#L-1041 ns3
12/15/86

Second Supplement to Memorandum 86-91

Subject: Study L-1041 - Rules of Procedure (Comments of Charles A. Collier, Jr.)

Attached to this supplementary memorandum are personal comments of Charles A. Collier, Jr., relating to the draft of rules of procedure. We will consider his comments at the Commission meeting in connection with the discussion of the sections to which they relate.

Respectfully submitted,

Nathaniel Sterling
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December 10, 1986

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Memorandum 86-91 -
Rules of Practice

Dear John:

The following are my personal comments as to Memorandum 86-91. State Bar Team Two has already submitted comments on this Memorandum by memo of October 7.

My comments are as follows:

1. Section 7200: Subparagraph (a), which would make rules of practice applicable to civil actions generally applicable to probate practice, appears to significantly expand the applicability of the CCP to probate procedures. Current Section 1233 makes only Part 2 of the CCP, Sections 307 through 1062.10, and that portion of Part 4 dealing with discovery starting with Section 2016 applicable to probate. Query whether it is appropriate or necessary to make the rules of civil practice generally applicable to probate proceedings or whether the limitations now found in Section 1233 remain appropriate.

As worded, this section would allow an attorney to sign any document that could be signed by an attorney in a civil proceeding. This would seem to include petitions, answers, motions, demurrers, statements of interest, etc., and would require client verification whenever required by the CCP for civil proceedings. In many cases, of course, the attorney is allowed to verify a pleading in a civil action where the client is out of state. Presumably that would also apply to probate.

As I am sure you are aware, the theory of requiring the personal representative to sign all papers and not just the verifications is that the personal representative is appointed by the court and draws powers directly from the

court appointment. This, of course, is different from a usual plaintiff or defendant in a civil litigation. Civil litigation, of course, is not subject to the same kind of court supervision as is a proceeding under the Probate Code. I believe that this proposal to allow attorneys to sign pleadings, and presumably all pleadings, in probate should be the subject of wider comment from the interested bar groups and persons to whom a tentative recommendation would normally be sent.

If lawyers are allowed to sign pleadings in probate, the same rule should apply to trusts, conservatorships, guardianships, etc., as there would be no particular rationale for allowing attorneys to sign court documents in probate proceedings but not in other fiduciary proceedings supervised by the court.

The comment in the first paragraph paraphrases the first sentence of Section 1230, namely, that "all issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions." This particular sentence, I believe, has been the source of confusion over the years when read with the third sentence of Section 1230, which states:

> "When a party is entitled to a trial by jury and a jury is demanded, . . ."

While probate lawyers generally take the view, I believe, that a jury trial is only available in those specific instances where a jury is authorized by a specific statute (will contests, petitions pursuant to Section 1080, certain objections to allowance of claims, etc.), civil litigators have contended that the language that "all issues of fact" must be tried in conformity with the rules of practice appplicable to civil actions greatly expands the scope of use of juries in probate. A lawyer will contend, for example, that certain issues are ones that could be tried before a jury in a civil proceeding. Therefore, they can be tried before a jury in a probate proceeding. Although cases, such as Estate of Beach, state that a jury is only available in probate as specifically provided by statute, Section 1230 has created an ambiguity in that area. My suggestion would be that the language of Section 1230 paraphrased in the first paragraph of the comment be deleted, since proposed Section 7202 clearly limits the right to a jury.

Although not specifically mentioned in the section or comment, I believe there is some confusion also as to when findings of fact are necessary in probate proceedings. Section 1230, for example, refers to the court's "decision in writing" but makes no reference to findings of fact. Is this a specific provision which overrules the general applicability of the CCP as to findings of fact? Something might be added to the comment as to those situations where findings of fact are appropriate in probate proceedings or in any other fiduciary proceedings under the Estate and Trust Code.

By way of illustration, Section 718 provides for reference of a matter to a disinterested party under paragraph (1) and provides that person as a referee "shall make his report thereon to the court." In subparagraph (2), it refers to the matter being assigned to a commissioner or referee regularly attach to the court and that person is to "make and file a decision in writing in which the facts found and conclusions of law must be separately stated." Also see Section 1081.

2. Section 7201: The second sentence of paragraph (a) relating to local rules is inappropriate. The rather elaborate rules, for example, necessary to administer the Los Angeles Probate Department have little or no application in a small county. Similarly, the rules in a small county would not provide adequate guidance for a large county, such as Alameda County. I believe the second sentence should be deleted.

3. Section 7202: See my comments to Section 7200 as they relate to a jury.

4. Section 7203: This provision should be generalized for the Estate and Trust Code, not just limited to probate matters.

