is absent from California, the same number of joint personal representatives must concur in the action as would be required if the absent personal representative were still in California.

Subdivision (d) is new. Paragraph (1) of subdivision (d) is drawn from a portion of the last sentence of former Probate Code Section 1000 and of the second sentence of former Probate Code Section 1020. Paragraph (2) of subdivision (d) is drawn from the law in other states. See Annot., 85 A.L.R.3d 1124 (1978).

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Proof of giving notice § 7308

COMPARABLE PROVISION

Guardianship-conservatorship § 2105

Note. This section might be more appropriately compiled with the provisions relating to appointment and qualification of personal representatives.

Min. 5/86-jd

*05/28/86

§ 9631. Liability of joint personal representative for breach of duty by another personal representative

9631. (a) Except as provided in subdivision (b), where there is more than one personal representative, one personal representative is not liable for a breach of fiduciary duty committed by another of the personal representatives.

(b) Where there is more than one personal representative, one personal representative is liable for a breach of fiduciary duty committed by another of the personal representatives under any of the following circumstances:

(1) Where the personal representative participates in a breach of fiduciary duty committed by the other personal representative.

(2) Where the personal representative improperly delegates the administration of the estate to the other personal representative.

(3) Where the personal representative approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by the other personal representative.

(4) Where the personal representative's negligence enables the other personal representative to commit a breach of fiduciary duty.

(5) Where the personal representative knows or has information from which the personal representative reasonably should have known of the breach of fiduciary duty by the other personal representative and fails to take reasonable steps to compel the other personal representative to redress the breach.

Comment. Section 9631 replaces the last portion of the first sentence of former Probate Code Section 920 (personal representative not liable for act or negligence of coexecutor or coadministrator except for collusion or gross negligence). Section 9631 is drawn from the law applicable to trustees (Section 16402) and is consistent with case law. See In re Estate of Osborn, 87 Cal. 1, 25 P. 157 (1890).

See also Sections [511-512] (joint personal representatives).

CROSS-REFERENCES

Definitions

Personal representative § 58

COMPARABLE PROVISION

Trustee § 16402 [A.B. 2652]

Note. Section 16402 (trust law) should be conformed to subdivision (b)(4) of Section 9631.

Note. Should there be a transitional provision like subdivision (c) of Section 16402? Subdivision (c) of Section 16402 (trust law) provides:

(c) The liability of a trustee for acts or omissions of a cotrustee that occurred before July 1, 1987, is governed by prior law and not by this section.

*05/28/86

Article 5. Independent Administration

§ 9640. Independent administration authority not limited

9640. Nothing in this part limits or restricts the authority given the personal representative under Part 6 (commencing with Section 10400) (Independent Administration of Estates Act) if the personal representative has been given the authority to administer the estate under that part.

Comment. Section 9640 is a new provision that makes clear that this part does not limit the authority of the personal representative under the Independent Administration of Estates Act. See generally Section 10500 (administration under independent administration authority).

CROSS-REFERENCES

Definitions

Personal representative § 58

CHAPTER 2. ESTATE MANAGEMENT GENERALLY

*05/28/86

§ 9650. Possession and management of decedent's estate

9650. (a) Except as provided by statute and subject to subdivision (c), 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.

(2) Is entitled to receive the rents, issues, and profits from the real and personal property in the estate until the estate is settled or delivered over by order of court to the heirs or devisees.

(b) With respect to property under his or her control, the personal representative shall (1) pay the taxes on the property and (2) take all steps reasonably necessary for the management, protection, and preservation of the property.

(c) Real property or tangible personal property may be left with or surrendered to the person presumptively entitled to it unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The person holding the property shall surrender it to the personal representative on request by the personal representative.

Comment. The introductory clause of subdivision (a) of Section 9650 recognizes that the subdivision is subject to other provisions of law governing possession of the estate. See, e.g., Sections 6500 (temporary possession of family dwelling and exempt property), 9656 (abandonment of valueless property).

The first sentence of paragraph (1) of subdivision (a) restates the first sentence of former Probate Code Section 571 without substantive change and supersedes a portion of the first sentence of former Probate Code Section 581. For a comparable provision in the guardianship-conservatorship law, see Section 2451 (collection of debts and benefits). The second sentence of paragraph (1) restates a portion of the first sentence of former Probate Code Section 920 without substantive change. Paragraph (2) of subdivision (a) restates the last portion of the first sentence of former Probate Code Section 581 without substantive change. See also Section [300] (estate subject to control of superior court).

Subdivision (b) is taken from Section 3-709 of the Uniform Probate Code (1977) and replaces the second sentence of former Probate Code Section 581, which imposed on the personal representative the duty of keeping in good tenantable repair all houses, buildings, and fixtures on estate property under the control of the personal representative. Under subdivision (b), the personal representative not only has a duty to maintain estate property in a reasonably good condition but also has, for example, a duty to obtain and maintain reasonably necessary insurance on estate property. Cf. Section 9657 (authority to insure). See also Section 9610 (extent of court supervision).

Subdivision (c) is taken from Section 3-709 of the Uniform Probate Code (1977), and replaces the third sentence of former Probate Code Section 581 and all of former Probate Code Section 582. Under subdivision (c), the expiration of the time to file or present claims no longer has significance in this context as it did under former Probate Code Sections 581 and 582. The sole question under subdivision (c) is whether, in the judgment of the personal representative, the property is "necessary for purposes of administration." The personal representative may be liable for failing to take possession of estate property if the property is thereby lost to those entitled to it. Estate of Boggs, 33 Cal. App. 2d 30, 33, 90 P.2d 814 (1939). However, where the property is in the possession of the person who will ultimately receive it (as authorized under subdivision (c) of Section 9650), the personal representative is not liable to the person having the property if it is not properly cared for by that person.

Concerning the duty of the personal representative to account for property not in his or her possession, see Section [to be drafted].

CROSS-REFERENCES

Definitions

Court § 29
Devisee § 34
Heirs § 44
Personal property § 57
Personal representative § 58
Real property § 68

Note. Is Section 9650 consistent with the concept adopted by the Commission that the personal representative has the authority to bring only a portion of the decedent's property into the probate proceeding?

Min. 5/86-jd

*05/28/86

§ 9651. Profit or loss to the estate

9651. 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 9651 restates the second sentence of former Probate Code Section 920 without substantive change. See also Section 10005 (property sold for more or less than appraisement).

CROSS-REFERENCES

Definitions

Personal representative § 58

Min. 5/86-jd

*05/28/86

§ 9652. Duty to keep cash invested

9652. (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) The requirement of subdivision (a) does not apply to the amount of cash that is reasonably necessary for orderly administration of the estate.

(c) The requirement of subdivision (a) does not apply to the extent the testator's will so provides.

Comment. Section 9652 restates former Probate Code Section 920.3 without substantive change, except that the portion of former Section 920.3 requiring the personal representative to show the investments upon each accounting is continued in Section [to be drafted]. For the provisions concerning investments authorized by law, see Sections 9700, 9730, 9731.

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

Min. 5/86-jd

*05/28/86

§ 9653. Duty to recover property transferred in fraud of creditors

9653. (a) On application of a creditor of the decedent or the estate, the personal representative shall commence and prosecute to final judgment an action for the recovery of real or personal property of the decedent for the benefit of creditors if the personal representative has insufficient assets to pay creditors and the decedent during lifetime did either of the following:

(1) Made a conveyance of the property, or any right or interest in the property, that is fraudulent as to creditors under the California Uniform Fraudulent Conveyance Act.

(2) Made a gift of the property in view of death.

(b) A creditor making application under this section shall pay such part of the cost and expenses of the suit and attorney's fees, or give an undertaking to the personal representative for that purpose, as the court [or a judge thereof] shall direct.

(c) The property recovered under this section shall (1) be sold for the payment of debts in the same manner as if the decedent had died seised or possessed of the property or (2) if the court so directs, be assigned to the creditor and credited against the debt in an amount equal to the value of the property as determined by the court. The court shall not order that the property be assigned to the creditor unless notice of the hearing at which the order is made has been given as provided in Section [to be drafted] to each creditor who filed a claim in the estate proceedings and whose claim remains unpaid in whole or in part.

(d) If the property is sold, the proceeds shall be applied first to the portion of the costs and expenses of suit, including attorneys' fees, that is to be born by the estate, and then to payment of the debts of the decedent in the same manner as other property in possession of the personal representative. The remainder of the

proceeds, after all the debts of the decedent have been paid, shall be paid to the person from whom the property was recovered. The property may be sold or assigned in its entirety, or in such portion as necessary to pay the debts.

Comment. Subdivision (a) of Section 9653 restates former Probate Code Section 579 without substantive change. The reference in paragraph (1) of subdivision (a) to conveyances fraudulent as to creditors under the California Uniform Fraudulent Conveyance Act (Civil Code §§ 3439-3439.12) replaces the former reference to conveyances made with intent to defraud creditors, to avoid any obligation due another, or that is void as against creditors. This change is nonsubstantive. See *Webb v. Pillsbury*, 23 Cal. 2d 324, 328, 144 P.2d 1 (1943); *Estate of Heigho*, 186 Cal. App. 2d 360, 365-66, 9 Cal. Rptr. 196 (1960); *Goldstein v. Prien*, 143 Cal. App. 2d 123, 127, 299 P.2d 344 (1956).

In cases where Section 9653 applies, the personal representative must take action to recover the property even in the absence of a request by a creditor. *Goldstein v. Prien*, *supra*. See also Section 9820 (actions or proceedings for benefit of estate).

Subdivisions (b), (c), and (d) restate former Probate Code Section 580 with the following additions:

(1) Authority is added in subdivision (b) for the court to require the creditor to pay all or part of the personal representative's attorney's fees.

(2) Authority is added in subdivision (c) for the court to order that the property be assigned to the creditor.

See also Civil Code §§ 1149-1153 (gifts in view of death).

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Property § 62

Real property § 68

Note. The second sentence of subdivision (c) of Section 9653 will be reviewed when the general notice provisions are drafted.

Min. 5/86-jd

*05/28/86

§ 9654. Action by heirs or devisees for possession or to quiet title to real property

9654. The heirs or devisees may themselves, or jointly with the personal representative, maintain an action for possession of real property or to quiet title to real property against any person except the personal representative.

Comment. Section 9654 restates the fourth sentence of former Probate Code Section 581 without substantive change. See also Section 9820 (authority of personal representative to maintain action for benefit of estate)

CROSS-REFERENCES

Definitions

Devisee § 34
Heirs § 44
Personal representative § 58
Real property § 68

Min. 5/86-jd

*05/28/86

§ 9655. Voting rights with respect to corporate shares or memberships or property

9655. With respect to a share of stock of a domestic or foreign corporation held in the estate, a membership in a nonprofit corporation held by the estate, or other property held in the estate, a personal representative may do any one or more of the following:

(a) Vote in person, and give proxies to exercise, any voting rights with respect to the share, membership, or property.

(b) Waive notice of a meeting or give consent to the holding of a meeting.

(c) Authorize, ratify, approve, or confirm any action which could be taken by shareholders, members, or property owners.

Comment. Section 9655 is drawn from Section 2458 (guardianship-conservatorship) and is consistent with former Probate Code Section 589. The personal representative may act under Section 9655 without prior court authorization. See Section 9610.

The requirement of former Probate Code Section 589 that authorization by a personal representative of any action which could be taken by shareholders be "in writing" is not continued, but this change is nonsubstantive. Whether a writing is required in such cases is governed by the Corporations Code, which generally does require a writing for ratification by shareholders or members. For example, a writing is required for shareholder waiver or consent to transactions conducted at an improperly called meeting. Corp. Code § 601(e). Also, a writing is required for shareholder consent to action taken without a meeting. Corp. Code § 603.

The word "meeting" in subdivision (b) includes a meeting of shareholders, members, or property owners, but is not so limited.

Subdivision (c) permits authorization of action taken at a defectively noticed meeting by approval of the minutes of the meeting if such approval satisfies the requirements of the Corporations Code or other applicable law.

See also Corp. Code §§ 702(a) (personal representative may vote share), 705(a) (person entitled to vote shares may give proxy).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

COMPARABLE PROVISION

Trusts § 16235 (SEE ALSO § 16236)

Min. 5/86-jd

*05/28/86

§ 9656. Abandonment of valueless tangible personal property

9656. (a) Unless the property is specifically devised, subject to subdivisions (b), (c), (d), and (e), the personal representative may:

(1) Dispose of or abandon valueless tangible personal property.

(2) Dispose of or abandon tangible personal property where the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.

(b) Unless otherwise provided in the will, the personal representative may exercise the power provided in subdivision (a) without court authorization or approval.

(c) Before disposing or abandoning property under subdivision (a) the personal representative shall give notice of the proposed disposition or abandonment, in the manner provided in subdivision (d), to all of the following:

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

(2) Each heir of the decedent if the estate is an intestate estate.

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

(d) The notice of the proposed disposition or abandonment shall describe the property to be disposed of or abandoned and indicate the manner in which it is to be disposed of or abandoned. The notice shall be delivered personally to each person required to be given notice or shall be sent by first-class mail to the person at the person's last known address. If the notice is mailed to a person who resides outside the United States, it shall be sent by air mail. If the notice is delivered personally, it shall be delivered to the

person not less than 5 days before the property is disposed of or abandoned. If the notice is sent by mail, it shall be deposited in the mail not less than 10 days before the date the property is disposed of or abandoned.

(e) If a person who receives the notice of the proposed disposition or abandonment delivers or mails a written objection to the disposition or abandonment to the personal representative before the property is disposed of or abandoned, the personal representative shall not dispose of or abandon the property without authorization by order of the court obtained under Section 9611 or another applicable provision of this code, except that the personal representative may abandon or dispose of the property without court authorization if the person who made the objection fails to take possession of the property at his or her expense within 10 days after the personal representative requests that the person do so. A person who takes possession of estate property pursuant to this subdivision is liable for the safekeeping of the property until the court orders its disposition under Section 9611 or another applicable provision of this code.

Comment. Section 9656 is new. The section applies only to tangible personal property. As to intangible personal property, Section 9820 gives the personal representative the power to institute and maintain actions and proceedings for the benefit of the estate. Under Section 9820, the personal representative may decline to institute an action to collect intangible personal property in a case where the cost of collection is likely to exceed the amount that would likely be collected. See Section 9600(b).

The personal representative is required to exercise the power granted by Section 9656 to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval).

Subdivision (a) of Section 9656 is consistent with case law. See In re Estate of Barreiro, 125 Cal. App. 153, 178-79, 13 P.2d 1017 (1932). Subdivision (a) is also consistent with the Independent Administration of Estates Act (Section 10502(e)), with guardianship-conservatorship law (Section 2465) and with the Uniform Probate Code (UPC § 3-715(6)). However, under the Independent Administration of Estates Act, valueless property can be disposed or abandoned without any notice to heirs or devisees, but Section 9656 requires that notice be given before property is disposed of or abandoned.

The provision in subdivision (b) for the will to require court approval before the power granted by Section 9656 may be exercised is drawn from the Independent Administration of Estates Act (Section 10502(e)).

Subdivisions (c), (d), and (e) are analogous to the notice of proposed action procedure under the Independent Administration of Estates Act (Sections 10550-10559)

CROSS-REFERENCES

Definitions

Court § 29
Personal representative § 58
Property § 62
Will § 88

COMPARABLE PROVISION

Guardianship-conservatorship § 2465
Trusts § 16227

Note. Section 9656 has been substantially revised in light of the Commission decisions made at the May 1986 meeting. The Commission has not reviewed the revised section. The Commission should reconsider the policy decision that the revised section presents: Does the benefit of requiring notice in order to avoid abandonment or destruction of apparently valueless property which actually has value outweigh the cost of giving notice and safeguarding the property during the notice period? I think we can safely assume that in the vast majority of the cases the property actually has no value? Also should there be a notice required for abandonment as distinguished from destruction? If no notice were required, the personal representative could exercise the power under Section 9656 only subject to subdivision (b) of Section 9600. That section provides that 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.

Section 9656 has been limited in coverage to cover only tangible personal property, so that the notice requirements will not affect the right of the personal representative to decline to pursue (abandon) a claim against a third person where the cost of pursuing the claim most likely will exceed the likely amount of the recovery on the claim. Requiring a notice of proposed abandonment would not work well in that situation. The time allowed between the time notice is given and the property can be abandoned or destroyed is shorter than the time required for advice of proposed action. The short time is provided to minimize the expense of safeguarding the property during the notice period.

Should the comparable provision of the guardianship and conservatorship law be conformed to Section 9656.

Note. Subdivision (e) of Section 10502 (Independent Administration of Estates Act) should be conformed to subdivision (a) of Section 9656?

Comment. The first sentence of Section 9700 provides independent authority for the deposit or investment of estate money without court authorization. See Section 9610 (prior court authorization not required). If the deposit is withdrawable only upon court order, provisions for reducing the amount of the bond are found in Estate and Trust Code Section [541.1] and Financial Code Section 1586. See also Section 9703 (deposits withdrawable only upon court order).

Section 9700 replaces former Probate Code Section 585. Section 9700 expands the deposits and investments permitted under former Section 585 to include deposits in trust companies and investments in insured credit unions. This makes the coverage of Section 9700 consistent with the coverage under Section 2453 (guardianship-conservatorship law).

The references in former Section 585 to statutory provisions that provide for the deposit or investment of money pursuant to a court order have been omitted as unnecessary. For provisions relating to deposits pursuant to court order, see Financial Code § 764 (deposit with bank or trust company) and Estate and Trust Code § [541.1] (exclusion of deposited property in computing amount of bond). See also Estate and Trust Code § 9703 (accounts and deposits withdrawable only upon court order) and Financial Code §§ 6850-6852 (account of fiduciary under savings association law).

The provision of former Probate Code Section 585 discharging the personal representative from responsibility for deposited money until withdrawn is not continued. The extent of the personal representative's responsibility for deposited funds is determined under Section 9600 (duty to use ordinary care and diligence). This is consistent with Section 2453 (guardianship-conservatorship law). See also the Comment to Section 2453.

CROSS-REFERENCES

Definitions

Account in insured savings and loan association § 22
Court § 29
Personal representative § 58
Shares in an insured credit union § 72
Trust company § 83

COMPARABLE PROVISION

Trusts § 16225

Note. There are technical conforming changes that the staff will consider at a later time in connection with Section 9700:

(1) If Section 9700 is extended to include shares in an insured credit union (as proposed by the section as drafted above), consideration should be given to whether provisions comparable to Financial Code Sections 6850-6852 and 6855 (accounts of administrators, executors, guardians, custodians, trustees, and other fiduciaries) should be added to the Financial Code to apply to credit unions.

(2) Consideration should be given to adding a provision like Section 764 of the Financial Code to the provisions relating to savings and loan associations and to eliminating any overlap or duplication from existing Probate Code Section 541.1. Or, instead, consideration

might be given to enacting provisions like Financial Code Sections 6850-6852 and 6855 for banks and trust companies and to expanding existing Probate Code Section 541.1 if necessary.

Min. 5/86-jd

*05/29/86

§ 9701. Deposit of personal property with trust company

9701. The personal representative may deposit personal property of the estate with a trust company. Unless otherwise provided by court order, the personal property may be withdrawn without order of the court.

Comment. The first sentence of Section 9701 provides independent authority for the deposit without court authorization of personal property of the estate with a trust company. See Section 9610 (prior court authorization not required). See also Estate and Trust Code Sections [541.1] and 9703 and Financial Code Section 1586 (property deposited with trust company under court order).

Section 9701 replaces former Probate Code Section 586 which permitted personal assets to be deposited with a trust company, and the bond of the personal representative reduced, "as provided by Division 1 of the Financial Code." If personal property is deposited with a trust company and the deposit is withdrawable only upon court order, provisions for reducing the amount of the bond are found in Estate and Trust Code Section [541.1] and Financial Code Section 1586. See also Section 9703 (deposits withdrawable only upon court order).

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Trust company § 83

Min. 5/86-jd

*05/29/86

§ 9702. Deposit of securities in securities depository

9702. (a) As used in this section, "securities depository" means a securities depository, as defined in Section 30004 of the Financial Code, which is either licensed under Chapter 2 (commencing with Section 30200) of Division 14 of the Financial Code or is exempted from such licensing by Section 30005 or 30006 of the Financial Code.

(b) Securities that constitute all or part of the estate may be deposited in a securities depository.

(c) If the securities have been deposited with a trust company pursuant to Section 9701, the trust company may deposit the securities in a securities depository as provided in subdivision (b).

(d) The securities depository may hold securities deposited with it in the manner authorized by Section 775 of the Financial Code.

Comment. Subdivision (a) of Section 9702 continues a portion of former Probate Code Sections 586.1 and 590 without substantive change. Subdivisions (b) and (d) restate the remainder of former Section 590 without substantive change. The personal representative may deposit securities under subdivision (b) without prior court authorization. See Section 9610. Subdivision (c) restates the remainder of former Section 586.1 without substantive change.

CROSS-REFERENCES

Definitions

Security § 70

Trust company § 83

Note. Should subdivision (a) of Section 9702 be a general definition?

Min. 5/86-jd

*05/29/86

§ 9703. Accounts and deposits withdrawable only upon court order

9703. Upon application of the personal representative, the court may, with or without notice, order that:

(a) All or a portion of the money of the estate be deposited in a bank in this state or in a trust company or be invested in an account in an insured savings and loan association or in shares in an insured credit union, subject to withdrawal only upon authorization of the court.

(b) All of a portion of the personal property of the estate be deposited with a trust company, subject to withdrawal only upon authorization of the court.

Comment. Section 9703 is a new provision based on authority implied under former Probate Code Sections 541.1, 585, and 586 except that Section 9703 includes investments in shares of insured credit unions which were not included under former Sections 541.1 and 585. Section 9703 is comparable to a provision of the guardianship and conservatorship law (Section 2456). If the deposit is withdrawable only upon court order, provisions for reducing the amount of the bond are found in Estate and Trust Code Section [541.1] and Financial Code Section 1586.

Only the personal representative may make an application under Section 9703. An interested person (such as a heir, devisee, or creditor) may neither make the application under Section 9703 nor petition for instructions under Section 9611. Where the personal representative unreasonably refuses to make the application, the interested person may petition for removal of the personal representative. See Sections 8500, 8502.

CROSS-REFERENCES

Definitions

Account in insured savings and loan association § 22
Court § 29
Personal property § 57
Personal representative § 58
Shares in an insured credit union § 72
Trust company § 83
Effect of court authorization or approval § 9612

Note. In preparing conforming amendment and additions, the staff may need to prepare provisions like Section 764 of the Financial Code for inclusion in the Financial Code provisions relating to savings and loan associations and credit unions.

Min. 5/86-jd

*05/29/86

§ 9704. Direct distribution by depository

9704. When a decree is rendered distributing money or personal property of an estate deposited with a bank, trust company, savings and loan association, credit union, or securities depository pursuant to this article, the bank, trust company, savings and loan association, credit union, or securities depository may deliver the property directly to the distributees and shall file receipts therefor with the clerk.

Comment. Section 9704 continues former Probate Code Section 586.5 and expands it to apply to all types of financial institutions where money or property may be deposited pursuant to this chapter. Former Section 586.5 applied only to a bank or trust company.

CROSS-REFERENCES

Definitions

Clerk § 27
Personal property § 57
Trust company § 83

Min. 5/86-jd

*05/29/86

§ 9705. Interest on deposits by trust company

9705. Where a trust company is a personal representative and in the exercise of reasonable judgment deposits money of the estate in an account 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 9705 restates former Probate Code Section 920.5 without substantive change. The reference in Section 9705 to an "association" is new and is intended to include a national banking association. See Fin. Code § 1502. The type of account into which moneys of the estate are to be deposited depends on the type of account which best serves the needs of the estate. The time within which the estate may be distributed, the time of the receipt of the funds, and the immediate need for funds in order to meet the requirements of administration are all factors in determining the type of account in which the funds should be deposited. For example, where there is a substantial sum in excess of the immediate requirements and the sum is to be held over a period of time, the personal representative should deposit the funds in an account (which would include purchase of a certificate of deposit where purchase of a certificate would be appropriate under the circumstances) which not only would safeguard the funds but also allow a rate of interest on the funds that is advantageous to the estate. See *In re Estate of Smith*, 112 Cal. App. 680, 685-86, 297 P. 927 (1931). See also *Estate of Buchman*, 138 Cal. App. 2d 228, 238-39, 291 P.2d 547 (1955). See also Fin. Code § 6515 (association as personal representative); Estate and Trust Code Sections 2453.5 (trust company as guardian or conservator), 9600 (duty of personal representative to manage estate using ordinary care and diligence), 16225 (trustee's power to deposit trust funds).

CROSS-REFERENCES

Definitions

Account § 21
Representative § 58
Trust company § 83

CHAPTER 4. INVESTMENTS AND PURCHASE OF PROPERTY

Min. 5/86-jd

*05/29/86

§ 9730. Investments permitted without prior court authorization

9730. Pending settlement of the estate, the personal representative may invest moneys of the estate in any one or more of the following:

(a) Direct obligations of the United States maturing not later than one year from the date of making the investment or reinvestment.

(b) Mutual funds which are invested only in either or both of the following:

(1) Direct obligations of the United States maturing not later than one year from the date of making the investment or reinvestment.

(2) Repurchase agreements with respect to direct obligations of the United States, regardless of maturity, in which the fund is authorized to invest. As used in this paragraph, "repurchase

agreement" means an agreement by which the seller will deliver the obligation to the fund by book entry, physical delivery, or third-party custodial agreement, and will repurchase from the fund an obligation of the United States of the same description, issue date, and maturity, on or before a specified date and for a specified amount.

(c) Units of a common trust fund described in Section 1564 of the Financial Code. The common trust fund shall have as its objective investment primarily in short term fixed income obligations and shall be permitted to value investments at cost pursuant to regulations of the appropriate regulatory authority.

Comment. The investments described in Section 9730 may be made without prior court authorization. See Section 9610. The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

Subdivisions (a) and (b) of Section 9730 continue former Probate Code Section 584.1 with the following changes in subdivision (b): The requirement has been added that a mutual fund must invest "only" in the permitted obligations and repurchase agreements. This limitation on the permissible investments of the mutual fund does not preclude the fund from having a reserve of uninvested cash. The provision has been added in subdivision (b) that repurchase agreements are limited to those with respect to "direct obligations of the United States." The definition of "repurchase agreement" is new, is drawn from Section 53601(i) of the Government Code, and is clarifying. The words "and reinvest" which were found in former Section 584.1 have been omitted as unnecessary; under Section 9730 "invest" includes reinvestment.

Subdivision (c) restates former Probate Code Section 585.1 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship §§ 2574, 2575

Trusts § 16224

Note. If it is desired to conform Section 9730 to the language used in Assembly Bill 2652 (trusts) to cover what appears to be the same type of investment, the following should be substituted for subdivision (b) of Section 9730:

(b) An interest in a money market mutual fund registered under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.) or an investment vehicle authorized for the collective investment of trust funds pursuant to Section 9.18

of Part 9 of Title 12 of the Code of Federal Regulations, the portfolios of which are limited to United States government obligations maturing not later than five years from the date of investment or reinvestment and to repurchase agreements fully collateralized by United States government obligations.

Min. 5/86-jd

*05/29/86

§ 9731. Investment in federal or state securities with court authorization

9731. (a) Pending settlement of the estate, upon a showing that it is to the advantage of the estate, the court may order that money of the estate in possession of the personal representative be invested in securities of the United States or of this state.

(b) To obtain an order pursuant to this section, the personal representative or any interested person shall file a petition stating the types of securities that are proposed to be purchased and the advantage to the estate of the purchase.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in [Section 1200.5].

Comment. Section 9731 restates a portion of former Probate Code Section 584 without substantive change except that (1) the order may be obtained only pending the settlement of the estate whereas former Section 584 permitted the order also to be obtained at the time of settlement of the estate and (2) the portion of subdivision (b) stating the contents of the petition is new.

