

9/29/86

Memorandum 86-89

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

Attached is a revised draft of the estate management recommendation. The Commission has reviewed this twice previously and the draft reflects Commission decisions. Remaining questions are noted in the draft after each section. If the Commission wants, this recommendation may be split from the rest of the proposed Estate and Trust Code and be included in our 1987 legislative program.

§ 10301. Notice of sale if property appraised at not more than \$5,000
§ 10302. Shortening time of notice of sale

At the May 1986 meeting, the Commission asked whether the period for posting of notice (10 days; five days if shortened) referred to court or calendar days. It was suggested that it should be court days.

In civil actions, notice periods are calendar days. See Code Civ. Proc. § 12. If the last day is a holiday, the period is extended to include the next day that is not a holiday. Id. § 12a. These rules apply in probate. See In re Estate of Rose, 63 Cal. 346 (1883).

The staff recommends against a special rule for notice in probate. Procedural uniformity is desirable, and a calendar-day period is easier to calculate than one which depends on how many days the court is in session.

Technical Revisions

After this draft was finished, our 1986 probate bill was enacted with technical revisions to notice. As a result, bracketed material on notice should be deleted from the Comments to Sections 9732, 9734, 9735, 9850, and 9861.

The staff has changed the numbers for procedural sections (Memo 86-91), so many cross-references in the draft must be renumbered.

On page 110 of the draft, in Example 6 (brokers' commissions) in the Comment to Section 10161, the parenthetical in the eighth line of the last paragraph should read "(six percent of \$210,500)". The staff will make other corrections orally at the meeting.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW

REVISION COMMISSION

RECOMMENDATION

relating to

PROBATE LAW

(ESTATE MANAGEMENT)

November 1986

(Staff Draft - October 1986)

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

November 11, 1986

LETTER OF TRANSMITTAL

The California Legislature has directed the California Law Revision Commission to study probate law and procedure. The Commission's ultimate objective is to recommend the enactment of a new Estate and Trust Code. The new code would replace the existing Probate Code.

This recommendation deals with one aspect of the probate law study -- management of a decedent's estate. The recommended legislation covers the powers and duties of personal representatives in connection with estate management, including sales of estate property. Recommendations for conforming revisions in the law governing management of estates by guardians and conservators are included.

The Commission has decided not to delay recommending the enactment of the proposed legislation contained in this recommendation until the entire new Estate and Trust Code can be prepared. Instead, the Commission plans to submit the recommended legislation for enactment by the 1987 session of the Legislature.

The narrative explanation at the beginning of this recommendation indicates the principal substantive revisions the proposed legislation would make in existing law. A Comment following each section of the proposed legislation gives the source of the section and indicates any changes the section would make in existing law. Comments showing the disposition of each existing section that would be superseded by the proposed legislation can be found at the end of the tentative recommendation.

Respectfully submitted,

ARTHUR K. MARSHALL
Chairperson

ESTATE MANAGEMENT
(Outline of Recommendation)

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INTRODUCTION

The existing statutory provisions relating to supervised administration of a decedent's estate¹ are incomplete and poorly organized. The provisions do not adequately cover the specific powers and duties of the personal representative. In addition, it is difficult to determine what the personal representative may do without prior court authorization and what the personal representative may do only with court authorization.

The proposed legislation reorganizes the existing statutory provisions, fills in gaps, and makes clear when court authorization is required and when it is not. The powers and duties of personal representatives are made more consistent with the 1979 revision of the guardianship-conservatorship law.² Some provisions of the proposed legislation are drawn from the new 1986 statute relating to trustees.³

The proposed legislation would make a number of changes in existing law. The experience of lawyers and judges who practice under existing law dictates the need for these changes. The more important substantive changes are described below.⁴

STANDARD OF CARE OF PERSONAL REPRESENTATIVE

The proposed legislation provides a statutory statement of the standard of care that must be exercised by the personal representative. The new provision codifies the case law rule that the

1. The Commission's recommendation relating to unsupervised administration (Independent Administration of Estates Act) will be separately published.

2. 1979 Cal. Stat. ch. 726, §3. The 1979 revision was enacted upon recommendation of the Commission. *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978); 15 Cal. L. Revision Comm'n Reports 451 (1980).

3. 1986 Cal. Stat. ch 820. The Trust Law was enacted upon Commission recommendation. *Recommendation Proposing The Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986).

4. Minor and technical revisions are not described below. They are noted in the Comments which follow the text of the sections of the recommended legislation set out in this Recommendation.

personal representative must use ordinary care and diligence in managing and controlling the estate.⁵ The new provision makes clear that what constitutes ordinary care and diligence is determined by all the circumstances of the particular estate.⁶

The proposed legislation also specifies when a power is to be exercised by the personal representative. The power must be exercised where ordinary care and diligence requires that it be exercised. The power may not be exercised where ordinary care and diligence requires that it not be exercised.

MEASURE OF LIABILITY FOR BREACH OF FIDUCIARY DUTY

The proposed legislation provides rules for determining the personal representative's liability for breach of fiduciary duty.⁷ The

5. See, e.g., *Estate of Beach*, 15 Cal.3d 623, 631, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); *Lobro v. Watson*, 42 Cal. App.3d 180, 189, 116 Cal. Rptr. 533 (1974). This is the same as the rule applicable to guardians and conservators of the estate. See Prob. Code § 2401. The standard of care for trustees is slightly different because of the existence of a trust instrument. See Prob. Code § 16040.

6. 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*, 15 Cal.3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975).

7. The new rules are consistent with the case law applicable to personal representatives. See *In re Estate of Elizalde*, 182 Cal. 427, 435, 188 P. 560 (1920) (liability for misappropriated funds plus interest, barring receipt of larger profit); *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 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 by 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); *Estate of Pardue*, 57 Cal. App.2d 918, 920-21, 135 P.2d 394 (1943) (liability for rental value of property). See also *In re Estate of Guglielmi*, 138 Cal. App. 80, 90, 31 P.2d 1078 (1934).

The new rules are drawn from the Restatement of Trusts and from California's new trust law. See Restatement (Second) of Trusts § 205 (1957); Prob. Code §§ 16440, 16441 (trust law). Existing statutory law provides a cryptic and unsatisfactory statement of the rules for the personal representative's liability. See, e.g., Prob. Code § 920.

personal representative is chargeable with any of the following that are appropriate under the circumstances:

(1) Any loss or depreciation in value of the estate resulting from the breach, 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 estate if the loss of profit is the result of the breach of duty.

The court may excuse the personal representative from liability in whole or part if the personal representative acted reasonably and in good faith and it would be equitable to do so.

If interest is awarded, the interest is that actually received by the personal representative, or the interest that accrues at the legal rate on judgments, whichever is greater.

JOINT PERSONAL REPRESENTATIVES

Absence from California

Under existing law, if two or more joint personal representatives have been appointed, majority concurrence is ordinarily required for them to act.⁸ But if one or more are absent from the state, the personal representatives remaining in California may act as though the absent personal representatives had not been appointed.⁹ The rule is different if there is only one personal representative; in that case, absence from the state does not take away the power to act.¹⁰

8. Prob. Code § 570. If two personal representatives have been appointed, the majority requirement means they both must concur to take action. *Bullis v. Security Pac. Nat'l Bank*, 21 Cal.3d 801, 810, 582 P.2d 109, 148 Cal. Rptr. 22 (1978).

9. Prob. Code § 570.

10. See Prob. Code §§ 405.1-405.6.

The proposed legislation provides a uniform rule governing the effect of absence from the state: Absence from the state does not take away the power of the absent personal representative to act. Where one of several personal representatives is absent from the state, the remaining personal representatives no longer can act as though the absent one had not been appointed. The personal representatives may act, but only with majority concurrence, just as though the absent personal representative were still in California. The new rule will impose no great burden on the remaining personal representatives; they can contact the absent personal representative by telephone rather than taking a possibly controversial action without consulting the absent personal representative.

Liability of One for Act or Omission of Another

Existing law provides that a personal representative is not liable for the act or negligence of a joint personal representative, except for collusion or gross negligence.¹¹

The proposed legislation provides a more detailed statement of liability.¹² One personal representative is liable for breach of fiduciary duty by another personal representative in the following cases:

(1) Where the personal representative participates in, approves, negligently enables, knowingly acquiesces in, or conceals the breach.

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

(3) Where the personal representative knows or should have known of the breach and neglects to take reasonable steps to compel the other personal representative to redress it.

11. Prob. Code § 920.

12. This provision is drawn from trust law (see Prob. Code § 16402) and is consistent with case law. See *In re Estate of Osborn*, 87 Cal. 1, 25 P. 157 (1890). The proposed legislation conforms the provision relating to joint guardians or conservators (Prob. Code § 2105) to the revised provision relating to joint personal representatives: Absence from the state will not deprive the absent guardian or conservator of power to act, and detailed rules are furnished for liability of one joint guardian or conservator for the act or omission of another.

EXTENT OF COURT SUPERVISION

Although under existing law the personal representative may perform many acts without prior court approval, the extent of this authority is not entirely clear.¹² The proposed legislation makes clear that, unless court approval is specifically required by statute, the personal representative may act without court approval.¹³

ACTIONS AND PROCEEDINGS BY OR AGAINST PERSONAL REPRESENTATIVE

Although the existing statute appears to require court authorization before the personal representative may compromise and settle claims and actions against the estate,¹⁴ the cases hold that the personal representative may make settlements without court authorization, but that in so doing the personal representative acts at his or her peril.¹⁵

The proposed legislation makes clear that the personal representative may compromise and settle claims and actions without court approval,¹⁶ except for the following matters for which prior court authorization is required:

(1) Any settlement before the time for filing creditors' claims has expired.¹⁷

(2) A settlement affecting real property.¹⁸

12. 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).

13. This is the same as the rule applicable to guardians and conservators of the estate. See Prob. Code § 2450.

14. Prob. Code §§ 578, 578a, 718.5.

15. See Estate of Lucas, 23 Cal.2d 454, 463-65, 144 P.2d 340 (1943); 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).

