

#L-1047

su71
07/21/86

Memorandum 86-76

Subject: Study L-1047 - Estate and Trust Code (Appeals)

Attached hereto is a draft of the provisions on appeals, including the contents of the judgment roll. See Prob. Code §§ 1240-1242. The staff has discovered no serious policy issues in this area. Some technical questions are raised in Notes following relevant sections.

Comments to repealed sections are also attached.

Respectfully submitted,

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Staff Draft

CHAPTER 6. APPEALS

§ 7500. Appealable orders or refusals to make orders

7500. An appeal may be taken from the making of, or the refusal to make, any of the following orders:

- (a) Granting or revoking letters testamentary or of administration.
- (b) Admitting a will to probate or revoking the probate of a will.
- (c) Setting aside a small estate under Section 6609.
- (d) Setting apart a homestead or property claimed to be exempt from enforcement of a money judgment.
- (e) Granting or modifying a family allowance.
- (f) Directing or authorizing the sale or conveyance or confirming the sale of property.
- (g) Directing or authorizing the granting of an option to purchase [real] property.
- (h) Adjudicating the merits of a claim under [Chapter 10 (commencing with Section 9860) of Part 5].
- (i) Allocating debts under Section [Chapter 10 (commencing with Section 9860) of Part 5].
- (j) Settling an account of a personal representative.
- (k) Instructing or directing a personal representative.
- (l) Directing or allowing the payment of a debt, claim, devise, or attorney's fee.
- (m) Determining the persons to whom distribution should be made.
- (n) Distributing property.
- (o) Determining that property passes to, or confirming that property belongs to, the surviving spouse under Section 13656 [as proposed in AB 2625].
- [(p) Fixing an inheritance tax or determining that none is due.]
- (q) Authorizing a personal representative to invest or reinvest surplus money under Section 9732.

Comment. Section 7500 restates former Probate Code Section 1240 [as amended by AB 2652] without substantive change, except that the

part of subdivision (m) of former Probate Code Section 1240 relating to determination of heirship is superseded by Section 325 (appeal of order determining membership in a class). Subdivision (o) is not limited to orders determining that property is *community* property passing to the surviving spouse as was former subdivision (o).

CROSS-REFERENCES

Definitions

Community property § 28

Devise § 32

Family allowance § 38

Probate homestead § 60

Property § 62

Real property § 68

Surviving spouse § 78

Will § 88

Judgment roll contents § [95]

Note. When the Commission considered the structure of the provision governing appeals in the Trust Law recommendation, the decision was made to provide that an "appeal may be taken from the grant or denial of any final order" except for specifically listed orders. See proposed Prob. Code § 17207 in AB 2652. This makes the section considerably shorter since only three matters are listed as being non-appealable. This approach also has the advantage that if a type of order is accidentally omitted, it will be appealable. However, there appears to be a fairly strong policy in estate administration of limiting the right to appeal. In this context, it is probably easier to list appealable orders, rather than to attempt to list all non-appealable orders.

Would it be more useful to provide in each relevant section that it is appealable, rather than listing them all in this section?

Should subdivision (g) be limited to real property options?

The staff would omit subdivision (p) relating to the inheritance tax. We assume that by the time this revised provision becomes operative, there would be no cases where an inheritance tax issue would still be appealable. If there is a problem, we can handle it by an appropriate transitional provision.

§ 7501. Effect of reversal of order appointing personal representative

7501. If an order appointing a personal representative is reversed on appeal for error, lawful acts of the personal representative performed between the time letters are issued and the reversal are as valid as though the order were affirmed.

Comment. Section 7501 restates former Probate Code Section 1241 without substantive change, except that the reference to the time of qualification is replaced by the reference to the time letters are issued. See Section 8400(a) (appointment of personal representative effective upon issuance of letters).

CROSS-REFERENCES

Definition

Letters § 52

Personal representative § 58

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§ [95]. Judgment roll

[95]. The judgment roll in a proceeding under this code consists of the following papers, where applicable:

(a) In all cases:

(1) The petition, application, contest, report, or account that initiates a particular proceeding.