The language of former Probate Code Section 584 that permitted the order to be obtained at the time of settlement of the estate is omitted from Section 9731. The omitted language appeared to be included in former Section 584 only to apply to the other provision of former Section 584 which permitted the purchase of an annuity expressly granted to a legatee by the decedent's will. The omitted language is continued in Section 9733 which continues the substance of the portion of former Section 584 that permitted the purchase of an annuity.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Security § 70

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISIONS

Guardianship-conservatorship law, see §§ 2573-2574

Note. Notice provisions in brackets will be superseded by general provisions, to be drafted.

Min. 5/86-jd

*05/29/86

§ 9732. Investment of money as provided in will

9732. (a) The court may order that money of the estate in possession of the personal representative be invested in any manner provided by the will if all of the following conditions are satisfied:

(1) The time for [filing or presenting] claims has expired.

(2) All uncontested claims have been paid or are sufficiently secured by mortgage or otherwise, or there is sufficient cash in the estate aside from the money to be invested to pay all uncontested claims, or the court is otherwise satisfied that all uncontested claims will be paid.

(3) The estate is not in a condition to be finally closed and distributed.

(b) To obtain an order under this section, the personal representative or any interested person shall file a petition showing the general condition of the estate and the types of investments that are proposed to be made.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided by [Section 1200.5]. In addition, the petitioner shall cause notice of the hearing and a copy of the petition to be mailed to all known devisees of property which is proposed to be invested. Where the property proposed to be invested is devised to a trust or trustee, notice of the hearing and a copy of the petition shall be mailed to (1) the trustee or, if the trustee has not yet been appointed, to the person nominated as trustee, and (2) all persons in being who may participate in the corpus or income of the trust. Mailing pursuant to this subdivision shall be to the person's last known address as provided in [Section 1200.5].

(d) If no objection has been filed by an interested person, the court may make an order authorizing or directing the personal representative to invest such portion of the money of the estate as the court deems advisable in the types of investments proposed in the petition and authorized by the will. If there is no objection by an

interested person and no substantial reason why some or all of the investment powers given by the will should not be exercised, the court shall make the order. The order may be for a limited period or until the administration of the estate is completed.

(e) Upon petition of the personal representative or any interested person, the court may at any time renew, modify, or terminate an order made under this section. Notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200.5].

Comment. Section 9732 replaces former Probate Code Sections 584.5 and 584.6.

[References to Section [1200.5] (formerly Probate Code Section 1200.5) (giving notice of hearing by mail) are substituted for the references in former Probate Code Sections 584.5 and 584.6 to former Probate Code Section 1200 (now Section [1200]) (posting of notice of hearing). Prior to 1980, Probate Code Section 1200 required notice both by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in a new Section 1200.5 (see 1980 Cal. Stats. ch. 955, §§ 29, 31), but conforming revisions were not made to all the sections of the Probate Code that made reference to Section 1200. The substitution in Section 9732 of references to notice by mail in place of the references to notice by posting will effectuate legislative intent. Subdivision (d) of former Probate Code Section 1200 provided that notice by posting under that section was not required, notwithstanding any other provision of the Probate Code, except for a few matters specifically enumerated in that section, and subdivision (e) of former Probate Code Section 1200.5 provided that the notice by mail under that section was in addition to the notice, if any, required to be given in the manner specified in Probate Code Section 1200.]

Subdivision (a) of Section 9732 restates the first sentence of former Probate Code Section 584.5 with the substitution of "may order" for "may authorize" and the inclusion of additional language in paragraph (2) to make clear that an order may be made if the court is satisfied that all uncontested claims will be paid. The word "reinvested" which was found in the former provision has been omitted as unnecessary. The limitation in the former provision that only "surplus" money could be invested has been omitted as unnecessary.

Subdivision (b) restates a portion of the second sentence of former Probate Code Section 584.5 without substantive change except that the personal representative or "any interested person" is authorized to file a petition. Former Section 584.5 permitted the personal representative to file an initial petition, while former Section 584.6 permitted any person interested to file a petition for renewal, modification, or termination of the order.

Subdivision (c) restates the third, fourth, and fifth sentences of former Probate Code Section 584.5 without substantive change, but language has been added to require notice to the person nominated as trustee if a trustee has not yet been appointed for a trust that is a devisee. The provision in the third sentence of former Section 584.5 requiring the clerk to set the petition for hearing by the court is

continued in Section 7202. The language of the fourth and fifth sentences of former Section 584.5 requiring notice to persons "whether or not they have requested special notice or given notice of appearance" has been omitted as unnecessary.

Subdivision (d) restates a portion of the first sentence of former Probate Code Section 584.5 (court "may" authorize) and all of former Probate Code Section 584.6 without substantive change. The language of former Section 584.6 that "the court shall hear the petition if no objection thereto has been filed" is revised to say that the court may make an order if no objection has been filed. This is consistent with the original intent of the section. See Review of Selected 1968 Code Legislation 224 (Cal. Cont. Ed. Bar 1968).

If the money cannot be invested as provided in the will because the requirements of Section 9732 are not satisfied, the money can be invested under other provisions. See Sections 9700 (savings accounts), 9703 (accounts and deposits withdrawable only upon court order), 9730 (investments permitted without court authorization), 9731 (investments in federal or state securities with court authorization).

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Property § 62

Trustee § 84

Will § 88

Proof of giving notice § 7308

Verification required § 7203

Should subdivision (e) be retained? Other sections do not have a similar provision. Should subdivision (e) be a general provision?

Note. The notice provisions of Section 9732 will be reviewed when the general notice provisions are drafted.

Note. Unless the substitution is made by legislation enacted in 1986 (AB 2625), the second paragraph of the Comment to Section 9732 (which explains the substitution of references to Section 1200.5 in place of the references to Section 1200) should appear in the Comment to the first section in the new Code where such a substitution is made and a reference to this discussion should be made in the Comment to each subsequent section where the same substitution is made. If Assembly Bill 2625 is enacted, the second paragraph of the Comment should be deleted.

Min. 5/86-jd

*05/29/86

§ 9733. Purchase of annuity granted in will

9733. (a) Pending settlement of the estate or at the time of settlement of the estate, on petition of the personal representative or

any interested person, the court may, upon good cause shown, order that any money in possession of the personal representative be invested in the purchase from an insurer, admitted to do business in this state, for any devisee named in the will of an annuity expressly granted to the devisee by the will.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in [Section 1200.5].

Comment. Section 9733 restates a portion of former Probate Code Section 584 without substantive change. The provision of former Section 584 that the clerk shall set the petition for hearing by the court is continued in Section 7202.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Devisee § 34

Interested person § 48

Personal representative § 58

Will § 88

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2459(b)(2)

Note. Notice provisions in brackets will be superseded by general provisions, to be drafted.

Min. 5/86-jd

*05/30/86

§ 9734. Exercise of restricted stock options

9734. (a) If an asset of the estate consists of an option right that is nontransferable except by testate or intestate succession from the decedent, the personal representative may exercise the option after authorization by order of court upon a showing that the exercise would be to the advantage of the estate and would be in the best interest of the interested persons. The personal representative may use any funds or property in the estate to acquire the property covered by the option.

(b) A petition under this section may be filed by the personal representative or any interested person.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided by [Section 1200.5], [but the court may order the notice to be given for a shorter period or dispensed with].

Comment. Section 9734 restates former Probate Code Section 584.2 without substantive change [, except that a reference to Section [1200.5] (formerly Probate Code Section 1200.5) (giving notice of hearing by mail) is substituted for the reference in former Probate Code Section 584.2 to former Probate Code Section 1200 (now Section [1200]) (posting of notice of hearing). Concerning this substitution, see the discussion in the Comment to Section 9732].

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval).

Under subdivision (b), a petition may be filed by the personal representative "or any interested person." Under former Probate Code Section 584.2, it was unclear whether an interested person was authorized to file a petition.

The provision of former Probate Code Section 584.2 that the petition shall be filed with the clerk is omitted as unnecessary. The provision of former Section 584.2 that the clerk shall set the petition for hearing by the court is continued in Section 7202. See also Section 10202 (sale of subscription rights).

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Property § 62

Proof of giving notice § 7308

Verification required § 7203

Note. Notice provisions in brackets will be superseded by general provisions, to be drafted. The provision relating to the shortening of notice may be unnecessary if that matter is covered by a general provision.

Note. Unless the substitution is made by legislation enacted in 1986 (AB 2625), the bracketed portion of the first paragraph of the Comment to this section (which explains the substitution of references to Section 1200.5 in place of the references to Section 1200) should appear in the Comment to the first section in the new Code where such a substitution is made and a reference to this discussion should be made in the Comment to each subsequent section where the same substitution is made. If Assembly Bill 2625 is enacted, the bracketed portion of the first paragraph of the Comment should be deleted.

*05/30/86

§ 9735. Purchase of securities or commodities sold short

9735. (a) After authorization by order of court, the personal representative may purchase securities or commodities required to perform an incomplete contract of sale where the decedent died having sold but not delivered securities or commodities not owned by the decedent. The court's order shall fix the terms and conditions of purchase.

(b) A petition under this section may be filed by the personal representative or by any party to the contract.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in [Section 1200.5], except that:

[(1) The court [or judge] may order that the notice of hearing be given for a shorter period or be dispensed with.]

(2) No notice of hearing need be given when the maximum purchase price is fixed or when the securities or commodities are to be purchased on an established stock, bond, or commodity exchange.

Comment. Section 9735 restates former Probate Code Section 771.3 without substantive change [except that a reference to Section [1200.5] (formerly Probate Code Section 1200.5) (giving notice of hearing by mail), is substituted for the reference in former Probate Code Section 771.3 to former Probate Code Section 1200 (now Section [1200]) (posting of notice of hearing). Concerning this substitution, see the discussion in the Comment to Section 9732]. The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval)

Only the personal representative or a party to the contract may petition under Section 9735. Where the personal representative unreasonably refuses to petition, the interested person may petition for removal of the personal representative. See Sections 8500, 8502.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Personal representative § 58

Security § 70

Proof of giving notice § 7308

Verification required § 7203

Note. Notice provisions in brackets will be superseded by general provisions, to be drafted. The provision relating to the shortening of notice may be unnecessary if that matter is covered by a general provision.

Note. Unless the substitution is made by legislation enacted in 1986 (AB 2625), the bracketed portion of the Comment to this section (which explains the substitution of references to Section 1200.5 in place of the references to Section 1200) should appear in the Comment to the first section in the new Code where such a substitution is made and a reference to this discussion should be made in the Comment to each subsequent section where the same substitution is made. If Assembly Bill 2625 is enacted, the bracketed portion of the Comment should be deleted.

CHAPTER 5. OPERATION OF DECEDENT'S BUSINESS

Min. 5/86-jd

*05/30/86

§ 9760. Operation of decedent's business other than partnership

9760. (a) As used in this section, "decedent's business" means a business that was operated by the decedent, but does not include a business operated by a partnership in which the decedent was a partner.

(b) If it is to the advantage of the estate and in the best interest of the interested persons, the personal representative, with or without court authorization, may continue the operation of the decedent's business; but the personal representative may not continue the operation of the decedent's business for a period of more than six months from the date of appointment of the personal representative unless a court order has been obtained under this section authorizing the personal representative to continue the operation of the business.

(c) The personal representative or any interested person may file a petition requesting an order (1) authorizing the personal representative to continue the operation of the decedent's business or (2) directing the personal representative to discontinue the operation of the decedent's business. The petition shall show the advantage to the estate and the benefit to the interested persons of the order requested. Notice of the hearing on the petition shall be given for the period and in the manner provided in Section [1200.5].

(d) If a petition is filed under this section, the court may make an order that either:

(1) Authorizes the personal representative to continue the operation of the decedent's business to such an extent and subject to such restrictions as the court determines to be for the advantage of the estate and in best interests of the interested persons.

(2) Directs the personal representative to discontinue the operation of the decedent's business within the time and in accordance with the provisions of the order.

(e) Upon petition of the personal representative or any interested person, the court may at any time modify or terminate an order made under this section. Notice of the hearing on the petition shall be given for the period and in the manner provided in Section [1200.5].

Comment. Subdivision (a) of Section 9760 makes clear that the section does not apply to a business operated by a partnership in which the decedent was a partner. See Sections 9761-9762 (operation of decedent's partnership).

Section 9760 permits but does not require a court order for the personal representative to continue operation of the decedent's nonpartnership business for a period of not exceeding six months from the date of appointment of the personal representative. The section requires court authorization to continue operation of the decedent's nonpartnership business for a period of more than six months from the date of the appointment of the personal representative. The six-month limitation is included in recognition that continuation of the operation of the business may result in the loss of estate assets if the business proves to be unprofitable. The six-month limitation is consistent with the requirement of the Independent Administration of Estates Act that advice of proposed action be given for 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. See Section 10551(f). Under prior law, if the personal representative continued the operation of the decedent's business without a court order, but acted in good faith and as a cautious and prudent person would act under similar circumstances, the personal representative was not personally liable for expenses of operating the business. In re Estate of Maddalena, 42 Cal. App. 2d 12, 18, 108 P.2d 17 (1940).

The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval).

Although Section 9760 makes clear that the personal representative may continue to operate the decedent's nonpartnership business without prior court authorization for the six-month period, it is generally advisable for the personal representative to obtain an order under

Section 9760 authorizing continued operation of the business. See Abel & Price, First Steps in Handling Decedents' Property, in 1 California Decedent Estate Administration § 6.29, at 218 (Cal. Cont. Ed. Bar 1971). If the personal representative operates the decedent's business without prior authorization of the court, the court may nonetheless ratify the acts and expenditures of the personal representative after the fact. In re Estate of Maddalena, supra, at 19, 108 P.2d at _____. Under Section 9760, the personal representative can obtain such ratification only upon the showing that it was to the advantage of the estate and in the best interest of interested persons to continue the operation of the decedent's business. See subdivision (b).

Subdivisions (c), (d), and (e) replace the first sentence of former Probate Code Section 572. Under subdivision (c), a petition may be filed by the personal representative or "any interested person." It was unclear under former Section 572 whether an interested person was authorized to file a petition.

The requirement that notice of the hearing on the petition shall be given for the period and in the manner provided in Section [1200.5] is substituted for the requirement of former Section 572 that the order be made after notice to all persons interested in the estate, given in such manner as may be directed by the court or a judge thereof. If the court determines that notice as provided in Section [1200.5] is not sufficient, the court can require such further and additional notice to be given as the court considers proper. See Section [1204].

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Proof of giving notice § 7308

Verification required § 7203

Note. At the May 1985 meeting, the Commission determined that this section should be made consistent with the Independent Administration of Estates Act. The staff has made the six-month period during which the personal representative is permitted to operate the business without court authorization run from the date of the appointment of the personal representative. This is the period used under the Independent Administration of Estates Act.

A remaining issue is whether "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" (language drawn from the tentative recommendation relating to independent administration) should be substituted for the words "a business that was operated by the decedent" in subdivision (a) of Section 9760? In other words, should the scope of Section 9760 be expanded to cover — in addition to a "business that was operated by the decedent" — "an unincorporated business in which the decedent was engaged or which was wholly or partly owned by the decedent at the time of his or her death"?

Note. Notice provisions in brackets will be superseded by general provisions, to be drafted. Subdivision (e) of Section 9760 may be unnecessary if a general provision on renewing, modifying, or terminating orders is drafted. On the other hand, the provision may be useful here because it indicates that any interested person may petition for an order that operation of the business be discontinued.

Min. 5/86-jd

*05/30/86

§ 9761. Settlement of affairs of partnership in which decedent was a general partner

9761. (a) As used in this section, "partnership" means a partnership in which the decedent was a general partner.

(b) Unless otherwise ordered by the court pursuant to Section 9762, when at the time of the decedent's death a partnership existed between the decedent and any other person, the surviving partner has the right to continue in possession of the partnership and to settle its business, but the interest of the decedent in the partnership shall be included in the inventory and be appraised as other property. The surviving partner shall settle the affairs of the partnership without delay, shall account to the personal representative, and shall pay over to the personal representative such amounts as may from time to time be payable to the personal representative by virtue of the interest of the decedent in the partnership.

(c) Upon application of the personal representative, the court [or a judge thereof] may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may [, after notice, compel it by attachment].

(d) The personal representative may maintain any action against the surviving partner which the decedent could have maintained.

Comment. Section 9761 restates the second, third, and fourth sentences of former Section 571 without substantive change but with the addition of a provision in subdivision (a) that makes clear that the section applies only where the decedent was a general partner in the partnership. This clarification is made in recognition that the death of a limited partner does not cause dissolution of the partnership. See Corp. Code §§ 15520-15521 (Uniform Limited Partnership Act, 15681 (California Revised Limited Partnership Act). See also Corp. Code § 15675 (exercise of rights by personal representative upon death of limited partner).

Only the personal representative may make application under subdivision (c) of Section 9761. An interested person may neither make

application under Section 9761 nor petition for instructions under Section 9611. Where the personal, representative unreasonably refuses to make application under subdivision (c), the interested person may petition for removal of the personal representative. See Sections 8500, 8502.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Note. Subdivision (b) of Section 9761 provides that an order against a surviving partner of the decedent may be enforced "by attachment." A general provision should be drafted for inclusion in the portion of the new code relating to orders to provide a procedure for enforcing orders against third persons, such as partners or other persons who have property of the decedent.

Min. 5/86-jd

*05/30/86

§ 9762. Personal representative continuing as partner in decedent's partnership

9762. (a) Subject to subdivisions (b), (c), (d), (e), and (f), after authorization by order of court upon a showing that it would be to the advantage of the estate and in the best interests of the interested persons, the personal representative may continue as a partner in any partnership in which the decedent was a partner at the time of death.

(b) The personal representative may not be authorized to continue as a partner if that would be inconsistent with the terms of any written partnership agreement signed by all of the partners prior to the decedent's death unless all surviving partners consent.

(c) The personal representative may be authorized to act as a general partner only if the decedent was a general partner at the time of death.

(d) The personal representative may be authorized to act as a limited partner only if the decedent at the time of death was either (1) a general partner or (2) a limited partner as described in Chapter 2 (commencing with Section 15501) or Chapter 3 (commencing with Section 15611) of Title 2 of the Corporations Code.

(e) If there is a written partnership agreement, the personal representative has all the rights, powers, duties, and obligations provided in the written partnership agreement, subject to the written approval of all of the surviving partners and to such restrictions specified in the order as the court determines to be for the advantage of the estate and in the best interest of the interested persons.

(f) If there is no written partnership agreement, subject to the written consent of the surviving partners, the personal representative shall have all the rights, powers, duties, and obligations that the court specifies in its order.

(g) To obtain an order pursuant to this section, the personal representative or any interested person shall file a petition showing that the order requested would be to the advantage of the estate and in the best interests of the interested persons. Notice of the hearing on the petition shall be given for the period and in the manner provided by Section [1200.5]. In addition, unless the court otherwise orders, not less than 10 days before the hearing the petitioner shall cause notice of hearing and a copy of the petition to be mailed to each of the surviving partners at his or her last known address.

Comment. Section 9762 replaces a portion of the first sentence and all of the second sentence of former Section 572 without substantive change except as indicated below.

The words "unless all surviving partners consent" in subdivision (b) is new.

The requirement that notice of the hearing on the petition be given for the period and in the manner provided in Section [1200.5] and by mail to each of the surviving partners is substituted for the requirement of former Section 572 that the order be made after notice to all persons interested in the estate, given in such manner as may be directed by the court or a judge thereof. If the court determines that notice as provided in Section [1200.5] is not sufficient, the court can require such further and additional notice to be given as the court considers proper. See Section [1204].

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval).

The reference to the California Revised Limited Partnership Act (Corp. Code §§ 15611-15723) which was enacted in 1983, is added.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Proof of giving notice § 7308

Verification required § 7203

Note. The application of this section to limited partnerships needs to be given further consideration by the Commission. See Memorandum 86-55.

Note. Notice provisions in brackets will be superseded by general provisions, to be drafted.

CHAPTER 6. BORROWING, REFINANCING, AND ENCUMBERING PROPERTY

Min. 5/86-jd

*05/30/86

§ 9800. Borrowing money, refinancing, and encumbering property

9800. (a) Subject to subdivision (c), after authorization by order of court obtained under this chapter upon a showing that it would be to the advantage of the estate, the personal representative may borrow money on a note, either unsecured or to be secured by a security interest or other lien on the personal property of the estate, or any part thereof, or to be secured by a mortgage or deed of trust on the real property of the estate, or any part thereof, and may give a security interest or other lien on the personal property of the estate, or any part thereof, or a mortgage or deed of trust on the real property of the estate, or any part thereof, in order to do any one or more of the following:

(1) Pay the debts of the decedent or the estate, devises made in the will of the decedent, and expenses and charges of administration.

(2) Pay, reduce, extend, or renew a security interest or lien or mortgage or deed of trust already existing on property of the estate.

(3) Improve, use, operate, or preserve property in the estate.

(b) The personal representative shall apply the money to the purpose specified in the order.

(c) Where the surviving spouse has elected to have his or her share of the community real property administered in the decedent's estate, the personal representative is authorized to borrow money to be

secured by a mortgage or deed of trust on the real property of the estate, or any part thereof, only with the written consent of the surviving spouse.

Comment. Subdivision (a) of Section 9800 restates a portion of the first sentence, and all of the third sentence, of former Probate Code Section 830 without substantive change. Clarifying language is added to in paragraph (1) of subdivision (a) to make clear that debts of the estate are included. As used in paragraph (1) of subdivision (a), "debts" includes taxes owed by the decedent or the estate. Paragraph (3) of subdivision (a) is new. For a comparable provision, see Section 2552 (guardianship and conservatorship).

Subdivision (b) is drawn from the second sentence of subdivision (a) of Section 2551 (guardianship and conservatorship).

Subdivision (c) is a new provision that makes clear that the personal representative may not borrow money to be secured by real property of the estate where the surviving spouse has elected to have his or her share of the community real property administered in the estate unless the written consent of the surviving spouse is obtained.

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval).

"Security interest" is substituted in Section 9800 for "chattel mortgage" and "pledge" which appeared in former Probate Code Section 830. Under the California Commercial Code, the security interest replaces the chattel mortgage and pledge. See Uniform Commercial Code Comment to Uniform Commercial Code Section 9101.

The word "note" has been substituted in Section 9800 in place of the phrase "note or notes" used in former Section 830. This is not a substantive change. See Section 10 (singular number includes the plural).

CROSS-REFERENCES

Definitions

Court § 29
Devise § 32
Personal property § 57
Personal representative § 58
Real property § 68

Min. 5/86-jd

*05/30/86

§ 9801. Acting jointly with other owners of interests in estate property

9801. If property of the estate consists of an undivided interest in real or personal property, or any other interest therein less than

the entire ownership, upon a showing that it would be to the advantage of the estate to borrow money to improve, use, operate, or preserve the property jointly with the owners of the other interests therein, or to pay, reduce, extend, or renew a security interest, lien, mortgage, or deed of trust already existing on all of the property, the personal representative, after authorization by order of the court obtained under this chapter, may join with the owners of the other interests in borrowing money and the execution of a joint and several note and such security interest, lien, mortgage, or deed of trust as may be required to secure the payment of the note. The note may be for such sum as is required for the purpose.

Comment. Section 9801 continues the second sentence of former Probate Code Section 830 without substantive change. Section 9801 is the comparable to subdivision (b) of Section 2552 (guardianship-conservatorship law). The word "note" has been substituted in Section 9801 for the phrase "note or notes" used in former Probate Code Section 830 and the word "owners" has been substituted in Section 9801 for the phrase "owner or owners" used in former Probate Code Section 830. These are not substantive changes. See Section 10 (singular number includes the plural, and the plural, the singular).

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). See also Section 9612 (effect of court authorization or approval).

CROSS-REFERENCES

Definitions

Court § 29
Personal property § 57
Personal representative § 58
Property § 62
Real property § 68

Min. 5/86-jd

*05/30/86

§ 9802. Petition

9802. (a) The personal representative or any interested person may file a petition for an order pursuant to this chapter.

(b) The petition shall state the purpose for which the order is sought and the necessity for or the advantage to accrue from the order. If applicable, the petition shall also show the amount of money

proposed to be raised, the rate of interest to be paid, the length of time the note is to run, and a general description of the property proposed to be mortgaged or subjected to the deed of trust, security interest, or other lien.

(c) Where the surviving spouse has elected to have his or her share of the community real property administered in the decedent's estate and the requested order would authorize the personal representative to borrow money to be secured by a mortgage or deed of trust upon the real property of the estate, or any part thereof,, the petition shall be accompanied by the written consent of the surviving spouse to the requested order.

Comment. Subdivisions (a) and (b) of Section 9802 restates the first sentence of former Section 831 without substantive change. Subdivision (c) is new and is reflects the addition of subdivision (c) to Section 9800.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Interested person § 48

Personal representative § 58

Verification required § 7203

Min. 5/86-jd

*05/30/86

§ 9803. Notice of hearing

9802. Notice of the hearing on the petition shall be given for the period and in the manner provided in Section [1200.5].

Comment. Section 9803 restates the last portion of the second sentence of former Section 831 without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Proof of giving notice § 7308

Note. The provisions in brackets will be superseded by general provisions, to be drafted.

Min. 5/86-jd

*05/30/86

§ 9804. Hearing; order

9804. (a) Subject to subdivision (c), if the court is satisfied that it will be to the advantage of the estate, the court shall make an

order that authorizes or requires that the personal representative do any one or more of the following:

(1) Borrow the money and execute a note.

(2) Execute a mortgage or deed of trust or give other security by security interest or other lien.

(3) Pay, reduce, extend, or renew a security interest or lien or mortgage or deed of trust already existing upon property of the estate.

(b) The court in its order may do any one or more of the following:

(1) Order that a lesser amount than that specified in the petition be borrowed.

(2) Prescribe the maximum rate of interest and the period of the loan.

(3) Require that the interest and the whole or any part of the principal be paid from time to time out of the whole estate or any part thereof.

(4) Require that the personal property used as security, or any buildings on real property to be mortgaged or subjected to the deed of trust, be insured for the further security of the lender and that the premiums be paid out of the estate.

(5) Specify the purpose for which the money to be borrowed is to be applied.

(6) Specify the terms and conditions of any extension or renewal agreement.

(7) Prescribe such other terms and conditions concerning the transaction as the court determines to be to the advantage of the estate.

(c) Where the surviving spouse has elected to have his or her share of the community real property administered in the decedent's estate, an order authorizing or requiring the personal representative to borrow money to be secured by a mortgage or deed of trust upon the real property of the estate, or any part thereof, may be made only if the court is satisfied that the surviving spouse has given written consent to the order.

Comment. Section 9804 restates the last portion of the first sentence of former Probate Code Section 830 and the first and second sentences of former Probate Code Section 832 without substantive change. The provision of former Section 832 that the court may direct in what coin or currency the loan shall be paid has been omitted as

obsolete. This omission is consistent with the 1982 amendment to Section 667 of the Code of Civil Procedure. Paragraphs (5) and (6) of subdivision (b) are new and state matters that were implied under former Section 830. Paragraph (7) of subdivision (b) is new and makes clear that the court has flexibility to fashion an appropriate order. Subdivision (c) is new and reflects the addition of subdivision (c) to Section 9800.

CROSS-REFERENCES

Definitions

Court § 29
Personal property § 57
Personal representative § 58
Property § 62
Real property § 68

Min. 5/86-jd

*05/30/86

§ 9805. Liability of personal representative

9805. The note and the mortgage or deed of trust, if any, shall be signed by the personal representative. The personal representative is not personally liable on the note and the mortgage or deed of trust by reason of so signing.

Comment. Section 9805 restates the second sentence of former Probate Code Section 833 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58
Effect of court authorization or approval § 9612
Transfer or conveyance pursuant to court order § 7411

Note. Section 9805 perhaps should be made a general provision and should be added as a part of Section 7411.

Min. 5/86-jd

*05/30/86

§ 9806. Effectiveness of encumbrance

9806. (a) Every mortgage, deed of trust, or security interest made pursuant to a court order obtained under this chapter is effectual to mortgage, or to subject to the deed of trust or security interest, both of the following:

(1) All right, title, interest, and estate which the decedent had in the property described therein at the time of the decedent's death or prior thereto.