16. This provision is drawn from guardianship-conservatorship law. See Prob. Code § 2500.

17. This provision supersedes a portion of Probate Code Section 718.5.

18. This provision is drawn from guardianship-conservatorship law. See Prob. Code § 2501.

(3) A settlement involving the transfer or encumbrance of estate property, or creation of an unsecured liability of the estate, in excess of \$25,000.¹⁹

(4) Settlement of a claim against the personal representative.²⁰

(5) Modification of a debt owed by the personal representative to the estate.²¹

(6) Settlement of a claim for wrongful death or personal injury of the decedent.²²

Under existing law, a creditor of the decedent may require the personal representative to bring suit to recover property conveyed by the decedent in fraud of creditors, and the court may direct the creditor to share in paying the costs of suit.²³ The proposed legislation expands this authority to permit the court to require the creditor to share in paying the attorney fees incurred in bringing the suit. Since suit is brought for the benefit of creditors, creditors should share in paying the attorney fees as well as the costs of suit where that is appropriate under the circumstances of the particular case.

SUMMARY DETERMINATION OF DISPUTES

Under existing law, if there is a disputed claim against the estate,²⁴ the personal representative and the claimant may agree to

19. This provision is drawn from guardianship-conservatorship law. See Prob. Code § 2502.

20. This provision is drawn from guardianship-conservatorship law. See Prob. Code § 2503(a).

21. This provision is drawn from guardianship-conservatorship law. See Prob. Code § 2503(b).

22. This provision continues a portion of Probate Code Section 578a.

23. Prob. Code §§ 579-580. There must be a deficiency of assets in the estate before this procedure may be used. Prob. Code § 579; Broll, Property Not Subject to Administration, in 1 California Decedent Estate Administration § 4.21, at 149 (Cal. Cont. Ed. Bar 1971).

24. A claim may be submitted for summary determination if the personal representative doubts its correctness, if it has been rejected, or if it has not been acted upon and may be deemed rejected by the claimant. Prob. Code § 718.

submit the dispute to a commissioner, referee, temporary judge, or other disinterested person.²⁵ The proposed legislation expands this authority to apply to any dispute relating to the estate.²⁶ The proposed legislation also authorizes the personal representative to agree to submit a dispute relating to the estate to arbitration.²⁷ This expanded authority should help to resolve disputes expeditiously.

LEASES OF ESTATE PROPERTY

Existing law²⁸ permits the personal representative to lease estate property without prior court approval in the following cases:

(1) Where the rental is not more than \$250 a month and the lease term is not longer than one year.

(2) When the lease is from month to month, regardless of the amount of rental.

The proposed legislation increases the maximum rental for leases the personal representative may make without prior court approval from \$250 a month to \$1500 a month. The \$250 limit was established in 1963,²⁹ and rental values in California have increased dramatically in the intervening decades.³⁰

25. Prob. Code § 718.

26. The new provision is drawn from guardianship-conservatorship law. See Prob. Code § 2405.

27. Unlike judicial arbitration, which includes a right to a trial de novo, voluntary arbitration is ordinarily binding. See Code Civ. Proc. §§ 1285-1288.8; 6 B. Witkin, California Procedure Proceedings Without Trial § 320, at 612 (3d ed. 1985). In voluntary arbitration, there is no right to a trial de novo, and, although the court may correct or vacate an award, the grounds for so doing are limited. See *id.* For the comparable provision in guardianship-conservatorship law, see Prob. Code § 2406.

28. Prob. Code § 844.

29. See 1963 Cal. Stat. ch. 51.

30. The proposed legislation makes a conforming revision to the Guardianship-Conservatorship Law (Prob. Code § 2555) to increase the maximum rental for leases that the guardian or conservator may execute without court authorization from \$750 per month to \$1500 per month.

CONTINUING OPERATION OF DECEDENT'S BUSINESS

Under existing law, the court may authorize the personal representative to continue operation of the decedent's business.³¹ Under case law, if the personal representative continues operation of the decedent's business without a court order, the personal representative is nonetheless excused from liability if he or she acted in good faith and as a cautious and prudent person would act under similar circumstances.³²

The proposed legislation makes clear that the personal representative may operate the decedent's nonpartnership business for six months, with or without court authorization.³³ Court authorization is required to operate the business for more than six months, because the risk to the estate increases the longer the business is operated. This is consistent with the Independent Administration of Estates Act which requires advice of proposed action for operation of the business for more than six months.³⁴

The proposed legislation gives the court express authority to make an order directing the personal representative to discontinue the operation of the decedent's business within the time and in accordance with the provisions of the order. Any interested person may request the court to issue the order. Giving the court this authority recognizes the risk to the estate of continuing the operation of a business after the death of the decedent.

31. Prob. Code § 572.

32. In re Estate of Maddalena, 42 Cal. App.2d 12, 18, 108 P.2d 17 (1940).

33. The proposed legislation requires that the surviving partner settle without delay the affairs of a partnership in which the decedent was a general partner unless the court authorizes the personal representative to continue as a general or limited partner. The proposed legislation also makes clear that court authorization is not required for the personal representative to exercise the decedent's rights as a limited partner for the purpose of settling the estate or administering the decedent's property as provided in Section 15675 of the Corporations Code.

34. Prob. Code § 591.3(b)(6).

PURCHASE OF ESTATE PROPERTY BY PERSONAL REPRESENTATIVE

Under existing law, the personal representative may not purchase property of the estate, unless the right is given by will or contract.³⁵ The proposed legislation expands this right to permit the personal representative to purchase estate property if written consent to the purchase is signed by all the decedent's heirs or devisees, is filed with the court, and the court approves the proposed purchase. The requirement of consent and court approval is a sufficient safeguard against the dangers of self-dealing.

ABANDONMENT OF TANGIBLE PERSONAL PROPERTY

The proposed legislation makes clear that the personal representative may dispose of or abandon tangible personal property not specifically devised where the property is either valueless or where the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value.³⁶ The proposed legislation requires that the personal representative first give notice of the proposed disposition or abandonment.³⁷ The persons given notice may prevent the disposition or abandonment by objecting to the personal

35. Prob. Code § 583; Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.8, at 507 (Cal. Cont. Ed. Bar 1971). The right must be given in the decedent's will or by a specifically enforceable contract made during the decedent's lifetime, or by an option to purchase given to the personal representative in the decedent's will. Id.

36. This provision is consistent with case law. See In re Estate of Barreiro, 125 Cal. App. 153, 178-79, 13 P.2d 1017 (1932). It is also consistent with the Independent Administration of Estates Act (Prob. Code § 591.6(d), with guardianship-conservatorship law (Prob. Code § 2465), and with the Uniform Probate Code (UPC § 3-715(6)).

37. The proposed legislation requires notice to devisees whose interest is affected, to heirs if the decedent died intestate, to persons who have requested special notice, and to the State of California if any portion of the estate is to escheat to it. Notice need not be given to a person who consents in writing to the proposed disposition or abandonment or who waives notice in writing.

representative.³⁸ This will prevent disposition of apparently valueless property that has sentimental or other special value to heirs or devisees.

DEPOSITS IN FINANCIAL INSTITUTIONS

Existing law permits the personal representative to deposit estate funds in banks within this state or in insured savings and loan associations.³⁹ The proposed legislation requires that the savings and loan association be within this state. The financial institutions in which deposits may be made are expanded to include trust companies⁴⁰ and insured credit unions in this state.

Existing law discharges the personal representative from further care or responsibility for funds deposited with financial institutions until the funds are withdrawn.⁴¹ The proposed legislation eliminates this immunity, and requires the personal representative to use ordinary care and diligence in managing deposited funds.⁴² Since the personal representative has overall management of the estate, the personal representative should ensure that funds on deposit are not subject to undue risk, as, for example, where it is known that the financial institution is in difficulty.

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38. The personal representative who receives an objection may not thereafter dispose of or abandon the property without court authorization. Also the person objecting may apply to the court for an order restraining the personal representative from disposing of or abandoning the property without prior court authorization. Notwithstanding these provisions, the personal representative may abandon or dispose of the property without court authorization if the personal representative requests the objecting person to take possession of and responsibility for the property and the objecting person fails to do so.

39. Prob. Code § 585.

40. "Trust companies" and "banks" are not synonymous. See, e.g., Fin. Code §§ 102, 106, 107, 1501.

41. Prob. Code § 585.

42. See supra text accompanying notes 5-6.

Existing law permits the personal representative, without prior court authorization, to invest in mutual funds comprised of direct obligations of the United States maturing not later than one year from the date of investment, or in repurchase agreements with respect to any obligation in which the fund is authorized to invest.⁴³ The proposed legislation substitutes for this authorization a provision taken from the new Trust Law. The Trust Law provision permits the mutual fund to invest in United States government obligations maturing not later than five years after investment or in repurchase agreements but requires that the fund's portfolio be limited to such investments⁴⁴ and that the repurchase agreements be fully collateralized by United States government obligations.⁴⁵ Substitution of this Trust Law provision will preclude estate assets from being invested indirectly in equities (such as common stocks) that are inappropriate for estate assets.

INSURING ESTATE ASSETS OR PERSONAL REPRESENTATIVE

Under existing law, the personal representative has implied authority to insure estate assets against damage or loss and to insure himself or herself against liability.⁴⁶ The proposed legislation codifies this authority in language drawn from the Independent Administration of Estates Act.⁴⁷ Although the new provision is permissive, proper performance of the personal representative's fiduciary duties may require the personal representative to insure estate assets in appropriate circumstances.⁴⁸

43. Prob. Code § 584.1.

44. This limitation does not preclude the fund from having a reserve of uninvested cash.

45. The Commission is informed that this is consistent with the intent of the original legislation, and that Probate Code Section 584.1 permits investment in repurchase agreements with respect to "any obligation," rather than with respect to U. S. government obligations, because of a drafting error.

46. See 1 California Decedent Estate Administration § 9.50, at 356 (Cal. Cont. Ed. Bar 1971).

47. Prob. Code § 591.6(i).

48. See supra text accompanying notes 5-6.

ESTATE SALES

The proposed legislation generally continues the substance of existing law relating to estate sales, except for the repeal of special provisions concerning sale of mining property,⁴⁹ and clarifies and simplifies the statute.⁵⁰

Compensation of Agent or Broker

Compensation reasonable, but not more than contract amount. The proposed legislation continues the rule of existing law that brokers' commissions on a sale of estate property shall be the amount the court determines is reasonable,⁵¹ but makes clear that the amount of the commission may not exceed the amount provided in the contract.

49. Prob. Code §§ 810-814. See discussion in text accompanying notes 79-81 infra. Other substantive changes to existing law are noted in text.