(2) Any order directing notice of the hearing to be given.

(3) Any notice of the hearing, and any order to show cause made in the proceeding, with the affidavits showing publication, posting, or mailing of the notice or order as may be required by law or court order.

(4) Any citation, in case no answer or written opposition is filed by a party entitled, by law or court order, to notice of the proceeding by citation, with the affidavit or proof of service [and, if service of the citation is made by publication, the affidavit of publication and the order directing publication].

(5) Any finding of the court or referee in the proceeding.

(6) The order made in the proceeding.

(7) Any letters of the personal representative.

(b) If an answer, demurrer, written opposition, or counter petition is filed in a proceeding:

(1) Pleadings and papers in the nature of pleadings.

(2) Any orders striking out a pleading in whole or in part.

(3) Any order made on demurrer, or relating to a change of parties, in the proceeding.

(4) The verdict of the jury, if any.

(c) If the proceeding is for the probate of a will, the will.

(d) If the proceeding is a contest of a will, for the revocation of the probate of a will, or for a [partial, ratable,][preliminary?] or final distribution of the estate under a will:

(1) The will.

(2) The order admitting the will to probate.

(e) If the proceeding is for the settlement of the final account of a personal representative or for the final distribution of an estate, the affidavit showing publication of notice to creditors.

Comment. Section [95] restates former Probate Code Section 1242 without substantive change. The former provision stating that the papers constituting the judgment roll need not be attached together is omitted as unnecessary.

CROSS-REFERENCES

Appealable orders

Decedent's estate administration § 7500

Guardianship and conservatorship § 2750

Trust administration § 17207

Definitions

Letters § 52

Personal representative § 58

Will § 88

Note. This provision seems to be needlessly detailed. Is this a matter that needs to be covered by statute? Or could it be left to court rule? It appears that the importance of the judgment roll is not what it was when stricter and more mechanical rules of civil procedure prevailed. See 9 B. Witkin, California Procedure Appeal § 417, at 414-15 (3d ed. 1985). The staff has not found any reference to the judgment roll in the statutes on appeal in the Probate Code. Basing an appeal on the judgment roll is governed by court rule. See Cal. R. Ct. 5; Abbott, Designating the Record, in California Civil Appellate Practice § 8.1, at 208, § 8.47-8.48, at 239-40 (Cal Cont. Ed. Bar 2d ed. 1985).

As noted in the Comment, the provision that the papers making up the judgment roll need not be attached together has been omitted. Until 1939, Code of Civil Procedure Section 670 required that the papers constituting the judgment roll be attached together. This provision derives from an overly cautious transitional provision apparently intended to make clear that the attachment requirement was really repealed. We can safely assume that clerks have become accustomed to the new practice of not attaching the judgment roll papers together and, consequently, that this provision is surplus.

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§ 325. Appeal

325. The making of or refusal to make an order under Section 324 is appealable.

Comment. Section 325 replaces part of subdivision (m) of former Probate Code Section 1240 [as amended by AB 2652].

Note. The procedure for determining membership in a class is set out in Memorandum 86-56.

Staff Draft

COMMENTS TO REPEALED SECTIONS

§ 1240. Appeal

Comment. Former Section 1240 is restated in Estate and Trust Code Section 7500 without substantive change, except that the part of subdivision (m) relating to determination of heirship is superseded by Estate and Trust Code Section 325 (appeal of order determining membership in a class) See the Comment to Est. & Trust Code § 7500.

§ 1241. Effect of reversal of order appointing personal representative

Comment. Former Section 1240 is restated in Estate and Trust Code Section 7501 without substantive change.

§ 1242. Contents of judgment roll

Comment. Former Section 1242 is restated in Estate and Trust Code Section [95] without substantive change. However, the former provision to the effect that the papers constituting the judgment roll need not be attached together is omitted as unnecessary.