

Memorandum 86-91

Subject: Study L-1041 - Estate and Trust Code (Rules of Procedure--
draft of statute)

Attached to this memorandum is a draft of the general procedural provisions that govern estate administration proceedings.

The general procedural provisions are intended to be applicable to all the different types of proceedings that may arise within estate administration. However, there may be some types of proceedings for which the general rule would be inappropriate and a different rule is necessary. We will refine the general procedural provisions and comments, and make specific exceptions, as we review the different types of administration proceedings in light of the general provisions.

Under existing law, some of the general procedural provisions apply by their terms to all proceedings under the code, including guardianship and conservatorship and other proceedings as well as estate administration. Other provisions are limited by their terms to estate administration, but perhaps should apply to other proceedings also. For now our effort is to develop a good body of rules of procedure for application in estate administration, with the intent to possibly broaden their application later.

Policy issues are noted in the draft following the provisions to which they relate.

Respectfully submitted,

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OUTLINE OF STATUTE

CHAPTER 3. RULES OF PROCEDURE

Article 1. General Provisions

- § 7200. General rules of practice govern
- § 7201. Judicial Council authority
- § 7202. Trial by jury
- § 7203. Costs
- § 7204. Appointment of guardian ad litem

Article 2. Petitions and Other Papers

- § 7251. Petitions
- § 7251. Verification required
- § 7252. Affidavit or verified petition as evidence
- § 7253. Lis pendens

Article 3. Hearings

- § 7300. General hearing procedure
- § 7301. Clerk to set matters for hearing
- § 7302. Notice of hearing
- § 7303. Response or objections
- § 7304. Continuances
- § 7305. Witnesses
- § 7306. Hearing and order
- § 7307. New trial

Article 4. Orders

- § 7350. Recital of jurisdictional facts unnecessary
- § 7351. Entry and filing
- § 7352. Renewal, modification, and termination
- § 7353. Effect of order on liability of personal representative
- § 7354. Effect of order on third persons
- § 7355. Recordation of order affecting real property
- § 7356. Transfer or conveyance of property pursuant to court order
- § 7357. Enforcement of order

Article 5. Appeals

[See Memorandum 86-90]

COMMENTS TO REPEALED SECTIONS

CONFORMING CHANGES

CHAPTER 3. RULES OF PROCEDURE

Article 1. General Provisions

§ 7200. General rules of practice govern

7200. (a) The rules of practice applicable to civil actions are applicable to and constitute the rules of practice in proceedings under this division.

(b) This section does not apply to the extent applicable rules of practice are provided by this division or by rules adopted by the Judicial Council.

Comment. Section 7200 generalizes the first sentence of former Probate Code Section 1233. Thus, all issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions, the party affirming being the plaintiff and the one denying or avoiding, the defendant. (Former Probate Code Section 1230.) The general rules of practice apply to discovery, trials, new trials, appeals, and all other matters of procedure. (Former Probate Code Section 1233.) Judgment on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions. (Former Probate Code Section 1230.)

Under Section 7200, an attorney may sign a petition as in civil proceedings, but verification must be done by the person making the petition. Code Civ. Proc. § 446. See also Section 7250 (verification required).

[Notices must be served in the manner prescribed in the Code of Civil Procedure. See, e.g., Code Civ. Proc. §§ 1011, 1013.]

Note. This section may be extended in connection with comparable provisions governing trusts and guardianship/conservatorship.

There is also a problem created by the fact that some of the probate procedure provisions are located outside the probate procedure division, specifically orders granting temporary possession of the family dwelling and exempt property, orders setting aside exempt property and probate homestead, and orders granting a family allowance. These provisions are all located in Division 6 rather than Division 7, even though they are part of estate administration. If we make the general procedural provisions applicable to the entire code, there is no problem, since Division 6 would then be covered. If not, we could make the general procedural provisions applicable to "this division and Division 6 (commencing with Section 6100)."