50. The existing chapter on estate sales is divided into five articles: sales in general (Prob. Code §§ 750-764), sale of personal property (Prob. Code §§ 770-776), sale of real property (Prob. Code §§ 780-794), sale of contract to purchase real property (Prob. Code §§ 800-802), and sale of mining property (Prob. Code §§ 810-814). However, because of amendments over the years, the substantive provisions are scattered through the chapter on sales, and are not necessarily in the proper article. The article on sales in general contains provisions applicable to real property sales only (Prob. Code § 754.6, first sentence), and others applicable to sales of personal property only (Prob. Code §§ 754.6, second sentence, 756.5, 760.5). The article on sale of real property contains provisions applicable to sales of personal property. Prob. Code § 787.

The article on sale of personal property contains a provision authorizing the personal representative to purchase property to complete a short sale. Prob. Code § 771.3. The proposed legislation relocates this provision in the chapter on the powers and duties of personal representatives.

The rules for abatement are located in the sales chapter (Prob. Code §§ 750-754), and should more appropriately go with the provisions on rules of construction of wills.

Some provisions are duplicated in nearly identical form in the article on sale of personal property and in the article on sale of real property. Compare Prob. Code §§ 775 and 776 with Prob. Code §§ 788 and 789. The proposed legislation will consolidate these provisions in one set of provisions applicable both to real and personal property sales.

51. See Prob. Code §§ 760, 761.5, 785.

Exclusive listing period. Probate Code Section 760 was amended in 1974⁵² to permit the personal representative to make an exclusive listing contract with a real estate broker for the sale of property of the estate. The exclusive listing contract requires court approval and may be for a period not to exceed 90 days.⁵³

The proposed legislation continues and clarifies this authority and makes clear that the personal representative, with court permission obtained upon ex parte application, may grant one or more extensions of the 90-day period. Each extension may be for a period not to exceed 90 days.

Assured commission for exclusive listing broker. The exclusive listing broker performs a valuable service to the estate even where the broker does not produce the buyer. By listing the property through the multiple listing service, the broker assures maximum exposure of the property to the market. In sales outside probate, the exclusive listing broker is entitled to a commission on the sale whether or not the exclusive listing broker produces a buyer for the property.⁵⁴ In probate sales, however, some courts inquire into the services actually performed by the exclusive listing broker.⁵⁵

The proposed legislation makes clear that the exclusive listing broker is entitled to share in the commission without producing a buyer or showing that he or she has personally made an effort to sell the property. This will avoid the need for the court to review the services provided and to determine their value.

Division of commission between exclusive listing broker and broker who returns bid to court. The existing statute provides for division of the commission when one broker produces a buyer whose bid is returned to the court for confirmation, but sale is confirmed to an

52. 1974 Cal. Stat. ch. 1422.

53. Prob. Code § 760.

54. See 1 H. Miller & M. Starr, Current Law of California Real Estate §§ 2.10, 2.11, at 185-87 (rev. ed. 1975).

55. See, e.g., San Diego County Probate Rules § 4.79, in California Local Probate Rules, 7th Edition (C.E.B. 1986). But the exclusive listing broker may be entitled to a commission even if he or she does not produce the buyer. See 1 H. Miller & M. Starr, Current Law of California Real Estate § 2.50, at 301 (rev. ed. 1975).

overbidder who is produced by another broker.⁵⁶ The 1974 amendment authorizing an exclusive listing contract⁵⁷ creates the possibility that three brokers may be involved in a transaction: the exclusive listing broker (Broker A), the broker who produces a buyer whose bid is returned to the court for confirmation (Broker B), and the broker who produces the successful overbidder (Broker C). However, the 1974 amendment did not revise the provisions governing division of commissions to take account of the possibility that there may be three brokers involved.

Under the proposed legislation, when there is an exclusive listing and three brokers are involved, the broker who produces the successful overbidder (Broker C) is entitled to one-half of the commission on the original bid and all of the commission on the difference between the original bid and the sale price confirmed to the overbidder, as under existing law.⁵⁸ The exclusive listing broker (Broker A) and the broker who produced the original bid (Broker B) divide the balance of the commission as provided in any agreement between them, or, if there is no agreement, divide it equally.

Measure of Damages on Purchaser's Default

If a purchaser of property at an estate sale defaults and the property is not resold by the personal representative, the measure of damages is the same as under general law: the amount by which the contract price exceeds the market value of the property at the time of breach (loss of bargain), plus expenses made necessary by the purchaser's breach.⁵⁹ However, if the property is resold by the

56. See Prob. Code §§ 760, 761. The broker who produced the original buyer whose bid was returned to the court for confirmation is entitled to a half commission on the original bid, and the broker who produced the successful overbidder is entitled to the balance of the commission. These provisions are satisfactory where only two brokers are involved.

57. 1974 Cal. Stat. ch. 1422 (amending Prob. Code § 760).

58. Prob. Code §§ 760, 761.

59. Estate of Williamson, 150 Cal. App.2d 334, 339, 310 P.2d 77 (1957); 1 B. Witkin, Summary of California Law Contracts § 663, at 562 (8th ed. 1973). Under general law, expenses made necessary by the purchaser's breach include expenses of resale to the extent they exceed expenses assumed by the seller under the breached contract. Jensen v. Dalton, 9 Cal. App.3d 654, 657, 88 Cal. Rptr. 426 (1970).

personal representative, there is a special rule of damages: Damages are measured by the contract price minus the amount realized on resale,⁶⁰ plus expenses of the first sale, but only if the amount realized on resale is insufficient to cover those expenses.⁶¹ This special limitation -- that expenses of the first sale are recoverable only if the amount realized on resale is insufficient to cover those expenses -- restricts the recoverable expenses to the disadvantage of the estate. The proposed legislation does not continue this special limitation and, instead, adopts the general rule that recoverable expenses are those made necessary by the purchaser's breach, whether or not the resale price exceeds the contract price of the first sale. The proposed legislation also makes clear that, as under general law, damages may include consequential damages.⁶²

Court Relief From Directions in Will

Under existing law, if directions are given in the will as to the mode of selling or the particular property to be sold, the personal representative must comply with those directions.⁶³ The proposed legislation permits the court to relieve the personal representative of the duty to comply with the directions in the will if the court determines it would be to the advantage of the estate and in the best interest of interested persons. Relief from directions in the will may be appropriate, for example, where conditions have changed since execution of the will.

60. Prob. Code §§ 775 (personal property), 788 (real property). The reason the resale price is used to determine loss of bargain in estate sales, rather than market value at the time of breach as under general law, is so the estate will not suffer loss in a declining market: There may be no loss of bargain at the time of breach, but the eventual resale price may be much lower. *Estate of Williamson*, 150 Cal. App.2d 334, 339, 310 P.2d 77 (1957). This is a sound reason to use resale price to determine loss of bargain. The proposed legislation therefore continues the special rule that resale price is used to determine loss of bargain in estate sales.

61. Prob. Code §§ 775 (personal property), 788 (real property).

62. In the case of real property, such consequential damages may include, for example, sewer assessments, utilities fees, and taxes. *Jensen v. Dalton*, 9 Cal. App.3d 654, 658, 88 Cal. Rptr. 426 (1970). See generally 1 B. Witkin, *Summary of California Law Contracts* §§ 665-666, at 564-65 (8th ed. 1973).

63. Prob. Code § 757.

Posting Notice of Sale of Real Property of Small Value

If the value of real property to be sold is \$1,000 or less, existing law permits the personal representative to post notice of sale at the courthouse rather than publishing the notice.⁶⁴ The proposed legislation increases to \$5,000 the maximum value of the property for posting of the notice.⁶⁵

Contents of Notice of Sale

When real property is to be sold, existing law requires that the notice of sale describe the property with particularity.⁶⁶ This requirement is understood to require a legal description of the property, either by metes and bounds or by lot and block number.⁶⁷ The proposed legislation replaces this requirement with a new requirement that the notice of sale describe the property by its street address or other common designation, if any. This is the description that will be most readily understood by potential purchasers. Only if there is no street address or other common designation is the legal description required under the proposed legislation.

The proposed legislation also makes clear that terms and conditions of sale may be included in the notice of sale.⁶⁸ If terms and conditions of sale are included, the bids must comply with them.⁶⁹

Notice on Redemption or Conversion of Securities

Existing law permits securities to be surrendered for redemption or conversion without notice.⁷⁰ The proposed legislation restricts

64. Prob. Code § 780.

65. The amount was last increased to \$1,000 in 1959. The increase to \$5,000 recognizes the effect of inflation in the intervening years.

66. Prob. Code § 780.

67. See Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.23, at 515 (Cal. Cont. Ed. Bar 1971).

68. This codifies existing practice. See Hudner, supra note 67, § 14.53, at 540.

69. This is consistent with case law. See Estate of Hunter, 194 Cal. App.2d 859, 865-68, 15 Cal. Rptr. 556 (1961) (real property); In re Estate of Dargie, 33 Cal. App.2d 148, 155-57, 91 P.2d 126 (1939) (personal property).

70. Prob. Code § 771(a).

this provision so that notice is required unless the securities are listed on an established stock or bond exchange or are securities designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc., and the redemption or conversion is at a price or value not less than the market price.

Auction Sales

Existing law permits real and personal property of the estate to be sold at public auction.⁷¹ If real property is sold at public auction, the sale must be made between 9 a.m. and the setting of the sun on the same day.⁷² The proposed legislation provides that auction sales of real property must be made between 9 a.m. and 9 p.m.

Auction sales of personal property are ordinarily made in the county where the estate proceedings are pending.⁷³ The proposed legislation permits the court by order to authorize an auction sale outside California or outside the United States. This may be desirable, for example, when the property to be auctioned is a rare work of art and an established market exists at some location outside California.

Petition for Confirmation by Purchaser

Under existing law, when court confirmation of sale is required, a report of the sale and a petition for court confirmation must be made within 30 days after the sale.⁷⁴ Existing law does not specify who must file the report and petition, nor does it state the consequences

71. Prob. Code § 754; see also Prob. Code §§ 760.5, 772, 781. There is some inconsistency in existing law concerning the type of personal property that may be auctioned: Some provisions authorize auction sale of personal property without limitation as to type. See Prob. Code §§ 754, 757, 772. Other provisions appear to limit auction sales of personal property to tangible personal property. See Prob. Code § 760.5. The proposed legislation provides that an auctioneer may auction any property authorized under the new Auctioneer and Auction Licensing Act. Bus. & Prof. Code §§ 5700-5791.5. The Auctioneer and Auction Licensing Act authorizes a licensed auctioneer to auction goods, wares, chattels, merchandise, or other personal property, including domestic animals and farm products. Bus. & Prof. Code §§ 5701(j), 5774, 5775-5776.

