

#L-1035

su21
05/05/86

Memorandum 86-57

Subject: Study L-1035 - Estate and Trust Code (Administration of
Estates of Missing Persons Presumed Dead)

Attached to this memorandum is a draft of a tentative recommendation relating to administration of estates of missing persons presumed dead. The statute and comments and the comments to repealed sections are a revised version of material considered at the March meeting. The explanatory text has not been considered before.

Respectfully submitted,

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Staff Counsel

Staff DraftTENTATIVE RECOMMENDATION
relating to
ADMINISTRATION OF ESTATES OF
MISSING PERSONS PRESUMED DEAD

Existing law provides that a person who has been missing for five years is presumed dead,¹ and provides a procedure for administration of the missing person's estate.²

The new code continues this procedure with a few minor changes:

•The new code adopts the general four-month limitation on preliminary distribution of the estate³ in place of the one-year delay of distribution applicable under existing law.⁴

•Existing law permits the spouse, a member of the missing person's family, an interested person, or a friend of the missing person to petition for administration.⁵ The new code requires that friends show that they have a right in or claim against the estate.⁶

•The three-month hearing date and 90-day publication provision of existing law⁷ are not continued in the new

1. Prob. Code § 1351.

2. Prob. Code §§ 1350-1359. These sections were enacted on recommendation of the Law Revision Commission. See *Recommendation Relating to Missing Persons*, 16 Cal. L. Revision Comm'n Reports 105 (1982).

3. See the discussion under [] *supra*.

4. Prob. Code § 1352.

5. Prob. Code § 1354.

6. See Prob. Code § 48.

7. See Prob. Code § 1355.

code. Hearing dates and notices are governed by general provisions.⁸

•Under existing law, the petitioner is liable for the cost of a search for the missing person if there is no administration and the estate is liable if there is administration.⁹ The new code makes the estate presumptively liable, but permits the court in its discretion to order the petitioner to pay the costs of a search if there is not administration. This rule recognizes that the person whose status as missing has necessitated the search should be liable for the cost of the search in the normal case.

8. See the discussion under [] *supra*.

9. Prob. Code § 1356(c).

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PART 12. ADMINISTRATION OF ESTATES OF MISSING
PERSONS PRESUMED DEAD

§ 12400. "Missing person" defined

12400. Unless the provision or context otherwise requires, as used in this part, "missing person" means a person who is presumed to be dead under Section 12401.

Comment. Section 12400 continues former Probate Code Section 1350 without substantive change.

§ 12401. Presumption of death for purposes of administration

12401. In proceedings under this division, a person who is absent for a continuous period of five years, during which time the person has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier.

Comment. Section 12401 continues former Probate Code Section 1351 without change. Section 12401 is the same in substance as Uniform Probate Code Section 1-107(3) (1977). See also Evid. Code §§ 667 (general presumption of death), 1282 (finding of presumed death by federal employee).

§ 12402. Manner of administration of missing person's estate

12402. The estate of a missing person may be administered, as though the person were dead, in the manner provided generally for the administration of estates of deceased persons, subject to the provisions of this part.

Comment. Section 12402 continues former Probate Code Section 1352 without substantive change, except that the former provision delaying distribution of property until one year after appointment and qualification of the personal representative is not continued. The general four-month limitation on preliminary distribution applies to

distribution under this part. See Section []. In addition, the reference to distribution of the estate is omitted; administration of the estate includes distribution. See Section []. See also Section 12408 (recovery of property by missing person upon reappearance).

CROSS-REFERENCES

Definition

Missing person § 12400

Personal representative § 58

§ 12403. Jurisdiction of court

12403. (a) If the missing person was a resident of this state at the time of the person's disappearance, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this part.

(b) If the missing person was a nonresident of this state at the time of the person's disappearance, the superior court of any county where any real property of the missing person is located, or of the county where any personal property is located if there is no real property in this state, has jurisdiction for the purposes of this part.

Comment. Section 12403 continues former Probate Code Section 1353 without change.

CROSS-REFERENCES

Definitions

Missing person § 12400

Personal property § 57

Real property § 68

Note. The general venue rules should be reviewed to see whether they should be made consistent with this section.