5. Section 7204: Section 7204 is much more limited in its scope than CCP Sections 372-373.5. Section 372, for example, gives a guardian the power with the approval of the court "to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to the compromise." There are a number of other provisions found in the sections which also are not included in 7402. It is unclear from (d) whether Section 7402 is meant to completely replace CCP Sections 372-373.5 or merely make those sections inapplicable to the appointment of the guardian ad litem but otherwise

applicable to the powers and duties of the guardian once appointed. Some clarification would be appropriate.

6. Section 7250: This section requiring a petition to be signed by the petitioner is inconsistent with the language of Section 7200 and in particular the second paragraph of the comment, unless it is covered by the language "except as otherwise specifically provided." However, this is a specific section and 7200 is a general section. Therefore, this section would seem to control.

There is no section dealing with a response, a statement of interest, objection or other document that may be filed by another party interested. Should there not be a more general section dealing with pleadings in general in probate, not just petitions?

7. Section 7251: Is paragraph (b) adequate to cover the situation where an account or report is verified on behalf of a corporate fiduciary? The language indicates that the verification shall be made "by the person making the report or account." This language literally does not cover the situation where a verification is signed on behalf of a corporate fiduciary by an authorized officer of the entity. Perhaps a comment would clarify this. With reference to the query following Section 7251, as to situations in probate where a response to a petition is appropriate, the chart on disputed probate proceedings, which is part of the program material on probate and trust litigation from CEB, (which chart I wrote some years ago) highlights the fact that there are relatively few provisions in the code which have specific reference to filing a response, answer or statement of interest to the petition. See, for example, Sections 370, 382, 851.5, and 1080. Proposed Section 7303 perhaps solves this issue by providing generally for a response or statement to any petition.

Perhaps Section 7303 could be modified to indicate that an interested person may at or before the hearing make a response or objection orally or in writing, except as to those matters where a specific time or method of filing a response is set forth in the section (such as a will contest, a Section 1080 petition, etc.).

A related issue is when a disputed matter is at issue. For example, Section 1080 provides:

> "Any person may appear and file a written statement setting forth his interest in the estate. No other pleadings are necessary and the allegations of each claimant shall be deemed to be denied by each of the other claimants to the extent that they conflict with any claim of the latter."

This language indicates, I believe, that the matter is at issue, even if none of the persons served file any statement of interest, and the court can proceed to determine the matter.

In contrast, Probate Code Section 370, dealing with a will contest before probate, provides that a citation shall be directed to the heirs of the decedent and all persons interested in the will and directs that they plead within 30 days. In many cases persons do not wish to participate in a will contest. I believe there is some confusion as to whether a formal entry of default against the nonresponding heirs or persons interested in the will is necessary in order to bring the matter to issue or whether it, in fact, is only at issue when all parties have responded. Those who do not respond will be bound by the court's determination in any event, if they had notice of the proceeding.

In most probate proceedings the type of provision found in Probate Code Section 1080 quoted above would be most helpful. That is, the matter is determined as to all parties whether or not they have appeared. The court does not lack jurisdiction merely because some of the parties have failed to appear in the proceeding. Perhaps a generalized section, such as found in Section 1080, might be appropriate. Perhaps this could be added to Section 7303.

8. Section 7252: I believe it is a practice to recognize verified pleadings as competent evidence in any uncontested proceeding involving trusts as well as estates and guardianships. The section should therefore be generalized or placed in another portion of the code.

9. Section 7253: Generalizing this concept of lis pendens seems to me inappropriate. 851.5 is a specific provision dealing with title to a specific piece of property. It is a proceeding between the personal representative and the third party. A lis pendens notice is appropriate in that type of litigation. However, this rather broad language

would appear, for example, to allow a beneficiary of an estate who was, for example, filing objections to an accounting to file a notice of lis pendens against the estate because there is a parcel of real property in the estate. It might preclude the personal representative from selling the property, even though the objections to the account had little or nothing to do with the real property. There is a strong possibility for abuse of this type of general lis pendens.

10. Section 7300: No comment.

11. Section 7301: No comment.

12. Section 7302: I believe this should be reversed. Most petitions in probate are set for hearing. Relatively few can be handled ex parte. For example, Probate Code Section 1004 allows an ex parte petition for preliminary distribution. Section 771 allows an ex parte petition for authority to sell stocks. There are a few other such sections dealing with ex parte orders, but the vast majority of petitions do require notice and a hearing.