(2) Any right, title, or interest in the property acquired by the estate of the decedent, by operation of law or otherwise, since the time of the decedent's death.

(b) Jurisdiction of the court to administer the estate of the decedent shall be effectual to vest the court with jurisdiction to make the order for the note and for the security interest, lien, mortgage, or deed of trust. This jurisdiction shall conclusively inure to the benefit of the owner of the security interest or lien, mortgagee named in the mortgage, or the trustee and beneficiary named in the deed of trust, and their heirs and assigns.

(c) No omission, error, or irregularity in the proceedings under this chapter shall impair or invalidate the proceedings or the note, security interest, lien, mortgage, or deed of trust given in pursuance to an order under this chapter. Subject to Section 9807, the owner of the security interest or lien, the mortgagee named in the mortgage, or the trustee and beneficiary named in the deed of trust, and their heirs and assigns, have and possess the same rights and remedies on the note and the security interest or lien or mortgage or deed of trust as if it had been made by the decedent prior to his or her death.

Comment. Section 9806 restates without substantive change the first and second sentences and the first portion of the third sentence of former Probate Code Section 834.

CROSS-REFERENCES

Definitions

Court § 29

Heirs § 44

Property § 62

Min. 5/86-jd

*05/30/86

§ 9807. Deficiency in case of foreclosure or sale under security interest or deed of trust

9807. (a) Except as provided in subdivision (b), no judgment or claim for any deficiency shall be had or allowed against the personal representative or the estate if (1) there is a foreclosure or sale under a security interest, lien, mortgage, or deed of trust and (2) the proceeds of sale of the encumbered property are insufficient to pay the note, the security interest, lien, mortgage, or deed of trust, and the costs or expenses of sale.

(b) If the note, security interest, mortgage, or deed of trust was given to pay, reduce, extend, or renew a lien, mortgage, security interest, or deed of trust existing on property of the estate at the time of death of the decedent and the indebtedness secured thereby was an [allowed and approved] claim against the estate, the part of the indebtedness remaining unsatisfied shall be classed and paid with other allowed claims against the estate.

Comment. Section 9807 restates the last portion of the third sentence of former Probate Code Section 834 without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

CHAPTER 7. ACTIONS AND PROCEEDINGS BY OR AGAINST
PERSONAL REPRESENTATIVE

Min. 5/86-jd

*05/30/86

§ 9820. Authority to sue and defend

9820. The personal representative may:

(a) Institute and maintain actions and proceedings for the benefit of the estate.

(b) Defend actions and proceedings against the decedent or the estate.

Comment. Section 9820 is new and is consistent with prior law. See 7 B. Witkin, Summary of California Law Wills and Probate § 337, at 5813 (8th ed. 1974); former Sections 573-577. Section 9820 is drawn from Section 2462 (guardianship-conservatorship law). The personal representative may act under Section 9820 without prior court authorization. See Section 9610; *Halleck v. Mixer*, 16 Cal. 574, 580 (1860). The personal representative must exercise ordinary care and diligence in determining whether to exercise a power granted by Section 9820 and in exercising the power. See Section 9600. The personal representative may seek instructions from the court if in doubt as to the appropriate action to take. See Section 9611. As to the effect of court authorization or approval, see Section 9612.

Section 9820 gives authority to the personal representative to defend actions and proceedings, but procedural requirements are governed by the Code of Civil Procedure. If the defendant in a pending action dies and the cause of action survives or continues, the court in the which the civil action is pending may, on motion, allow the action to be continued against the personal representative. Code Civ. Proc. § 385(a).

The personal representative and third party may agree to use of a summary procedure for determination of a dispute. See Sections 9620 (submission to temporary judge) and 9621 (submission to arbitration).

See also Sections 9650 (possession and management of decedent's estate), 9653 (duty to recover property transferred in fraud of creditors), 9654 (action by heirs or devisees for possession of or to quiet title to real property, 9656 (abandonment of tangible personal property where cost of collection would exceed its value), 9761 (action against decedent's surviving partner), [existing Section 612 (action for penal damages against embezzler)], 9823 (partition action). See also Code Civ. Proc. §§ 376 (action against personal representative of person causing injury to child), 377 (wrongful death action against personal representative of person causing death), 385 (continuation of action against deceased defendant without appointment of personal representative).

CROSS-REFERENCES

Definitions

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2462

Trusts § 16249

Min. 5/86-jd

*05/30/86

§ 9821. Effect of death on causes of action

9821. (a) Except as provided in this section [and subject to Part 4 (commencing with Section 9000)], no cause of action is lost by reason of the death of any person but may be maintained by or against the person's personal representative.

(b) In an action brought under this section against a personal representative, all damages may be awarded which might have been recovered against the decedent had the decedent lived except damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

(c) Where a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative are limited to the loss or damage the decedent sustained or incurred prior to death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived but not including any damages for pain, suffering, or disfigurement.

(d) This section applies where a loss or damage occurs simultaneously with or after the death of a person who would have been liable for the loss or damage if his or her death had not preceded or occurred simultaneously with the loss or damage.

(e) Nothing in this section shall be construed as making assignable things in action which are of such a nature as not to have been assignable prior to September 15, 1961.

Comment. Section 9821 restates former Section 573 without substantive change. The language in subdivision (a) that Section 9821 is subject to Part 4 (creditors' claims) is new but continues prior law. See 7 B. Witkin, Summary of California Law Wills and Probate §§ 343, 416-422, at 5818-19, 5868-73 (8th ed. 1974).

See also Section 9654 (action by heirs or devisees for possession or to quiet title to real property). See also Code Civ. Proc. §§ 353 (limitation on action by or against personal representative or estate),

355 (limitation on action by personal representative after reversal of judgment), 376 (action against personal representative for injury to minor child), 377 (wrongful death action against personal representative of person causing death), 385 (continuation of action against deceased defendant without appointment of personal representative).

CROSS-REFERENCES

Definitions

Personal representative § 58

Min. 5/86-jd

*05/30/86

§ 9822. Action on bond of former personal representative

9822. The personal representative may maintain an action on the bond of any former personal representative of the same estate, for the use and benefit of all interested persons.

Comment. Section 9822 restates former Section 576 without substantive change. The former reference to the personal representative acting "as such" has been omitted as unnecessary. The personal representative may act under this section without prior court authorization. See Section 9610. The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Note. A cross-reference should be made to Section 9822 under an appropriate provision in the portion of the statute relating to bonds of personal representatives.

Min. 5/86-jd

*05/30/86

§ 9823. Partition actions

9823. (a) If the decedent leaves an undivided interest in any property, an action for partition of the property may be instituted and maintained against the personal representative.

(b) The personal representative may institute and maintain an action against the other cotenants for partition of any property in which the decedent left an undivided interest.

Comment. Section 9823 continues former Probate Code Section 575 without substantive change. Section 9823 is a specific example of the general authority given the personal representative by Section 9820. The personal representative may act under this section without prior court authorization. See Section 9610. The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

When a partition action is brought against the personal representative, the rules of venue for partition actions generally apply. See Code Civ. Proc. § 872.110.

Under subdivision (b), court authorization is not required for the personal representative to commence a partition action. See Section 9610. This continues prior law. See Review of Selected 1969 Code Legislation 187 (Cal. Cont. Ed. Bar 1969).

The personal representative and third party may agree to use of a summary procedure for determination of a dispute. See Sections 9620 (submission to temporary judge) and 9621 (submission to arbitration).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Note. When the successor section to Probate Code Section 1200.5 (notice by mail) is drafted, the provision for notice on a petition for leave to institute a partition action should be deleted, since court authorization is not required.

Min. 5/86-jd

*05/30/86

§ 9824. Dispensable parties

9824. In actions by or against personal representatives, it is not necessary to join as parties those to whom letters were ordered issued but who have not qualified.

Comment. Section 9824 continues former Section 577 and broadens the section to apply to administrators as well as executors. See also Section 9654 (action by heirs or devisees for possession or to quiet title to real property).

CROSS-REFERENCES

Definitions

Letters § 52

Personal representative § 58

CHAPTER 8. COMPROMISE OF CLAIMS AND ACTIONS;
EXTENSION, RENEWAL, OR MODIFICATION OF OBLIGATIONS

NOT APPROVED

§ 9830. Authority to compromise claims and actions and to extend,
renew, or modify obligations

9830. (a) Subject to subdivisions (b) and (c), if it is to the advantage of the estate, the personal representative may do any of the following:

(1) Compromise or settle a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate, including the giving of a covenant not to sue.

(2) Extend, renew, or in any manner modify the terms of an obligation owing to or running in favor of the decedent or the estate.

(b) Unless this chapter or some other applicable statute requires court authorization or approval, the power set forth in subdivision (a) may be exercised by the personal representative without court authorization, instruction, approval, or confirmation. Nothing in this subdivision precludes the personal representative from seeking court authorization pursuant to the provisions of this chapter.

(c) Upon petition of an interested person or upon the court's own motion, the court may limit the authority of the personal representative under subdivision (a). Notice of the hearing on the petition shall be given for the period and in the manner provided in [Section 1200.5].

Comment. Section 9830 is drawn from Section 2500 (guardianship-conservatorship law). It replaces the first, second, and third sentences of former Probate Code Section 578 and the portion of the first sentence of former Probate Code Section 718.5 relating to compromises or settlements after the time for filing creditor's claims has expired.

The provisions of former Sections 578 and 718.5 authorized the personal representative to do the acts described in subdivision (a) "with the approval of the court." Under Section 9830, the personal representative may, but is not required to, obtain court authorization. By permitting but not requiring prior court authorization, Section 9830 continues prior law. See *Moulton v. Holmes*, 57 Cal. 337, 343-44 (1881); *Estate of Coffey*, 161 Cal. App. 2d 259, 264, 326 P.2d 511 (1958); *Taylor v. Sanson*, 24 Cal. App. 515, 517-18, 141 P. 1060 (1914). See also *Estate of Lucas*, 23 Cal. 2d 454, 463-65, 144 P.2d 340 (1943).

When the personal representative acts under Section 9830 without court authorization, the action taken may be later reviewed by the

court. Section 9830 requires that the action taken be to the advantage of the estate. In addition, the personal representative must exercise ordinary care and diligence in determining whether to exercise a power granted by Section 9830 and in exercising the power. See Section 9600. The personal representative may seek prior authorization from the court under Sections 9836-9837 if in doubt as to the appropriate action to take. As to the effect of obtaining court authorization, see Section 9612.

This chapter limits the authority the personal representative had under prior law to compromise claims and actions without court approval. Although there is no general requirement under this chapter that authorization of the court be obtained, certain matters (specified in Sections 9831-9835) do require authorization by the court. This new scheme is drawn from the guardianship-conservatorship law. See Sections 2500-2507. In addition, under subdivision (c) of Section 9830, the court may limit the authority of the personal representative under this section by requiring, for example, prior authorization by the court for any compromise or settlement of a particular matter or of a particular kind of matter or that no compromise or settlement be made unless it has first been authorized by the court. Under subdivision (c), a creditor or other interested person may request that the court make an order that, for example, limits the authority of the personal representative to take action under this section without prior authorization by order of the court.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISION

Guardianship-conservatorship § 2500

Note. The notice provision of subdivision (c) of Section 9830 will be reviewed when the general notice provisions are drafted.

Note. The Commission has not previously considered this section. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association comments concerning this section:

We agree with the substance of this proposed section, which would provide flexibility for the personal representative to compromise claims and modify obligations without court authority. Any interested person may seek an order limiting the authority of the personal representative and is thereby protected.

§ 9831. Compromise before time for filing creditor's claims has expired

9831. Unless the time for filing creditor's claims has expired, authorization by order of court is required for a compromise or settlement of a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate.

Comment. Section 9831 restates without substantive change the portion of the first sentence of former Probate Code Section 718.5 relating to compromises or settlements before the time for filing creditor's claims has expired. The remainder of the first sentence of former Section 718.5 is replaced by subdivision (a)(1) of Section 9830.

Section 9831 requires authorization by order of court obtained under Sections 9836-9837 if the compromise or settlement is to be made before the time for filing creditor's claims has expired. The section requires court authorization only "for a compromise or settlement of a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate." See Section 9830(a)(1). The section does not require court authorization in order to extend, renew, or in any manner modify the terms of an obligation owing to or running in favor of the decedent or the estate. See Section 9830(a)(2).

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Note. The Commission has not previously considered this section. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association comments concerning this section:

We also agree with the substance of this proposed section. Until the personal representative has received all of the claims, the representative is not fully informed as to the total amount of obligations which will be owed by the estate.

We presume that Section 9831 is limited to the actions of the personal representative regarding matters set forth in §9038(a)(1). Perhaps this section should be modified to clarify that extension or modification of obligations as set forth in §9830(a)(2) may be done before the expiration of the period for filing creditors' claims. Compromise of rental obligations and similar items described in §9832(b) should not necessarily be delayed until the period for filing creditors' claims.

The Comment to Section 9831 which was set out in the previous version of this material has been revised to make the make clear that the section has the effect suggested in the second paragraph of the comment from the LA Bar Probate and Trust Law Section set out above.

NOT APPROVED

§ 9832. Matters relating to real property

9832. Except as provided in subdivision (b), authorization by order of court is required for a compromise, settlement, extension, renewal, or modification which affects any of the following:

(1) Title to real property.

(2) An interest in real property or a lien or encumbrance on real property.

(3) An option to purchase real property or an interest in real property.

(b) If it is to the advantage of the estate, the personal representative without prior court authorization may extend, renew, or modify a lease of real property having an unexpired term of one year or less where, under the lease as extended, renewed, or modified (1) the rental does not exceed one thousand five hundred dollars (\$1,500) a month and the term does not exceed one year or (2) regardless of the amount of the rental, the lease is from month to month.

Comment. Section 9832 is new and is drawn in part from Section 2501 (guardianship-conservatorship law).

Except as provided in subdivision (b), a transaction described in Section 9832 requires authorization by order of court obtained under Sections 9836-9837. Subdivision (b), which provides an exception to the requirement of court authorization, is consistent with Section 9940 (leases permitted without court authorization).

In determining whether to extend, renew, or modify a lease under subdivision (b) without prior court authorization, and in extending, renewing, or modifying the lease under that subdivision, the personal representative is required to exercise ordinary care and diligence. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Real property § 68

Effect of court authorization or approval § 9612

Independent administration authority §§ 9613, 10500

COMPARABLE PROVISION

Guardianship-conservatorship § 2501

Note. The Commission has not previously considered this section. The existing guardianship-conservatorship provision requires that the rental not exceed \$750 a month, but we plan to revise the

guardianship-conservatorship provision to substitute \$1,500 for the \$750 maximum limit used in that section.

Subdivision (b) of Section 9832 does not permit a lease for a term exceeding ONE year without court authorization whereas the provision of the guardianship-conservatorship law permits a lease for a term not exceeding TWO years without court authorization. The one-year limitation of proposed Section 9940 is adopted in the staff draft of Section 9832. The one-year limit recognizes that the administration of a decedent's estate should be completed expeditiously whereas a conservatee's estate ordinarily will require a longer period of administration.

Subdivision (b) of Section 9832 uses the standard the Commission has approved for making leases without prior court authorization. The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association approves subdivision (b):

We agree with the provisions of §9832(b) regarding the modification of leases which do not exceed \$1,500 per month for a term of not to exceed one year. This expansion from Probate Code §2501 will allow the personal representative greater flexibility in administering the estate without being required to seek court approval.

NOT APPROVED

§ 9833. Compromise in excess of specified amount

9833. Authorization by order of court is required for a compromise or settlement of a matter when the transaction requires the transfer or encumbrance of property of the estate, or the creation of an unsecured liability of the estate, or both, in an amount or value in excess of twenty-five thousand dollars (\$25,000).

Comment. Section 9833 is new and is the same in substance as Section 2502 (guardianship-conservatorship law). Section 9833 requires authorization by order of court obtained under Sections 9836-9837 where the amount to be paid or charged against the estate exceeds \$25,000. Section 9833 does not apply to a claim by the estate.

Although Section 9833 does not require court authorization for a compromise or settlement where the amount to be paid or charged against the estate is not more than \$25,000, another provision may require court authorization in the particular case (as, for example, under Section 9832--matter affecting real property).

CROSS-REFERENCES

Definitions

Court § 29

Property § 62

Effect of court authorization or approval § 9612

Independent administration authority §§ 9613, 10500

Transfer or conveyance pursuant to court order § 7411

COMPARABLE PROVISION

Guardianship-conservatorship § 2502

Note. The Commission has not previously considered this section.

NOT APPROVED

§ 9834. Claim of estate against personal representative; debt of personal representative to estate

9834. Authorization by order of court is required for any of the following:

(a) A compromise or settlement of a claim by the estate against the personal representative, whether or not the claim arises out of the administration of the estate.

(b) An extension, renewal, or modification of the terms of a debt or similar obligation of the personal representative owing to or running in favor of the estate.

Comment. Section 9834 is new and is the same in substance as Section 2503 (guardianship-conservatorship law). Section 9834 requires authorization by order of court obtained under Sections 9836-9837 for a compromise, settlement, extension, renewal, or modification described in the section. Section 9834 requires court authorization because the section involves matters that place the personal representative in a position where there may be a conflict of interest. See Section 9613.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Effect of court authorization or approval § 9612

Independent administration authority §§ 9613, 10500

Note. The Commission has not previously considered this section.

NOT APPROVED

§ 9835. Wrongful death and personal injury claims

9835. Authorization by order of court is required for the compromise or settlement of a claim or right of action given to the personal representative by any law for the wrongful death or injury of the decedent, including any action brought by the personal representative in attempting enforcement of the claim or right of action. Authorization to compromise or settle the claim or right of action includes authorization to give a covenant not to sue.

Comment. Section 9835 continues the substance of the first paragraph of former Probate Code Section 578a. Section 9835 requires authorization by order of court obtained under Sections 9836-9837 for a

compromise or settlement described in the section. For provisions giving the personal representative a right of action for wrongful death of the decedent, see Code Civ. Proc. § 377 (wrongful death of adult or certain minors), Labor Code § 2803 (wrongful death of employee).

CROSS-REFERENCES

Action by personal representative

Wrongful death of adult or certain minors Code Civ. Proc. § 377

Wrongful death of employee Labor Code § 2803

Definitions

Court § 29

Personal representative § 58

Continuance of action after death Code Civ. Proc. § 385

Death of party before expiration of time limited for commencement of action Code Civ. Proc. § 353

Effect of court authorization or approval § 9612

Independent administration authority §§ 9613, 10500

Limitation of action for wrongful death § Code Civ. Proc. § 340

Survival of actions § 9821

Note. The Commission has not previously considered this section.

NOT APPROVED

§ 9836. Court having authority to give authorization

9836. (a) Subject to subdivision (c), when the claim or matter is the subject of a pending action or proceeding, the court authorization required by this chapter shall be obtained from the court in which the action or proceeding is pending.

(b) If the claim or matter is not the subject of a pending action or proceeding, the court authorization required by this chapter shall be obtained from the court in which the estate is being administered.

(c) When the claim or matter is the subject of a pending action or proceeding that is not brought in a court of this state, court authorization required by this chapter shall be obtained from either of the following:

(1) The court in which the action or proceeding is pending.

(2) The court in which the estate is being administered.

Comment. Section 9836 is new and is included to make clear to which court application for authorization is to be made. The section is drawn from Section 2505 (guardianship-conservatorship law). Subdivision (c) applies to cases in the federal courts and in sister state courts or courts outside the United States.

COMPARABLE PROVISION

Guardianship-conservatorship § 2505

Note. The Commission has not previously considered this section.

NOT APPROVED

§ 9837. Petition for court authorization; notice

9837. (a) A petition for an order authorizing a compromise, settlement, extension, renewal, or modification under this chapter may be filed by any of the following:

(1) The personal representative.

(2) Any interested person with the approval of the personal representative.

(b) The petition shall show the terms of and the advantage of the compromise, settlement, extension, renewal, or modification to the heirs or devisees and the estate.

(c) Notice of the hearing on the petition shall be given for the period and in the manner required by [Section 1200.5].

Comment. Section 9837 restates the fourth and fifth sentences of former Probate Code Section 578, the third and fourth sentences of former Probate Code Section 578a, and the second sentence of former Probate Code Section 718.5, without substantive change except for the authorization of the filing of a petition by an interested person with the approval of the personal representative. In some cases, the personal representative may desire to have an outside party bear the legal expense of obtaining the court approval, or the estate beneficiaries may be interested in seeking court approval of a modification.

An interested person may petition under Section 9837 only with the approval of the personal representative. If the personal representative unreasonably refuses to give approval, the interested person may not petition for instructions under Section 9611 but may petition for removal of the personal representative. See Sections 8500, 8502.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Personal representative § 58

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISION

Guardianship-conservatorship § 2506

Note. The Commission has not previously considered this section. The section set out above has been revised by the staff to adopt the suggestion of the Executive Committee of the Probate and Trust Law

Section of the Los Angeles County Bar Association that any interested party be authorized to file a petition with the approval of the personal representative.

Note. The notice provision of Section 9837 will be reviewed when the general notice provisions are drafted.

Note. At the suggestion of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association, the staff has omitted from the draft statute a provision formerly included which was drawn from the guardianship-conservatorship law:

§ 9838. Application of other statutes

9838. Notwithstanding Sections 9830 to 9837, inclusive:

(a) If another statute requires, provides a procedure for, or dispenses with court authorization of a compromise, settlement, extension, renewal, or modification, the provisions of that statute govern any case to which that statute applies.

(b) Whenever another statute provides that a compromise or settlement of an administrative proceeding is not valid unless authorized in such proceeding, the authorization shall be governed by that statute, and authorization in the estate proceeding is not required.

Comment. Section 9838 is new and is the same in substance as Section 2507 (guardianship-conservatorship law).

COMPARABLE PROVISION

Guardianship-conservatorship § 2507

The staff recommends that this provision be omitted. The provision is comparable to a provision of the guardianship-conservatorship law, but the provision does not appear to be necessary and adds complexity to the statute.

CHAPTER 9. ACCEPTANCE OF DEED IN LIEU OF FORECLOSURE OR TRUSTEE'S SALE; GRANT OF PARTIAL SATISFACTION OR PARTIAL RECONVEYANCE

Min. 5/86-jd

*06/01/86

§ 9850. Acceptance of deed in lieu of foreclosure or trustee's sale

9850. (a) If it is to the advantage of the estate to accept a deed to property which is subject to a mortgage or deed of trust in lieu of foreclosure of the mortgage or sale under the deed of trust, the personal representative may, after authorization by order of the court and upon such terms and conditions as may be imposed by the court, accept a deed conveying the property to the heirs or devisees of the decedent, subject to administration.

(b) To obtain an order under this section, the personal representative or any interested person shall file a petition showing the advantage to the estate of accepting the deed. Notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200.5].

Comment. Section 9850 restates the substance of former Probate Code Section 718.6 [except that a reference to Section [1200.5] (formerly Probate Code Section 1200.5) (giving notice of hearing by mail) is substituted for the reference in former Section 718.6 to former Probate Code Section 1200 (now Section [1200]) (posting of notice of hearing). Prior to 1980, Probate Code Section 1200 required notice both by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in a new Section 1200.5 (see 1980 Cal. Stats. ch. 955, §§ 29, 31), but conforming revisions were not made to all the sections of the Probate Code that made reference to Section 1200. The substitution in Section 9850 of a reference to the provision providing for notice by mail in place of the references in prior law to the provision providing for notice by posting will effectuate legislative intent. Subdivision (d) of former Probate Code Section 1200 provided that notice by posting under that section was not required, notwithstanding any other provision of the Probate Code, except for a few matters specifically enumerated in that section, and subdivision (e) of former Probate Code Section 1200.5 provided that the notice by mail under that section was in addition to the notice, if any, required to be given in the manner specified in Probate Code Section 1200.]

Among the factors to be taken into consideration by the court in determining whether it is to the advantage of the estate to take a deed in lieu of foreclosure are (1) whether there will be subordinate liens that will continue on the property if the deed is taken that would be eliminated if the mortgage is foreclosed or the property is sold under the deed of trust and (2) whether there is a right to a deficiency judgment that would continue if the mortgage were foreclosed and the property were to fail to yield enough to pay the amount of the encumbrance. These factors would not necessarily preclude the granting of the order (as where the subordinate lien that would continue is for only a small amount or where the deficiency judgment would be uncollectible).

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Devisee § 34

Heirs § 44

Interested person § 48

Personal representative § 58

Property § 62

Proof of giving notice § 7308

Verification required § 7203

Note. A reference to the petition requesting authorization of acceptance of the deed in lieu of foreclosure or trustee's sale should be added to the petitions listed in Section 1200.5. The notice provision of subdivision (b) of Section 9850 will be reviewed when the general notice provisions are drafted.

Note. Unless the substitution is made by legislation enacted in 1986 (AB 2625), the provision of the Comment to this section (which explains the substitution of references to Section 1200.5 in place of the references to Section 1200) should appear in the Comment to the first section in the new Code where such a substitution is made and a reference to this discussion should be made in the Comment to each subsequent section where the same substitution is made. If Assembly Bill 2625 is enacted, the bracketed portion of the first paragraph of the Comment should be omitted.

Min. 5/86-jd

*06/01/86

§ 9851. Grant of partial satisfaction or partial reconveyance

9851. (a) Except as provided in subdivision (c), if it is to the advantage of the estate for the personal representative to give a partial satisfaction of a mortgage or to cause a partial reconveyance to be executed by a trustee under a trust deed held by the estate, the personal representative may, after authorization by order of the court and upon such terms and conditions as may be imposed by the court, give the partial satisfaction or cause the partial reconveyance to be executed by the trustee.

(b) To obtain an order under this section, the personal representative or any interested person shall file a petition showing the advantage to the estate of giving the partial satisfaction or causing the partial reconveyance. Notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200.5].

(c) No authorization by the court is necessary for the personal representative to give a partial satisfaction of a mortgage or to cause a partial reconveyance to be executed by a trustee under a trust deed held by the estate if the partial satisfaction or partial reconveyance is executed pursuant to the terms of the mortgage or trust deed held by the estate.

Comment. Section 9851 restates former Section 718.7 without substantive change. The personal representative is required to exercise the power granted by subdivision (a) (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Proof of giving notice § 7308

Verification required § 7203

Note. The notice provision of subdivision b) of Section 9851 will be reviewed when the general notice provisions are drafted.

CHAPTER 10. CONVEYANCE OR TRANSFER OF PROPERTY CLAIMED TO BELONG TO DECEDENT OR OTHER PERSON

Min. 5/86-jd

*06/01/86

§ 9860. Petition for order

9860. (a) The personal representative or any interested person may file a petition requesting that the court make an order under this chapter in any of the following cases:

(1) Where the decedent while living is bound by a contract in writing to convey real property or to transfer personal property and dies before making the conveyance or transfer and the decedent, if living, could have been compelled to make the conveyance or transfer.

(2) Where the decedent while living binds himself or herself or his or her personal representative by a contract in writing to convey real property or to transfer personal property upon or after his or her death, and the contract is one which can be specifically enforced.

(3) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another.

(4) Where the decedent died having a claim to real or personal property, title to or possession of which is held by another.

(b) The petition shall set forth the facts upon which the claim is based.

Comment. The introductory clause of subdivision (a) of Section 9860 restates a portion of the first sentence of former Probate Code Section 851 and a portion of the first sentence of former Probate Code Section 851.5 without substantive change except that under the former provisions only the personal representative and a claimant had the right to file a petition. Paragraphs (1) and (2) of subdivision (a) restate a portion of former Probate Code Section 850 without substantive change. Paragraphs (3) and (4) of subdivision (a) restate a portion of the first sentence of former Probate Code Section 851.5 without substantive change. Paragraph (4) is broad enough to permit the court to adjudicate claims under Sections [612-613], and therefore overrules *Laing v. Superior Court*, 88 Cal. App. 2d 641, 199 P.2d 373 (1948).

Subdivision (b) restates a portion of the first sentence of former Probate Code Section 851 and a portion of the first sentence of former Probate Code Section 851.5 without substantive change.