72. Prob. Code § 781.

73. See Prob. Code § 772.

74. Prob. Code § 755.

of failure to file the report and petition within the 30-day period.⁷⁵ The proposed legislation permits the purchaser to file the report and petition if the personal representative fails to do so within the 30-day period.

Limitation Period for Recovery of Property on Claimed Void Sale

Existing law provides a three-year limitation period for recovery of any property sold by a personal representative on the claim that the sale is void.⁷⁶ The three-year limitation period is measured from settlement of the personal representative's final account or from the date of discovery of any fraud on which the action is based, whichever is later.⁷⁷ Under existing law, the three-year limitation period is tolled for minors or others under a legal disability to sue at the time the right of action accrued; the period is extended to three years from the removal of the disability.⁷⁸

The proposed legislation eliminates the special tolling period for minors and others under a legal disability to sue. The result is that, absent fraud, the proposed legislation gives the purchaser of the property more certain limitation period -- three years from the settlement of the personal representative's final account -- after which the property cannot be taken away from the purchaser, even though the sale is void for failure to comply with some procedural requirement.

Repeal of Special Provisions for Sale of Mining Property

Generally when real property of the estate is to be sold, one court proceeding is required -- for court confirmation of the sale.⁷⁹ However, when the property is mining property, two court proceedings are required -- one on the petition for a court order authorizing the

75. See *Costello v. Wells Fargo Bank*, 258 Cal. App.2d 90, 65 Cal. Rptr. 612 (1968) (no cause of action against personal representative for failing to file report and petition within 30-day period).

76. Prob. Code § 793.

77. Prob. Code § 793.

78. Prob. Code § 793.

79. See Prob. Code §§ 755, 785-785.1.

sale, and another on the petition for court confirmation of sale.⁸⁰ This two-step procedure is cumbersome, unnecessary, and wasteful. Moreover, the special provisions for sale of mining property are rarely used.⁸¹ For these reasons, the proposed legislation treats estate sales of mining property under the provisions for sales of real property generally. The result is that only one court hearing (on confirmation of sale) will be required.

80. Prob. Code §§ 810-811, 814.

81. Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.71, at 554 (Cal. Cont. Ed. Bar 1971).

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

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- § 9610. Extent of court supervision
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- § 9651. Profit or loss to the estate
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- § 9761. Settlement of affairs of partnership in which decedent was a general partner
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CHAPTER 6. ABANDONMENT OF TANGIBLE PERSONAL PROPERTY

- § 9780. Abandonment of tangible personal property
- § 9781. Court authorization or approval not required unless will otherwise provides
- § 9782. Notice of proposed disposition or abandonment
- § 9783. Delivery of notice
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- § 9785. Restraining order
- § 9786. Notice not required where consent or waiver
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CHAPTER 7. BORROWING, REFINANCING, AND ENCUMBERING PROPERTY

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- § 9804. Hearing; order
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- § 9820. Authority to sue and defend
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- § 9834. Claim of estate against personal representative; debt of personal representative to estate
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- § 10150. Contract with agent or broker
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Article 3. Compensation of Agent, Broker, or Auctioneer

- § 10160. Limitation on liability of estate
- § 10161. Compensation and fees to be in reasonable amount determined by court
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- § 10163. Compensation where original bid made by purchaser direct to estate and sale made on increased bid
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- § 10165. Compensation where sale made on increased bid by purchaser represented by agent or broker and either the original bid returned to court was made by a purchaser procured by another agent or broker or there is another agent or broker who holds exclusive right to sell contract
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PART 5. ESTATE MANAGEMENT

CHAPTER 1. GENERAL PROVISIONS

Article 1. Duties and Liabilities of Personal Representative

Min. 5/86-jd

*05/28/86§ 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, 15 Cal. 3d 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 9656. 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 PROVISIONS

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 Sections 9631 (liability of joint personal representative for breach of duty by another personal representative), 10380 (liability for neglect or misconduct in sale of estate property), 10381 (liquidated damages for fraudulent sale), 10382 (limitation of actions for recovery of property). 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

Personal representative § 58

COMPARABLE PROVISIONS

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

Min. 7/86-jd

*08/25/86

§ 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 is 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 (other remedies not affected). In the absence of a breach of duty for which the personal representative is liable pursuant to Section 9601, a trust company (defined in Section 83) 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 PROVISIONS

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

Note. At the July meeting, the Commission directed that the Comment to Section 9602 be revised to add: "For a definition of 'trust

company,' see Fin. Code § 107." In place of a reference to Section 107 of the Financial Code, the staff has substituted a reference to Section 83 of the Estate and Trust Code (defining "trust company" as used in the new Estate and Trust Code) The Comment to Section 83 of the Estate and Trust Code includes a reference to Section 107 of the Financial Code.

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 PROVISIONS

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

Min. 7/86-jd

*08/25/86

§ 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).

In a case where Section 9610 authorizes the personal representative to act without court authorization and the personal representative decides to take the action without obtaining court authorization, the personal representative must use ordinary care and diligence in taking the action. See Section 9600. 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

Personal representative § 58

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2450(a)

*08/25/86

§ 9611. Instructions from or confirmation by court

9611. (a) In all cases where no other 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 procedure is provided by statute. Section 2403 is not so limited. If some other procedure is provided by statute but the personal representative is uncertain whether the statute providing the other 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).

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

Interested person § 48

Personal representative § 58

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISIONS

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

Min. 7/86-jd

*08/25/86

§ 9612. Effect of court authorization or approval

9612. (a) When a judgment or order 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 or order. 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 or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment or order 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 *Bank of America v. Superior Court*, 181 Cal. App.3d 705, ___ Cal. Rptr. ___ (1986); *Lazzarone v. Bank of America*, 181 Cal.App.3d 581, ___ Cal.Rptr. ___ (1986); *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 or order made pursuant to this division becomes final, see Section [to be drafted].

CROSS-REFERENCES

Definitions

Devisee § 34

Heirs § 44

Personal representative § 58

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2103

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

Article 3. Summary Determination of Disputes

Min. 5/86-jd
Min. 7/86-jd

*09/11/86

§ 9620. Submission of dispute to temporary judge

9620. If there is a dispute relating to the estate between the personal representative and a third person, the personal representative may do either of the following:

(a) Enter into an agreement in writing with the third person to refer the dispute to 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 or the third person 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, including but not limited to one concerning a claim by or against the decedent or the estate. 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 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

Person § 56

Personal representative § 58

COMPARABLE PROVISIONS

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 interrogate between Section 9620 and the claims provisions needs to be studied.

Min. 5/86-jd

Min. 7/86-jd

*09/11/86

§ 9621. Submission of dispute to arbitration

9621. If there is a dispute relating to the estate between the personal representative and a third person, 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. Notice of the hearing on the petition for approval of the agreement shall be given for the period and in the manner provided in [Section 1200.5] unless the court, upon a showing of good cause, orders that notice be given for a shorter period or that notice be dispensed with. The order approving the agreement may be made ex parte.

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

Proc. §§ 1285-1288.8; 6 B. Witkin, California Procedure, Proceedings Without Trial § 320, at 612 (3 ed. 1985). There is no right to a jury trial when an arbitration award as contemplated by Section 9621 is confirmed. See Code Civ. Proc. § 1286. See also Madden v. Kaiser Foundation Hospitals, 17 Cal.3d 699, 714, 552 P.2d 1178, 131 Cal.Rptr. 882 (1976).

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

COMPARABLE PROVISIONS

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.

Note. The last two sentences have been added to Section 9621 to effectuate the direction of the Commission at the July meeting. The language is drawn from a portion of Probate Code Section 860, continued in Section 9922(b) of the draft.

Article 4. Joint Personal Representatives

Min. 5/86-jd

Min. 7/86-jd

*08/25/86

§ 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 (1) absent from the state and unable act, or (2) otherwise unable to act, or (3) 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 drawn in part 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

Personal representative § 58
Proof of giving notice § 7308

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2105

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

Note. Section 2105 (guardianship-conservatorship law) should be conformed to Section 9630.

Min. 5/86-jd

Min. 7/86-jd

*08/25/86

§ 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.

(c) The liability of a personal representative for a breach of fiduciary duty committed by another of the personal representatives that occurred before [the date this section becomes operative] is governed by prior law and not by this section.

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). Subdivision (b), which imposes liability on one personal representative for a breach of fiduciary duty by another representative under certain circumstances, is generally 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 PROVISIONS

Trustee § 16402 [A.B. 2652]

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

Note. The operative date the the Estate and Trust Code should be substituted for the bracketed language in subdivision (c) of Section 6931.

Min. 5/86-jd

*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

Min. 5/86-jd

Min. 7/86-jd

*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) Has the right to, and shall take possession or control of, all the estate of the decedent to be administered in the decedent's estate 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) The personal representative shall pay taxes on, and take all steps necessary for the management, protection, and preservation of, the estate in his or her possession.

(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), 9780 (abandonment of tangible personal 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. This language used in this sentence is drawn from Section 3-709 of the Uniform Probate Code. For a comparable provision in the guardianship-conservatorship law, see Section 2451 (collection of debts and benefits). Where necessary, the personal representative may maintain an action to recover possession of estate property or to determine title thereto. See Sections 9820 (action or proceeding for benefit of estate), 9654 (action by heirs or devisees for possession or to quiet title to real property of estate). See also Section [300] (estate subject to control of superior court).

The second sentence of paragraph (1) of subdivision (a) 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.

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 9656 (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. Paragraph (c) proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by the devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, the heir or devisee must surrender the asset to the personal representative. It may be possible for the heir or devisee to question the judgment of the personal representative in later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate. On the other hand, 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. In re 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.

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."

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

Devisee § 34

Heirs § 44

Personal representative § 58

Real property § 68

*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

*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. See also Section 9705 (interest on deposits by trust company).

CROSS-REFERENCES

Definitions

Personal representative § 58

Will § 88

*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, 143 Cal. App. 2d 123. 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

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.

Note. A reference to the Uniform Fraudulent Transfer Act should be substituted in paragraph (a)(1) (and the Comment revised to reflect this change) if that Act is enacted in California.

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 Sections 9650 (right of personal representative to possession or control of estate), 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

*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 PROVISIONS

Trusts § 16235 (SEE ALSO § 16236)

*05/29/86-Renumbered 08/27/86

§ 9656. Insuring estate assets; insuring personal representative
against liability

9656. The personal representative may insure assets of the estate against damage or loss, and may insure himself or herself against liability to third persons.

