

Memorandum 87-23

Subject: Study L-1035 - Amendments to AB 708 (Administration of Estates of Missing Persons)

At the March meeting, the Commission revised the *Tentative Recommendation Relating to Administration of Estates of Missing Persons* in response to comments we received. Attached to this memorandum is a revised version of this recommendation that implements the Commission's decisions. The staff has revised the explanatory text and the comments to conform to the changes made in the statutory material.

The Commission has tentatively decided to amend this material into AB 708 in the second set of amendments. However, the Commission should consider delaying introduction of this material in light of the issues raised below.

The revised recommendation restates the substance of the existing statute, but there are some minor and technical changes and the statute would be renumbered from Sections 1350-1359 (in Division 3) to Sections 12400-12409 (in Division 7). It is not necessary to revise the missing person statute this year. On the other hand, there is no harm in revising this statute now, except that further revisions may be desired after the issues discussed below are dealt with.

The following issues merit consideration:

Relation to Evidence Code Section 667

At the urging of the State Bar, the Commission revised draft Section 12401 to read as follows:

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

This language differs from the general presumption in Evidence Code

Section 667, which reads as follows: "A person not heard from in five years is presumed to be dead."

Ideally, the standard for presuming a person to be dead should be the same in probate administration and in other situations, or at least in other situations involving the disposition of property. The Evidence Code provision could be conformed to the Probate Code standard, or vice versa, to achieve consistency. The argument against revising the Evidence Code is that a change of language there could disrupt the case law developed under this standard since 1872 (or earlier).

The Probate Code provision could be revised to conform to the Evidence Code as follows:

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

The language relating to persons likely to have heard from the missing person and to a search or inquiry would remain in draft Sections 12404 and 12406. Thus, if the court was not satisfied that a diligent search or inquiry had been made, it could order a search or inquiry as appropriate under the circumstances and thus make sure that the persons who are likely to have heard from the missing person are contacted.

Relation to Probate Code §§ 200-204 (Proceedings to Establish Death)

Probate Code Sections 200-204 provide for proceedings in the superior court to "establish the fact of death." As noted in the Comment to Section 200, this procedure is intended to provide an expeditious procedure for the purpose of clearing title to property. The relationship of this procedure to the missing person procedure should be considered. It might be useful to locate part of the missing person statute with the "establishing the fact of death" procedure. The establishment procedure would be available where there is sufficient evidence of death whereas the missing person procedure would be available after the person was missing for five years.

Procedure Applicable to Nonprobate Assets

The missing person statute ties the presumption of death of a missing person to administration of that person's estate. However, a judicial determination that a person is presumed dead is just as useful for an orderly disposition of nonprobate assets, such as joint tenancy property, insurance benefits, and trusts. As noted above, the presumption in Evidence Code Section 667 applies in nonprobate circumstances. However, a set of consistent provisions in the Probate Code to deal with both probate and nonprobate property would be useful.

Recovery of Nonprobate Assets on Reappearance

After distribution of a probate estate, the missing person statute governs the rights of distributees and the missing person upon the missing person's reappearance. It would be useful to apply similar rules to the recovery of and rights in nonprobate assets upon reappearance of a missing person.

Relation to Ancillary Administration

The relation of draft Section 12403 (jurisdiction of court) to the statutes on ancillary administration may need clarification after the Commission has considered the material dealing with ancillary administration.

In light of these areas of concern, the staff suggests that the missing person statute be given further study and revision.

Respectfully submitted,

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Staff Counsel

STAFF DRAFT

STATE OF CALIFORNIA
California Law Revision Commission

RECOMMENDATION

relating to

PROBATE LAW AND PROCEDURE

ADMINISTRATION OF ESTATES OF MISSING PERSONS

April 1987

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
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April 10, 1987

To: The Honorable George Deukmejian
Governor of California and
The Legislature of California

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The ultimate goal is to submit a new Probate Code to the Legislature. The new code will replace the existing Probate Code.

Pending preparation of the entire new code, however, some revisions will be proposed in the existing Probate Code. This recommendation sets forth the Commission's proposed revisions relating to administration of estates of missing persons (Probate Code Sections 1350-1359).

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Arthur K. Marshall
Chairperson

RECOMMENDATION
relating to
ADMINISTRATION OF ESTATES OF MISSING PERSONS

Existing law provides that a person who has been missing for five years is presumed dead,¹ and provides a procedure for administration of the missing person's estate.² The proposed law continues this procedure with the changes noted below.