Query. The State Bar asks whether it is appropriate to have the attorney sign papers as is the case in civil proceedings, so long as verified (when verification is necessary) by the personal

representative. The staff has added the second paragraph of the Comment to make clear that this principle applies to petitions. Should it be expanded to apply to other papers in probate, as suggested by the State Bar?

§ 7201. Judicial Council authority

7201. (a) The Judicial Council may provide by rule for the practice and procedure under this division. Unless otherwise expressly provided by the Judicial Council, a court may not by local rule or otherwise provide for any special practice or procedure under this division.

(b) The Judicial Council may prescribe the form of the applications, notices, orders, and other documents required by this division. Any such form prescribed by the Judicial Council is deemed to comply with this division.

Comment. Section 7201 is consistent with Cal. Const. Art. 6, § 6, and Gov't Code § 68511. Cf. Section 1456 (guardianship and conservatorship).

Note. The Commission has not previously reviewed subdivision (a). This provision is an attempt to limit proliferation of local rules under the new code, with the view towards statewide uniformity of practice.

§ 7202. Trial by jury

7202. Except as otherwise expressly provided in this division, there is no right to a jury trial in proceedings under this division.

Comment. Section 7202 continues the general rule under prior law that there is no right to a jury in probate proceedings unless that right is granted by statute. Estate of Beach, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975). [Some provisions of this division do grant the right to trial by jury. See Sections 371, 382, 928, 1081, 1230, and 1231.] See also Sections 1452 (guardianship and conservatorship) and 17006 (trusts).

§ 7203. Costs

7203. When not otherwise prescribed by this [code] or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require.

Comment. Section 7203 continues former Section 1232.

Query. This provision by its terms appears to apply throughout the code. Should it? If so, it should be generalized; if not, it should be limited.

§ 7204. Appointment of guardian ad litem

7204. (a) The court may, on its own motion or on request of a personal representative or interested person, appoint a guardian ad litem at any stage of a proceeding concerning the estate to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate:

- (1) A minor.
- (2) An incapacitated person.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(c) The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of the property of the estate or by the petitioner.

(d) Sections 372 to 373.5, inclusive, of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.

Comment. Section 7204 is a new provision drawn from Section 17208 (guardian ad litem in trust proceedings). Under former law, the appointment of a guardian ad litem in proceedings for administration of the decedent's estate was governed by Code of Civil Procedure Sections 372-373.5. A guardian ad litem may be appointed in situations where a guardian or conservator has already been appointed, if the need for a guardian ad litem exists. This section is not intended to limit any power the court may have to appoint an attorney to represent the interests of an incapacitated person. If the beneficiary has an interest in only part of the estate, the court may not charge expenses to the whole estate, but only the beneficiary's interest. See Estate of Corotto, 125 Cal. App. 314, 325, 270 P.2d 498 (1954).

CROSS-REFERENCES

Definitions

Interested person § 48
Person § 56
Personal representative § 58

COMPARABLE PROVISION

Guardianship-conservatorship § 1455

Article 2. Petitions and Other Papers

§ 7250. Petitions

7250. Except as otherwise specifically provided in this division, a petition shall be in writing, signed by the petitioner, and filed with the clerk of the court.

Comment. Section 7250 is new. It generalizes provisions found throughout the former Probate Code.

§ 7251. Verification required

7251. (a) Except as otherwise specifically provided in this division, all of the following shall be verified:

- (1) A petition, report, or account.
- (2) An objection or response to a petition, report, or account.

(b) The verification of a petition shall be made by the petitioner. The verification of a report or account shall be made by the person making the report or account. The verification of an objection or response shall be made by the objector or respondent.

Comment. Subdivision (a) of Section 7251 is comparable to former Probate Code Section 1450 (guardianship and conservatorship). It generalizes portions of the following provisions of the former Probate Code: Sections 467, 511, 541(b), 550, 578, 578a, 584.3(a), 584.5, 604, 608, 609, 613, 615, 705, 707, 718.5, 721(b), 755, 831, 841, 842.1, 851, 851.5, 921, 922, 1025.5, 1064, 1068, 1190, 1354.