Comment. Section 9656 is new and is drawn from subdivision (1) of former Probate Code Section 591.6. Section 9656 continues a power implied under former law. See 1 California Decedent Estate Administration § 9.50, at 356 (Cal. Cont. Ed. Bar 1971). The personal representative may act under Section 9656 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). For example, if the estate includes real property, the personal representative ordinarily will have the responsibility to maintain a reasonable amount of insurance on improvements on property and may insure himself or herself against personal liability arising out of the duty to maintain the property. Where the personal representative properly exercises the power under this section, the cost of insurance for estate property or to protect the personal representative against liability is a proper expense of estate administration.

CROSS-REFERENCES

Definitions

Personal representative § 58

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2453

Trusts § 16240

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

Min. 5/86-jd

Min. 7/86-jd

*08/25/86

§ 9700. Savings accounts

9700. (a) The personal representative may do any one or more of the following:

(1) Deposit money belonging to the estate in a bank in this state or in a trust company.

(2) May invest money belonging to the estate in an account in an insured savings and loan association in this state or in shares of an insured credit union in this state.

(b) Unless otherwise provided by court order, the money deposited or invested under this section may be withdrawn without order of the court.

Comment. Subdivision (a) 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

Personal representative § 58

Shares of an insured credit union § 72

Trust company § 83

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2453

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.

Note. Section 2453 (guardianship and conservatorship law) should be conformed to Section 9700.

Min. 5/86-jd

Min. 7/86-jd

*08/25/86

§ 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 (defined in Section 83). 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

Personal representative § 58

Trust company § 83

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2454

*08/25/86

§ 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. See also Section 83 (defining "trust company").

CROSS-REFERENCES

Definitions

Security § 70

Trust company § 83

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2455

Note. Should subdivision (a) of Section 9702 be a general definition? The same definition could be used in Section 2455 (guardianship and conservatorship law).

Note. Section 2455 (guardianship and conservatorship law) should be conformed to Section 9702.

*08/25/86

§ 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 in this state or in shares in an insured credit union in this state, subject to withdrawal only upon authorization of the court.

(b) All or 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.

CROSS-REFERENCES

Definitions

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

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2456

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.

Note. Section 2456 (guardianship and conservatorship law) should be conformed to Section 9703.

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

Trust company § 83

Min. 5/86-jd

Min. 7/86-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. See Section 83 (defining "trust company"). 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

Personal representative § 58

Trust company § 83

CHAPTER 4. INVESTMENTS AND PURCHASE OF PROPERTY

Min. 5/86-jd

Min. 7/86-jd

*08/26/86

§ 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) 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.

(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.

Subdivision (a) of Section 9730 continues a portion of former Probate Code Section 584.1 without substantive change. Subdivision (b) of Section 9730 replaces a portion of former Probate Code Section 584.1 with language drawn from Section 16224 (powers of trustees). 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 PROVISIONS

Guardianship-conservatorship §§ 2574, 2575

Trusts § 16224

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

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

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? See also Note under Section 9760.

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

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

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.

Min. 5/86-jd

Min. 7/86-jd

*08/26/86

§ 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.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

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

Min. 7/86-jd

*08/26/86

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

9760. (a) As used in this section, "decedent's business" means 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, 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 is a new provision. The first portion of subdivision (a) uses language taken from former Probate Code Section 591.3(b)(6), continued as Estate and Trust Code Section 10551(f). Subdivision (a) also makes clear that Section 9760 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, 42 Cal. App. 2d at 19. Under Section 9760, the personal representative can obtain such ratification only upon the showing that it was to the advantage of the estate and 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. 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.

*08/25/86

§ 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 Section 9763; 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.

CROSS-REFERENCES

Decedent's limited partnership § 9763

Definitions

Personal representative § 58

*09/11/86

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

9762. (a) Subject to subdivisions (b), (c), and (d), 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 general or a limited partner in any partnership in which the decedent was a general 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) If there is a 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, the personal representative has all the rights, powers, duties, and obligations provided in the written partnership agreement.

(d) 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.

(e) 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.

The section is limited to a partnership in which the decedent was a general partner at the time of the decedent's death. Insofar as former Probate Code Section 572 may have applied to a partnership in which the decedent was a limited partner, the section is superseded by Section 9763. See the Comment to that section.

The words "unless all surviving partners consent" are added to subdivision (b).

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 Probate Code 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).

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Decedent's limited partnership § 9763

Definitions

Interested person § 48

Personal representative § 58

Proof of giving notice § 7308

Verification required § 7203

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

Note. The following conforming revision should be made in Corporations Code Section 15031:

15031. Dissolution is caused:

....

(4) By the death of any partner unless otherwise provided in an agreement in writing signed by all the partners before such death or in a court order made pursuant to Section 9762 of the Estate and Trust Code.

*09/11/86

§ 9763. Partnership in which decedent was a limited partner

9763. The personal representative may exercise the decedent's rights as a limited partner as provided in Section 15675 of the Corporations Code.

Comment. Section 9763 replaces the provisions of former Probate Code Section 572 that may have required court approval for the personal representative to exercise the decedent's rights as a limited partner. Under Section 15675 of the Corporations Code, court approval is not required, but the personal representative may exercise the decedent's rights only for the purpose of settling the estate.

Note. Section 15675 of the Corporations Code provides:

15675. If a limited partner who is an individual dies or a court of competent jurisdiction adjudges the limited partner to be incompetent to manage the limited partner's person or property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all of the partner's rights for the purpose settling the partner's estate or administering the partner's property.

CHAPTER 6. ABANDONMENT OF TANGIBLE PERSONAL PROPERTY

Min. 5/86-jd

Min. 7/86-jd

*08/26/86

§ 9780. Abandonment of tangible personal property

9780. Unless the property is specifically devised, subject to the requirements of this chapter, the personal representative may:

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

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

Comment. This chapter (commencing with Section 9780) is new. The chapter 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 likely to be collected. See Section 9600(b).

The personal representative is required to exercise the power granted by this chapter 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).

Section 9780 is consistent with case law. See *In re Estate of Barreiro*, 125 Cal. App. 153, 178-79, 13 P.2d 1017 (1932). The section also is 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, whereas this chapter (Section 9782) requires that notice be given before property is disposed of or abandoned.

The procedure provided by this chapter is analogous to the notice of proposed action procedure under the Independent Administration of Estates Act (Sections 10550-10560)

CROSS-REFERENCES

Definitions

Devise § 32
Personal representative § 58
Property § 62

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465
Independent administration § 10502(e)
Trusts § 16227

Note. The comparable provision of the guardianship and conservatorship law should be conformed to this chapter.

Note. Subdivision (e) of Section 10502 (Independent Administration of Estates Act) should be conformed to Section 9780.

Note. This chapter replaces Section 9656 of the previous draft of this portion of the new code. The former section required extensive revisions to conform to the decisions made at the July meeting, and the staff concluded that, because of the length of the revised section, it would be desirable to split the section into a number of short sections and to compile those sections in a separate chapter.

Min. 7/86-jd

*08/26/86

§ 9781. Court authorization or approval not required unless will otherwise provides

9781. Unless otherwise provided in the will, subject to the requirements of this chapter, the personal representative may exercise the power provided in Section 9780 without court authorization or approval.

Comment. The provision in Section 9781 for the will to require court authorization before the power granted by Section 9780 may be exercised is drawn from Section 10502(e) (Independent Administration of Estates Act).

CROSS-REFERENCES

Definitions

Personal representative § 58
Will § 88

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465
Independent administration § 10502(e)

Min. 7/86-jd

*09/11/86

§ 9782. Notice of proposed disposition or abandonment

9782. (a) Except as provided in Section 9786, before disposing or abandoning property under Section 9870, the personal representative shall give notice of the proposed disposition or abandonment, in the manner provided in Section 9783, 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].

(4) The State of California if any portion of the estate is to escheat to it.

(b) The notice of the proposed disposition or abandonment shall describe the property to be disposed of or abandoned, indicate the manner in which the property is to be disposed of or abandoned, and specify the date on or after which the property will be disposed of or abandoned.

Comment. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Devise § 32
Heirs § 44
Personal representative § 58
Property § 62

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465
Independent administration § 10552

*09/11/86

§ 9783. Delivery of notice

9783. 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 date specified in the notice as the date on or after which the property will be 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 specified in the notice as the date on or after which the property will be disposed of or abandoned.

Comment. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Person § 56

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465

Independent administration § 10556

*08/26/86

§ 9784. Objection to proposed disposition or abandonment

9784. 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 on or before the date specified in the notice as the date on or after which the property will be 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.

Comment. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Person § 56
Personal representative § 58
Property § 62

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465
Independent administration § 10557

Min. 7/86-jd

*09/11/86

§ 9785. Restraining order

9785. (a) A person described in Section 9782 who objects to the disposition or abandonment of property by the personal representative under Section 9780 may apply to the court having jurisdiction over the proceeding for an order restraining the personal representative from disposing of or abandoning the property without prior court authorization.

(b) The court shall grant the requested order without requiring notice to the personal representative and without cause being shown for the order if the court is satisfied that the estate will not suffer any loss or unreasonable expense if the order is granted.

(c) The person who obtained the order may serve it upon the personal representative in the same manner provided for in Section 415.10 or 415.30 of the Code of Civil Procedure or in the manner authorized by the court.

Comment. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Person § 56
Personal representative § 58
Property § 62

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465
Independent administration § 10558

Min. 7/86-jd

*08/26/86

§ 9786. Notice not required where consent or waiver

9786. Notice of the proposed disposition or abandonment need not be given to any of the following:

(a) Any person who consents in writing to the proposed disposition or abandonment.

(b) Any person who, in writing, waives the right to notice of the proposed disposition or abandonment.

Comment. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Person § 56

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465

Independent administration §§ 10553, 10554

Min. 7/86-jd

*08/26/86

§ 9787. Notice of hearing of petition for court authorization

9787. A person who objects to the disposition or abandonment as provided in Section 9784 or serves a restraining order issued under Section 9785 in the manner provided in that section shall be given notice of any court hearing on a petition for court authorization of the disposition or abandonment of the property.

Comment. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Person § 56

Property § 62

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465

Independent administration § 10559

Min. 7/86-jd

*09/11/86

§ 9788. Waiver of right to court review

9788. (a) Except as provided in subdivision (b), a person waives the right to have the court later review the disposition or abandonment of the property unless the person does one of the following:

(1) Delivers or mails a written objection as provided in Section 9784.