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612. The personal representative and third party may agree to use of a summary procedure for determination of a dispute. See Sections 9620 (submission to temporary judge) and 9621 (submission to arbitration).

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Real property § 68

Verification required § 7203

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2520

Min. 5/86-jd

*06/01/86

§ 9861. Notice of hearing

9861. (a) At least 30 days prior to the day of the hearing, the petitioner shall cause notice of the hearing and a copy of the petition to be served in accordance with Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure on all of the following persons (other than the petitioner):

(1) The personal representative.

(2) Any person claiming an interest in, or having title to or possession of, the property.

(b) Except for those persons given notice pursuant to subdivision (a), notice of the hearing on the petition, together with a copy of the petition, also shall be given for the period and in the manner provided in [Section 1200.5] to all of the following:

(1) To all known heirs and devisees, whether or not they have requested special notice or given notice of appearance.

(2) To the persons described in Section [1200.5].

Comment. Subdivision (a) of Section 9861 replaces the last portion of the second sentence of former Probate Code Section 851 and the fourth sentence of former Probate Code Section 851.5. Subdivision (a) expands the requirement of former Section 851.5 that service be made in accordance with Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure to require service in that manner on any person claiming an interest in or having title to or possession of the property, even though the person may be an heir or devisee who former Section 851.5 required to be mailed notice of hearing and a copy of the petition "as provided in Section 1200" (service by posting). Subdivision (a) also expands the requirement of former Section 851.5 that the service be made at least 30 days before the day of the hearing to require that the personal representative (if not the petitioner) be served at least 30 days before the day of the hearing and makes clear that service on the personal representative is to be made in accordance with Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

Subdivision (b) replaces the second and third sentences of former Probate Code Section 851.5. The provision of the second sentence of former Section 851.5 requiring the clerk to set the petition for hearing is continued in Section 7202. Notice is given under subdivision (b) only to those persons described in the subdivision who are not given notice as provided in subdivision (a). [A reference to Section [1200.5] (formerly Probate Code Section 1200.5) (giving notice of hearing by mail) is substituted for the references in the second and third sentences of former Section 851.5 to former Probate Code Section 1200 (now Section [1200]) (posting of notice of hearing). Prior to 1980, Probate Code Section 1200 required notice both by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in a new Section 1200.5 (see 1980 Cal. Stats. ch. 955, §§ 29, 31), but conforming revisions were not made to all the sections of the Probate Code that made reference to Section 1200. The substitution in Section 9861 of a reference to the provision providing for notice by mail in place of the references in prior law to the provision providing for notice by posting will effectuate legislative intent. Subdivision (d) of former Probate Code Section 1200 provided that notice by posting under that section was not required, notwithstanding any other provision of the Probate Code, except for a few matters specifically enumerated in that section, and subdivision (e) of former Probate Code Section 1200.5 provided that the notice by mail under that section was in addition to the notice, if any, required to be given in the manner specified in Probate Code Section 1200.]

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Devisee § 34

Heirs § 44

Person § 56

Personal representative § 58

Property § 62

Proof of giving notice § 7308

COMPARABLE PROVISION

Guardianship-conservatorship § 2521

Note. Notice provisions in brackets will be superseded by general provisions, to be drafted.

Note. Unless the substitution is made by legislation enacted in 1986 (AB 2625), the bracketed portion of the last paragraph of the Comment to this section (which explains the substitution of references to Section 1200.5 in place of the references to Section 1200) should appear in the Comment to the first section in the new Code where such a substitution is made and a reference to this discussion should be made in the Comment to each subsequent section where the same substitution is made. If Assembly Bill 2625 is enacted, the bracketed portion of the last paragraph of the Comment should be deleted.

Min. 5/86-jd

*06/01/86

§ 9862. Continuance for preparation for hearing

9862. Any interested person may request time for filing a response to the petition, for discovery proceedings, or for other preparation for the hearing, and the court shall grant a continuance for a reasonable time for any of such purposes.

Comment. Section 9862 continues the fifth sentence of former Section 851.5 without change.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 2522

*06/01/86

§ 9863. Filing of notice of lis pendens

9863. If the matter concerns real property, notice of the pendency of the proceeding may be filed pursuant to Section 409 of the Code of Civil Procedure.

Comment. Section 9863 continues the sixth sentence of former Section 851.5 with the addition of the introductory clause.

CROSS-REFERENCES

Definitions

Real property § 68

COMPARABLE PROVISION

Guardianship-conservatorship § 2523

*06/01/86

§ 9864. Denial of petition if objection based on venue

9864. Any person having or claiming title to or an interest in the property which is the subject of the petition may, at or prior to the hearing, object to the hearing of the petition if the petition is filed in a court which is not the proper court under any other provision of law for the trial of a civil action seeking the same relief and, if the objection is established, the court shall not grant the petition.

Comment. Section 9864 continues the seventh sentence of former Section 851.5 without change.

CROSS-REFERENCES

Definitions

Person § 56

Property § 62

COMPARABLE PROVISION

Guardianship-conservatorship § 2524

*06/01/86

§ 9865. Abatement of petition if civil action pending

9865. (a) Except as provided in subdivision (b), if a civil action is pending with respect to the subject matter of a petition filed pursuant to this chapter and jurisdiction has been obtained in

the court where the civil action is pending prior to the filing of the petition, upon request of any party to the civil action, the court shall abate the petition until the conclusion of the civil action.

(b) The court need not abate the petition if the court determines that the civil action was filed for the purpose of delay.

Comment. Subdivision (a) of Section 9865 restates the last sentence of former Section 851.5 without substantive change. Subdivision (b) codifies the rule of *Richer v. Superior Court*, 63 Cal. App. 3d 748, 756-57, 134 Cal. Rptr. 52 (1976).

CROSS-REFERENCES

Definitions

Court § 29

COMPARABLE PROVISION

Guardianship-conservatorship § 2525

Min. 5/86-jd

*06/01/86

§ 9866. Denial of petition if matter should be determined by civil action

9866. The court shall not grant a petition under this chapter if the court determines that the matter should be determined by a civil action.

Comment. Section 9866 restates a portion of the first sentence of former Section 852 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

COMPARABLE PROVISION

Guardianship-conservatorship § 2526

Min. 5/86-jd

*06/01/86

§ 9867. Order

9867. Except as provided in Sections 9864, 9865, and 9866, if the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the personal representative or other person having title to or possession of the property to execute a conveyance or transfer to the person entitled thereto or granting other appropriate relief.

Comment. Section 9867 restates portions of former Section 850 and of the first sentence of former Section 852 without substantive change. Under Section 9867, the court orders the property to be transferred to "the person entitled thereto," which may include the decedent's estate in an appropriate case. See Section 9860.

CROSS-REFERENCES

Definitions

Court § 29

Person § 56

Personal representative § 58

Property § 62

COMPARABLE PROVISION

Guardianship-conservatorship § 2527

Min. 5/86-jd

*06/01/86

§ 9868. Execution of conveyance or transfer; effect of order

9868. (a) The personal representative or other person ordered to execute a conveyance or transfer under Section 9867 shall execute the conveyance or transfer according to the terms of the order, and the court may enforce its execution by process.

(b) After entry of an order that the personal representative or other person execute a conveyance or transfer, the person entitled thereunder has the right to the possession of the property, and the right to hold the property, according to the terms of the order as if the property had been conveyed or transferred in accordance with the terms of the order.

Comment. Subdivision (a) of Section 9868 restates the second sentence of former Section 853 without substantive change. Subdivision (b) restates a portion of the first sentence of former Section 853 without substantive change. The provision of former Section 853 that the order is prima facie evidence of the correctness of the proceedings, and of the authority of the personal representative or other person to make the conveyance or transfer, has been omitted as unnecessary in view of Section 9612 (effect of court authorization or approval) and Section 7411(d) (conveyance or transfer by personal representative passes title as fully as if decedent had executed it while living).

Section 9868 is subject to the provisions for stay of execution on appeal. See Sections [to be drafted, drawn from Sections 2750-2752 (guardianship-conservatorship law).]

CROSS-REFERENCES

Definitions

Court § 29

Person § 56

Personal representative § 58

Person § 56

Property § 62

Effect of court authorization or approval § 9612

Transfer or conveyance pursuant to court order § 7411

Note. The new Estate and Trust Code should contain a general provision like Section 9612 of the draft statute concerning the effect of an order when it becomes final and perhaps also a provision that probate orders are prima facie evidence of the correctness of the proceedings (to cover such matters as notice of hearing and other procedural matters).

Are the provisions of Section 9612 and 7411(d) adequate to replace the language of former Section 853 that is not continued? See *Wood v. Roach*, 125 Cal. App. 631, 639, 14 P.2d 170 (1931); *Fletcher v. Superior Court*, 79 Cal. App. 468, 473-74, 250 P. 195 (1926); 7 B. Witkin, *Summary of California Law Wills and Probate* § 234, at 5742 (8th ed. 1974); *Evid. Code* §§ 639, 666.

CHAPTER 11. PURCHASE OF ESTATE PROPERTY BY PERSONAL REPRESENTATIVE

Min. 5/86-jd

*06/02/86

§ 9880. Prohibition against purchase of estate property or claim against estate

9880. Except as provided in this chapter, no personal representative may purchase any property of the estate, or any claim against the estate, directly or indirectly, nor be interested in any such purchase.

Comment. Section 9880 restates the first portion of the first paragraph of former Probate Code Section 583 without substantive change.

CROSS-REFERENCES

Credit in accounts only for amount actually paid on claim § _____

Definitions

Personal representative § 58

Property § 62

Min. 5/86-jd

*06/02/86

§ 9881. Purchase with consent of all heirs or devisees

9881. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal

representative to purchase property of the estate if all of the following requirements are satisfied:

(a) Written consent to the purchase is signed by (1) all the devisees under the decedent's will if the decedent died testate or (2) all of the decedent's heirs if the decedent died intestate.

(b) The written consents are filed with the court.

(c) The purchase is shown to be to the advantage of the estate.

Comment. Section 9881 is new.

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Personal representative § 58

Property § 62

Will § 88

Min. 5/86-jd

*06/02/86

§ 9882. Purchase where authorized by will

9882. Upon a petition filed under Section 9883, the court may make an order under this section authorizing the personal representative to purchase property of the estate if the will of the decedent authorizes the personal representative to purchase the property.

Comment. Section 9882 supersedes the first portion of the third paragraph of former Probate Code Section 583 which provided that the prohibition against purchase by the personal representative did not prohibit the purchase of property of the estate by the personal representative pursuant to the will of the decedent.

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Will § 88

Min. 5/86-jd

*06/02/86

§ 9883. Petition for order under Section 9881 or 9882

9883. (a) The personal representative may file a petition requesting that the court make an order under Section 9881 or 9882. The petition shall set forth the facts upon which the request for the order is based.

(b) Notice of the hearing on the petition shall be given for the period and in the manner required by Sections [1200.5] to all of the following:

(1) All heirs and devisees known to the petitioner, whether or not they have requested special notice or given notice of appearance.

(2) All other persons described in Section [1200.5].

(c) If the court is satisfied that the purchase should be authorized, the court shall make an order authorizing the purchase upon the terms and conditions specified in the order, and the personal representative may execute a conveyance or transfer according to the terms of the order. Unless otherwise provided in the will or in the consents referred to in Section 9881, the order of the court shall provide that the sale of the property be made in the same manner as other estate property of the same nature.

Comment. Subdivision (a) of Section 9883 continues the substance of the first sentence of former Probate Code Section 851 which was applied to purchases by the personal representative of estate property by the last sentence of former Probate Code Section 583.

Subdivision (b) continues the substance of the portion of the last sentence of former Probate Code Section 583 relating to notice.

The first sentence of subdivision (c) continues the substance of the last portion of the first sentence of former Probate Code Section 852 and the first portion of the second sentence of former Probate Code Section 853. These provisions were applied to purchases by the personal representative of estate property by the last sentence of former Probate Code Section 583. The second sentence of subdivision (c) is new.

Only the personal representative may petition under Section 9883. An interested person may neither petition under Section 9883 nor petition for instructions under Section 9611. If the personal representative unreasonably refuses to petition under Section 9883, the interested person may petition for removal of the personal representative. See Section 8500, 8502.

CROSS-REFERENCES

Clerk to set petition for hearing § 7202

Definitions

Devise § 32

Heirs § 44

Person § 56

Personal representative § 58

Effect of court authorization § 9612

Petition to be verified § 7203

Proof of giving of notice § 7308

Transfer or conveyance pursuant to court order § 7411

Note. The notice provision of this section will be reviewed when the general notice provisions are drafted.

Note. The staff has added the last sentence of subdivision (c) in accord with the Commission's direction at the May meeting. However, the staff is concerned that this sentence may limit the power of the court to prescribe terms and conditions that are appropriate under the circumstances of the particular case.

Min. 5/86-jd

*06/02/86

§ 9884. Purchase pursuant to contract of decedent to sell

9884. This chapter does not prohibit the purchase of property of the estate by the personal representative pursuant to a contract in writing made during the lifetime of the decedent if the contract is one that can be specifically enforced and the requirements of Chapter 10 (commencing with Section 9860) are satisfied.

Comment. Section 9884 restates the last portion of the third paragraph of former Probate Code Section 583 without substantive change. An order authorizing the personal representative to purchase property pursuant to a contract of the decedent to sell the property is obtained under Chapter 10 (commencing with Section 9860), not under this chapter. See also Section 9860(a)(1), (2).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Min. 5/86-jd

*06/02/86

§ 9885. Option to purchase given in will

9885. This chapter does not prevent the exercise by the personal representative of an option to purchase property of the estate given in the will of the decedent if the requirements of Chapter 16 (commencing with Section 9980) are satisfied.

Comment. Section 9885 restates the second paragraph of former Probate Code Section 583 without substantive change. An order authorizing the exercise by the personal representative of an option to purchase property of the estate is obtained under Chapter 16 (commencing with Section 9980), not under this chapter. Under Section 9980, the decedent's will must have been duly admitted to probate.

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62
Will § 88

CHAPTER 12. DEDICATION OR CONVEYANCE FOR STREET OR HIGHWAY PURPOSES OR OF EASEMENT OR ACCESS RIGHT

Min. 5/86-jd

*06/02/86

§ 9900. Dedication or conveyance of real property or easement with or without consideration

9900. If it is to the advantage of the estate and in the best interest of the interested persons, the personal representative, after authorization by order of the court made pursuant to this chapter and upon such terms and conditions as the court may prescribe, may do any of the following either with or without consideration:

(a) Dedicate or convey real property of the estate [or an interest therein] for any purpose to any of the following:

(1) This state or any public entity in this state.

(2) The United States or any agency or instrumentality of the United States.

(b) Dedicate or convey an easement over real property of the estate to any person for any purpose.

(c) Convey, release, or relinquish to this state or any public entity in this state any access rights to any street, highway, or freeway from any real property of the estate.

(d) Consent as a lienholder to a dedication, conveyance, release, or relinquishment under subdivision (a), (b), or (c) by the owner of property subject to the lien.

Comment. Section 9901 restates a portion of former Section 587 with the following changes:

(1) Language is added to recognize that the court may prescribe terms and conditions in its order.

(2) Subdivision (d), a new provision drawn from Section 2556 (guardianship and conservatorship), is added.

(3) In the introductory clause, the language "advantage of the estate and in the best interest of the interested persons" is substituted for the former language "advantage, benefit, and best interest of the estate, and those interested therein." This change is nonsubstantive.

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Definitions

Court § 29

Interested person § 48

Person § 56

Personal representative § 58

Real property § 68

Effect of court authorization § 9612

Transfer or conveyance pursuant to court order § 7411

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2556

Note. Should the guardianship and conservatorship law provisions (Section 2556 be conformed to Section 9900?

Min. 5/86-jd

*06/02/86

§ 9901. Petition; notice of hearing

9901. (a) The personal representative or any interested person may file a petition for an order pursuant to this chapter.

(b) Notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200.5].

Comment. Section 9901 restates a portion of former Probate Code Section 587 without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Interested person § 48

Personal representative § 58

Petition must be verified § 7203

Proof of giving notice § 7308

Note. The notice provision of subdivision (b) will be reviewed when the general notice provisions are drafted.

CHAPTER 13. EXCHANGE OF PROPERTY

Min. 5/86-jd

*06/02/86

§ 9920. Court authorization for exchange

9920. If it is to the advantage of the estate to exchange property of the estate for other property, the personal representative may, after authorization by order of court obtained under this chapter and upon such terms and conditions as may be imposed by the court, exchange the property for the other property. The terms and conditions prescribed by the court may include the payment or receipt of part cash by the personal representative.

Comment. Section 9920 restates a portion of the first sentence of former Section 860 without substantive change. The language "advantage of the estate" is substituted for the former language "advantage or best interests of the estate." This change is nonsubstantive.

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Effect of court authorization § 9612

Definitions

Court § 29

Personal representative § 58

Property § 62

COMPARABLE PROVISION

Guardianship-conservatorship § 2557

Min. 5/86-jd

*06/02/86

§ 9921. Petition

9921. To obtain an order under this chapter, the personal representative or any interested person shall file a petition showing that the exchange would be to the advantage of the estate.

Comment. Section 9921 restates a portion of the first sentence of former Probate Code Section 860 without substantive change. The phrase "advantage of the estate" is substituted for the former phrase "advantage or best interests of the estate." This change is nonsubstantive.

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Verification required § 7203

COMPARABLE PROVISION

Guardianship-conservatorship § 2557

Min. 5/86-jd

*06/02/86

§ 9922. Notice of hearing

9922. (a) Except as provided in subdivision (b), notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200.5].

(b) If the petition is for authorization to exchange stocks, bonds, or other securities as defined in Section [771] for different stocks, bonds, or other securities, the court, upon a showing of good cause, may order that the notice be given for a shorter period or that the notice be dispensed with. The order provided by this subdivision may be made ex parte.

Comment. Section 9922 restates the second and third sentences of former Probate Code Section 860 without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Power of judge at chambers § 7061

Proof of giving notice § 7308

COMPARABLE PROVISION

Guardianship-conservatorship § 2557

Note. The notice provisions of this section will be reviewed when the general notice provisions are drafted.

CHAPTER 14. LEASES

Min. 5/86-jd

*06/02/86

§ 9940. Leases permitted without court authorization

9940. If it is to the advantage of the estate, the personal representative may lease real property of the estate without authorization of the court in either of the following cases:

(a) Where the rental does not exceed one thousand five hundred dollars (\$1500) a month and the term does not exceed one year.

(b) Where the lease is from month to month, regardless of the amount of the rental.

Comment. Section 9940 supersedes former Probate Code Section 844. The personal representative may act under Section 9940 without prior court authorization, but the personal representative must exercise ordinary care and diligence in determining whether or not to lease the real property and in the leasing of the property. See Section 9600. The personal representative may seek approval from the court under Section 9941 if in doubt as to the appropriate action to take. As to the effect of court authorization, see Section 9612.

Subdivision (a) of Section 9940 increases the maximum rental under former Probate Code Section 844 from \$250 a month to \$1,500 a month. Court supervision for leases for less than \$1,500 a month adds little protection to the estate, since overbids on these leases are rare and the one-year maximum limit on the lease term assures that the lease will terminate before or soon after distribution of the average estate. See Review of 1963 Code Legislation, 38 St. B.J. 601, 777 (1963). If the lease gives the lessee an option to extend the lease beyond a one-year term, court approval of the lease is required. See also Section 9942.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Real property § 68

COMPARABLE PROVISION

Guardianship-conservatorship § 2555

Min. 5/86-jd

*06/02/86

§ 9941. Court authorization for lease

9941. The personal representative may lease real property of the estate after authorization by order of court obtained under this chapter upon a showing that the proposed lease is to the advantage of the estate.

Comment. Section 9941 restates former Probate Code Section 840 without substantive change. The portion of former Section 840 permitting the court to make orders "as often as the occasion therefor shall arise in the administration of the estate" has been omitted as unnecessary, since there is no limit under this chapter on the number of times an order may be obtained. As to a lease that includes an option to purchase real property of the estate, see Section 9942.

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the

extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Real property § 68

COMPARABLE PROVISION

Guardianship-conservatorship § 2555

Min. 5/86-jd

*06/02/86

§ 9942. Lease with option to purchase

9942. (a) For the purposes of this chapter, "lease" includes, without limitation, a lease that includes an option to purchase real property of the estate.

(b) If the proposed lease includes an option to purchase real property of the estate, a petition for an order authorizing the lease shall be filed under this chapter but the applicable provisions for court approval in both this chapter and in Chapter 15 (commencing with Section 9960) apply to the execution of the lease.

Comment. Section 9942 restates former Probate Code Section 845 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

Real property § 68

Min. 5/86-jd

*06/02/86

§ 9943. Petition for order

9943. (a) To obtain an order under this chapter, the personal representative or any interested person shall file a petition containing all of the following:

(1) A general description of the real property proposed to be leased.

(2) The term, rental, and general conditions of the proposed lease.

(3) A showing of the advantage to the estate to accrue from giving the lease.

(b) If the lease is proposed to be for a term longer than 10 years, the petition shall also state facts showing the need for the longer lease and its advantage to the estate and its benefit to the interested persons.

Comment. Subdivision (a) of Section 9943 restates the first sentence of former Probate Code Section 841 without substantive change. Subdivision (b) restates a portion of the first sentence of former Probate Code Section 842.1 without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Interested person § 48

Personal representative § 58

Real property § 68

Terms and conditions of lease §§ 9946, 9947

Verification required § 7203

Min. 5/86-jd

*06/02/86

§ 9944. Notice of hearing

9944. (a) Notice of the hearing on the petition shall be given for the period and in the manner required by [Sections 1200 and 1200.5].

(b) Notice of the hearing on the petition also shall be given for the period and in the manner required by Section [780], but this notice is not required if the will authorizes or directs the personal representative to lease property.

(c) If the lease is proposed to be for a term longer than 10 years, the petitioner shall [also mail notice of the hearing at least 20 days before the hearing to the persons named as devisees under the decedent's will or, in an intestacy proceeding, to the persons named as heirs whose names and addresses appear in the estate proceeding].

Comment. Subdivisions (a) and (b) of Section 9944 restate a portion of the second sentence and all of the third sentence of former Probate Code Section 841 without substantive change.

Subdivision (c) restates the second sentence of former Probate Code Section 842.1 without substantive change. The authority under former Section 842.1 for the court to require additional notice is omitted as unnecessary in view of the general provision which gives the court this authority. See Section [1204].

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Devise § 32

Heirs § 44

Personal property § 57

Property § 62

Will § 88

Proof of giving notice § 7308

COMPARABLE PROVISION

Guardianship-conservatorship § 2553(b)

Note. The notice provisions will be reviewed when the general notice provisions are drafted. Subdivision (c) will be reviewed when the general notice provisions are drafted. Compare subdivision (b) of Section 9963 with subdivision (c) of Section 9944.

Min. 5/86-jd

*06/02/86

§ 9945. Hearing and order

9945. (a) At the hearing, the court shall entertain and consider any other offer made in good faith at the hearing to lease the same property on more favorable terms.

(b) If the court is satisfied that it will be to the advantage of the estate, the court shall make an order authorizing the personal representative to make the lease to the person and on the terms and conditions stated in the order. The court shall not make an order authorizing the personal representative to make the lease to any person other than the lessee named in the petition unless the offer made at the hearing is acceptable to the personal representative.

Comment. Section 9945 restates the first sentence of former Probate Code Section 842, and a portion of the first sentence of former Probate Code Section 842.1, without substantive change. The portion of former Section 842 providing that "the court shall hear the petition and any objections thereto that may have been presented" has been omitted as unnecessary.

CROSS-REFERENCES

Definitions

Court § 29

Person § 56

Personal representative § 58

Property § 62

Effect of court authorization or approval § 9612

Terms and conditions of lease §§ 9946, 9947

Transfer or conveyance pursuant to court order § 7411

COMPARABLE PROVISION
Guardianship-conservatorship § 2553

Min. 5/86-jd

*06/02/86

§ 9946. Terms and conditions of leases

9946. (a) Subject to Section 9947, an order authorizing the execution of a lease shall set forth the minimum rental or royalty and the period of the lease.

(b) The order may authorize other terms and conditions of the lease, including, with respect to a lease for the purpose of production of minerals, oil, gas, or other hydrocarbon substances, any of the following:

(1) A provision for the payment of rental and royalty to a depository.

(2) A provision for the appointment of a common agent to represent the interests of all the lessors.

(3) A provision for the payment of a compensatory royalty in lieu of rental and in lieu of drilling and producing operations on the land covered by the lease.

(4) A provision empowering the lessee to enter into any agreement authorized by Section 3301 of the Public Resources Code with respect to the land covered by the lease.

(5) A provision for pooling or unitization by the lessee.

(c) If the lease covers additional property owned by other persons or an undivided or other interest of the decedent less than the entire ownership in the property, the order may authorize the lease to provide for division of rental and royalty in the proportion that the land or interest of each owner bears to the total area of the land or total interests covered by the lease.

Comment. Section 9946 restates a portion of the second and the third and fourth sentences of former Probate Code Section 842 without substantive change. As to the maximum term of the lease, see Section 9947.

CROSS-REFERENCES

Definitions

Person § 56

Property § 62

Maximum term of lease § 9947

COMPARABLE PROVISION
Guardianship-conservatorship § 2554

Min. 5/86-jd

*06/02/86

§ 9947. Maximum term of lease

9947. Except as provided in this section, the period of the lease shall be for such time as the court may authorize.

(b) Except as provided in subdivisions (c) and (d), the court shall not authorize a lease for longer than 10 years if any heir or devisee who has an interest in the property to be leased objects at the hearing.

(c) If the lease is for the purpose of production of minerals, oil, gas, or other hydrocarbon substances, the court may authorize that the lease be for a fixed period and any of the following:

(1) So long thereafter as minerals, oil, gas, or other hydrocarbon substances are produced in paying quantities from the property leased or mining or drilling operations are conducted thereon.

(2) If the lease provides for the payment of a compensatory royalty, so long thereafter as such compensatory royalty is paid.

(3) If the land covered by the lease is included in an agreement authorized by Section 3301 of the Public Resources Code, so long thereafter as oil, gas, or other hydrocarbon substances are produced in paying quantities from any of the lands included in any such agreement or drilling operations are conducted thereon.

(d) If the lease is for the growing of asparagus, the court may authorize the lease for a period longer than 10 years.

Comment. Subdivisions (a) and (b) of Section 9947 continue without substantive change the portion of the second sentence of former Probate Code Section 842 that concerned the period of the lease and third sentence of former Probate Code Section 842.1.

Subdivision (c) continues the fifth sentence of former Probate Code Section 842 without substantive change. Subdivision (d) continues a portion of the second sentence of former Probate Code Section 842 without substantive change. Except as provided in subdivisions (c) and (d), the court may not authorize a lease for longer than 10 years if any heir or devisee who has an interest in the property to be leased objects at the hearing.

CROSS-REFERENCES

Definitions

Court § 29
Devisee § 34
Heirs § 44
Property § 62

COMPARABLE PROVISION

Guardianship-conservatorship § 2554

Min. 5/86-jd

*06/02/86

§ 9948. Effectiveness of lease

9948. (a) A lease made pursuant to an order obtained under this chapter is effectual to demise and let the premises described in the order at the rent, for the term, and upon the conditions prescribed in the order.

(b) Jurisdiction of the court to administer the estate of the decedent shall be effectual to vest the court with jurisdiction to make the order for the lease. This jurisdiction shall conclusively inure to the benefit of the lessee and the lessee's heirs and assigns.

(c) No omission, error, or irregularity in the proceedings under this chapter shall impair or invalidate the proceedings or the lease made pursuant to an order made under this chapter.