The proposed law eliminates the one-year delay of distribution of an estate applicable under existing law³ and relies on the general provisions governing distribution of decedents' estates. This change is made in the interest of uniformity. In view of the length of time that must pass before the missing person's property can be distributed, the additional delay provided by existing law is not a necessary protection. In addition, a missing person who reappears may recover his or her property or its value from distributees to the extent it would be equitable at any time until five years after the distribution.

Existing law permits the spouse, a member of the missing person's family, an interested person, or a friend of the missing person to petition for administration.⁴ The proposed law permits any person who may be appointed as a personal representative to petition for administration of the missing person's estate, except for a person who would qualify for appointment as a personal representative only as a "person legally competent."⁵

1. Prob. Code § 1351.

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

3. Prob. Code § 1352.

4. Prob. Code § 1354.

5. See Prob. Code §§ 400-410 (appointment of executor or administrator with the will annexed), 422 (persons entitled to letters of administration). Under this scheme, the following persons could petition for administration of a missing person's estate: a person named as executor in the will, a surviving spouse, children, grandchildren, parents, brothers and sisters, next of kin entitled to

Existing law delays the hearing on the petition for administration of a missing person's estate for three months and requires publication of notice of the hearing 90 days beforehand.⁶ These delays are not continued in the proposed law. Hearing dates and notices are governed by general provisions, subject to the court's authority to order a further search for the missing person.

Under existing law, the petitioner is liable for the cost of a search for the missing person where there is no administration; the estate is liable if there is administration.⁷ The proposed law makes the estate presumptively liable, but permits the court in its discretion to order the petitioner to pay the costs of a search if there is no administration. This rule recognizes that the person whose status as a missing person has necessitated the search should be liable for the cost of the search in the normal case.

share in the estate, relatives of predeceased spouse entitled to succeed to an interest in the estate, a conservator or guardian of the estate, public administrator, and creditors. Regardless of who petitions for administration of the missing person's estate, the order of priority for appointment as personal representative is unaffected.

6. See Prob. Code § 1355.

7. Prob. Code § 1356(c).

OUTLINE OF STATUTE

PART 12. ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

- § 12400. "Missing person" defined
- § 12401. Presumption of death for purposes of administration
- § 12402. Manner of administration of missing person's estate
- § 12403. Jurisdiction of court
- § 12404. Petition for administration
- § 12405. Notice of hearing
- § 12406. Determination whether person is person presumed to be dead;
search for missing person
- § 12407. Appointment of personal representative and determination of
date of disappearance
- § 12408. Recovery of property by missing person upon reappearance
- § 12409. Application of part

**PART 12. ADMINISTRATION OF ESTATES OF MISSING
PERSONS PRESUMED DEAD**

§ 12400. "Missing person" defined

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

Comment. Section 12400 restates former Section 1350 without substantive change.

§ 12401. Presumption of death for purposes of administration

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

Comment. Section 12401 restates former Section 1351 without substantive change. The language of the standard as stated in this section has been revised for consistency with Section 12404. Section 12401 is the same in substance as Uniform Probate Code Section 1-107(3) (1977). See also Evid. Code §§ 667 (general presumption of death), 1282 (finding of presumed death by federal employee).

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

12402. Subject to the provisions of this part, the estate of a missing person may be administered in the manner provided generally for the administration of estates of deceased persons.

Comment. Section 12402 restates former Section 1352 without substantive change, except that the former provision delaying distribution of property until one year after appointment and qualification of the personal representative is not continued. The time limitations on preliminary and final distribution apply to distribution under this part. The former reference to distribution of the estate is omitted; administration of the estate includes distribution. See also Section 12408 (recovery of property by missing person upon reappearance).

CROSS-REFERENCES

Definitions

Missing person § 12400

§ 12403. Jurisdiction of court

12403. (a) If the missing person was a resident of this state when last seen or heard from, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this part.

(b) If the missing person was a nonresident of this state when last seen or heard from, the superior court of a county where real property of the missing person is located, or of a county where personal property is located if the missing person has no real property in this state, has jurisdiction for the purposes of this part.

Comment. Section 12403 restates former Section 1353 without substantive change.