(2) Serves a restraining order obtained under Section 9785 before the date specified in the notice of proposed disposition or abandonment as the date on or after which the property will be disposed of or abandoned, or before the property has actually been disposed of or abandoned, whichever is the later time.

(b) The court may review the disposition or abandonment of the property only upon the motion of a person described in subdivision (a) of Section 9782 who (1) establishes that he or she did not actually receive notice of the proposed disposition or abandonment before the time to object expired or (2) establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in the disposition or abandonment of the property.

Comment. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Person § 56

Property § 62

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2465

Independent administration § 10560

Min. 7/86-jd

*08/26/86

§ 9789. Tender of possession of property to person objecting

9789. (a) Notwithstanding Sections 9784 and 9785, the personal representative may abandon or dispose of the property without court authorization if the person who made the objection or obtained the restraining order 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.

(b) A person who takes possession of estate property pursuant to this section 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. See the Comment to Section 9780.

CROSS-REFERENCES

Definitions

Person § 56

Personal representative § 58

Property § 62

COMPARABLE PROVISIONS
Guardianship-conservatorship § 2465

CHAPTER 7. 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 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

Devise § 32

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 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

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 restate the first sentence of former Section 831 without substantive change. Subdivision (c) is new and 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. As to the recording of the order, see Section [to be drafted].

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Real property § 68

*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.

*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

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 8. 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 Probate Code 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), 9761 (action against decedent's surviving partner), 9780 (abandonment of tangible personal property where cost of collection would exceed its value), [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 PROVISIONS

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

Min. 7/86-jd

*08/27/86

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

9830. (a) Unless this chapter or some other applicable statute requires court authorization or approval, if it is to the advantage of the estate, the personal representative may do any of the following without court authorization, instruction, approval, or confirmation:

(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) Nothing in this section 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. See Section [to be drafted]. 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. For other provisions that may apply to a compromise or settlement, see e.g., Code Civ. Proc. § 372 (compromise of pending action or proceeding); Lab. Code § 5001 (compromise of worker's compensation proceeding).

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

Interested person § 48

Personal representative § 58

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2500

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

Note. A provision should be added to this section, or a general provision drafted, that states in substance that when the personal representative acts without court authorization, the action taken may be later reviewed by the court. Perhaps the rule should be in the accounting provisions.

*08/27/86

§ 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

Personal representative § 58

Min. 7/86-jd

*08/27/86

§ 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 PROVISIONS

Guardianship-conservatorship § 2501

Min. 7/86-jd

*08/27/86

§ 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

Property § 62
Effect of court authorization or approval § 9612
Independent administration authority §§ 9613, 10500
Transfer or conveyance pursuant to court order § 7411

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2502

Min. 7/86-jd

*08/27/86

§ 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

Personal representative § 58
Effect of court authorization or approval § 9612
Independent administration authority §§ 9613, 10500

Note. The staff was requested to review this section to determine whether it should be expanded to require court authorization where a spouse or relative of the personal representative is involved in the compromise, extension, etc. Cf. Section 9880 (personal representative may not purchase estate property "directly or indirectly"). Subject to the resolution of this issue, the Commission has approved this section.

*08/27/86

§ 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

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

*08/27/86

§ 9836. Court having authority to give authorization

9836. (a) 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 both of the following courts:

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

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

(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.

Comment. Section 9836 is new.

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2505

Note. Does the Commission wish to require that both courts approve the settlement of a pending action? Existing law permits a conservator to settle the pending action with the approval of the court in which the action is pending OR with the approval of the court in which the estate is being administered. Will the dual approval requirement affect adversely the effectiveness of settlement conferences?

Note. Section 2505 (guardianship-conservatorship law) should be conformed to Section 9836.

Min. 7/86-jd

*08/27/86

§ 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.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Personal representative § 58

Effect of court authorization or approval § 9612

Proof of giving notice § 7308

Verification required § 7203

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2506

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

CHAPTER 10. 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

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

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

*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

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. The bracketed language in the introductory portion of subdivision (a) should be replaced by a general provision.

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 PROVISIONS

Guardianship-conservatorship § 2522

10

Min. 5/86-jd

*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 PROVISIONS

Guardianship-conservatorship § 2523

Min. 5/86-jd

*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 PROVISIONS

Guardianship-conservatorship § 2524

Min. 5/86-jd

*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).

COMPARABLE PROVISIONS

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.

COMPARABLE PROVISIONS

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

Person § 56

Personal representative § 58

Property § 62

COMPARABLE PROVISIONS

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

Person § 56

Personal representative § 58

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 12. PURCHASE OF ESTATE PROPERTY BY PERSONAL REPRESENTATIVE

Min. 5/86-jd

Min. 7/86-rm

*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

Definitions

Personal representative § 58
Property § 62

Min. 5/86-jd

*09/11/86

§ 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 known devisees of the property which is proposed to be sold to the personal representative 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

Min. 7/86-jd

*08/27/86

§ 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 or in the order of the court, the sale of the property shall 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 made applicable 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.

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. A provision should be added to the Independent Administration of Estates Act to make clear that the personal representative must obtain court authorization to purchase estate property.

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 11 (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 11 (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 17 (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 17 (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 13. 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 9900 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

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 14. 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

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 PROVISIONS

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
Power of judge at chambers § 7061
Proof of giving notice § 7308
Securities, sale or surrender for redemption or conversion § 10200

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2557

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

CHAPTER 15. 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

Personal representative § 58

Real property § 68

COMPARABLE PROVISIONS

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

Personal representative § 58

Real property § 68

COMPARABLE PROVISIONS

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 16 (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

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

Min. 7/86-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

Devisee § 34

Heirs § 44

Property § 62

Will § 88

Proof of giving notice § 7308

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2553(b)

Note. The notice provisions will be reviewed when the general notice provisions are drafted. The 20-day period in subdivision (c) will be reviewed when the general notice provisions are drafted. Perhaps the notice period should be 10 days to conform to the notice period generally required. 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

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 PROVISIONS
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 PROVISIONS

Guardianship-conservatorship § 2554

Min. 5/86-jd

*06/02/86

§ 9947. Maximum term of lease

9947. (a) 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

Devisee § 34
Heirs § 44
Property § 62

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2554

Min. 5/86-jd

Min. 7/86-jd

*08/27/86

§ 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.

The following provisions of former law are not continued:

(1) The last sentence of former Probate Code Section 842 ("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 former Probate Code Section 843 ("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.").

Section 9948 does not deal with the rights of the lessee and a subsequent lessee or purchaser of the property except to the extent that the section protects the lessee from a claim by a third party that there was an omission, error, or irregularity in the proceedings under this chapter; Section 9948 is limited to defining the relationship between the personal representative and the beneficiaries and creditors of the estate, the relationship between the personal representative and the lessee, and the relationship between the personal representative and the court from which the personal representative derives his or her authority. The lessee may want to cause the order authorizing the lease to be recorded so that constructive notice of the lease will be given to subsequent lessees or purchasers of the leased property. See Section _____ (right to record order affecting real property of the estate).

CROSS-REFERENCES

Definitions
Heirs § 44

COMPARABLE PROVISIONS

Guardianship-conservatorship § 2553

Note. The last paragraph of the Comment states what the staff believes is the intent of the Commission with respect to this section. Does the Comment accurately reflect Commission intent? Does the Comment accurately reflect the effect of the text of the section?

CHAPTER 16. 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
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

*08/27/86

§ 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.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Personal representative § 58

Real property § 68

Verification required § 7203

Min. 5/86-jd

*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

Devisee § 34

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.

*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 10311 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

Personal representative § 58

Real property § 68

Effect of court authorization or approval § 9612

Transfer or conveyance pursuant to court order § 7411

Min. 5/86-jd

*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 17. OPTION TO PURCHASE GIVEN IN WILL

Min. 5/86-jd

*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

Person § 56

Personal representative § 58

Real property § 68

Will § 88

Effect of court authorization or approval § 9612

Transfer or conveyance pursuant to court order § 7411

Min. 5/86-jd

*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

Min. 5/86-jd

*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.

Min. 5/86-jd

*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 18. 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 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) of Section 10001 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 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
Min. 7/86-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. This subdivision 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

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. 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

Personal representative § 58

Property § 62

Real property § 68

Sale of assets 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 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

Personal representative § 58
Property § 62
Real property § 68

Note. Subdivision (a) of Section 10004 should be listed in a cross-reference under the appropriate appraisal provision.

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

Min. 6/86-jd

*09/09/86

§ 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 the obligations of the estate 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 to exceed 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 except that the former reference to a "bona fide agent or broker" is not continued. Instead, a reference to a "licensed real estate broker" is made in paragraph (1) of subdivision (a) and the second sentence of paragraph (2) of subdivision (a) has been added. 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 the obligations of the estate 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 to exceed 90 days) if the personal representative obtains permission of the court for each extension.

CROSS-REFERENCES

Contract with auctioneer § 10151

Definitions

Personal representative § 58

Property § 62

Real property § 68

Min. 5/86-jd

Min. 6/86-jd

*06/09/86

§ 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 shall be one that is legally enforceable under the law of the jurisdiction where made.

(c) 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 the obligations of the estate 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.

(d) 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).

Subdivision (b) is new.

Subdivisions (c) and (d) restate the remainder of former Probate Code Section 760.5 without substantive change.

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

CROSS-REFERENCES

Definitions

Personal representative § 58
Sales at public auction § 10254

Article 3. Compensation of Agent, Broker, or Auctioneer

Min. 5/86-jd

Min. 6/86-jd

*09/09/86

§ 10160. Limitation on liability of estate

10160. 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:

(a) An actual sale is made.

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

(c) The sale is consummated.

Comment. 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 subdivision (c) 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).

CROSS-REFERENCES

Contract with agent or broker § 10150
Contract with auctioneer § 10151
Definitions
Property § 62

09/09/86

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

10161. (a) 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.

(c) Unless the agent or broker holds a contract granting an exclusive right to sell the property, an agent or broker is not entitled to any fee, compensation, or other compensation for services to the estate in connection with a sale except in the following cases:

(1) Where the agent or broker produces the original bid which is returned to the court for confirmation.

(2) Where the property is sold on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by the agent or broker.

(c) If the agent or broker has a contract with the personal representative, the amount of the compensation of the agent or broker in connection with the sale of property shall not exceed the amount provided for in the contract.