Comment. Section 9948 restates the second, third and fourth sentences of former Probate Code Section 843 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29
Heirs § 44

COMPARABLE PROVISION

Guardianship-conservatorship § 2553

Note. The provisions relating to leases do not continue the following provisions of existing law:

(1) The last sentence of Probate Code Section 842, which provides: "A certified copy of the order shall be recorded in the office of the recorder of every county in which the leased land or any portion thereof lies,"

(2) The first sentence of Probate Code Section 843, which provides: "The executor or administrator shall execute, acknowledge and deliver the lease as directed, setting forth therein that it is made by authority of the order, giving the date of the order,"

The provisions of Section 9948 appear to have been based on the statutory requirements set out above (which will be omitted from the

Estate and Trust Code pursuant to a Commission decision made at the May meeting). It is unclear how Section 9948 will work with reference to another good faith purchaser, encumbrancer, or lessee, where the lease or order is not recorded and the lease does not indicate that it is made by authority of the order, giving the date of the order. If it is desired not to require in every case that the lease be recorded and the lease set out that it is made by authority of the court order, the staff recommends that Section 9948 be limited to cases where those requirements are met. In other words, we revise Section 9948 to read:

9948. (a) This section applies only where both the the following requirements are satisfied:

(1) The personal representative has executed, acknowledged, and delivered the lease as directed by the order obtained under this chapter, setting forth in the lease that the lease is made by authority of the order, giving the date of the order.

(2) A certified copy of the order has be recorded in the office of the recorder of every county in which the leased real property or any portion thereof lies.

(b) If the requirements of subdivision (a) are satisfied:

(1) A lease made pursuant to an order obtained under this chapter is effectual to demise and let the premises described in the order at the rent, for the term, and upon the conditions prescribed in the order.

(2) Jurisdiction of the court to administer the estate of the decedent shall be effectual to vest the court with jurisdiction to make the order for the lease. This jurisdiction shall conclusively inure to the benefit of the lessee and the lessee's heirs and assigns.

(3) No omission, error, or irregularity in the proceedings under this chapter shall impair or invalidate the proceedings or the lease made pursuant to an order made under this chapter.

CHAPTER 15. GRANTING OPTION TO PURCHASE REAL PROPERTY

Min. 5/86-jd

*06/02/86

§ 9960. Authority to grant option

9960. After authorization by order of court obtained under this chapter, the personal representative may grant an option to purchase real property of the estate for a period within or beyond the period of administration.

Comment. Section 9960 restates the first sentence of former Probate Code Section 584.3 without substantive change. The option must set forth therein that it is made by authority of the order authorizing or directing the personal representative to grant the option, giving

the date of the order, and a certified copy of the order authorizing the granting of the option must be recorded. See Section 7411 and Comment thereto. As to the effect of the granting of the option pursuant to the court order, see Section 7411(d).

The personal representative is required to exercise the power granted by this section (by filing a petition with the court) to the extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Real property § 68

Effect of court authorization or approval § 9612

Effect of transfer pursuant to court order § 7411

Option to purchase given in will § 9980

Verification required § 7203

Min. 5/86-jd

*06/02/86

§ 9961. Petition

9961. To obtain an order under this chapter, the personal representative shall file a petition containing all of the following:

(a) A description of the real property.

(b) The terms and conditions of the proposed option.

(c) A showing of the advantage to the estate to accrue from the granting of the option.

Comment. Section 9961 restates subdivision (a) of former Probate Code Section 584.3 without substantive change. Only the personal representative may file a petition under this section. An interested person may neither petition under this section nor petition for instructions under Section 9611. If the personal representative unreasonably refuses to petition under this section, the interested person may petition for removal of the personal representative. See Sections 8500, 8502.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Personal representative § 58

Real property § 68

Verification required § 7203

*06/02/86

§ 9962. Minimum purchase price

9962. The purchase price of the real property subject to the option shall be at least 90 percent of the appraised value of the real property. The appraisal shall be one made by a probate referee within one year prior to the filing of the petition.

Comment. Section 9962 restates subdivision (b) of former Probate Code Section 584.3 without substantive change except that a requirement that the appraisal be made within one year prior to the filing of the petition has been substituted for the former requirement that the appraisal be made within 90 days prior to the filing of the petition. This substitution makes Section 9962 consistent with the requirement of Section 10309(a)(1) (minimum price for private sale of real property).

The requirement of Section 9962 that the purchase price be at least 90 percent of appraised value is consistent with the general provision prescribing the minimum price for private sales of real property. See Section 10106.

CROSS-REFERENCES

Definitions

Real property § 68

*06/02/86

§ 9963. Notice of hearing

9963. (a) Notice of the hearing on the petition shall be given for the period and in the manner provided in Sections [1200 and 1200.5].

(b) The personal representative shall also cause notice of the hearing to be mailed at least 10 days before the hearing, postage prepaid, to all heirs and devisees [of the decedent who are known to the personal representative, addressed to them at their respective post office addresses].

Comment. Section 9963 restates subdivision (c) of former Probate Code Section 584.3 without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Devise § 32

Heirs § 44

Personal representative § 58

Proof of giving notice § 7308

Note. Portions of subdivision (b) may go in a general provision (10 days for mailed notice; how mailed notice is addressed). Compare subdivision (b) of Section 9963 with subdivision (c) of Section 9944.

Min. 5/86-jd

*06/02/86

§ 9964. Order

9964. (a) The court shall make an order authorizing the personal representative to grant the option upon the terms and conditions stated in the order if the court is satisfied as to all of the following:

(1) Good reason exists to grant the option and granting the option will be to the advantage of the estate.

(2) It does not appear that a higher offer with respect to the purchase price of the real property subject to the option may be obtained. An offer is a higher offer with respect to purchase price only if the offer satisfies the requirements of Section 10108 governing increased bids in real property sales.

(3) It does not appear that a better offer with respect to the terms of the option may be obtained. An offer is a better offer with respect to the terms of the option only if the offer is materially more advantageous to the estate.

(b) A higher offer made either for cash or on credit, whether on the same or different credit terms, or a better offer, shall be considered only if the personal representative informs the court in person or by counsel, before the court makes its order authorizing the granting of the option, that the offer is acceptable.

Comment. Section 9964 restates the second, third, and fourth sentences of subdivision (d) of former Probate Code Section 584.3 without substantive change. A certified copy of the order must be recorded in each county where any portion of the real property is located. See Section 7411 and Comment thereto.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Real property § 68

Effect of court authorization or approval § 9612

Transfer or conveyance pursuant to court order § 7411

*06/02/86

§ 9965. Option expires unless notice of exercise recorded

9965. An option granted pursuant to an order made under this chapter, whether within or beyond the administration of the estate, is subject to Chapter 4 (commencing with Section 884.010) of Title 5 of Part 2 of Division 2 of the Civil Code.

Comment. Section 9965 restates the second sentence of subdivision (e) of former Probate Code Section 584.3 without substantive change.

CHAPTER 16. OPTION TO PURCHASE GIVEN IN WILL

*06/01/86

§ 9980. Option to purchase given in will

9980. (a) When an option to purchase real or personal property is given in a will, the person given the option has the right to exercise the option at any time within the time limits provided by the will. For the purposes of this section, if a time limitation in the will is measured from the death of the testator, that time shall be extended by the period between the testator's death and the issuance of letters testamentary or of administration with the will annexed or by six months, whichever is the shorter period.

(b) When an option to purchase real or personal property is given in a will admitted to probate, the court may make an order directing the personal representative to transfer or convey the property to the person given the option upon compliance with the terms and conditions stated in the will.

Comment. Section 9980 continues subdivision (a) and a portion of the first sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

Person § 56

Personal property § 57

Personal representative § 58

Real property § 68

Will § 88

Effect of court authorization or approval § 9612

Transfer or conveyance pursuant to court order § 7411

*06/01/86

§ 9981. Filing of petition; persons who may file; time for filing

9981. (a) To obtain an order under this chapter, the personal representative or the person given the option to purchase the property shall file a petition within any time limits provided in the will.

(b) Subject to subdivision (c), if the option given in the will is exercisable under the terms of the will after the time that the estate would otherwise be closed, the property subject to the option shall be distributed subject to the option.

(c) If the will does not provide a time limit for exercise of the option, the time limit is one year from the death of the decedent.

Comment. Subdivision (a) of Section 9981 continues a portion of the first sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change. Subdivisions (b) and (c) of Section 9981 continue subdivisions (c) and (d) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Person § 56

Personal representative § 58

Property § 62

Will § 88

Verification required § 7203

*06/01/86

§ 9982. Notice of hearing

9982. Notice of the hearing on the petition shall be given for the period and in the manner required by [Section 1200.5].

Comment. Section 9982 continues the third sentence of subdivision (b) of former Probate Code Section 854.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Verification required § 7203

Note. The notice provision in brackets will be reviewed when the general notice provisions are drafted.

*06/01/86

§ 9983. Protection of rights of creditors

9983. The court shall not make an order under this chapter unless one of the following requirements is satisfied:

(a) The court determines that the rights of creditors will not be impaired by the making of the order.

(b) The court requires a bond in an amount and with such surety as the court shall direct or approve.

Comment. Section 9983 restates the fourth sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

Granting of option to purchase real property §§ 9960-9966

CHAPTER 17. SALES

Article 1. General Provisions

Min. 5/86-jd

*06/03/86

§ 10000. When estate property may be sold

10000. The personal representative may sell real or personal property of the estate in any of the following cases:

(a) When the sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes.

(b) When the sale is to the advantage of the estate and in the best interest of the interested persons.

(c) When the property is directed by the will to be sold.

(d) When authority is given in the will to sell the property.

Comment. Subdivisions (a) and (b) of Section 10000 restate a portion of the second sentence of former Probate Code Section 754 without substantive change.

The reference to "taxes" has been added to subdivision (a) of Section 10000, consistent with the likely construction of former Section 754. See Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.3, at 504 (Cal. Cont. Ed. Bar 1971).

The phrase "to the advantage of the estate and in the best interest of the interested persons" has been substituted in subdivision (b) of Section 10000 for the phrase "for the advantage, benefit, and best interests of the estate and those interested therein" which was used in former Probate Code Section 754. This substitution makes no substantive change in the provision.

Subdivisions (c) and (d) restate portions of the first sentence of former Probate Code Section 757 without substantive change.

The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Court order requiring sale § 10001

Damages for neglect or misconduct in sale § 10380

Definitions

Devise § 32

Interested person § 48

Personal property § 57

Personal representative § 58

Property § 62

Real property § 68

Will § 88

Independent administration

Authority not limited § 9640

Authorization § 10500

Limitation of actions for recovery of property § 10382

Liquidated damages for fraudulent sale of real property § 10381

Min. 5/86-jd

*06/03/86

§ 10001. Court order requiring sale of property

10001. (a) If the personal representative neglects or refuses to sell the property, any interested person may petition the court for an order requiring the personal representative to sell real or personal property of the estate in any of the following cases:

(1) When the sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes.

(2) When the sale is to the advantage of the estate and in the best interest of the interested persons.

(3) When the property is directed by the will to be sold.

(b) Notice of the hearing on the petition shall be given for the period and in the manner required by Section [1200.5].

(c) Notice of the hearing on the petition also shall be given to the personal representative by citation served at least five days before the hearing.

Comment. Section 10001 restates former Probate Code Section 758, without substantive change except for the addition of subdivision (b) which is new.

The reference to "taxes" has been added to subdivision (a)(1), consistent with the addition of "taxes" to subdivision (a) of Section 10000. See the Comment to that section.

The phrase "to the advantage of the estate and in the best interest of the interested persons" has been substituted in subdivision (a)(2) of Section 10001 for the phrase "for the advantage, benefit, and best interests of the estate and those interested therein" which was

used in former Probate Code Section 758. This substitution makes no substantive change and makes subdivision (a)(2) consistent with subdivision (b) of Section 10000.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Compliance with directions in will § 10002

Definitions

Devise § 32

Interested person § 48

Personal property § 57

Personal representative § 58

Property § 62

Real property § 68

Will § 88

Effect of court authorization or approval § 9612

Giving notice by citation §§ [1206, 1207]

Proof of giving notice § 7308

Verification required § 7203

Note. The notice provision of subdivision (b) will be reviewed when the general notice provisions are drafted. Subdivision (c) also will be reviewed when the general notice and citation provisions are drafted.

Min. 5/86-jd

*06/03/86

§ 10002. Directions in will as to mode of selling or property to be sold

10002. (a) Subject to subdivision (b), if directions are given in the will as to the mode of selling or the particular property to be sold, the personal representative shall comply with those directions.

(b) If the court determines that it would be to the advantage of the estate and in the best interest of the interested persons, the court may make an order relieving the personal representative of the duty to comply with the directions in the will. The order shall specify the mode and the terms and conditions of selling or the particular property to be sold, or both. The personal representative or any interested person may file a petition for an order under this subdivision. Notice of the hearing on the petition shall be given for the period and in the manner provided in Section [1200.5].

Comment. Subdivision (a) of Section 10002 continues the last sentence of former Probate Code Section 757 without substantive change. Subdivision (b) is new. Subdivision (b) permits the court the dispense in whole or in part with the directions given in the will where good cause is shown why the personal representative should not be

required to comply with the directions. The court may make an order under subdivision (b), for example, where the property directed to be sold to pay the decedent's debts has greatly increased in value since the will was executed and there is sufficient cash in the estate to pay the debts and paying the debts with the cash would not adversely affect any of the interested persons. Or the court may determine that the mode of selling directed in the will is not appropriate under the circumstances existing at the time the property is to be sold.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Property § 62

Will § 88

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Verification required § 7203

Note. At the May meeting, the Commission decided to permit the court to make an order relieving the personal representative from complying with directions in the will as to the mode of selling or the particular property to be sold. Subdivision (b) has been added to Section 10002 to effectuate this decision. This subdivision should be reviewed by the Commission.

Note. The notice provision in the last sentence of subdivision (b) will be reviewed when the general notice provisions are drafted.

Min. 5/86-jd

*06/03/86

10003. Discretion of personal representative as to property to be sold and mode of selling

10003. Subject to Article 5 (commencing with Section 6190) of Chapter 5 of Part 1 of Division 6 and to Sections 10001 and 10002, if estate property is required or permitted to be sold, the personal representative may:

(a) Use his or her discretion as to which property, real or personal, to sell first.

(b) Sell the entire interest of the estate in the property or any lesser interest or estate therein.

(c) Sell the property either at public auction or private sale.

Comment. Subdivision (a) of Section 10003 restates the first sentence and a portion of the second sentence of former Probate Code Section 754 without substantive change except that the former provision

provided that there shall be no priority between personal and real property in selling property "to pay debts, legacies, family allowance or expenses." Subdivision (a) of Section 10003 applies without regard to the reason that causes the property to be sold. For the rules of abatement, see Sections 6190-6194.

Subdivision (b) restates the third sentence of former Probate Code Section 754 without substantive change.

Subdivision (c) restates a portion of the second sentence of former Probate Code Section 754 and a portion of the first sentence of former Section 757 without substantive change.

CROSS-REFERENCES

Compliance with directions in will § 10002

Definitions

Devise § 32

Personal property § 57

Personal representative § 58

Property § 62

Real property § 68

Sale of assests of estate as unit § 10004

Min. 5/86-jd

*06/03/86

§ 10004. Sale of assets, whether real or personal, as a unit

10004. (a) When the personal representative determines in his or her discretion that, by use or relationship, any assets of the estate, whether real or personal, constitute a unit for purposes of sale, the personal representative may cause the property to be appraised as a unit.

(b) Whether or not the property is appraised as a unit, the personal representative may sell all the assets described in subdivision (a) as a unit and under one bid if the court finds the sale to be to the advantage of the estate.

(c) No private sale of the assets as a unit may be made for less than 90 percent of the sum of the appraised values of the personal property and the sum of the appraised values of the real property, appraised separately, or for less than 90 percent of the appraised value if appraised as a unit.

(d) If the assets to be sold as a unit include any real property, the sale shall be made in the manner provided for the sale of real property, and the bid and sale are subject to the limitations and restrictions established for the sale of real property. If the assets to be sold as a unit are entirely personal property, the property shall be sold in the manner provided for the sale of personal property.

Comment. Section 10004 restates former Probate Code Section 754.5 without substantive change. The personal representative is required to exercise the power granted by this section (by filing a petition with a court) to the extent that ordinary care and diligence requires that the power be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Definitions

Court § 29
Personal property § 57
Personal representative § 58
Property § 62
Real property § 68

Min. 5/86-jd

*06/03/86

§ 10005. Sale for more or less than appraisement

10005. (a) If any property of the estate is sold for more than the appraisement, the personal representative shall account for the [proceeds of sale], including the excess over the [appraisement].

(b) If any property of the estate is sold for less than the [appraisement] and the sale has been made in accordance with law, the personal representative is not responsible for the loss.

Comment. Section 10005 restates the last sentence of former Probate Code Section 920 without substantive change. The language in subdivision (a) requiring the personal representative to account for the "proceeds of sale" is new, but is consistent with case law. See In re Estate of Gianelli, 146 Cal. 139, 141, 79 P. 841 (1905).

The language in subdivision (b) that the personal representative is not responsible for a loss where a sale is made "in accordance with law" replaces the former reference to a sale which is "justly" made. The new language is consistent with case law. See In re Estate of Guglielmi, 138 Cal. App. 80, 86-88, 31 P.2d 1078 (1934). The new language embraces both a sale made in accordance with this chapter and a sale made under the Independent Administration of Estates Act.

See also Sections 9651 (personal representative shall not profit from increase, nor suffer loss from decrease or destruction without fault), 10900 (duty to account).

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62

Note. Consideration should be given to including Section 10005 in the provisions relating to accounting.

Article 2. Contract With Agent, Broker, or Auctioneer

Min. 5/86-jd

*06/04/86

§ 10150. Contract with agent or broker

10150. (a) The personal representative may enter into a written contract with either or both of the following:

(1) A licensed real estate broker, or multiple group of licensed real estate brokers, to secure a purchaser for any real property of the estate.

(2) One or more agents or brokers to secure a purchaser for any personal property of the estate. If the particular property to be sold or the particular manner of sale requires that the agent or broker be licensed, the contract may be made only with an agent or broker that is so licensed.

(b) The contract may provide for payment of a commission out of the proceeds of sale, but the contract is binding and valid as against the estate only for such amount as the court allows pursuant to Article 3 (commencing with Section 10160). No liability of any kind is incurred by the estate under the contract or a sale unless the sale is confirmed by the court, except for its obligations to the purchaser of personal property as to which title passes pursuant to Section 10259 without court confirmation or approval. The personal representative is not personally liable on the contract by reason of execution of the contract.

(c) The contract may grant an exclusive right to sell property for a period not in excess of 90 days if prior to execution of the contract granting an exclusive right to sell the personal representative obtains permission of the court to enter into the contract upon a showing of necessity and advantage to the estate. The court may grant the permission when the personal representative is appointed or at any subsequent time upon ex parte application. The personal representative may execute one or more extensions of the contract granting an exclusive right to sell property, each extension being for a period not in excess of 90 days, if for each extension the personal representative obtains permission of the court upon ex parte application to extend the contract upon a showing of necessity and advantage to the estate of the extension.

Comment. Subdivision (a) of Section 10150 continues a portion of the first sentence of former Probate Code Section 760 without substantive change except that the former reference to a "bona fide agent or broker" is replaced by the reference to a "licensed real estate broker" in paragraph (1) and by the second sentence of paragraph (2). For various licensing provisions, see Bus. & Prof. Code §§ 5731 (auctioneer), 10000-10602 (real estate brokers); Fin. Code § 22200 (personal property brokers); Health & Safety Code §§ 18006, 18045 (sale of mobilehomes and manufactured housing).

The first sentence of subdivision (b) continues the last portion of the first sentence and the fourth sentence of former Probate Code Section 760 without substantive change. The second sentence of subdivision (b) continues the last portion of the last sentence of former Probate Code Section 760 with the addition of the phrase "except for its obligations to the purchaser of personal property as to which title passes pursuant to Section 10259 without court confirmation or approval." This additional phrase is clarifying and is drawn from former Probate Code Section 760.5, continued as Estate and Trust Code Section 10151. The third sentence of subdivision (b) restates the first portion of the fifth sentence of former Probate Code Section 760 without substantive change.

The first two sentences of subdivision (c) continue the third sentence of former Probate Code Section 760 without substantive change. The third sentence of subdivision (c) is new and makes clear that the exclusive right to sell contract may be extended for any number of additional periods (each period not in excess of 90 days) if the personal representative obtains permission of the court for each extension.

CROSS-REFERENCES

Contract with auctioneer § 10151

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Property § 62

Real property § 68

Note. This section has been revised to reflect decisions made at the May 1986 meeting and should be reviewed by the Commission.

J. Earle Norris, Vice President and Senior Claims Counsel, Ticor Title Insurance, Los Angeles, commented concerning the independent administration recommendation:

The first comment is . . . concerning . . . exclusive right to sell. That section as drafted indicates an exclusive right to sell for 90 days. In my experience in the last few years many real estate brokers will not take a listing of property unless it is at least a six month listing. I would suggest that the section be opened to allow a longer listing period.

The staff has added the provision for renewal of the exclusive right to sell contract to Section 10150, but such a renewal provision does not protect the broker because there is no requirement that the contract be renewed unless the personal representative decides to renew.

Another experienced and highly regarded probate lawyer called me to ask why it was necessary to get court approval to grant an exclusive sales contract to a broker or agent. Considering that the contract can not be for more than 90 days and that the agent's or broker's commission is subject to court review and limited to the amount the court determines is reasonable, what purpose is served by requiring court approval? Is the court approval not routinely given? Is this a case where unnecessary paperwork is required? Is protection needed in view of the fact that the court has the final say on the compensation after a sale is confirmed? The staff recommends that court approval not be required to enter into an exclusive sales contract, but that court approval be required to renew such a contract. Also, we would give the court authority to authorize an exclusive sales contract for a term longer than 90 days for good cause shown.

Min. 5/86-jd

*06/03/86

§ 10151. Contract with auctioneer

10151. (a) The personal representative may enter into a written contract with any of the following:

(1) Where the public auction sale will be held in this state, an auctioneer who holds a valid license under Chapter 3.7 (commencing with Section 5700) of Division 3 of the Business and Professions Code to conduct a public auction sale and to secure purchasers by that method for any personal property of the estate to the extent authorized under Chapter 3.7 (commencing with Section 5700) of Division 3 of the Business and Professions Code.

(2) Where the public auction sale will be held outside this state pursuant to an order made under Section 10254, an auctioneer who is legally permitted in the jurisdiction where the sale will be held to conduct a public auction sale and to secure purchasers by that method for the personal property authorized to be sold by public auction sale in that jurisdiction under the court order.

(b) The contract may provide for payment to the auctioneer of a fee or commission out of the proceeds of sale and for reimbursement of expenses, but the contract is binding and valid as against the estate only for such amounts as the court allows pursuant to Section 10167. No liability of any kind is incurred by the estate under the contract or a sale unless the sale is approved by the court, except for its obligations to the purchaser of personal property as to which title passes pursuant to Section 10259 without court confirmation or

approval. The personal representative is not personally liable on the contract by reason of execution of the contract.

(c) The contract may provide that personal property of two or more estates being administered by the same personal representative may be sold at the same public auction sale. Items of personal property may be sold separately or in a lot with other items from the same estate. A sale pursuant to the contract shall be with reserve. The auctioneer shall comply with the instructions of the personal representative with respect to withdrawal of items, risk of loss, place of delivery, warranties, and other matters.

Comment. Subdivision (a) of Section 10151 restates the first and sixth sentences of former Probate Code Section 760.5 with the following changes:

(1) The reference in former Section 760.5 to a "bona fide" auctioneer "authorized to act as such in the locality" is replaced by the reference to an auctioneer licensed under the Auctioneer and Auction Licensing Act (Bus. & Prof. Code §§ 5700-5791.5) and, where the sale is to be made in another jurisdiction, the reference to a person permitted to sell the property by public auction sale in that jurisdiction.

(2) The provision of former Section 760.5 authorizing auction sale of "tangible" personal property is revised to authorize auction sale of all personal property an auctioneer may auction under the Auctioneer and Auction Licensing Act (see, e.g., Bus. & Prof. Code §§ 5701(j), 5774, 5775-5776).

Subdivisions (b) and (c) of Section 10151 restate the remainder of former Probate Code Section 760.5 without substantive change except for the last portion of the third sentence which is replaced by Section 10152.

See also Sections 10254 (sales at public auction), 10259 (personal representative responsible for the value of property title to which passes without court confirmation or approval unless the court subsequently approves the sale).

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Sales at public auction § 10254

Note. This section has been revised to reflect decisions made at the May 1986 meeting and should be reviewed by the Commission. Section 10151 is drafted to permit a contract not only with an auctioneer licensed under California law but also with an auctioneer permitted to sell in another jurisdiction where the sale will take place in that jurisdiction. See Section 10254(b)(1), providing that the court may order that a sale of personal property at public auction be made at any place within or without the United States. Does the requirement that the sale be with reserve limit the usefulness of the section?.

Article 3. Compensation of Agent, Broker, or Auctioneer

Min. 5/86-jd

*06/03/86

§ 10160. Limitation on liability of estate

10160. (a) Except as provided in subdivision (b), the estate is not liable to an agent, broker, or auctioneer under a contract for the sale of property or in connection with a sale of property for any fee, commission, or other compensation or expenses unless the following requirements are satisfied:

(1) An actual sale is made.

(2) If court confirmation or approval is required, the sale is confirmed or approved by the court as required.

(3) The sale is consummated.

(b) Where the successful bidder is produced by an agent or broker [holding a contract under Section 10150 granting the exclusive right to sell the property] and the sale is confirmed by the court but estate does not receive the purchase price for the property sold because the successful bidder fails to complete the purchase, any deposit made by the successful bidder that is forfeited because the successful bidder fails to complete the purchase shall be divided between the estate and the agent or broker producing the successful bidder in such proportions as the court, in its discretion, determines to be reasonable under the circumstances of the particular case.

Comment. Subdivision (a) of Section 10160 restates the last portion of the last sentence of former Probate Code Section 760 and a portion of the third sentence of former Probate Code Section 760.5 with the addition of paragraph (3) which makes clear that the sale must be consummated before the estate is liable to the agent, broker, or auctioneer. In the case of real property, the requirement that an actual sale be made and be consummated requires that the estate receive the purchase price and that a deed be given to the purchaser and a mortgage or deed of trust be taken for payments due in the future. See Estate of Rule, 25 Cal.2d 1, 16, 152 P.2d 1003 (1944); Wilson v. Fleming, 106 Cal. App. 542, 549, 289 P. 658 (1930). As to when court confirmation or approval is not required, see Section 10259 (personal property).

Subdivision (b) is new. This subdivision makes clear that the court has authority to divide any forfeited deposit between the agent or broker producing the successful bidder and the estate. Under this authority, the court may order that all of the forfeited deposit be paid to the estate where that is reasonable under the circumstances or

may divide the deposit in such proportions as the court determines reasonable under the circumstances. In determining the amount of the forfeited deposit the estate is to receive, the court should take into account such costs and expenses to the estate as those resulting from the delay caused by the uncompleted sale and the cost of any court proceedings to confirm the sale and to vacate the sale.

CROSS-REFERENCES

Contract with agent or broker § 10150

Contract with auctioneer § 10151

Definitions

Court § 29

Property § 62

Note. This section has been revised to reflect the decisions made at the May 1986 meeting. The staff would exclude the bracketed material from subdivision (b).

Min. 5/86-jd

*06/03/86

§ 10161. Compensation and fees to be in reasonable amount determined by court

10161. Subject to the provisions of this article, whether or not the agent or broker has a contract with the personal representative, the fee, commission, or other compensation of an agent or broker in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable compensation for the services of the agent or broker to the estate.

Comment. Section 10161 restates a portion of the fourth sentence of former Probate Code Section 760 (contract binding "for an amount to be allowed by the court"), a portion of former Probate Code Section 761.5 (overbidder's agent entitled to "reasonable compensation" fixed by the court), and a portion of the second and third sentences of former Probate Code Section 785 (overbidder's agent entitled to "reasonable compensation" fixed by the court), without substantive change. Section 10161 uses language drawn primarily from the last portion of former Probate Code Section 761.5.

The compensation to an agent or broker may be for the sale of real or personal property. See Section 10150. For a limitation on the amount of compensation that may be allowed to the agent or broker who produces the successful overbidder, see Section 10162. See also Section 10166 (invalidity of provision in bid that certain amount of the bid be paid to agent or broker).