Subdivision (b) of Section 7251 is a new provision that makes clear the person who is to make the verification.

Note. Whether there are in fact any specific provisions otherwise is subject to review.

Query. The State Bar comments that, "the situations in probate where a response to a petition is appropriate are unclear. See, e.g., the chart which is published by the CEB in connection with its program on probate and trust litigation. Some clarification in this area would seem appropriate." The staff is not sure it understands this comment.

It seems to us that a response is appropriate if a person believes the petition should be denied and no response is necessary if a person believes the petition should be granted. We are not sure exactly what the Bar is thinking of, unless it is a general provision, such as Section 7303 (response or objections), infra.

§ 7252. Affidavit or verified petition as evidence

7252. An affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code.

Comment. Section 7252 generalizes the first sentence of the second paragraph of former Section 1233. Proceedings under this code include proceedings relating to the administration of estates of decedents and proceedings relating to the administration of estates of persons for whom a guardian or conservator has been appointed. See also Code Civ. Proc. § 2009 (affidavit may be used to establish record of birth).

Query. Existing law applies this section to uncontested "probate proceedings", which is defined to include both decedents' estates and guardianship/conservatorship estates. This revision applies the provision throughout the code, which is clearly an expansion, including trusts and miscellaneous proceedings that will be included in the new code. Is this appropriate, and in any case, shouldn't this provision be located among general provisions somewhere at the front of the code?

§ 7253. Lis pendens

7253. If a proceeding affects real property, notice of the pendency of the proceeding may be filed pursuant to Section 409 of the Code of Civil Procedure.

Comment. Section 7253 is new. It generalizes a provision of former Probate Code Section 851.5. It is comparable to Section 2523 (Guardianship and Conservatorship Law).

CROSS-REFERENCES

Definitions

Real property § 68

Article 3. Hearings

§ 7300. General hearing procedure

7300. The provisions of this article govern the hearing of all matters under this division except where the statute that provides for the hearing of the matter prescribes a different procedure.

Comment. Section 7300 is new. It seeks to simplify the procedural statutes of this division and eliminate duplication and unnecessary variances by prescribing a uniform hearing procedure.

§ 7301. Clerk to set matters for hearing

7301. When a petition, report, account, or other matter that requires a hearing is filed with the clerk of the court, the clerk shall set the matter for hearing.

Comment. Section 7301 continues provisions that were scattered throughout former Division 3 of the Probate Code. See, e.g., former Probate Code Sections 327, 441, 578, 578a, 584, 584.2, 584.3, 584.5, 591.1, 591.7, 605, 643, 653, 662, 718.5, 755, 758, 771, 771.3, 773, 810, 831, 841, 851, 851.5, 854, 1000, 1004, 1041, 1068, 1102, 1120, 1120.1a, 1123.5, 1125.1, 1129, 1138.6, 1139.3, 1139.15, 1172, 1191, 1200, 1355.

COMPARABLE PROVISION

Guardianship-conservatorship § 1451

§ 7302. Notice of hearing

7302. A hearing under this division shall be ex parte unless the statute that provides for the hearing requires notice.

Comment. Section 7302 is new. It generalizes a number of provisions formerly found in the Probate Code.

Note. Whether the ordinary rule under existing law is that hearings are ex parte, we do not know. The rule could be phrased the opposite way, with notice required unless the statute provides for an ex parte hearing.

Where notice is required, the type of notice will be governed by the general notice provisions, which have not yet been drafted.

§ 7303. Response or objections

7303. An interested person may, at or before the hearing, make a response or objection orally or in writing.

Comment. Section 7303 is new. It generalizes a number of provisions formerly found in the Probate Code. For exceptions to the rule stated in this section, see [to be supplied].