Comment. Subdivision (a) of 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. Subdivision (a) uses language drawn primarily from the last portion of former Probate Code Section 761.5. As was the case under former law, a local court rule may, for example, fix reasonable compensation as a commission of six percent of the original bid or sales price (whichever is appropriate under the rules set out in this article), and the court may determine what constitutes reasonable compensation by applying the court rule.

Subdivision (b) is a new provision that makes clear that an agent or broker holding a nonexclusive contract is not entitled to compensation unless the agent or broker produces the original bid returned to the court for confirmation or procures the overbidder to whom the sale is confirmed at the confirmation hearing. For example,

the agent or broker holding a nonexclusive contract is not entitled to compensation in the following cases:

(1) Where the bid returned to the court for confirmation was submitted by a bidder not represented by an agent or broker and the sale is confirmed to that bidder.

(2) Where the bid returned to the court for confirmation was submitted by a bidder represented by another agent or broker and the sale is confirmed to that bidder.

(3) Where the bid returned to the court for confirmation was submitted by a bidder not represented by the agent or broker who holds the nonexclusive contract and the court at the confirmation hearing confirms the sale of the property to an overbidder not procured by the agent or broker holding the nonexclusive contract.

Subdivision (c) is a new provision that makes clear that the amount of the compensation of the agent or broker may not exceed the amount provided for in the contract. For example, if the contract provides for a five percent commission and the applicable court rule would allow a six percent commission, the commission awarded by the court may not exceed the five percent rate provided for in the contract. See also Section 10166 (invalidity of provision in bid that certain amount of bid be paid to agent or broker).

Where an agent or broker holding a nonexclusive contract either produces the original bid returned to the court for confirmation or procures the successful overbidder, the compensation to which the agent or broker is entitled is the amount determined by the court to be a reasonable compensation for the services of the agent or broker to the estate (Section 10161) and is subject to the provisions of this article.

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 bid be paid to agent or broker).

The court has considerable flexibility in determining the compensation of the agent or broker or the agents or brokers in connection with a sale of property. Subject to the provisions of this article, compensation may be fixed, for example, as a percentage of the amount of the bid returned to the court for confirmation (see Sections 10164 and 10165) or as a percentage of the amount for which the sale is confirmed (see Section 10165). The court may use one percentage (e.g. six percent) for improved property and another (e.g., ten percent) for unimproved property. Or the court may use a schedule with the percentage decreasing as the value of the property increases (e.g., six percent for the first 100,000; five percent for amounts in excess of \$100,000). The percentage or percentages or other method of computing the compensation may be prescribed by court rule, but the court rule must be consistent with the provisions of this article. Nothing in this article precludes the court from fixing the compensation using a different method than a percentage of the amount bid or the amount for which the sale is confirmed. The personal representative and the agent or broker may provide in their contract for the amount or manner of computing the compensation for the sale and, although the court may fix the compensation at less than the amount provided for in the contract, the compensation allowed by the court in such a case may not exceed the contract amount. See Section 10161(c).

The following examples illustrate the effect of Sections 10161-10166. In these examples, Broker A refers to the broker holding the contract (either exclusive or nonexclusive unless otherwise indicated) with the personal representative. Broker B refers to a cooperating broker whose bid is returned to the court for confirmation. Broker C refers to a broker who does not have a contract with the personal representative and who procures a successful overbidder (this broker is referred to as Broker C whether or not there is a Broker A or a Broker B in the transaction).

Example 1. Broker with contract produces original bid; no overbid. The personal representative enters into a written contract (either exclusive or nonexclusive) with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker A finds a purchaser whose bid is confirmed by the court. The court is not bound by the six percent commission provided in the contract, but may fix a commission in such amount as the court determines is reasonable compensation for the services of the Broker A to the estate, but not at amount in excess of the amount provided in the contract. See Section 10161.

A court rule may, for example, establish what constitutes reasonable compensation and fix the compensation at six percent of the sales price in this situation (or at a higher or lower percentage), and the court may determine what constitutes reasonable compensation by applying the court rule. If the court rule provides for a commission at six percent of the sales price in this situation but the contract provides for a commission at five percent of the sales price, the court may not award a commission in excess of the five percent provided for in the contract.

Example 2. Broker with contract produces original bid; successful overbidder not represented by broker. The personal representative enters into a written contract (either exclusive or nonexclusive) with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker A finds a purchaser whose bid is returned to the court for confirmation. At the confirmation hearing, the highest bid is made by another bidder who is not represented by a broker. The court confirms the sale to the overbidder. The commission payable to Broker A is such amount as the court determines is reasonable. See Section 10161. (But see the discussion in Example 1.) The commission is allowed on the amount of the original bid. See Section 10164(b). For example, where the commission is fixed by the court in a percentage amount, the percentage is applied to the amount of the original bid, not the amount of the successful overbid.

Example 3. Exclusive listing contract; original bid produced by cooperating broker; successful overbid by purchaser not represented by broker. The personal representative enters into a written exclusive listing contract with Broker A. (An exclusive listing contract must be authorized by a court order. See Section 10150(c) (personal representative must obtain permission of court to enter into an exclusive listing contract; showing of necessity and advantage to estate required; duration of contract limited).) The original bid returned to court for confirmation is procured not by Broker A, but rather by Broker B, a cooperating broker. At the confirmation hearing, the highest bid is made by another bidder who is not represented by a broker. The court confirms the sale to the overbidder. The commission is determined as in Example 2 (reasonable commission on amount of original bid), and is divided between Broker A and Broker B as provided in any agreement between them, or, if there is no agreement, is divided equally. See Section 10164(c). For example, if the original bid returned to the court by Broker B is \$100,000 and the sale is confirmed to the successful overbidder at \$150,000, and the court determines that a reasonable commission is six percent of the original bid returned to court for confirmation (six percent of \$100,000, or \$6,000), the \$6,000 is divided between Broker A and Broker B as provided in their agreement or, absent an agreement, Broker A receives \$3,000 and Broker B receives \$3,000.

Example 4. Original bidder not represented by broker; successful overbidder represented by broker. The personal representative has not entered into an exclusive sales contract with an agent or broker. The original bid is made by a purchaser who is not represented by a broker. The successful overbidder is procured by Broker C. The reasonable commission allowed by the court is paid entirely to Broker C. See Section 10163. Subject to Section 10162, the commission is allowed on the full amount for which the sale is confirmed. See Section 10163(b). For example, where the commission is fixed by the court in a percentage amount, the percentage is applied to the full amount for which the sale is confirmed. See Section 10163(b). The commission of Broker C is subject to the limitation that it may not exceed one-half of the difference between the amount bid in the original return and the amount of the successful bid. See Section 10162.

Example 5. Broker holding contract produces original bidder; successful overbidder represented by another broker. The personal representative enters into a written nonexclusive contract with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker A finds a purchaser whose bid is returned to the court for confirmation. At the confirmation hearing, the highest bid is made by another bidder who is also represented by a broker (Broker C) who does not hold a contract with the personal representative. The court confirms the sale to the overbidder. Under Section 10165, where a broker returns a bid for confirmation and another broker brings in a successful overbid, the commission

is divided as follows: One-half of the commission on the original bid to the original broker (Broker A); the remaining one-half of the commission on the original bid plus all of the commission on the overbid amount to the successful overbidding broker (Broker C). For example, Broker A returns a \$100,000 bid for confirmation, and Broker C brings in an increased bid of \$110,000 on which the sale is confirmed. The court awards six percent of \$110,000 or \$6,600 in commissions. Broker A receives one-half of the commission on the original bid (\$100,000 at six percent commission equals \$6,000; one-half of \$6,000 equals \$3,000) or \$3,000. Broker C receives the other one-half of the commission on the original bid (\$3,000) plus all of the commission on the amount of the difference between the original bid and the amount for which the sale is confirmed (six percent of the difference between \$110,000 and \$100,000 (\$10,000) or \$600). Broker C thus receives \$3,600.

Example 6. Exclusive listing contract; original bid produced by cooperating broker; successful overbid by purchaser represented by another broker. The personal representative enters into a written exclusive sales contract with Broker A for the sale of real property of the estate. The contract provides for a commission to Broker A of six percent of the sale price. Broker B, a cooperating broker finds a purchaser whose bid is returned to the court for confirmation. At the confirmation hearing, the highest bid is made by another bidder who is represented by Broker C. The court confirms the sale to the overbidder. Under Section 10165, Brokers A and B are entitled to share one-half of the commission on the original bid; Broker C is entitled to the remaining one-half of the commission on the original bid plus all of the commission on the overbid. Under Section 10165, where there are two brokers on the original bid -- Broker A (broker holding a contract granting an exclusive right to sell the property) and Broker B (broker who produced the original bid returned to the court for confirmation) -- the one-half commission on the original bid is divided equally between the brokers, unless otherwise provided in an agreement between them. See Section 10165. The commission of Broker C (the broker for the successful overbidder) is subject to the limitation that it may not exceed one-half of the difference between the amount bid in the original return and the amount of the successful bid. See Section 10162. However, this limitation does not apply to Broker A (broker who holds a contract granting an exclusive right to sell the property) or to Broker B (broker who produced the original bid which was returned to the court for confirmation). See Section 10162.

For example, Broker B returns a \$100,000 bid for confirmation, and Broker C brings in an increased bid of \$110,000 on which the sale is confirmed. The court awards six percent of \$110,000 or \$6,600 in commissions. Broker A (holder of exclusive sales contract) and Broker B (broker producing purchaser whose bid was returned to the court for confirmation) are entitled to share one-half of the commission on the original bid (\$100,000 at six percent commission equals \$6,000; one-half of \$6,000 equals \$3,000) or \$3,000. The one-half commission on the original bid

(\$3,000) is divided equally between the Brokers A and B (each receiving \$1,500), unless otherwise provided in an agreement between them. Broker C receives the other one-half of the commission on the original bid (\$3,000) plus all of the commission on the amount of the difference between the original bid and the amount for which the sale is confirmed (six percent of the difference between \$110,000 and \$100,000 (\$10,000) or \$600). Broker C thus receives \$3,600.

The commission of Broker C (the broker for the successful overbidder) is subject to the limitation that it may not exceed one-half of the difference between the amount bid in the original return and the amount of the successful bid. See Section 10162. For example, assume that Broker B returns a \$200,000 bid for confirmation; at the hearing Broker C brings in an overbid of \$210,500 upon which the sale is confirmed. The total commission allowed ordinarily would be \$12,630 (six percent of \$210,000), \$6,000 of which would be divided as described above by Brokers A and B (broker holding the exclusive sales contract and broker for the original bidder), leaving a balance of \$6,630 for Broker C (broker bringing in the successful overbid). However, in this example, because of Section 10162, the commission of Broker C is limited to one-half of the amount overbid (\$10,500), or \$5,250. Therefore, the total commission in this situation would be \$11,250.