§ 12404. Petition for administration

12404. (a) A petition may be filed in the court having jurisdiction under Section 12403 for the administration of the estate of a missing person.

(b) The petition may be filed by any one or more of the following:

(1) The spouse of the missing person.

(2) A relative of the missing person.

(3) A person interested in the estate of the missing person.

(c) In addition to the matters otherwise required in a petition for administration of the estate, the petition shall state all of the following:

(1) The last known place of residence of the missing person.

(2) The time and circumstances of the person's disappearance.

(3) That the missing person has not been heard from by the persons most likely to hear (naming them and their relationship to the missing person) for a period of five years and the whereabouts of the missing person is unknown to those persons and to the petitioner.

(4) A description of any search or inquiry made concerning the whereabouts of the missing person.

Comment. Section 12404 continues former Probate Code 1354(a)-(c) without substantive change, except as noted. The reference to probate of the will in former Probate Code Section 1354(a) is eliminated as surplusage in light of Section 8000 (petition for administration). The list of persons who may petition under former Probate Code Section 1354(b) has been revised by referring to a "relative" instead of "member of the family" and deleting the reference to a friend of the missing person. The first change is not substantive; the second change means that a friend may petition only if he or she is an interested person. Pursuant to subdivision (c) and Section 12402, the general requirements for a petition for administration of the estate (see Section 8002) are applicable. Subdivision (b) does not affect the order of priority of appointment of an administrator; this is controlled by provisions governing administration generally. See, e.g., Sections 8441 (priority for appointment of administrator with will annexed), 8446 (priority for appointment of administrator).

CROSS-REFERENCES

Definition

Interested person § 48

Missing person § 12400

Verification required § 7203

§ 12405. Notice of hearing

12405. Notice of hearing shall be served and published, and proof made in the same manner as in proceedings for administration of the estate of a decedent, except that notice of hearing on the petition shall also be sent by registered mail to the missing person at his or her last known address.

Comment. Section 12405 supersedes former Probate Code Section 1355. Section 12405 no longer provides for a three-month hearing date or a 90-day publication provision.

CROSS-REFERENCES

Certified mail equivalent of registered mail § 5

Clerk to set matter for hearing § 7202

Definitions

Missing person § 12400

Note. We have conformed the hearing date and publication times to those in probate administration generally, pursuant to a suggestion of the State Bar and LA County Bar. We have likewise conformed the other notice provisions. Lengthened notice is no longer necessary in the missing person situation because Section 12406 now gives the court the ability to require further notice where it appears that the initial notice may be inadequate.

§ 12406. Determination whether person is person presumed to be dead;
search for missing person

12406. (a) At the hearing, the court shall determine whether the alleged missing person is a person who is presumed to be dead under Section 12401. The court may receive evidence and consider the affidavits and depositions of persons likely to have heard from or know the whereabouts of the alleged missing person.

(b) If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a reasonably diligent search and to report the results of the search. The court may order the search to be made in any manner that seems advisable, including any or all of the following methods:

(1) Inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the missing person.

(2) Notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the missing person.

(3) Engaging the services of an investigator.

(c) The costs of any search ordered by the court pursuant to subdivision (b) shall be paid by the estate of the missing person, but if there is no administration, the court in its discretion may order the petitioner to pay the costs.

Comment. Subdivisions (a) and (b) of Section 12406 continue former Probate Code Section 1356(a) and (b) without substantive change. Subdivision (c) replaces former Probate Code Section 1356(c) which required that costs be paid by the petitioner if there was no administration and by the estate if there was administration. The new rule makes the estate presumptively liable for costs, but gives the court discretion to order the petitioner to pay costs if there is no administration.

CROSS-REFERENCES

Definitions

Missing person § 12400

§ 12407. Appointment of personal representative and determination of date of disappearance

12407. (a) If the court finds that the alleged missing person is a person presumed to be dead under Section 12401, the court shall do both of the following:

(1) Appoint a personal representative for the estate of the missing person in the manner provided for the estates of deceased persons.

(2) Determine the date of the missing person's death.

(b) The personal representative shall administer the estate of the missing person in the same general manner and method of procedure, and with the same force and effect, as provided for the administration of the estates of deceased persons, except as otherwise provided in this part.