§ 7304. Continuances

7304. An interested person may request time for filing a response or objections to the matter to be heard, for discovery proceedings, or for other preparation for the hearing, and the court may grant a continuance for a reasonable time for any of these purposes.

Comment. Section 7304 generalizes a number of provisions formerly found in the Probate Code. See, e.g., former Probate Code Sections 370, 851.5.

§ 7305. Witnesses

7305. The court may examine and compel any person to attend as a witness.

Comment. Section 7305 is new. It generalizes a number of provisions formerly found in the Probate Code.

CROSS-REFERENCES

Definitions

Person § 56

§ 7306. Hearing and order

7306. At the hearing the court shall hear and determine the matter and any response or objection presented and shall make such orders as may be appropriate.

Comment. Section 7306 generalizes a number of provisions formerly found in the Probate Code. See, e.g., former Probate Code Sections 407, 440, 852. The court must sign and file its decision. Section 7351 (entry and filing).

§ 7307. New trial

7307. A motion for a new trial may be made only in the following cases:

(a) Contest of a will or revocation of probate of a will.

(b) Cases in which a right to jury trial is expressly granted, whether or not the case was tried by a jury.

Comment. Section 7307 restates former Section 1231 without substantive change. The provision for new trial in proceedings to determine heirship and interests in estates is no longer necessary, since such proceedings are no longer under this division and therefore are no longer subject to the new trial limitation of Section 7306.

See Sections 320-324. Cases in which a jury trial is expressly granted are: [to be supplied]. There is no right to a jury trial unless expressly provided by statute. Section 7202 (trial by jury).

COMPARABLE PROVISION

Guardianship-conservatorship § 1453

Query. The staff is not clear about the policy behind this section limiting new trials. Is there any inclination to expand or contract it?

Article 4. Orders

§ 7350. Recital of jurisdictional facts unnecessary

7350. (a) The jurisdiction of the court to administer the estate of the decedent vests the court with jurisdiction to make orders under this division.

(b) Except as otherwise provided in this division, an order made in a proceeding under this division need not recite the existence of facts, or the performance of acts, upon which jurisdiction depends, but need only contain the matters ordered.

Comment. Subdivision (a) of Section 7350 is drawn from former Probate Code Section 843. Subdivision (b) restates former Probate Code Section 1220 without substantive change. For an exception to subdivision (b), see Section 8006 (court order).

§ 7351. Entry and filing

7351. (a) Except as provided in subdivision (b), orders shall be entered at length in the minute book of the court, or else signed by the judge and filed.

(b) An order for distribution shall be entered at length in a judgment book or other permanent record of the court.

Comment. Section 7351 restates former Probate Code Section 1221 and a portion of the fourth sentence of former Probate Code Section 1230 without substantive change.

§ 7352. Renewal, modification, and termination

7352. Upon petition therefor, the court may renew, modify, or terminate an order.

Comment. Section 7352 is new. It generalizes provisions formerly found in the Probate Code. See, e.g., [to be supplied].

§ 7353. Effect of order on liability of personal representative

7353. (a) Unless reversed on appeal, an order is final and releases the personal representative and the sureties from all claims of beneficiaries and other interested persons based on any act or omission directly authorized, approved, or confirmed in the order. For the purposes of this section, "order" includes an order settling an account of the personal representative, whether an intermediate or final account.

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

Comment. Section 7353 is new. It is drawn from Section 2103 (Guardianship and Conservatorship Law).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Interested person § 48
Personal representative § 58

§ 7354. Effect of order on third persons

7354. (a) An order of the court is prima facie evidence of the correctness of the proceedings and of the authority of any person authorized to execute the order.

(b) An order, when it becomes final, is conclusive on all persons.

Comment. Section 7354 is new. It is drawn from portions of former Probate Code Sections 853 and 1468 and from Code of Civil Procedure Section 1908.

CROSS-REFERENCES

Definitions

Person § 56

§ 7355. Recordation of order affecting real property

7355. (a) When an order is made determining any matter affecting title to real property, a certified copy of the order may be recorded in the office of the county recorder of any county in which the property or a part thereof is situated.