CROSS-REFERENCES

Contract with agent or broker § 10150

Definitions

Personal representative § 58

Property § 62

Min. 5/86-jd

Min. 6/86-jd

*09/09/86

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

10162. (a) 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.

(b) Subdivision (a) does not limit the compensation of either of the following:

(1) The agent or broker who produced the original bid which was returned to the court for confirmation.

(2) The agent or broker who holds a contract under Section 10150 granting him or her the exclusive right to sell the property.

Comment. Section 10162 restates the fourth sentence of former Probate Code Section 785 with the following changes:

(1) Section 10162 applies to sales of real and personal property. Formerly, the provision applied only to real property sales.

(2) Section 10162 does not limit the compensation of the agent or broker who produced the original bid, whether or not the agent or broker held the contract with the personal representative, or the compensation of the agent or broker holding a contract granting the exclusive right to sell the property. Under former Probate Code Section 785, the provision did not limit the compensation of the agent or broker who held the contract with the personal representative, but there was no specific provision that the limitation did not apply to the agent or broker who produced the original bid.

See also 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 Section 785).

For examples of the operation of this section, see the examples in the Comment to Section 10161.

CROSS-REFERENCES

Definitions

Personal representative § 58

Real property § 68

Min. 5/86-jd

Min. 6/86-jd

*09/09/86

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

10163. (a) This section applies if all of the following circumstances exist:

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

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

(3) 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.

(b) Subject to Section 10162, if all the circumstances described in subdivision (a) exist, 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.

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. The reference to Section 10161 in Section 10163 makes clear that the court has discretion to determine the total amount of compensation to be paid. Section 10163 applies only where there is no agent or broker holding an exclusive right to sell the property. For

an example of the operation of Section 10163, see Example 4 in the Comment to Section 10161. If there is an agent or broker holding an exclusive right to sell contract and the requirements of paragraphs (2) and (3) of Section 10163 are satisfied, the compensation is determined under Section 10165. 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

Property § 62

Min. 5/86-jd

Min. 6/86-jd

*09/09/86

§ 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.

For examples of the operation of Section 10164, see Examples 2 and 3 in the Comment to Section 10161.

CROSS-REFERENCES

Definitions

Property § 62

Min. 5/86-jd

Min. 6/86-ld

*09/09/86

§ 10165. Compensation where sale made on increased bid by purchaser represented by agent or broker and either the original bid returned to court was made by a purchaser procured by another agent or broker or there is another agent or broker who holds exclusive right to sell contract

10165. (a) Where 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, 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 either of the following conditions is satisfied:

(1) The original bid returned to the court for confirmation was made by a purchaser who was procured by another agent or broker.

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

(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 a bona fide agent or broker and there is no 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.

(3) If there is an agent or broker who 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 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. Subdivision (a) of Section 10165 describes the circumstances that must exist before Section 10165 applies. The section applies only where the court confirms a sale on an increased bid made at the time of the hearing on the petition for confirmation. The successful overbidder must be one procured by a bona fide agent or broker. In addition, before the section applies one of the following requirements also must be satisfied:

(1) The original bid returned to court for confirmation was made by a purchaser who was procured by another agent or broker (i.e., an agent or broker other than the one who procured the successful overbidder).

(2) A agent or broker (other than the one who procured the successful overbidder) holds an exclusive sales contract. All that is required to satisfy this requirement is that an exclusive right to sell the property has been granted to the agent or broker; there is no requirement that the agent or broker holding the exclusive sales contract have produced the purchaser whose original bid was returned to the court for confirmation.

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

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).

Paragraphs (1) and (2) of subdivision (c) continue a portion of the first sentence of former Probate Code Section 761 without substantive change. Paragraph (3) of 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. Paragraph (3) 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 (3) 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 was the case under the second sentence of former Probate Code Section 760. If the agent or broker who holds the contract under Section 10150 has not been granted an exclusive right to sell the property, the agent or broker is allowed a commission only if he or she returns the original bid to the court or procures the successful overbidder to whom the sale of the property is confirmed at the confirmation hearing. See Section 10161(b).

For examples showing the operation of Section 10165, see Examples 5 and 6 in the Comment to Section 10161.

CROSS-REFERENCES

Definitions

Property § 62

Note. The staff has revised paragraphs (1) and (2) of subdivision (c) of Section 10165 to make clear that an agent or broker who submits the original bid to the court is entitled to a commission, the amount of which is determined under the provisions of the section, whether or not the agent or broker has a contract granting the exclusive right to sell the property. This revisions makes clear that the section continues existing law.

Min. 5/86-jd

Min. 6/86-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.

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

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 to be surrendered for redemption or conversion are listed on an established stock or bond exchange or 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., and the redemption or conversion is at a price or value not less than the market price on the date of the redemption or conversion.

Comment. Section 10200 restates subdivisions (a) and (b) of former Probate Code Section 771 with the following additions and revisions:

(1) The first sentence of subdivision (c) is new.

(2) Paragraph (3) of subdivision (e) is new.

(3) Paragraph (4) of subdivision (e) is more limited than former

law. Under former Probate Code Section 771 no notice of the redemption or conversion was required where a security is surrendered for redemption or conversion. Under Section 10200, notice of the redemption or conversion is required unless the requirements stated in paragraph (4) are satisfied.

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. See also Section 10201 (sale or withdrawal of savings accounts and mutual capital certificates without court order).

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

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.

Note. Paragraph (4) of subdivision (e) has been revised to include the Commission's decision that notice of the redemption or conversion must be given when securities are surrendered for redemption or conversion unless the requirements stated in the paragraph are satisfied. Under existing law, no notice of redemption or conversion need be given when securities are surrendered for redemption or conversion. Existing law includes provisions governing notice of sale, providing for posting at least 10 days before the sale at the courthouse or publication, or both, as the personal representative may determine. There are no existing provisions governing a "notice of the redemption or conversion." The staff wonders whether the Commission desires to require that there be a posting at the courthouse for not less than 10 days (or as an alternative a publication for at least 10 days) before securities can be surrendered for redemption or conversion. Notice of the hearing on the petition for an order permitting the surrender for redemption or conversion is required. What purpose is served by the posting of the notice of the redemption or conversion. Will anyone make an offer to purchase the securities that are to be surrendered for redemption or conversion? Should not this case be treated differently than the case where it is proposed to sell the securities and the notice of sale may attract a purchaser? The staff is of the view that the change in paragraph (4) to require "notice of the surrender for redemption or conversion" serves no useful

purpose and merely adds complexity to the statute and will cause delay in the surrender for conversion or redemption after the court order has been obtained after notice. We recommend that the existing law be retained. The existing law could be retained by substituting the following for paragraph (4):

(4) The securities are to be surrendered for redemption or conversion.
If this substitution is made, the Comment would need to be revised to indicate that paragraph (4) continues existing law.

Min. 5/86-jd

*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

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

*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

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

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

Transfer or conveyance pursuant to court order § 7411

*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

Person § 56

Personal representative § 58

Real property § 68

Transfer or conveyance pursuant to court order § 7411

Note. Will the change in existing law made in subdivision (c) — that title does not pass until the bond is furnished to the personal representative — affect the marketability of the title to the property? The existing requirement that the court not confirm the sale until the bond is given would not affect marketability because the purchaser of the property could rely on the court confirmation order to establish that the bond (if required) was given. However, where the court has confirmed the sale but title does not pass until the bond is furnished to the personal representative, how can it be determined from the record whether or not the bond was furnished?

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 (Cal. Stat. 1978 ch. 40, §1) 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

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

Min. 5/86-jd

Min. 7/86-jd

*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 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 PROVISIONS

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).

COMPARABLE PROVISIONS

Real property sales § 10302

*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 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 PROVISIONS

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

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 PROVISIONS

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
 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 PROVISIONS

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
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 PROVISIONS

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
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 PROVISIONS

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 (1962). 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). See also Section 10258 (court order relaxing requirements for credit sale).

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

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 PROVISIONS

Real property sales § 10315

Min. 5/86-jd

Min. 7/86-jd

*08/27/86

§ 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.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202

Definitions

Devisee § 34

Heirs § 44

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

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

*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
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 PROVISIONS

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, 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, 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

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 PROVISIONS

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

Direction in will as to mode of selling § 10002

Sale for more or less than appraisal § 10005

COMPARABLE PROVISIONS

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.

COMPARABLE PROVISION

Real property sales § 10312

Note. This section might possibly be replaced by a general provision.

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

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 PROVISIONS

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 recognizes to a limited extent 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.

COMPARABLE PROVISIONS

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 PROVISIONS

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 PROVISIONS

Personal property sales § 10253

*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 PROVISIONS

Personal property sales § 10254

Min. 5/86-jd

*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 PROVISIONS

Personal property sales § 10255

Min. 5/86-jd

*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 PROVISIONS

Personal property sales § 10256

*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
 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 PROVISIONS

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

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

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 PROVISIONS

Personal property sales § 10261

Min. 5/86-jd

*09/10/86

§ 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).

(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

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 PROVISIONS

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.

COMPARABLE PROVISIONS

Personal property sales § 10263

Note. Section 10312 perhaps should be a general provision.

Min. 5/86-jd

*09/10/86

§ 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 sum exceeding the original bid by 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, 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

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

Note. Paragraph (7) of subdivision (a) of Section 10313 should be deleted if Section 10206 remains in the form in which it is presently contained in the draft statute.

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*06/10/86

§ 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 802 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?

Note. If Section 10206 is revised, this section will require revision to conform.

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§ 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 PROVISIONS

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, 150 Cal. App. 2d at 339. 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, 9 Cal. App. 3d at 658), and insurance, security, storage, and pool and gardening expenses.

CROSS-REFERENCES

Definitions

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

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*06/10/86

§ 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

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.

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

Real property § 68

*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 lien, 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 better than can be obtained at the time of the sale.

(2) Former Section 762 required that the "necessary" expenses of the sale 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

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
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 upon the bond of the personal representative, or otherwise." This change is nonsubstantive. When the personal representative is liable, the liability may be enforced against the bond of the personal representative or by other means of enforcement of a judgment. 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

Min. 7/86-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