Comment. Section 12407 continues former Probate Code 1357 without substantive change. See also Sections 12401 (death presumed at end of five-year period unless sufficient evidence of earlier death), 12402 (manner of administration and distribution).

CROSS-REFERENCES

Definition

Missing person § 12400

Personal representative § 58

§ 12408. Recovery of property by missing person upon reappearance

12408. (a) If the missing person reappears:

(1) The missing person may recover property of the missing person's estate in the possession of the personal representative, less fees, costs, and expenses thus far incurred.

(2) The missing person may recover from distributees any property of the missing person's estate that is in their possession, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all the circumstances, but any action under this paragraph is forever barred five years after the time the distribution was made.

(b) The remedies available to the missing person under subdivision

(a) are in addition to any remedies available to the missing person by reason of any fraud or intentional wrongdoing.

(c) Except as provided in subdivisions (a) and (b), the decree of final distribution, when it becomes final, is conclusive as to the rights of the missing person and the rights of the heirs and devisees of the missing person.

(d) If a dispute exists as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under [Probate Code Section 1080], notwithstanding the limitations of time prescribed in [Probate Code Section 1080], for the determination of the identity of the person claiming to be the reappearing missing person.

Comment. Section 12408 continues former Probate Code 1358 without change, except that the five-year period for recovery of property under subdivision (a)(2) runs from the date of distribution rather than the date the petition was filed. In addition, the term "beneficiaries" is substituted for "heirs and devisees" in subdivision (c). This is a nonsubstantive change.

Subdivisions (a) and (b) are drawn from the last paragraph of Section 3-412 of the Uniform Probate Code (1977), which was revised to add a provision barring an action under paragraph (a)(2) five years after distribution under Section 12404. This additional provision continues the general effect of the parts of former Probate Code Sections 287-292 (the statute in effect before former Probate Code Sections 1350-1359) that gave a distribution conclusive effect after the missing person had been missing 10 years.

Subdivision (c) is consistent with Section [] (effect of a decree of final distribution in probate proceedings generally). Subdivision (c) permits a distributee to convey a good title to property of the missing person prior to the time an action by the missing person against the distributee would be barred under subdivision (a)(2). This is because subdivision (c) provides a rule that the decree of final distribution, when it becomes final, is conclusive as to the rights of the missing person. The exception to this rule in subdivision (a)(2) is limited to property in the hands of the distributee or its proceeds in the hands of the distributee; subdivision (a)(2) does not permit an action against the person to whom the property has been transferred by the distributee. Where a distributee has encumbered property of the missing person, the lender likewise would be protected under subdivision (c); but, if the action of the missing person is not barred under subdivision (a)(2), the reappearing missing person might recover from the distributee the property subject to the encumbrance.

Subdivision (d) was drawn from a portion of former Probate Code Section 287, the predecessor of former Probate Code Section 1358(d).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Missing person § 12400
Personal representative § 58
Property § 62

Note. We have restored to subdivision (a)(1) language relating to fees, costs, and expenses at the suggestion of our State Bar consultants.

§ 12409. Application of part

12409. (a) This part applies only to cases where a petition is filed under Section 12404, or under former Section 1354 of the Probate Code, after December 31, 1983. If a petition is filed under Section 12404, or under former Section 1354 of the Probate Code, the required period of absence of the alleged missing person may include a period of absence that commenced to run before the operative date of the section.

(b) This part does not apply to any proceeding under former Sections 280 to 294, inclusive, of the Probate Code that was pending on December 31, 1983, and the law that applies to such proceeding on December 31, 1983, continues to apply after that date.

Comment. Subdivision (a) of Section 12409 restates former Probate Code 1359 without substantive change, but also makes clear that this part applies to petitions filed pursuant to former Probate Code Sections 1350-1359.

Subdivision (b) has the same effect as subdivision (b) of former Probate Code Section 1359.

CROSS-REFERENCES

Definitions

Missing person § 12400

Note. This section has been revised to apply the revised rules of this part to petitions filed under the former law, but not the law that preceded the former law. This has the effect of applying the same rule barring recovery of property by a reappearing missing person under Section 12408 to all cases started since December 1, 1983. This results in the extension of the time for recovery since the new rule runs from the time of distribution rather than from the time the petition is filed.