(b) From the time of filing the certified copy of the order for record, notice is imparted to all persons of the contents of the order.

Comment. Section 7355 restates former Probate Code Section 1222, making recordation permissive rather than mandatory. For mandatory recordation of a court-ordered transaction affecting real property, see Section 7356 (transfer or conveyance of property pursuant to court order).

CROSS-REFERENCES

Definitions

Person § 56

Real property § 68

§ 7356. Transfer or conveyance of property pursuant to court order

7356. (a) As used in this section, "transaction" means a transaction affecting title to property in the estate, including but not limited to:

(1) In the case of real property, a conveyance (including a sale, option, or order confirming a sale or option), a lease, the creation of a mortgage, deed of trust, or other lien or encumbrance, the setting apart of a probate homestead, or the distribution of property.

(2) In the case of personal property, a transfer or the creation of a security interest or other lien on the property.

(b) Whenever the court makes an order that authorizes or directs a transaction, the the personal representative shall execute the transaction in accordance with the terms of the order.

(c) A transaction affecting real property in the estate executed by the personal representative shall set forth therein that it is made by authority of the order authorizing or directing the transaction and shall give the date of the order. The personal representative shall record a certified copy of the order in the office of the county recorder in each county in which any portion of the real property is situated. This subdivision does not apply to a lease of property.

(d) A transaction executed by the personal representative in accordance with an order authorizing or directing the transaction has the same effect as if the decedent were living at the time of the transaction and had carried it out in person while having legal capacity to do so.

Comment. Subdivisions (a), (b), and (c) of Section 7356 restate portions of former Probate Code Sections 786 (sales of real property), 832-833 (mortgages), 842-843 (leases), and 852-853 (property claimed to belong to decedent or other person). These subdivisions are comparable to subdivisions (a), (b), and (c) of former Probate Code Section 2111 (guardianship and conservatorship).

Subdivision (c) applies to any conveyance of an interest in real property of the estate, including but not limited to the granting of an option to purchase real property of the estate, but does not apply to a lease of real property of the estate. The order authorizing or directing the personal representative to make a lease of real property of the estate may, however, be recorded if the lessee or the personal representative so desires. See Section 7355 (recordation of order affecting real property). Recordation of an order for distribution of real property has the effect of a receipt by the distributee. Section 11751 (receipt for distributed property).

Subdivision (d) is drawn from subdivision (d) of former Probate Code Section 2111 (guardianship and conservatorship) and is consistent with provisions scattered through the former Probate Code. See former Probate Code Sections 786 (sales of real property), 834 (mortgages, pledges, deeds of trust), 843 (leases), 853 (property claimed to belong to decedent or other person). Whether or not after-acquired title is passed by an instrument executed by the personal representative depends on the terms of the instrument. See generally 3 B. Witkin, Summary of California Law Real Property §§ 86, 160, at 1840, 1900-01 (8th ed. 1973).

CROSS-REFERENCES

Definitions

Personal representative § 58
Probate homestead § 60
Property § 62
Real property § 68

COMPARABLE PROVISION

Guardianship-conservatorship § 2111

Note. Suppose there is no recordation--does this invalidate the order or simply put it in the same category as any other unrecorded judgment or document affecting land? Does this section add anything to existing law on the effect of recordation?

Note. Section 2111 (guardianship and conservatorship) should be conformed to Section 7356).

§ 7357. Enforcement of order

7357. An order may be enforced by execution or otherwise as orders and judgments in civil actions.

Comment. Section 7357 restates a portion of the last sentence of former Probate Code Section 1230 without substantive change. It elaborates one aspect of Section 7200 (general rules of practice govern).

Article 5. Appeals [See Memorandum 86-76]

COMMENTS TO REPEALED SECTIONS

ARTICLE 2. ORDERS

Probate Code § 1220 (repealed)

Comment. Former Section 1220 is continued without substantive change in Estate and Trust Code Section 7350 (recital of jurisdictional facts unnecessary).