CROSS-REFERENCES

Contract with agent or broker § 10150

Definitions

Court § 29

Personal representative § 58

Property § 62

Note. This section has been revised to reflect decisions made at the May 1986 meeting and should be reviewed by the Commission.

Min. 5/86-jd

*06/04/86

§ 10162. Limitation on compensation of agent or broker producing successful overbidder

10162. [In the case of a sale of real property,] the compensation of the agent or broker who produces the successful bidder shall not exceed one-half of the difference between the amount of the bid in the original return and the amount of the successful bid. This limitation does not apply to the compensation of the agent or broker who holds the contract with the personal representative under Section 10150.

Comment. Section 10162 restates the fourth sentence of former Probate Code Section 785 without substantive change. See Review of Selected 1966 Code Legislation, at 160 (Cal. Con. Ed. Bar 1955) (50-50 split of former Section 761 subject to one-half of the difference limit of former Section 785).

CROSS-REFERENCES

Definitions

Personal representative § 58

Real property § 68

Note. This section has been revised to reflect decisions made at the May 1986 meeting and should be reviewed by the Commission. The staff recommends that this section be made applicable to all sales by removing the introductory provision that restricts the applicability of the section to sales of real property.

Min. 5/86-jd

*06/05/86

§ 10163. Compensation where original bid made by purchaser direct to estate and sale made on increased bid

10163. Subject to Section 10162, the court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed to the agent or broker who procured the purchaser to whom the sale is confirmed if all of the following conditions are satisfied:

(a) There is no agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property.

(b) The original bid was made direct to the estate by a purchaser who was not procured by an agent or broker.

(c) The court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by a bona fide agent or broker.

Comment. Section 10163 restates the substance of former Probate Code Section 761.5. Section 10163 refers to Section 10161 which continues the last portion of former Section 761.5 without substantive change. For a limitation on the amount of compensation that may be allowed to the agent or broker who produces the successful overbidder, see Section 10162.

CROSS-REFERENCES

Definitions

Court § 29

Note. This section has been revised to reflect decisions made at the May 1986 meeting and should be reviewed by the Commission.

Min. 5/86-jd

*06/05/86

§ 10164. Compensation where sale made on increased bid by purchaser not procured by agent or broker

10164. (a) This section applies only where the court confirms a sale on increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

(b) Except as provided in subdivision (c), the court shall allow the compensation determined under Section 10161 on the amount of the original bid to the agent or broker whose original bid was returned to the court.

(c) If an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property and the original bid returned to the court is made by a purchaser who was procured by another agent or broker, the compensation determined under Section 10161 on the amount of the original bid shall be divided between the agent or broker holding the contract and the other agent or broker as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the compensation shall be divided equally between the agent or broker holding the contract and the other agent or broker.

Comment. Subdivision (b) of Section 10164 continues the last sentence of former Section 761 without substantive change. Subdivision (c) is a new provision that covers the situation where an agent or broker holds an exclusive right to sell contract and the original bid returned to the court is made by a purchaser who was procured by another agent or broker. Former Section 761 failed to cover this situation. If there is an agreement concerning the sharing of commissions, subdivision (c) requires that the court divide the commission as provided in the agreement, rather than requiring the court to "give consideration" to the agreement as under the second sentence of former Probate Code Section 760.

The references to Section 10161 in Section 10164 make clear that the court has discretion to determine the total amount of compensation to be paid and allocated.

CROSS-REFERENCES

Definitions

Court § 29

Property § 62

Note. This section has been revised to reflect decisions made at the May 1986 meeting and should be reviewed by the Commission.

Min. 5/86-jd

*06/05/86

§ 10165. Compensation where sale made on increased bid by purchaser represented by agent or broker and another agent or broker holds exclusive right to sell contract

10165. (a) The court shall allow the compensation determined under Section 10161 on the full amount for which the sale is confirmed, as provided in this section, if both of the following conditions are satisfied:

(1) An agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property.

(2) The court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by another bona fide agent or broker.

(b) Subject to Section 10162, the agent or broker who procured the purchaser to whom the sale is confirmed shall be paid one-half of the compensation on the amount of the original bid and all of the compensation on the amount of the difference between the original bid and the amount for which the sale is confirmed.

(c) The other one-half of the compensation on the amount of the original bid shall be paid as follows:

(1) If the original bid returned to the court is made by a purchaser who was procured by the agent or broker holding a contract under Section 10150 granting the exclusive right to sell the property, the entire one-half of the compensation on the original bid shall be paid to that agent or broker.

(2) If the original bid returned to the court is made by a purchaser who was procured by another agent or broker, the one-half of the compensation on the amount of the original bid shall be divided between the agent or broker holding the contract granting the exclusive right to sell the property and the other agent or broker whose original bid was returned to the court for confirmation as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the one-half of the compensation on the amount of the original bid shall be divided equally between the agent or broker holding the contract and the other agent or broker whose original bid was returned to the court for confirmation.

Comment. The reference in subdivision (a) of Section 10165 to Section 10161 make clear that the court has discretion to determine the total amount of compensation to be allocated under Section 10165.

Subdivision (b) continues a portion of the first sentence of former Probate Code Section 761 without substantive change. The introductory clause of subdivision (b), referring to Section 10162, makes clear that the right to compensation under subdivision (b) is subject to the limitation stated in Section 10162. See Review of Selected 1955 Code Legislation, at 160 (Cal. Cont. Ed. Bar 1955) (50-50 split of former Section 761 subject to one-half of the difference limit of former Probate Code Section 785).

Paragraph (1) of subdivision (c) continues a portion of the first sentence of former Probate Code Section 761 without substantive change. Paragraph (2) is a new provision that covers the situation where an agent or broker holds an exclusive right to sell contract and the original bid returned to the court is made by a purchaser who was procured by another agent or broker. Former Section 761 failed to cover this situation. Paragraph (2) makes clear that the agent or broker holding an exclusive right to sell contract is allowed a commission whether or not he or she returns a bid to the court. In this respect paragraph (2) is consistent with what appears to have been prior law. See 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:50, at 301 (rev. ed. 1975). If there is an agreement concerning the sharing of commissions, subdivision (c) requires that the court divide the commission as provided in the agreement, rather than requiring the court to "give consideration" to the agreement as under the second sentence of former Probate Code Section 760.

CROSS-REFERENCES

Definitions

Court § 29

Property § 62

Note. This section has been revised to reflect decisions made at the May 1986 meeting and should be reviewed by the Commission.

Note. One probate lawyer has suggested that in the case where there are three agents or brokers (one holding the exclusive right to sell contract, another who produced the purchaser whose original bid was submitted to the court for confirmation, and a third who produced the purchaser to whom the sale was confirmed) that it would be simpler and more likely to motivate all the agents or brokers involved if the commission were split into three equal shares instead of as provided in Section 10165.

Min. 5/86-jd

*06/05/86

§ 10166. Condition of bid that certain amount of bid be paid to agent or broker

10166. Notwithstanding that a bid contains a condition that a certain amount of the bid shall be paid to an agent or broker by the personal representative, only such compensation as is proper under this article shall be allowed. Acceptance of the bid by the court binds the bidder even though the compensation allowed by the court is less than that specified by the condition.

Comment. Section 10166 restates the last portion of the sixth sentence of former Probate Code Section 785 (real property) without substantive change, and generalizes it to apply also to sales of personal property.

CROSS-REFERENCES

Definitions

Court § 29

Min. 5/86-jd

*06/05/86

§ 10167. Compensation and expenses of auctioneer

10167. Whether or not the auctioneer has a contract with the personal representative, the fees, compensation, and expenses of an auctioneer in connection with a sale of property shall be the amount the court, in its discretion, determines to be a reasonable amount for the services of the auctioneer to the estate.

Comment. Section 10167 is a new provision that is consistent with the second sentence of former Probate Code Section 760.5 (auctioneer's fee "to be determined by the court"). The language of Section 10167 is drawn from the language used in Section 10161 (compensation of agent or broker). The compensation to an auctioneer may be for the sale of personal property only. See Section 10151.

CROSS-REFERENCES

Contract with auctioneer § 10151

Definitions

Court § 29

Personal representative § 58

Article 4. Special Provisions Applicable to Particular Types of Property

Min. 5/86-jd

*06/05/86

§ 10200. Sale or surrender for redemption or conversion of securities

10200. (a) As used in this section, "securities" means "security" as defined in Section 70, land trust certificates, certificates of beneficial interest in trusts, investment trust certificates, mortgage participation certificates, or certificates of deposit for any of the foregoing, but does not include notes secured by a mortgage or deed of trust unless the note or notes have been authorized or permitted to be issued by the Commissioner of Corporations or have been made by a public utility subject to the Public Utilities Act.

(b) After authorization by order of court, securities may be sold, or surrendered for redemption or conversion, and title thereto passed without the need for subsequent court confirmation.

(c) To obtain an order under this section, the personal representative or any interested person shall file a petition stating the terms and conditions and the advantage to the estate of the proposed sale or redemption or conversion. If the court authorizes the sale, redemption, or conversion, the court's order shall fix the terms and conditions of sale, redemption, or conversion.

(d) Notice of the hearing on the petition shall be given for the period and in the manner provided in [Sections 1200 and 1200.5], [but the court may order that the notice be given for a shorter period or dispensed with].

(e) No notice of sale or of the redemption or conversion need be given if any of the following conditions is satisfied:

(1) The minimum selling price is fixed by the court.

(2) The securities are to be sold on an established stock or bond exchange.

(3) The securities to be sold are securities designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, inc., sold through a broker-dealer registered under the Securities Exchange Act of 1934 during the regular course of business of the broker-dealer.

(4) The securities are to be surrendered for redemption or conversion.

Comment. Section 10200 restates subdivisions (a) and (b) of former Probate Code Section 771 with the addition of the first sentence of subdivision (c) and the addition of paragraph (3) of subdivision (e). See also Section 10201 (sale or withdrawal of savings accounts and mutual capital certificates without court order).

The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Security § 70

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Transfer or conveyance pursuant to court order § 7411

Verification required § 7203

Note. The notice provision of subdivision (d) will be reviewed when the general notice provisions are drafted.

The definition of security in subdivision (a) should be reviewed to determine whether it contains language that is unnecessary in view of the broad definition of "security" in Section 70.

*06/05/86

§ 10201. Sale or withdrawal of savings accounts and mutual capital certificates

10201. (a) As used in this section:

(1) "Federal association" has the same meaning as defined in Section 5102 of the Financial Code.

(2) "Mutual capital certificate" has the same meaning as defined in Section 5111 of the Financial Code.

(3) "Savings account" has the same meaning as defined in Section 5116 of the Financial Code.

(4) "Savings association" has the same meaning as defined in Section 5102 of the Financial Code.

(5) "Withdrawal value" has the same meaning as defined in Section 5124 of the Financial Code.

(b) Notwithstanding Section 10200, savings accounts and mutual capital certificates of a savings association or federal association may be sold or surrendered for withdrawal by the personal representative, and title thereto passed, without notice of sale, prior order of court, or subsequent confirmation by the court, if an amount of money is obtained upon the sale or withdrawal not less than the withdrawal value of the savings account or the value of the mutual capital certificate.

Comment. Section 10201 restates subdivision (c) of former Probate Code Section 771 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29

Personal representative § 58

Note. Revision of the general definitions may permit the simplification of this section.

*06/05/86

§ 10202. Sale of subscription rights

10202. Notwithstanding Section 10200, if an estate by reason of owning securities, also owns or receives subscription rights for the purchase of additional securities, the personal representative may sell

all or part of the subscription rights without notice of sale, prior order of court, or subsequent confirmation by the court.

Comment. Section 10202 restates former Probate Code Section 771.5 without substantive change except that language is added to make clear that notice of sale is not required. This addition makes Section 10202 consistent with subdivision (e) of Section 10200 and with Section 10201. The words "stocks" and "bonds" which appeared in former Section 771.5 are omitted in view of the broad definition of "securities" provided in Section 70. See also Section 9734 (exercise of restricted option rights).

The personal representative is required to exercise the power granted by this section to the extent that ordinary care and diligence requires that the power be exercised and may not exercise the power to the extent that ordinary care and diligence requires that the power not be exercised. See Section 9600(b). As to the effect of court authorization or approval, see Section 9612.

CROSS-REFERENCES

Definitions

Personal representative § 58

Security § 70

Min. 5/86-jd

*06/05/86

§ 10203. Decedent's leasehold interest

10203. (a) Except as provided in subdivision (b), when property to be sold consists of a leasehold interest, the sale shall be made as in the case of the sale of personal property of the estate.

(b) The sale of a leasehold interest shall be made as in the case of the sale of real property of the estate if the interest to be sold consists of any of the following:

(1) A leasehold interest in real property with an unexpired term of 10 years or longer.

(2) A leasehold interest in real property together with an option to purchase the leased property or some part thereof.

(3) An oil or gas leasehold interest.

Comment. Section 10203 continues former Probate Code Section 754.6 without substantive change.

CROSS-REFERENCES

Definitions

Personal property § 57

Property § 62

Real property § 68

Transfer or conveyance pursuant to court order § 7411

Note. Should subdivision (b) be expanded to cover an interest in "a lease for the purpose of production of minerals, oil, gas, or other hydrocarbon substances"? See Section 9946 relating to an order authorizing the personal representative to execute such a lease.

Min. 5/86-jd

*06/05/86

§ 10204. Decedent's partnership interest

10204. Property of the estate that consists of a partnership interest or an interest belonging to an estate by virtue of a partnership formerly existing may be sold in the same manner as other personal property.

Comment. Section 10204 continues a portion of the first sentence of former Probate Code Section 774 without substantive change. A partner's interest in the partnership is that partner's share of the profits and surplus and is itself personal property. Corp. Code § 15026; *Kenworthy v. Hadden*, 87 Cal. App. 3d 696, 701, 151 Cal. Rptr. 169 (1978); see generally Annot., 80 A.L.R.2d 1107 (1961). See also Section 10261 (confirmation of sale of partnership interest).

CROSS-REFERENCES

Definitions

Personal property § 57

Transfer or conveyance pursuant to court order § 7411

Min. 5/86-jd

*06/05/86

§ 10205. Decedent's chose in action

10205. A chose in action belonging to the estate may be sold in the same manner as other personal property.

Comment. Section 10205 continues a portion of the first sentence of former Probate Code Section 774 without substantive change.

CROSS-REFERENCES

Definitions

Personal property § 57

Transfer or conveyance pursuant to court order § 7411

Min. 5/86-jd

*06/05/86

§ 10206. Decedent's contract right to purchase real property

10206. (a) Except as otherwise provided in this section, if the decedent at the time of death was possessed of a contract for the purchase of real property and the decedent's interest in the property

and under the contract is to be sold, the sale shall be made as in the case of the sale of real property of the estate.

(b) If the decedent's interest in the property and under the contract is sold, the sale shall be made subject to all payments which are due at the time of sale or which may thereafter become due on the contract. Except as provided in subdivision (d), if there are any payments due or to become due, title to the decedent's interest in the property and under the contract does not pass to the purchaser until the purchaser executes a bond to the personal representative that satisfies the requirements of subdivision (c).

(c) The bond shall be for the benefit and indemnity of the personal representative and the persons entitled to the interest of the decedent in the real property contracted for. The amount of the bond shall be equal to the amount of payments then due and thereafter to become due on the contract, with such sureties as the court [or judge] may approve. The bond shall be conditioned that the purchaser will (1) make all payments for the property which are then due or which become due after the date of the sale and (2) fully indemnify the personal representative and the person entitled to the interest of the decedent against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in the contract.

(d) The bond need not be given in either of the following cases:

(1) When no claim has been made against the estate on the contract and the time for [filing or presenting] claims has expired.

(2) When the person entitled to payment under the contract waives all recourse to the assets of the estate for payment and releases the estate and the personal representative from liability for payment.

Comment. Subdivision (a) of Section 10206 restates former Probate Code Section 800 without substantive change. The remainder of Section 10206 restates former Probate Code Section 801 without substantive change except Section 10206 substitutes a provision that title does not pass to the purchaser until the bond is furnished for the requirement of former Section 801 that the sale must not be confirmed by the court until the bond is given. This substitution avoids the need to furnish the bond until the sale has been confirmed but protects the estate against possible loss by retaining title in the estate until the bond is furnished. See also Section 10314 (assignment of contract right to purchaser after confirmation of sale and furnishing of bond if bond required).

Treating the sale of the decedent's contract right to purchase real property in the same manner as sale of real property generally is

consistent with the general treatment of such interests as real property at the decedent's death. See *Fleishman v. Woods*, 135 Cal. 256, 259, 67 P. 276 (1901) (equitable estate of vendee "is alienable, descendible, and devisable in like manner as real estate held by a legal title"); *Retsloff v. Smith*, 79 Cal. App. 443, 448, 249 P. 886 (1926) ("[i]f the purchaser dies while the contract is in force and effect, his interest passes to his heirs as real property").

CROSS-REFERENCES

Definitions

Court § 29

Person § 56

Personal representative § 58

Real property § 68

Transfer or conveyance pursuant to court order § 7411

Min. 5/86-jd

*06/06/86

§ 10207. Sale to grazing or pasture association in conformity with the federal Consolidated Farm and Rural Development Act

10207. (a) Real property suitable for a shift-in-land-use loan to develop grazing or pasture facilities may be sold under this section by the personal representative to a grazing or pasture association in conformity with the federal Consolidated Farm and Rural Development Act, 7 U.S.C. Sections 1921 et seq., after authorization by order of the court.

(b) The personal representative or any interested person may file a petition for an order under this section. Notice of the hearing on the petition shall be given for the period and in the manner provided by [Section 1200.5].

(c) An order for sale of property under this section may be made only if the court determines both of the following:

(1) Either the sale is made pursuant to the will of the decedent or all the decedent's heirs or all of the devisees having an interest in the property under the decedent's will consent to the sale.

(2) The sale will not jeopardize the rights of creditors of the estate.

(d) If the court makes an order authorizing sale of the property, the personal representative may make the sale in accord with the terms and conditions set out in the order, subject to the following requirements:

(1) Except as provided in Sections 10002, 10301, 10303, and 10500, notice of the time and place of the sale shall be published pursuant to Section 10300.

(2) The price of the sale made shall be not less than the value of the property as established by an independent and competent appraiser mutually acceptable to the federal government, the grazing or pasture association, and the personal representative.

(3) Except as provided in Sections 10002 and 10500, the sale shall be reported to and confirmed by the court as provided in Article 6 (commencing with Section 10300) before title to the property passes, but the sale may be made irrespective of whether a higher bid is made to the court at the hearing on the petition to confirm the sale.

Comment. Section 10207 restates subdivision (b) of former Probate Code Section 794 without substantive change but with the addition of subdivision (b).

Subdivision (a) of former Section 794 which contained a finding and declaration by the legislature concerning the need for the enactment of the section is not continued but remains relevant should Section 10207 be challenged in court.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Devisee § 34

Heirs § 44

Interested person § 48

Personal representative § 58

Real property § 68

Will § 88

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Transfer or conveyance pursuant to court order § 7411

Verification required § 7203

Note. A check should be made to determine that the federal act is still in existence and the section is in conformity with the federal act.

The notice provision of subdivision (b) will be reviewed when the general notice provisions are drafted.

Article 5. Sale of Personal Property

*06/06/86

§ 10250. Notice of sale

10250. Subject to Sections 10251 and 10252 and except as otherwise provided by statute, personal property of the estate may be sold only after notice of sale is given by one or both of the following methods, as the personal representative may determine:

(a) By posting at the county courthouse of the county in which the proceedings are pending, for at least 10 days before:

(1) In the case of a private sale, the day specified in the notice of sale as the day on or after which the sale is to be made.

(2) In the case of a public auction sale, the day of the auction.

(b) By publication pursuant to Section 6063a of the Government Code in a newspaper in the county in which the proceedings are pending, such publication to be completed before:

(1) In the case of a private sale, the day specified in the notice of sale as the day on or after which the sale is to be made.

(2) In the case of a public auction sale, the day of the auction.

Comment. Section 10250 restates the first sentence of former Probate Code Section 772 without substantive change. As to when property of the estate may or must be sold, see Sections 10000, 10001. See also Section 10251 (shortening time of notice of sale).

For provisions permitting sale of personal property without notice of sale, see Sections 10200 (securities), 10201 (savings accounts and mutual capital certificates), 10202 (subscription rights), 10252 (perishable property; property directed or authorized by will to be sold; property sold to pay family allowance), 10500 (sale under independent administration authority). See also Section 10006 (independent administration authority not limited).

CROSS-REFERENCES

Definitions

Personal property § 57
Personal representative § 58
Direction in will as to mode of selling § 10002
Discretion of personal representative as to
Mode of selling property § 10003
Property to be sold § 10003
Interests treated as personal property
Certain leasehold interests § 10203
Chose in action § 10205
Partnership interest § 10204
Sale without notice of sale
Mutual capital certificates § 10201
Perishable property § 10252
Property authorized or directed by will to be sold § 10252
Property sold to pay family allowance § 10252
Property sold under independent administration § 10500
Savings accounts § 10201
Securities § 10200
Subscription rights § 10202
Shortening time of notice of sale § 10251

COMPARABLE PROVISION

Real property sales § 10300-10301

Min. 5/86-jd

*06/06/86

§ 10251. Shortening time of notice of sale

10251. (a) If it is shown that it will be for the advantage of the estate, the court [or judge] may by order shorten the time of notice of sale to five days.

(b) If the court [or judge] makes an order under subdivision (a), notice of sale shall be given by one or both of the following methods, as the personal representative may determine:

(1) By posting as provided in Section 10250 except that the posting shall be for for at least five days instead of 10 days as required by Section 10250.

(2) By publication as provided in Section 10250 except that the publication shall be pursuant to Section 6061 of the Government Code.

Comment. Section 10251 restates the second sentence of former Probate Code Section 772 without substantive change. The reference in Section 10251 to a court "or judge" is drawn from former Probate Code Section 782 (real property).

CROSS-REFERENCES

Definitions

Court § 29

COMPARABLE PROVISION

Real property sales § 10302

Min. 5/86-jd

*06/06/86

§ 10252. Sale without notice of sale

10252. Personal property may be sold with or without notice, as the personal representative may determine, in any of the following cases:

- (a) Where the property is directed by the will to be sold.
- (b) Where authority is given in the will to sell the property
- (c) Where the property is perishable, will depreciate in value if not disposed of promptly, or will incur loss or expense by being kept.
- (d) Where sale of the property is necessary to provide for the payment of a family allowance pending receipt of other sufficient funds.

Comment. Subdivisions (a) and (b) of Section 10252 restate a portion of the first sentence of former Probate Code Section 757 without substantive change. Under Section 10252, it is not necessary that the will specifically grant the personal representative authority to sell without notice. If the will directs or authorizes the sale, whether or not notice should be given is within the discretion of the personal representative. See *Bagley v. Bloom*, 19 Cal. App. 255, 271, 125 P. 931 (1912). However, unless there is some other statutory provision dispensing with the need for confirmation of the sale in the particular case, a sale of personal property made pursuant to a direction or authorization in the will must be confirmed by the court before title to the property passes to the purchaser. See Section 10260.

Subdivisions (c) and (d) restate the first portion of former Probate Code Section 770 without substantive change.

For other provisions permitting sale of personal property without notice of sale, see Sections 10200 (securities), 10201 (savings accounts and mutual capital certificates), 10202 (subscription rights), 10500 (sales under independent administration authority).

CROSS-REFERENCES

Definitions

Personal property § 57
Personal representative § 58
Property § 62
Direction in will as to mode of selling § 10002
Interests treated as personal property
 Certain leasehold interests § 10203
 Chose in action § 10205
 Partnership interest § 10204
Sale without notice of sale
 Mutual capital certificates § 10201
 Property sold under independent administration § 10500
 Savings accounts § 10201
 Securities § 10200
 Subscription rights § 10202

COMPARABLE PROVISION

Real property sales § 10303

Min. 5/86-jd

*06/06/86

§ 10253. Contents of notice of sale

10253. (a) The notice of sale given pursuant to Section 10250 shall state all of the following:

(1) Whether the sale is to be a private sale or a public auction sale.

(2) In the case of a private sale, the place at which bids or offers will be received and a day on or after which the sale will be made or, in the case of a public auction sale, the time and place of sale.

(3) A brief description of the personal property to be sold.

(b) The notice of sale may state other matters in addition to those required by subdivision (a), including terms and conditions of sale.

Comment. Subdivision (a) of Section 10253 restates the third sentence and a portion of the fourth sentence of former Probate Code Section 772 without substantive change.

Subdivision (b) is new and codifies existing practice. See Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.53, at 540 (Cal. Cont. Ed. Bar 1971).

CROSS-REFERENCES

Definitions

Personal property § 57
Direction in will as to mode of selling § 10002
Discretion of personal representative
Sale either at public auction or private sale § 10003
Sale of assets of estate as unit § 10004
Sale of entire interest or lesser interest § 10003
Interests treated as personal property
Certain leasehold interests § 10203
Chose in action § 10205
Partnership interest § 10204
Sale pursuant to contract with auctioneer § 10151

COMPARABLE PROVISION

Real property sales § 10304

Min. 5/86-jd

*06/06/86

§ 10254. Sale at public auction

10254. (a) Unless the court orders otherwise pursuant to subdivision (b):

(1) A sale of personal property at a public auction sale shall be made within this state at the courthouse door, at the auction house, at some other public place, or at the residence of the decedent.

(2) No public auction sale shall be made of any tangible personal property that is not present at the time of sale.

(b) Upon petition of the personal representative or any interested person, the court may order either or both of the following:

(1) That a sale of personal property at public auction be made at any place within or without the United States.

(2) That tangible personal property need not be present at the time of sale.

(c) The personal representative may postpone a public auction sale of personal property from time to time if all of the following conditions are satisfied:

(1) The personal representative believes that the postponement will serve the interests of all persons concerned.

(2) Notice of the postponement is given by public declaration at the time and place appointed for the sale.

(3) The postponement, together with previous postponements of sale of the property, does not exceed three months in all.

Comment. Section 10254 restates the fifth, sixth, and seventh sentences of former Probate Code Section 772 without substantive change, except that the former requirement that personal property be present at the time of sale is limited to "tangible" personal property, and the authority for the court to order that the auction be held somewhere other than as required in paragraph (1) of subdivision (a) is new. The court may order, for example, that rare art works be sold in some other country when to do so will afford a better market.

See also Section 10151 (manner of sale pursuant to contract with auctioneer). For the provision concerning passage of title to personal property sold at public auction without court confirmation or approval, see Section 10259. The overbid provision does not apply where property is sold at public auction. See Section 10262.

CROSS-REFERENCES

Confirmation, when not required § 10259

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Direction in will as to mode of selling § 10002

Discretion of personal representative

Sale either at public auction or private sale § 10003

Sale of assets of estate as unit § 10004

Compensation of auctioneer § 10167

Contract with auctioneer § 10151

Independent administration authority § 10500

Manner of sale pursuant to contract with auctioneer § 10151

Overbid provision not applicable § 10262

COMPARABLE PROVISION

Real property sales § 10305

Min. 5/86-jd

*06/06/86

§ 10255. Private sale

10255. A private sale of personal property may not be made before the day stated in the notice of sale as the day on or after which the sale will be made, nor later than one year after that day.

Comment. Section 10255 restates a portion of the fourth sentence of former Probate Code Section 772 without substantive change.

CROSS-REFERENCES

Compensation of agent or broker §§ 10160-10166

Contract with agent or broker § 10150

Definitions

Personal property § 57

Direction in will as to mode of selling § 10002

Interests treated as personal property

Certain leasehold interests § 10203

Chose in action § 10205

Partnership interest § 10204

Sale to lienholder § 10363

COMPARABLE PROVISION

Real property sales § 10306

Min. 5/86-jd

*06/06/86

§ 10256. Bids to comply with notice of sale

10256. Whether a sale of personal property is private or at public auction, bids shall substantially comply with any terms specified in the notice of sale.