13. Section 7303: See my comments to Section 7251.

14. Section 7304: In addition to generalizing various provisions, I believe it codifies existing practice.

15. Section 7305: Presumably this section is limited by the provisions in the CCP dealing with the ability of a court to compel any person to attend as a witness. As written, this language is extremely broad and I believe should be limited by a cross-reference to the CCP or other appropriate reference.

16. Section 7306: Probate Code Section 1230 states:

> "The party affirming is plaintiff, and the one denying or avoiding is defendant."

This concept is not carried forward in these proposed rules of procedure so far as I have been able to ascertain. I believe that that concept might be modified (as was done at the Law Revision Commission meeting on December 5) to provide essentially as follows:

> "The petitioner shall be deemed the plaintiff and the objector shall be deemed the respondent."

That type of language would be helpful in reference to the persons having the burden of proof in a probate proceeding. For example, if a beneficiary files an objection to an account, is it the duty of the personal representative to satisfy the court that the account is correct, or is it the burden of the objector to show that the account is wrong? Some reference in these provisions to the petitioner being deemed the plaintiff would help clarify the burden of proof. I believe this is appropriate even though probate proceedings are essentially equitable in nature.

17. Section 7307: The comment questions why a motion for new trial is limited to the situations mentioned. These are the only situations where there is a proceeding that is equivalent to a civil trial. Most other proceedings are somewhat more informal, often do not involve findings of fact, etc. Therefore, limiting the formal motion for new trial to those areas seems appropriate. In other situations, a motion for reconsideration may be appropriate under CCP Section 1008 or a motion based upon mistake, inadvertence or excusable neglect under CCP Section 473 may be used. These remedies seem adequate for the normal probate petition.

18. Section 7350: No comment.

19. Section 7351: No comment.

20. Section 7352: This section as written, I believe, is inappropriate. A probate proceeding is deemed to be in rem or quasi-in rem. The various orders of the court are final once the time for appeal has expired (Probate Code Section 1240). Because creditors are being paid and the assets of the estate are being distributed to those entitled thereto, finality of orders is essential for probate administration. As noted above, a motion for reconsideration of the court's ruling can be made under CCP Section 1008. If there is mistake, a motion under CCP Section 473 is appropriate. Nunc pro tunc orders are also common to correct clerical errors. Matters occasionally can be reviewed and modified in connection with the order for final distribution, so as to eliminate any errors in the intermediate orders.

The power to renew an order, such as to renew an order for family allowance, of course, is appropriate as would be an order, for example, to terminate a family allowance if there was a change in facts. Therefore, the particular provision of this section, which is I believe inappropriate, is the reference to the power to modify any order. As worded, this section seems to be an invitation to litigate and relitigate matters by filing petitions to modify or terminate prior orders of the court which otherwise would be final.

21. Section 7353: Based upon the Commission's decision as to the language in proposed Section 9612(b), subpart (b) of this section should be deleted. Is the phrase "any act or omission directly authorized, approved or confirmed in the order" consistent with the case law in this area? The cases indicate that any matter not adequately disclosed by the account, for example, is not res judicata. The language appears satisfactory, but perhaps the applicable cases, such as Estate of de Laveaga, 50 Cal.2d 484, 487 (1958), should be reviewed.

22. Section 7354: The comment might add a reference that paragraph (b) is derived in part from Probate Code Sections 1021, 1123, etc.

23. Section 7355: I believe the section should be modified in paragraph (a) to state that a certified copy of the order or an appropriate deed from the personal representative shall be recorded. This would give the personal representative the option to record the executor's deed, for example, or the full order as appropriate but would require that one or the other be recorded.

24. Section 7356: Both Section 786 and Section 834, for example, provide that the transaction includes not only the interest held by the decedent at date of death, but any interest acquired by the estate subsequent to date of death. Is this concept adequately covered by paragraph (d)? If not, that language should be added at an appropriate place. Perhaps it can be covered in the comment.

Paragraph (c), of course, is not accurate in that a personal representative may be able to sell real property without court order under independent administration. In the case of independent administration, would that first sentence mean reference to the date that letters are issued granting independent authority or the date of the order for probate which granted independent authority? Again, referring to paragraph (c), can the personal representative record a personal representative's deed rather than the order?

The last paragraph of the comment refers to "former" Probate Code Section 2111. I believe that reference is in error, as that section is not going to be renumbered.

As to the note raising the question of failure to record, I would think that failure to record would have the same effect as any other unrecorded judgment or document

affecting land. The duty to record should be imposed on the personal representative to clearly show a change of title or interest.

25. Section 7357: No comment.

I hope the above comments will be of assistance to the Commission and the Staff.

Sincerely,

Charles A. Collier, Jr.

CAC:vjd
cc: Lloyd Homer, Esq.
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