Probate Code § 1221 (repealed)

Comment. Former Section 1221 is continued without substantive change in Estate and Trust Code Section 7351 (entry and filing).

Probate Code § 1222 (repealed)

Comment. Former Section 1222 is restated in Estate and Trust Code Section 7355 (recordation of order affecting real property). See also Section 7356 (transfer or conveyance of property pursuant to court order).

Probate Code § 1224 (repealed)

Comment. Former Section 1224 is superseded by Estate and Trust Code Section 11853 (copy of order of distribution).

ARTICLE 3. RULES OF PROCEDURE

Prob. Code § 1230 (repealed). Trials

Comment. Former Section 1230 is superseded by Estate and Trust Code Sections 7200 (general rules of practice govern), 7351 (entry and filing), and 7357 (enforcement of order). See the Comment to Section 7200. See also Code Civ. Proc. §§ 309 (court may submit issue to jury not defined by pleadings) and 631 (jury trial waived if not demanded).

Prob. Code § 1231 (repealed). New trial

Comment. Former Section 1231 is restated in Estate and Trust Code Section 7307 (new trial) without substantive change. The provision for new trial in proceedings to determine heirship and interests in estates is no longer necessary, since such proceedings are no longer subject to the new trial limitation of Section 7306. See Comment to Section 7306.

Prob. Code § 1232 (repealed). Costs

Comment. Former Section 1232 is continued in Estate and Trust Code Section 7203 (costs).

Prob. Code § 1233 (repealed). Rules of practice

Comment. The first paragraph of former Section 1233 is superseded by Estate and Trust Code Section 7200 (general rules of practice govern). See Comment to Section 7200; see also Code Civ. Proc. § 2009 (affidavit may be used to establish record of birth). The first sentence of the second paragraph is superseded by Estate and Trust Code Section 7252 (affidavit or verified petition as evidence) and Code of Civil Procedure Section 2009 (affidavit in uncontested proceedings to establish record of birth). The second sentence is restated in Section 8220 (evidence of subscribing witness) without substantive change.

CONFORMING CHANGES

Code Civ. Proc. § 1908 (amended)

SEC. . Section 1908 of the Code of Civil Procedure is amended to read:

1908. (a) The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

(1) In case of a judgment or order against a specific thing, ~~or in respect to the probate of a will, or the administration of the estate of a decedent,~~ or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, ~~the will, or administration,~~ or the condition or relation of the person.

[remainder of section unchanged]

Comment. Section 1908 is amended to delete the references to probate of a will and administration of an estate. These references duplicate provisions of the Estate and Trust Code. See Est. & Trust Code § 7354 (effect of order on third persons).

Code Civ. Proc. § 2004 (amended)

SEC. . Section 2004 of the Code of Civil Procedure is amended to read:

2004. (a) A deposition is a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him the adverse party to attend and cross-examine.

(b) In all actions and proceedings where the default of the defendant has been duly entered, ~~and in all proceedings to obtain letters of administration, or for the probate of wills and the issuance of letters testamentary thereon, where, after due and legal notice, those entitled to contest the application have failed to appear,~~ the entry of said defaults, ~~and the failure of said persons to appear after notice,~~ shall be deemed to be a waiver of the right to any further notice of any application or proceeding to take testimony by deposition in such action or proceeding.

Comment. The portion of Section 2004 that related to proceedings for administration of the estate of a decedent is restated in Estate and Trust Code Section 8005 without substantive change.

Est. & Tr. Code § 8005 (added)

§ 8005. Default

8005. In a proceeding for administration of the estate of a decedent, if a person entitled to contest the petition fails to appear, the failure shall be deemed to be a waiver of the right to further notice of any application or proceeding to take testimony by deposition in the proceeding.

Comment. Section 8005 restates a portion of former Code of Civil Procedure Section 2004 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56