Comment. Section 10256 is new and is consistent with existing case law. See In re Estate of Dargie, 33 Cal. App. 2d 148, 155-57, 91 P.2d 126 (1939) (personal property); cf. Estate of Hunter, 194 Cal. App. 2d 859, 865-68, 15 Cal. Rptr. 556 (1961) (real property). For the section prescribing required and optional contents of the notice of sale, see Section 10253.

CROSS-REFERENCES

Credit sale §§ 10257, 10258

Definitions

Personal property § 57

Discretion of personal representative

Sale either at public auction or private sale § 10003

Sale of assets of estate as unit § 10004

Sale of entire interest or lesser interest § 10003

Independent administration authority § 10500

Interests treated as personal property

Certain leasehold interests § 10203

Chose in action § 10205

Partnership interest § 10204

COMPARABLE PROVISION

Real property sales § 10307

Min. 5/86-jd

*06/06/86

§ 10257. Sale for cash or on credit

10257. (a) Personal property may be sold for cash or on credit.

(b) Except as may otherwise be ordered by the court pursuant to Section 10258, if a sale is made on credit, not less than 25 percent of the purchase price shall be paid in cash at the time of sale, and the personal representative shall do one of the following:

(1) Take the note of the purchaser for the balance of the purchase money, with a security interest in the personal property sold, to secure the payment of the balance.

(2) Enter into a conditional sale contract under which title is retained until the balance is paid.

(c) The terms of the note and security interest or conditional sales contract shall be approved by the court at the time of confirmation of sale.

(d) Where property sold by the personal representative for part cash and part deferred payments consists of an undivided interest in personal property or any other interest therein less than the entire ownership and the owner or owners of the remaining interests therein join in the sale, the note and security interest may be made to the personal representative and such others having an interest in the property. The interest of the personal representative in the note and security interest shall be in the same tenancy and in the same proportions as the estate's interest in the property prior to the sale.

Comment. Subdivisions (a), (b), and (c) of Section 10257 restate the first, second, third, and fourth sentences of former Probate Code Section 773 without substantive change. "Security interest" is substituted in Section 10257 for "pledge" and "chattel mortgage" which appeared in former Section 773. Under the California Commercial Code, the security interest replaces the pledge and chattel mortgage. See California State Bar Committee on the Commercial Code, A Special Report, The Uniform Commercial Code, 37 Calif. State Bar J. 199 (19XX). Concerning the requirement that 25 percent of the purchase price be paid in cash at the time of sale, see Consolidated Copperstate Lines v. Frasher, 141 Cal. App. 2d 916, 297 P.2d 692 (1956).

Subdivision (d) restates the second and third sentences of former Probate Code Section 787 without substantive change as it applied to personal property.

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Direction in will as to mode of selling § 10002

Discretion of personal representative

Sale either at public auction or private sale § 10003

Sale of assets of estate as unit § 10004

Sale of entire interest or lesser interest § 10003

Independent administration authority § 10500

Interests treated as personal property

Certain leasehold interests § 10203

Chose in action § 10205

Partnership interest § 10204

COMPARABLE PROVISION

Real property sales § 10315

*06/06/86

§ 10258. Court order relaxing requirements for credit sale

10258. (a) On petition of the personal representative, the court may by order authorize a sale of personal property on credit on terms providing for less than 25 percent of the purchase price to be paid in cash at the time of sale, or may waive or modify the requirement that a security interest or other lien shall be retained or taken to secure payment of the balance of the purchase price, when in the opinion of the court the terms are for the best interests of the estate and the property to be sold is of such a nature that it is impracticable to sell the property for a larger cash payment at the time of sale or to retain a security interest or other lien in the property. The order of the court shall fix the terms and conditions of the sale.

(b) Notice of the hearing on the petition shall be given for the period and in the manner provided in [Sections 1200 and 1200.5]. In addition, notice of the hearing shall be given by mail at least 10 days prior to the hearing to [all heirs and devisees named in the petition for probate of the will or for letters of administration].

Comment. Section 10258 restates the fifth, sixth, seventh, and eighth sentences of former Probate Code Section 773 without substantive change. Section 10258 permits the court to vary the requirements of Section 10257 where it is impractical to meet those requirements, such as in the sale of an insurance business, a liquor license, the goodwill of a business, or the stock in trade of a merchant. 36 Cal. St. B.J. 829-30 (1961).

Only the personal representative may petition under Section 10258. An interested person may neither petition under Section 10258 nor petition for instructions under Section 9611. If the personal representative unreasonably refuses to petition under Section 10258, the interested person may petition for removal of the personal representative. See Sections 8500, 8502.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Devisee § 34

Heirs § 44

Personal property § 57

Personal representative § 58

Will § 88

Direction in will as to mode of selling § 10002

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Verification required § 7203

Independent administration authority § 10500

Interests treated as personal property

Certain leasehold interests § 10203

Chose in action § 10205

Partnership interest § 10204

Note. The notice of hearing provisions in subdivision (b) will be reviewed when the general notice provisions are drafted.

Min. 5/86-jd

***06/06/86**

§ 10259. Passage of title without court confirmation

10259. (a) Title to the following personal property passes upon sale without the need for court confirmation or approval:

(1) Personal property which is perishable, which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept.

(2) Personal property the sale of which is necessary to provide for the payment of a family allowance pending receipt of other sufficient funds.

(b) Title to personal property sold at public auction passes without the need for court confirmation or approval upon receipt of the purchase price and:

(1) In the case of tangible personal property, the delivery of the property to the purchaser.

(2) In the case of intangible personal property, the delivery to the purchaser of the instrument that transfers the title to the property to the purchaser.

(c) The personal representative is responsible for the actual value of the property described in subdivision (a) or (b) unless the sale is reported to and approved by the court.

Comment. Section 10259 restates former Probate Code Section 770 and the last sentence of former Probate Code Section 772 without substantive change. Paragraph (2) of subdivision (b) is new and reflects the expansion of the authority to sell at public auction to include intangible personal property. See Section 10254. See also Section 10152 (obligation to purchaser of property).

For other provisions dispensing with the requirement of court confirmation, see Sections 10200 (securities), 10201 (mutual capital certificates; savings accounts), 10202 (subscription rights), 10500 (sale under independent administration authority). For special confirmation provisions, see Sections 10206 (decedent's interest under contract to purchase real property), 10207 (property sold to grazing or pasture association).

CROSS-REFERENCES

Compensation of agent or broker §§ 10160-10166

Compensation of auctioneer § 10167

Definitions

Clerk § 27

Personal property § 57

Personal representative § 58

Direction in will as to mode of selling § 10002

Dispensing with court confirmation

Mutual capital certificates § 10201

Savings accounts § 10201

Securities § 10200

Subscription rights § 10202

Interests treated as personal property

Certain leasehold interests § 10203

Interest in personal property pledged § 10205

Partnership interest § 10204

Sale for more or less than appraisal § 10005

Sale pursuant to contract with auctioneer § 10151

Sale under independent administration authority § 10500

Min. 5/86-jd

*06/06/86

§ 10260. Report of sale and petition for confirmation of sale

10260. (a) Except as provided in Sections 10200, 10201, 10202, 10259, and 10500, all sales of personal property shall be reported to and be confirmed by the court before title to the property passes to the purchaser.

(b) If the personal representative fails to file the report and a petition for confirmation of the sale within 30 days after the sale, the purchaser at the sale may file the report and petition for confirmation of the sale.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in [Sections 1200 and 1200.5].

Comment. Section 10260 restates former Probate Code Section 755 without substantive change as it applied to personal property, but Section 10260 substitutes the requirement that the report and petition be "filed" within 30 days after each sale for the requirement of former Section 755 that the report and petition be "made" within 30 days after each sale and Section 10260 gives the purchaser the right to file the report and petition if the personal representative fails to file the report and petition within 30 days after the sale. The former provision required that the report and petition be filed within 30 days but did not state the remedy, if any, the purchaser had if the report and petition were not filed within the 30-day period..

For provisions dispensing with the requirement of court confirmation, see Sections 10200 (securities), 10201 (mutual capital certificates; savings accounts), 10202 (subscription rights), 10259 (personal property which is perishable, which will depreciate in value if not disposed of promptly, or which will incur loss or expense by being kept; personal property the sale of which is necessary to provide for the payment of a family allowance pending receipt of other sufficient funds; personal property sold at public auction), 10500 (sale under independent administration authority). See also Sections 10150 (liability on contract with agent or broker), 10151 (liability on contract with auctioneer), 10160-10167 (compensation of agent, broker, or auctioneer).

When property is directed by the will to be sold, or authority is given in the will to sell property, the personal representative may sell the property with or without notice of sale (Section 10252), but the personal representative must make a return of sale and obtain confirmation of the sale as in other cases and no title passes until the sale is confirmed by the court. See Section 10260. See also Section 10261(a) (when sale is directed or authorized by will, necessity and advantage of sale need not be shown at hearing on petition for confirmation of the sale). The provision for overbids at the confirmation hearing also applies to a sale authorized or directed by the will. See Section 10262. However, if the will provides for the mode of sale, the directions in the will must be followed. See Section 10002.

CROSS-REFERENCES

Application of purchase money when encumbered property sold
 § 10361-10362
Clerk to set matter for hearing § 7202
Contract with agent or broker § 10150
Contract with auctioneer § 10151
Definitions
 Court § 29
 Personal property § 57
Direction in will as to mode of selling § 10002
Dispensing with court confirmation
 Mutual capital certificates § 10201
 Perishable property § 10259
 Personal property sold at public auction § 10259
 Property sold to pay family allowance § 10259
 Sale under independent administration § 10500
 Savings accounts § 10201
 Securities § 10200
 Subscription rights § 10202
Effect of court authorization or approval § 9612
Interests treated as personal property
 Certain leasehold interests § 10203
 Chose in action § 10205
 Partnership interest § 10204
Proof of giving notice § 7308
Sale for more or less than appraisal § 10005
Sale pursuant to contract with auctioneer § 10151
Transfer or conveyance pursuant to court order § 7411
Verification required § 7203

COMPARABLE PROVISION

Real property sales § 10308

Note. Subdivision (c) will be reviewed when the general notice provisions are drafted.

Min. 5/86-jd

*06/10/86

§ 10261. Hearing on petition for confirmation of sale

10261. (a) Except as provided in this subdivision, at the hearing on the petition for confirmation of the sale, the court shall examine into the necessity for the sale or the advantage of the estate in making the sale. If the decedent's will authorizes or directs the property to be sold, there need be no showing of the necessity of the sale or advantage of the estate in making the sale.

(b) Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections.

(c) Before confirming the sale of a partnership interest, whether made to the surviving partner or to any other person, the court shall do both of the following:

(1) Inquire into the condition of the partnership affairs.

(2) Examine the surviving partner if the surviving partner is in the county and able to be present in court.

Comment. The first sentence of subdivision (a) of Section 10261 is a new provision drawn from a portion of the first sentence of former Probate Code Section 785 (real property). Section 10000 provides that real or personal property of the estate may be sold (1) when the sale is necessary to pay debts, devise, family allowance, expenses of administration, or taxes, (2) when the sale is to the advantage of the estate and in the best interest of the interested persons, (3) when the property is directed by the will to be sold, or (4) when authority is given in the will to sell the property. See also Section 10206 (requirement of bond in certain cases before confirmation of sale of decedent's contract right to purchase real property).

The second sentence of subdivision (a) is a new provision drawn from a portion of the second sentence of former Probate Code Section 757 (real property). This new provision of subdivision (a) permits real or personal property of the estate to be sold without further showing of necessity or advantage when the will authorizes or directs the sale.

Subdivision (b) restates the first sentence of former Probate Code Section 756 insofar as it applied to personal property with the addition of the phrase "at or before the hearing."

Subdivision (c) restates the second sentence of former Probate Code Section 774 without substantive change.

Unlike the statutes governing the sale of real property (see Sections 10309, 10313), those for sale of personal property do not require that the purchase price of the property be within a specified percentage range of the amount for which the property is appraised by the probate referee. Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.56, at 542 (Cal. Cont. Ed. Bar 1971).

CROSS-REFERENCES

Application of purchase money when encumbered property sold

§ 10361-10362

Definitions

Court § 29

Interested person § 48

Will § 88

Direction in will as to mode of selling § 10002

Proof of giving notice § 7308

Sale for more or less than appraisal § 10005

Sale to lienholder § 10363

Vacating sale when purchaser defaults

Confirming sale to new higher bidder § 10351

Order for resale § 10350

COMPARABLE PROVISION

Real property sales § 10310

Min. 5/86-jd

*06/10/86

§ 10262. Overbid

10262. (a) Except as provided in subdivision (b), if a written offer to purchase the property is made to the court at the hearing on the petition for confirmation of the sale and the new bid is at least 10 percent more than the amount stated in the report made to the court, the court in its discretion may accept the new bid and confirm the sale to the offeror, or may order a new sale, if all of the following conditions are satisfied:

(1) The original bid as stated in the report to the court is more than \$100 or, if the original bid is for less than \$100, the increased bid is for not less than \$100 more than the original bid.

(2) The new bid is made by a responsible person.

(3) The new bid complies with all provisions of law.

(b) If there is more than one offer that satisfies the requirements of subdivision (a), the court shall do one of the following:

(1) Accept the highest such offer and confirm the sale to the offeror.

(2) Order a new sale.

(c) This section does not apply to a sale of property described in Section 10259.

Comment. Section 10262 restates former Probate Code Section 756.5 without substantive change except that Section 10262 permits an overbid where the original bid is less than \$100 and the overbid is not less than \$100 more than the original bid. Subdivision (b) is a new provision drawn from former Probate Code Section 785. See also Section 10207 (sale to grazing or pasture association permitted irrespective of whether higher bid made at confirmation hearing).

Unlike the statutes governing the sale of real property (see Sections 10309, 10313), those for sale of personal property do not require that the purchase price of the property be within a specified percentage range of the amount for which the property is appraised by the probate referee. Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.56, at 542 (Cal. Cont. Ed. Bar 1971).

CROSS-REFERENCES

Agent or broker

Compensation §§ 10160-10166

Contract § 10150

Definitions

Court § 29

Personal property § 57

Direction in will as to mode of selling § 10002

Sale for more or less than appraisal § 10005

COMPARABLE PROVISION

Real property sales § 10311

Min. 5/86-jd

*06/10/86

§ 10263. Proof that notice of sale was given

10263. If notice of the sale was required, before an order is made confirming the sale, it shall be proved to the satisfaction of the court that notice of the sale was given as required by this article, and the order of confirmation shall show that such proof was made.

Comment. Section 10263 restates the last sentence of former Probate Code Section 756 without substantive change as it applied to personal property.

CROSS-REFERENCES

Definitions

Court § 29

COMPARABLE PROVISION

Real property sales § 10312

Note. This section might possibly be replaced by a general provision.

*06/03/86

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Article 6. Sale of Real Property

Min. 5/86-jd

*06/10/86

§ 10300. Publication of notice of sale

10300. (a) Except as provided in Sections 10301 to 10303, inclusive, and in Section 10500, real property of the estate may be sold only after notice of sale has been published pursuant to Section 6063a of the Government Code (1) in a newspaper published in the county in which the real property or some portion thereof lies or (2) if there is no such newspaper, in such newspaper as the court [or judge] may direct.

(b) The publication of notice of sale shall be completed before:

(1) In the case of a private sale, the day specified in the notice as the day on or after which the sale is to be made.

(2) In the case of a public auction sale, the day of the auction.

Comment. Section 10300 restates the first sentence of former Probate Code Section 780 without substantive change, except that the requirement that the notice state the "time and place" of sale is continued in Section 10304. For provisions permitting sale of real property without notice of sale, see Sections 10303 (property authorized or directed by will to be sold), 10500 (sale under independent administration authority). See also Section 9640 (independent administration authority not limited). As to when property of the estate may or must be sold, see Sections 10000, 10001.

CROSS-REFERENCES

Definitions

Court § 29
Real property § 68
Direction in will as to mode of selling § 10002
Discretion of personal representative
Mode of selling property § 10003
Property to be sold § 10003
Dispensing with publication of notice of sale
Property appraised at not more than \$5,000 § 10301
Interests treated as real property
Certain real property leasehold interests § 10203
Decedent's interest under contract to purchase real property § 10206
Oil or gas leasehold interest § 10203
Personal property sold with real property as a unit § 10004
Publication of notice of sale to grazing or pasture association § 10207
Sale without notice of sale
Property authorized or directed by will to be sold § 10303
Property sold under independent administration §§ 9640, 10500
Shortening time of notice of sale § 10302

COMPARABLE PROVISION

Personal property sales § 10250

Min. 5/86-jd

*06/10/86

§ 10301. Notice of sale where property appraised at not more than \$5,000

10301. (a) If it appears from the inventory and [appraisement] that the value of the real property to be sold does not exceed five thousand dollars (\$5,000), the personal representative may in his or her discretion dispense with publication of notice of sale and, in lieu of publication, post the notice of sale at the courthouse of the county in which the real property or some portion thereof lies.

(b) Except as provided in Section 10302, posting pursuant to this section shall be for at least 10 days before:

(1) In the case of a private sale, the day specified in the notice of sale as the day on or after which the sale is to be made.

(2) In the case of a public auction sale, the day of the auction.

Comment. Section 10301 restates the second sentence of former Probate Code Section 780 except that Section 10301 increases the amount from \$1,000 to \$5,000. The amount was last increased to \$1,000 in 1959. The increase to \$5,000 reflects the effect of inflation during the last 30 years.

CROSS-REFERENCES

Definitions

Personal representative § 58

Real property § 68

Direction in will as to mode of selling § 10002

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

Publication of notice of sale to grazing or pasture association § 10207

Sale without notice of sale

Property authorized or directed by will to be sold § 10303

Property sold under independent administration §§ 9640, 10500

Shortening time of notice of sale § 10302

Min. 5/86-jd

*06/10/86

§ 10302. Shortening time of notice of sale

10302. (a) If it is shown that it will be to the advantage of the estate, the court [or judge] may by order shorten the time of notice of sale to five days.

(b) Except as provided in subdivision (c), if the court [or judge] makes an order under subdivision (a), notice of sale shall be published as provided in Section 10300 except that the publication shall be pursuant to Section 6061 of the Government Code.

(c) In a case described in Section 10301, if the court makes an order under subdivision (a), notice of sale shall be posted as provided in Section 10301 except that the posting shall be for at least five days instead of 10 days as required by Section 10301.

Comment. Section 10302 restates the last portion of the first sentence of former Probate Code Section 782 without substantive change except that posting is required to be for at least five days instead of "one week" as required by former Section 782. The five-day posting period required by Section 10302 is consistent with the posting period required by Section 10251 (shortening time of notice of sale of personal property) which continues the five-day posting period required by former Probate Code Section 772.

CROSS-REFERENCES

Definitions

Court § 29

COMPARABLE PROVISION

Personal property sales § 10251

Note. The staff will check to determine whether the five and 10 day periods are "court days" or "calendar days."

Min. 5/86-jd

*06/10/86

§ 10303. Sale without notice where will directs or authorizes sale

10303. Real property may be sold with or without notice, as the personal representative may determine, in either of the following cases:

- (a) Where the property is directed by the will to be sold.
- (b) Where authority is given in the will to sell the property.

Comment. Section 10303 restates a portion of the first sentence of former Probate Code Section 757 without substantive change as it applied to real property. Under Section 10303, it is not necessary that the will specifically grant the personal representative authority to sell without notice. If the will directs or authorizes the sale, whether or not notice should be given is within the discretion of the personal representative. See *Bagley v. Bloom*, 19 Cal. App. 255, 271, 125 P. 931 (1912). However, a sale of real property made pursuant to a direction or authorization in the will must be confirmed by the court before title to the property passes to the purchaser. See Section 10308. See also Section 10500 (sale without notice or court confirmation under independent administration authority).

CROSS-REFERENCES

Definitions

Personal representative § 58
Real property § 68
Will § 88

Direction in will as to mode of selling § 10002

Interests treated as real property

Certain real property leasehold interests § 10203
Decedent's interest under contract to purchase real property § 10206
Oil or gas leasehold interest § 10203
Personal property sold with real property as a unit § 10004
Publication of notice of sale to grazing or pasture association § 10207
Sale without notice of sale
Property sold under independent administration §§ 9640, 10500

COMPARABLE PROVISION

Personal property sales § 10252

Min. 5/86-jd

*06/10/86

§ 10304. Contents of notice of sale

10304. (a) The notice of sale given pursuant to this article shall state all of the following:

(1) Whether the sale is to be a private sale or a public auction sale.

(2) In the case of a private sale, the place at which bids or offers will be received and a day on or after which the sale will be made or, in the case of a public auction sale, the time and place of sale.

(3) The street address or other common designation or, if none, a legal description of the real property to be sold.

(b) The notice of sale may state other matters in addition to those required by subdivision (a), including terms and conditions of sale.

Comment. Paragraphs (1) and (2) of subdivision (a) of Probate Code Section 10304 restate a portion of the first sentence of former Probate Code Section 780 and a portion of the first sentence of former Probate Code Section 782 without substantive change. Paragraph (3) of subdivision (a) supersedes the third and fourth sentences of former Probate Code Section 780.

Subdivision (b) is new and codifies existing practice. See Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.22, at 514 (Cal. Cont. Ed. Bar 1971).

CROSS-REFERENCES

Definitions

Real property § 68
Direction in will as to mode of selling § 10002
Discretion of personal representative
Sale either at public auction or private sale § 10003
Sale of assets of estate as unit § 10004
Sale of entire interest or lesser interest § 10003
Interests treated as real property
Certain real property leasehold interests § 10203
Decedent's interest under contract to purchase real property § 10206
Oil or gas leasehold interest § 10203
Personal property sold with real property as a unit § 10004
Sale pursuant to contract with agent or broker § 10150

COMPARABLE PROVISION

Personal property sales § 10253

Min. 5/86-jd

*06/10/86

§ 10305. Sale at public auction

10305. (a) A sale of real property at public auction shall be made in the county in which the property is located. If the property is located in two or more counties, it may be sold in any one of them.

(b) A sale of real property at public auction shall be made between 9:00 a.m. and 9:00 p.m., and the sale shall be made on the day specified in the notice of sale unless the sale is postponed.

(c) The personal representative may postpone a public auction sale of real property from time to time if all of the following conditions are satisfied:

(1) The personal representative believes that the postponement will serve the interests of all persons concerned.

(2) Notice of the postponement is given by public declaration at the time and place appointed for the sale.

(3) The postponement, together with previous postponements of sale of the property, does not exceed three months in all.

Comment. Subdivisions (a) and (b) of Section 10305 restate former Probate Code Section 781 with the following change: An auction sale of real property must be between 9:00 a.m. and 9:00 p.m., instead of between 9 a.m. and sunset as formerly.

Subdivision (c) restates former Probate Code Section 783 without substantive change. Under subdivision (c), the notice of the postponement is given by public declaration at the time and place specified in the notice of sale unless the auction at that time and place was previously postponed and set for a new date. If the sale is to be again postponed, the notice of the postponement is given by public declaration at the time and place of the new auction as announced in the declaration that postponed the first auction. See also Estate of Hunter, 194 Cal. App. 2d 859, 863-64, 15 Cal. Rptr. 556 (1961) (former Probate Code Section 783 applied to public auction sales but not to private sales).

CROSS-REFERENCES

Compensation of agent or broker §§ 10160-10166

Contract with agent or broker § 10150

Definitions

Personal representative § 58

Real property § 68

Direction in will as to mode of selling § 10002

Discretion of personal representative

Sale either at public auction or private sale § 10003

Sale of assets of estate as unit § 10004

Sale of entire interest or lesser interest § 10003

Independent administration authority §§ 9640, 10500

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

COMPARABLE PROVISION

Personal property sales § 10254

*06/10/86

§ 10306. Private sale

10306. (a) A private sale of real property may not be made before the day stated in the notice of sale as the day on or after which the sale will be made, nor later than one year after that day.

(b) In the case of a private sale of real property, the bids or offers shall be in writing and shall be left at the place designated in the notice of sale, or be delivered to the personal representative personally, at any time after the first publication or posting of notice and before the making of the sale.

Comment. Subdivision (a) of Section 10306 restates a portion of the first sentence of former Probate Code Section 782 without substantive change. Subdivision (b) restates the the last sentence of former Section 782 with the following change: The former authority for filing bids with the clerk of the court is not continued.

CROSS-REFERENCES

Compensation of agent or broker §§ 10160-10166

Contract with agent or broker § 10150

Definitions

Personal representative § 58

Real property § 68

Direction in will as to mode of selling § 10002

Independent administration authority §§ 9640, 10500

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

Sale on credit § 10315

Sale to lienholder § 10363

COMPARABLE PROVISION

Personal property sales § 10255

*06/10/86

§ 10307. Bids to comply with notice of sale

10307. Whether a sale of real property is private or at public auction, bids shall substantially comply with the terms specified in the notice of sale.

Comment. Section 10307 is new and is consistent with existing case law. See Estate of Hunter, 194 Cal. App. 2d 859, 865-68, 15 Cal. Rptr. 556 (1961) (real property); cf. In re Estate of Dargie, 33 Cal. App. 2d 148, 155-57, 91 P.2d 126 (1939) (personal property). See also Section 10304 (required and optional contents of notice of sale).

CROSS-REFERENCES

Definitions

Real property § 68
Discretion of personal representative
Sale either at public auction or private sale § 10003
Sale of assets of estate as unit § 10004
Sale of entire interest or lesser interest § 10003
Independent administration authority §§ 9640, 10500
Interests treated as real property
Certain real property leasehold interests § 10203
Decedent's interest under contract to purchase real property § 10206
Oil or gas leasehold interest § 10203
Personal property sold with real property as a unit § 10004

COMPARABLE PROVISION

Personal property sales § 10256

Min. 5/86-jd

*06/10/86

§ 10308. Report of sale and petition for confirmation of sale

10308. (a) Except as provided in Section 10500, all sales of real property shall be reported to and be confirmed by the court before title to the property passes to the purchaser, whether the sale is a private sale or a public auction sale, and notwithstanding that the property is directed by the will to be sold or authority is given in the will to sell the property.

(b) If the personal representative fails to file the report and a petition for confirmation of the sale within 30 days after the sale, the purchaser at the sale may file the report and petition for confirmation of the sale.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in [Sections 1200 and 1200.5].

Comment. Section 10308 restates former Probate Code Section 755 without substantive change as it applied to real property except that Section 10308 gives the purchaser the right to file the report of sale and the petition for confirmation of the sale if the personal representative fails to file the report and petition within 30 days after the sale. The former provision required that the report and petition be filed within 30 days but did not state the remedy, if any, the purchaser had if the report and petition were not filed within the 30-day period. The introductory clause of subdivision (a) recognizes that a sale of real property under independent administration authority does not require court confirmation. See Sections 9640, 10500. The language in subdivision (a) that confirmation is required whether the

sale is public or private and whether made pursuant to a will is new, but continues the effect of former Section 755. See 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:49, at 296 (rev. ed. 1975); former Probate Code § 757 ("When property is directed by the will to be sold, or authority is given in the will to sell property, the [personal representative] . . . must make a return of sales and obtain confirmation as in other cases. In either case no title passes unless the sale is confirmed by the court . . .").

For special confirmation provisions, see Sections 10206 (decedent's interest under contract to purchase real property), 10207 (property sold to grazing or pasture association). See also Sections 10150 (liability on contract with agent or broker), 10160-10166 (compensation of agent or broker).

CROSS-REFERENCES

Application of purchase money when encumbered property sold

§§ 10361-10362

Clerk to set matter for hearing § 7202

Definitions

Court § 29

Real property § 68

Direction in will as to mode of selling § 10002

Effect of court authorization or approval § 9612

Independent administration authority §§ 9640, 10500

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

Proof of giving notice § 7308

Sale for more or less than appraisal § 10005

Sale to lienholder § 10363

Special confirmation provisions

Decedent's interest under contract to purchase real property § 10206

Property sold to grazing association § 10207

Transfer or conveyance pursuant to court order § 7411

Verification required § 7203

COMPARABLE PROVISION

Personal property sales § 10260

Note. The notice provision of subdivision (c) will be reviewed when the general notice provisions are drafted.

Min. 5/86-jd

*06/10/86

§ 10309. Minimum price for private sale of real property

10309. (a) Except as provided in Section 10207, no sale of real property at private sale shall be confirmed by the court unless all of the following conditions are satisfied:

(1) The real property has been appraised within one year of the date of the sale.

(2) The valuation date used in the appraisal described in paragraph (1) is within one year prior to the date of the sale.

(3) The sum offered for the property is at least 90 percent of the appraised value of the property as determined by the appraisal described in paragraph (1).

(b) An appraisal of the property may be had at any time before the sale or the confirmation of sale in any of the following cases:

(1) Where the property has not been previously appraised.

(2) Where the property has not been appraised within one year before the date of the sale.

(3) Where the valuation date used in the latest appraisal is more than one year before the date of the sale.

(4) Where the court is satisfied that the latest appraisal is too high or too low.

(c) A new appraisal made pursuant to subdivision (b) may be made by the probate referee who made the original appraisal without further order of the court or further request for the appointment of a new probate referee. A new probate referee shall be appointed, using the same procedure as for the appointment of an original referee, to make the new appraisal if the original probate referee is dead, has been removed, or is otherwise unable to act, or if there is other reason to appoint another probate referee.

Comment. Section 10309 restates former Probate Code Section 784 without substantive change except that subdivision (c) permits the appointment of a new probate referee if "there is other reason to appoint another probate referee" in place of the provision of former Section 784 that permitted appointment of new probate referee "for just cause." The introductory "except" clause of subdivision (a) continues one effect of the "notwithstanding" clause of subdivision (b) of former Probate Code Section 794.

Paragraph (2) of subdivision (a) of Section 10309 refers to the "valuation date" of the appraisement. This was the intent of former Section 784, pursuant to which an appraisement was deemed to relate back to the valuation date. See 1 A. Marshall, California Probate Procedure § 1403, at 200 (4th ed. 1984).

All sales of real property must be confirmed by the court, whether the sale is private or at public auction (Section 10308), and all sales must be for a sum not disproportionate to the value of the property (Section 10313(a)(4)). However, the requirement of Section 10309 that the offer be at least 90 percent of the appraised value applies only to private sales. As under prior law, the 90 percent requirement does not apply to sales made at public auction. 1 A. Marshall, supra, § 1407, at 204; 1 H. Miller & M. Starr, Current Law of California Real Estate

§ 2:49, at 296 n.19 (rev. ed. 1975). See also Section 10004 (sale of real and personal property as a unit). A sale of real property under independent administration authority does not require court confirmation. See Sections 9640, 10500.

CROSS-REFERENCES

Definitions

Court § 29

Real property § 68

Direction in will as to mode of selling § 10002

Independent administration authority §§ 9640, 10500

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

Sale for more or less than appraisal § 10005

Special confirmation provisions

Decedent's interest under contract to purchase real property § 10206

Property sold to grazing association § 10207

Min. 5/86-jd

*06/10/86

§ 10310. Hearing on petition for confirmation of sale

10310. (a) Except as provided in this subdivision, at the hearing on the petition for confirmation of the sale of the real property, the court shall examine into the necessity for the sale or the advantage of the estate and the benefit to the interested persons in making the sale. If the decedent's will authorizes or directs the property to be sold, there need be no showing of the necessity of the sale or the advantage of the estate and benefit to the interested persons in making the sale.

(b) The court shall examine into the efforts of the personal representative to obtain the highest and best price for the property reasonably attainable.

(c) Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections.

Comment. The first sentence of subdivision (a) of Section 10310 restates a portion of the first sentence of former Probate Code Section 785 without substantive change. The second sentence of subdivision (a) restates a portion of the second sentence of former Probate Code Section 757 without substantive change.

The phrase "advantage of the estate and benefit to the interested persons" has been substituted in subdivision (a) of Section 10310 for

the phrase "advantage, benefit, and interest of the estate" used in former Probate Code Section 785. This substitution makes no substantive change in the provision and makes the provision consistent with subdivision (b) of Section 10000. See the Comment to that section.

Subdivision (b) restates a portion of the first sentence of former Probate Code Section 785 with the substitution of the phrase "to attain the highest and best price for the property reasonable attainable" for the language "to expose the property to the market and must examine the return and witnesses in relation to the sale."

Subdivision (c) restates the first sentence of former Probate Code Section 756 insofar as it applied to real property with the addition of the phrase "at or before the hearing."

CROSS-REFERENCES

Authorization to sell real property § 10000

Definitions

Court § 29

Interested person § 48

Personal representative § 58

Real property § 68

Will § 88

Direction in will as to mode of selling § 10002

Independent administration authority §§ 9640, 10500

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

Sale for more or less than appraisal § 10005

COMPARABLE PROVISION

Personal property sales § 10261

Min. 5/86-jd

*06/10/86

§ 10311. Overbid

10311. (a) Subject to subdivisions (b), (c), (d), and (e), and except as provided in Section 10207, if a written offer to purchase the property is made to the court at the hearing on the petition for confirmation of the sale, the court shall accept the offer and confirm the sale to the offeror if all of the following conditions are satisfied:

(1) The offer is for an amount at least 10 percent more on the first ten thousand dollars (\$10,000) of the original bid and five percent more on the amount of the original bid in excess of ten thousand dollars (\$10,000), exclusive of the expenses of a new sale.

(2) The offer is made by a responsible person.

(3) The offer complies with all provisions of law.

(b) Subject to subdivisions (c), (d), and (e), if there is more than one offer that satisfies the requirements of subdivision (a), the court shall accept the highest such offer and confirm the sale to the person making that offer.

(c) The court may, in its discretion, decline to accept the offer that satisfies the requirements of subdivisions (a) and (b); and, in such case, the court shall order a new sale.

(d) If the sale returned for confirmation is on credit and the higher offer is for cash or on credit, whether on the same or different credit terms, or the sale returned for confirmation is for cash and the higher offer is on credit, the court may not consider the higher offer unless the personal representative informs the court in person or by counsel prior to confirmation of sale that the higher offer is acceptable.

(e) For the purpose of this section, the amount of the original bid and any higher offer shall be determined by the court without regard to any of the following:

(1) Any commission on the amount of the bid to which an agent or broker may be entitled under a contract with the personal representative.

(2) Any condition of the bid that a certain amount of the bid be paid to an agent or broker by the personal representative.

Comment. Subdivision (a) of Section 10311 restates a portion of the second sentence of former Probate Code Section 785 without substantive change. The reference to Section 10207 in the introductory clause of subdivision (a) continues one effect of the "notwithstanding" clause of subdivision (b) of former Probate Code Section 794.

Subdivision (b) restates a portion of the third sentence of former Probate Code Section 785 without substantive change.

Subdivision (c) restates portions of the second and third sentences of former Probate Code Section 785 without substantive change.

Subdivision (d) restates former Probate Code Section 785.1 and the last sentence of former Probate Code Section 785 without substantive change.

Subdivision (e) restates the fifth sentence and a portion of the sixth sentence of former Probate Code Section 785 without substantive change. See also Sections 10162 (limitation on compensation of agent or broker producing successful overbidder), 10166 (effect of condition in bid that certain amount of bid be paid to agent or broker).

As under prior law, the overbid procedure applies both to private sales and to public auction sales. See 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:48, at 294 (rev. ed. 1975). A sale

of real property under independent administration authority does not require court confirmation and the overbid procedure does not apply to the sale. See Sections 9640, 10500.

CROSS-REFERENCES

Compensation of agents and brokers §§ 10160-10166

Definitions

Court § 29

Personal representative § 58

Direction in will as to mode of selling § 10002

Independent administration authority §§ 9640, 10500

New sale procedure § 10313(d)

Sale for more or less than appraisal § 10005

Sale on credit § 10315

COMPARABLE PROVISION

Personal property sales § 10262

Min. 5/86-jd

*06/10/86

§ 10312. Proof that notice of sale was given

10312. If notice of the sale was required under Sections 10300 to 10303, inclusive, before an order is made confirming the sale, it shall be proved to the satisfaction of the court that notice of the sale was given as required by this article, and the order of confirmation shall show that the proof was made.

Comment. Section 10312 restates the last sentence of former Probate Code Section 756 without substantive change as it applied to real property.

CROSS-REFERENCES

Definitions

Court § 29

COMPARABLE PROVISION

Personal property sales § 10263

Note. Section 10312 perhaps should be a general provision.

Min. 5/86-jd

*06/10/86

§ 10313. Order confirming or vacating sale

10313. (a) The court shall make an order confirming the sale to the person making the highest offer that satisfies the requirements of this article, and directing conveyances or assignments or both to be executed, if it appears to the court that all of the following requirements are satisfied:

(1) Either the sale was authorized or directed to be made by the decedent's will or good reason existed for the sale.

(2) If notice of the sale was required, the proof required by Section 10312 has been made.

(3) The sale was legally made and fairly conducted.

(4) The amount for which the sale is to be confirmed is not disproportionate to the value of the property.

(5) In the case of a private sale, the sale complied with the requirements of Section 10309.

(6) If the sale is confirmed to the original bidder, it does not appear that a higher bid that satisfies the requirements of Section 10311 may be obtained.

(7) If a bond is required by Section 10206 (sale of decedent's contract right to purchase real property), the bond has been furnished.

(b) The court shall fix the compensation of the agent or broker as provided in Article 3 (commencing with Section 10160).

(c) If it appears to the court that the requirements of subdivision (a) are not satisfied, the court shall vacate the sale and order a new sale.

(d) If the court orders a new sale under subdivision (c) of this section or under subdivision (c) of Section 10311, notice of the new sale shall be given and the new sale shall in all respects be conducted as if no previous sale had taken place.

Comment. Subdivision (a) of Section 10313 restates portions of the first, second, and third sentences of former Probate Code Section 785 without substantive change.

Paragraph (1) of subdivision (a) recognizes that it is not necessary to show that good reason existed for the sale if the sale was authorized or directed by the decedent's will. This continues the last portion of the second sentence of former Probate Code Section 757 as it applied to real property.

Paragraph (5) of subdivision (a) recognizes that the 90 percent requirement of Section 10309 applies only to private sales, and not to public auction sales. This continues a portion of the first sentence of former Probate Code Section 784. See 1 A. Marshall, California Probate Procedure § 1407, at 204 (4th ed. 1984); 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:49, at 296 n.19 (rev. ed. 1975).

Paragraph (7) of subdivision (a) recognizes that Section 10206 requires that a bond be furnished in some cases before the court may confirm a sale of the decedent's contract right to purchase real property.

Subdivision (b) restates portions of the second and third

sentences of former Probate Code Section 785 without substantive change. See Sections 10160-10166 (compensation of agent or broker). See also Section 10150 (contract with agent or broker).

Subdivisions (c) and (d) continue the last portion of the first sentence of former Probate Code Section 785 without substantive change.

CROSS-REFERENCES

Agents and brokers

Compensation §§ 10160-10166

Contract § 10150

Application of purchase money when encumbered property sold

§§ 10361-10362

Conveyance or assignment after confirmation § 10314

Definitions

Court § 29

Person § 56

Real property § 68

Will § 88

Effect of court authorization or approval § 9612

Independent administration authority §§ 9640, 10500

Liability of purchaser who defaults § 10350(e)

Proof that notice of sale was given § 10312

Sale for more or less than appraisal § 10005

Sale on credit § 10315

Sale to lienholder § 10363

Vacating sale for purchaser's default

Confirming sale to new high bidder § 10351

Order for resale § 10350

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§ 10314. Conveyance or assignment after confirmation

10314. (a) Except as provided in subdivision (b), upon confirmation of the sale, the personal representative shall execute a conveyance to the purchaser which shall refer to the order confirming the sale and directing the conveyance to be executed. A certified copy of the order shall be recorded in the office of the recorder of the county in which the real property or any portion thereof lies.

(b) Upon confirmation of a sale of the decedent's interest under a contract for the purchase of real property by the decedent and after the purchaser has furnished a bond if one is required under Section 10206, the personal representative shall execute an assignment of the contract to the purchaser.

(c) An conveyance or assignment made pursuant to this section vests in the purchaser all the right, title, and interest of the estate, or of the persons otherwise entitled to the interest of the

decedent, at the time of sale in the property conveyed or assigned. The purchaser of the decedent's interest under a contract for the purchase of real property by the decedent has the same rights and remedies against the vendor of the property as the decedent would have had if living.

Comment. Subdivision (a) of Section 10314 restates the first sentence of former Probate Code Section 786 without substantive change.

Subdivision (b) restates the first portion of former Probate Code Section 802 with the addition of the requirement that the bond be furnished (if one is required) before the assignment is executed. This addition conforms Section 10314 to Section 10206. See the Comment to Section 10206.

Subdivision (c) restates the second sentence of former Probate Code Section 786 and the last portion of former Probate Code Section without substantive change. The language of subdivision (c) that a conveyance passes the interest of the estate "at the time of sale" is drawn from former Probate Code Section 802, and replaces the language of former Probate Code Section 786 that the conveyance passes the decedent's interest "at the time of his death; and if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances." This substitution does not make a substantive change in prior law.

CROSS-REFERENCES

Definitions

Personal representative § 58

Real property § 68

Effect of court authorization or approval § 9612

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

Transfer or conveyance pursuant to court order § 7411

Note. For provisions similar to subdivisions (c) and (d), see proposed Sections 7411 and 9954, *supra*, and existing Section 2551 (guardianship-conservatorship). Should these be consolidated in a general provision?

Min. 5/86-jd

*06/10/86

§ 10315. Sale on credit

10315. (a) If a sale is made on credit, the personal representative shall take the note or notes of the purchaser for the unpaid portion of the purchase money, with a mortgage or deed of trust on the property to secure their payment. The mortgage or deed of trust

shall be subject only to encumbrances existing at the date of sale and such other encumbrances as the court may approve.

(b) Where property sold by the personal representative for part cash and part deferred payments consists of an undivided interest in real property or any other interest therein less than the entire ownership and the owner or owners of the remaining interests therein join in the sale, the note and deed of trust or mortgage may be made to the personal representative and such others having an interest in the property. The interest of the personal representative in the note and deed of trust or mortgage shall be in the same tenancy and in the same proportions as the estate's interest in the property prior to the sale.

Comment. Section 10315 restates former Probate Code Section 787 without substantive change as it applied to real property.

CROSS-REFERENCES

Definitions

Personal representative § 58

Real property § 68

Direction in will as to mode of selling § 10002

Discretion of personal representative

Sale either at public auction or private sale § 10003

Sale of assets of estate as unit § 10004

Sale of entire interest or lesser interest § 10003

Independent administration authority §§ 9640, 10500

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

COMPARABLE PROVISION

Personal property sales § 10257

Article 7. Vacating Sale for Purchaser's Default

Min. 5/86-jd

*06/10/86

§ 10350. Order vacating sale and directing resale

10350. (a) If after court confirmation of sale of real or personal property the purchaser fails to comply with the terms of sale, the court may, on petition of the personal representative, vacate the order of confirmation and order a resale of the property.

(b) Notice of the hearing on the petition shall be given to the defaulting purchaser in the manner directed by the court, except that

notice need not be given to the defaulting purchaser if his or her written consent to the vacation of the order confirming sale to him or her is filed with the court before the hearing.

(c) Notice of the resale of the property shall be given in the manner provided in this chapter for a sale of the property in the first instance.

(d) Proceedings after notice of the resale shall be in the manner provided in this chapter for a sale of the property in the first instance.

(e) If the property is resold, the defaulting purchaser is liable to the estate for damages equal to the sum of the following:

(1) The difference between the contract price of the first sale and the amount paid by the purchaser at the resale.

(2) Expenses made necessary by the purchaser's breach.

(3) Other consequential damages.

Comment. Subdivisions (a) and (b) of Section 10350 restate the first sentence of former Probate Code Section 775 and the first sentence of former Probate Code Section 788 without substantive change except that the provision in subdivision (b) that notice need not be given to a defaulting purchaser who has filed a written consent is new and is drawn from former Probate Code Sections 776 and 789.

Subdivision (c) restates the substance of a portion of the second sentence of former Probate Code Section 788 (resale of real property) and supersedes the third sentence and a portion of the second sentence of former Probate Code Section 775 (resale of personal property).

Subdivision (d) restates a portion of the second sentence of former Probate Code Section 775 and a portion of the second sentence of former Probate Code Section 788 without substantive change.

Subdivision (e) supersedes the last sentence of former Probate Code Section 775 and the last sentence of former Probate Code Section 788. Paragraph (1) of subdivision (e) continues prior law. Under former Probate Code Sections 775 and 788, if the amount realized on resale did not cover the bid and expenses of the first (incomplete) sale, the defaulting purchaser was liable for the "deficiency." See also Estate of Williamson, 150 Cal. App. 2d 334, 339, 310 P.2d 77 (1957). Under paragraph (1) of subdivision (e) as under former Probate Code Sections 775 and 788, the estate's loss of bargain is measured by the contract price for the first sale less the price obtained on the second sale. This differs from damages for defaults generally in that, under the general rule, the resale price is merely some evidence of value. See 1 B. Witkin, Summary of California Law Contracts § 664, at 563 (8th ed. 1973).

Paragraph (2) of subdivision (e) changes prior law. Under former Probate Code Sections 775 and 788, if there was a resale of the property, recoverable expenses were those of the first (incomplete) sale, not those of the resale. Estate of Williamson, supra. Under paragraph (2), the recoverable expenses of sale are those made

necessary by the purchaser's breach, the same as under general law. Id. Such expenses may include expenses of resale to the extent they exceed the expenses assumed by the estate under the breached contract. Jensen v. Dalton, 9 Cal. App. 3d 654, 657, 88 Cal. Rptr. 426 (1970).

Paragraph (3) of subdivision (e) is new. Under paragraph (3), consequential damages are recoverable as under general law. See 1 B. Witkin, supra §§ 665-666, at 564-65. In the case of real property, such consequential damages may include sewer assessments, taxes, and fees for utilities (Jensen v. Dalton, supra at 658, 88 Cal. Rptr. at), and insurance, security, storage, and pool and gardening expenses.

CROSS-REFERENCES

Definitions

Court § 29

Personal property § 57

Personal representative § 58

Real property § 68

Interests treated as personal property

Certain leasehold interests § 10203

Chose in action § 10205

Partnership interest § 10204

Interests treated as real property

Certain real property leasehold interests § 10203

Decedent's interest under contract to purchase real property § 10206

Oil or gas leasehold interest § 10203

Personal property sold with real property as a unit § 10004

Notice of sale §§ 10300-10304

Sale to new high bidder § 10351

Min. 5/86-jd

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§ 10351. Order vacating sale and confirming sale to new high bidder

10351. (a) The court may vacate the order of confirmation of a sale of real or personal property and make an order confirming the sale to the new high bidder if both of the following requirements are satisfied:

(1) A petition is filed within 45 days after confirmation of the sale showing that (A) the purchaser at the sale has failed to complete the purchase and (B) a bid has been made for the property in the same or a higher amount, on the same or better terms, and in the manner prescribed in the original notice of sale.

(2) The sale has not been vacated pursuant to Section 10350.

(b) Notice of the hearing on the petition shall be given to the defaulting purchaser in the manner directed by the court, except that notice need not be given to the defaulting purchaser if his or her written consent to the vacation of the order confirming the sale to him or her is filed with the court prior to the hearing.

(c) If the report and petition for confirmation of the second sale are not filed within 45 days of the confirmation of the first sale, the property may be resold only in the manner provided in Section 10350.

Comment. Section 10351 restates former Probate Code Sections 776 and 789 without substantive change.

CROSS-REFERENCES

Definitions

Court § 29
Personal property § 57
Real property § 68
Interests treated as personal property
Certain leasehold interests § 10203
Chose in action § 10205
Partnership interest § 10204
Interests treated as real property
Certain real property leasehold interests § 10203
Decedent's interest under contract to purchase real property § 10206
Oil or gas leasehold interest § 10203
Personal property sold with real property as a unit § 10004

Note. The notice provision of subdivision (b) will be reviewed when the general notice provisions are drafted.

Note. What is the meaning of the phrase "and in the manner prescribed in the original notice of sale" in paragraph (1) of subdivision (a) of Section 10351? Should this phrase be retained or revised or omitted?

Article 8. Application of Sale Proceeds of Encumbered Property; Sale to Lienholder

Min. 5/86-jd

*06/10/86

§ 10360. Definitions

10360. As used in this article:

(a) "Amount secured by the lien" includes interest and any costs and charges secured by the lien.

(b) "Encumbered property" means real or personal property that is subject to a lien for a secured debt which is a valid claim against the estate and which has been [allowed].

(c) "Lien" means a mortgage, deed of trust, or other lien.

Comment. Section 10360 is new and is included for convenience in drafting.

CROSS-REFERENCES

Definitions

Personal property § 57

Real property § 68

Min. 5/86-jd

*06/10/86

§ 10361. Application of purchase money on sale of encumbered property

10361. (a) If encumbered property is sold, the purchase money shall be applied in the following order:

(1) The payment and satisfaction of the amount secured by the lien on the property sold if payment and satisfaction of the lien is required under the terms of the sale.

(2) The payment of the expenses of the sale.

(3) Application in the due course of administration.

(b) The application of the purchase money to the payment and satisfaction of the amount secured by the lien on the property sold shall be made without delay; and, subject to Section 10362, the property sold remains subject to the lien until the purchase money has been actually so applied.

Comment. Section 10361 restates former Probate Code Section 762 with the following changes:

(1) Section 10361 requires that the amount secured by the lien on the property sold be paid and satisfied (if required under the terms of the sale) before payment of the expenses of the sale. Former Section 762 required that the necessary expenses of the sale be paid before the lien on the property sold was paid and satisfied, and did not specifically permit sale of the property subject to the lien. The change made by Section 10361 recognizes that, unless the property is sold subject to the line, the sale of the property cannot be completed until the lien is paid and satisfied, but Section 10361 requires that the lien be paid and satisfied only if required under the terms of the sale. This permits the property to be sold subject to the lien, a term of sale that might be beneficial to the estate if the terms of the existing financing are are better than can be obtained at the time of the sale.

(2) Former Section 762 required that the "necessary" expenses of the said be paid. Section 10361 provides that the purchase money be used to pay the expenses of sale. If the expenses of sale are unreasonable in amount, the personal representative is liable for the excess amount. See Sections 9600-9603.

CROSS-REFERENCES

Definitions

Amount secured by the lien § 10360

Encumbered property § 10360

Lien § 10360

Property § 62

*06/10/86

§ 10362. Payment to clerk of court

10362. (a) If encumbered property is sold, the purchase money, or so much of the purchase money as is sufficient to pay the amount secured by the lien on the property sold and the expenses of the sale, may be paid to the clerk of the court. Upon the payment being so made, the lien on the property sold ceases.

(b) The clerk of court without delay shall use the money paid to the clerk under this section to pay the expenses of the sale and to pay and satisfy the amount secured by the lien on the property sold. The clerk shall at once return the surplus, if any, to the personal representative unless the court, for good cause shown and after notice to the personal representative, otherwise orders.

Comment. Section 10362 restates former Probate Code Section 763 without substantive change.

CROSS-REFERENCES

Definitions

Amount secured by the lien § 10360

Court § 29

Encumbered property § 10360

Lien § 10360

Property § 62

*06/10/86

§ 10363. Sale to lienholder

10363. (a) At a sale of real or personal property subject to a lien, the lienholder may become the purchaser of the property, even though no claim for the amount secured by the lien on the property sold has been, or could have been, [presented or allowed].

(b) Unless the property is sold subject to the lien:

(1) If the lienholder becomes the purchaser of the property and the amount secured by the lien on the property is a valid claim against the estate and has been allowed, the receipt of the lienholder for the amount due the lienholder from the proceeds of the sale is a payment pro tanto.

(2) If the lienholder becomes the purchaser of the property and no claim for the amount secured by the lien on the property has been [presented or allowed], the court may at the hearing on the petition for confirmation of the sale examine into the validity and enforceability of the lien and the amount secured by the lien, and the court may authorize the personal representative to accept the receipt of the lienholder for the amount secured by the lien as payment pro tanto.

(3) If the lienholder becomes the purchaser of the property and the amount for which the property is purchased is insufficient to pay the expenses of the sale, whether or not a claim has been presented or allowed, the lienholder shall pay to the clerk of the court an amount sufficient to cover the expenses of the sale.

(c) Nothing permitted under this section shall be deemed to be an allowance of a claim based upon the lien or the amount secured by the lien.

Comment. Section 10363 restates former Probate Code Section 764 without substantive change except for revisions necessary to reflect the new authorization under Section 10361 to sell property subject to the lien on the property.

CROSS-REFERENCES

Definitions

Amount secured by the lien § 10360
Lien § 10360
Personal property § 57
Property § 62
Real property § 68

Article 9. Damages and Recovery of Property

Min. 5/86-jd

*06/10/86

§ 10380. Damages for neglect or misconduct of personal representative

10380. The personal representative is liable to an interested person for damages suffered by the interested person by reason of the neglect or misconduct of the personal representative in the proceedings in relation to a sale.

Comment. Section 10380 restates former Probate Code Section 759 without substantive change. The language that "the personal representative is liable to an interested person" replaces the former language that "the party aggrieved may recover the damage by enforcing

the liability on the bond of the personal representative." This change is nonsubstantive. When the personal representative is liable, the liability may be enforced against the bond of the personal representative. See Section [541]; Schifferman, Actions by and Against Representatives, in 2 California Decedent Estate Administration § 25.43, at 1085 (Cal. Cont. Ed. Bar 1975). See also Section 10381 (liquidated damages for fraudulent sale of real property).

CROSS-REFERENCES

Definitions

Interested person § 48

Personal representative § 58

Min. 5/86-jd

*06/10/86

§ 10381. Liquidated damages for fraudulent sale of real property

10381. In addition to any other damages for which the personal representative is liable, if the personal representative fraudulently sells real property of the estate contrary to or otherwise than under the provisions of this chapter, the person having an estate of inheritance in the real property may recover from the personal representative, as liquidated damages, an amount equal to double the [fair market] value of the real property sold [on the date of sale].

Comment. Section 10381 restates former Probate Code Section 792 without substantive change except (1) the damages are double the value of the "real property" sold rather than double the value of the "land" sold and language is added to make clear that the damages are to be computed using the value of the property on the date it was sold and (2) Section 10381 makes clear that the liquidated damages provided for in the section are in addition to any other recoverable damages. See also Sections 9601-9603 (measure of liability for breach of fiduciary duty), 10380 (damages for neglect or misconduct of personal representative); Civil Code §§ 761-783 (estates in real property).

CROSS-REFERENCES

Definitions

Personal representative § 58

Real property § 68

Min. 5/86-jd

*06/10/86

§ 10382. Limitation of actions for recovery of property

10382. (a) No action for the recovery of property sold by a personal representative on the claim that the sale is void may be maintained by an heir or other person claiming under the decedent unless the action is commenced within whichever of the following is the later time:

(1) Three years after the settlement of the final account of the personal representative.

(2) Three years after the discovery of any fraud upon which the action is based.

(b) The limitation established by subdivision (a) is not tolled for any reason.

Comment. Subdivision (a) of Section 10382 continues the first sentence of former Probate Code Section 793 without substantive change. Subdivision (b) replaces the second sentence of former Probate Code Section 793 which provided for tolling of the limitation for minors and others under legal disability).

CROSS-REFERENCES

Definitions

Heirs § 44

Personal representative § 58

Property § 62

Note. At the May 1986 meeting, the Commission decided to conform the rule on tolling for minors and others under legal disability under Section 10382 to the will contest rules which had been revised to provide limited tolling for minors and others under legal disability (but not beyond final distribution of the estate). However, Section 10382 provides a statute of limitations which permits an action to be commenced after the final distribution of the estate, and adding the provision for tolling from the will contest rules would limit the time within which the action must be brought rather than to extend the time allowed for bringing the action. The Commission should review Section 10382. The provision of the will contest statute requires that the will contest be commenced within 120 days after the will has been admitted to probate and provides that, notwithstanding that limitation, "a person who was a minor or who was incompetent and had no guardian or conservator at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before the close of administration of the estate." Does the Commission wish to limit the right to bring an action under Section 10302 as set out above?