CROSS-REFERENCES

Definitions

Missing person § 12400

Personal property § 57

Real property § 68

§ 12404. Petition for administration

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

(b) The petition may be filed by any person who may be appointed as a personal representative, other than a person described in paragraph (12) of subdivision (a) of Section 422.

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

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

(2) The time and circumstances when the missing person was last seen or heard from.

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

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

Comment. Section 12404 restates former 1354(a)-(c) without substantive change, except as noted below.

The reference to probate of the will in former Section 1354(a) is eliminated as surplus.

The list of persons who may petition under former Section 1354(b) has been revised to incorporate the list of persons who may be appointed as personal representative. See Sections 400-410 (appointment of executor or administrator with the will annexed), 422 (persons entitled to letters of administration). This revision makes clear that a petition may be filed by persons such as the public administrator or a creditor. See Section 422(a)(10) (public administrator) and (a)(11) (creditors). However, as subdivision (b) makes clear, a person who qualifies for appointment as a personal representative only as a "person legally competent" under Section 422(a)(12) may not petition under this section; only persons who fall into some other category may petition. Subdivision (b) does not affect the order of priority of appointment of an administrator; this is controlled by provisions governing administration generally.

The requirement that the petitioner give the last known address of the missing person in subdivision (c)(1) is new. Subdivision (c)(2) is revised for consistency with subdivision (c)(3). Subdivision (c)(3) is revised to eliminate the need to identify the persons who are most likely to know the whereabouts of the missing person. The reference to seeing the missing person is new, but makes no substantive change. Pursuant to subdivision (c) and Section 12402, the general requirements for a petition for administration of the estate apply to proceedings under this part.

CROSS-REFERENCES

Definitions

Missing person § 12400
Verification required § 1284

§ 12405. Notice of hearing

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

Comment. Section 12405 replaces former Section 1355. Section 12405 no longer delays the hearing for three months nor requires publication 90 days before the hearing.

CROSS-REFERENCES

Certified mail equivalent of registered mail § 5
Clerk to set matter for hearing § 1285
Definition
Missing person § 12400

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

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

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

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

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

(3) Engaging the services of an investigator.

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

Comment. Subdivisions (a) and (b) of Section 12406 restate former Section 1356(a) and (b) without substantive change. The word "reasonably" which preceded "diligent search" under former Section 1356(b) has been omitted, but this is not a substantive change. The court has the authority to order a search that is appropriate under the circumstances of the case. The reference in subdivision (b)(1) to newspapers is new; this is not a substantive change.

Subdivision (c) replaces former Section 1356(c) which required that costs be paid by the petitioner, if there was no administration, or by the estate, if there was administration. The new rule makes the estate presumptively liable for costs, but gives the court discretion to order the petitioner to pay costs if there is no administration.

CROSS-REFERENCES

Definition

Missing person § 12400

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

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

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

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

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

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

CROSS-REFERENCES

Definitions

Missing person § 12400

Personal representative § 58

§ 12408. Recovery of property by missing person upon reappearance

12408. (a) If the missing person reappears:

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

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

(b) The remedies available to the missing person under subdivision (a) are exclusive, except for any remedy the missing person may have by reason of fraud or intentional wrongdoing.

(c) Except as provided in subdivisions (a) and (b), the order for

final distribution, when it becomes final, is conclusive as to the rights of the missing person, the rights of the beneficiaries of the missing person, and the rights of all other persons interested in the estate.

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

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

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

Subdivision (c) is consistent with Section 1021 (effect of an order for final distribution in probate proceedings generally). Subdivision (c) permits a distributee to convey good title to property of the missing person before the time an action by the missing person against the distributee would be barred under subdivision (a)(2). This is because subdivision (c) provides a rule that the order for final distribution, when it becomes final, is conclusive as to the rights of the missing person. The exception to this rule in subdivision (a)(2) is limited to property in the hands of the distributee or its proceeds in the hands of the distributee; subdivision (a)(2) does not permit an action against the person to whom the property has been transferred by the distributee. Where a distributee has encumbered property of the missing person, the lender likewise would be protected under subdivision (c); but, if the action of the missing person is not barred under subdivision (a)(2), the reappearing missing person might recover from the distributee the property, subject to the encumbrance.

Subdivision (d) restates former Section 1358(d) without substantive change. Subdivision (d) is revised to make clear that the restrictions on the time of filing a petition under Section 1080 do not apply under this part.

CROSS-REFERENCES

Definitions

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

§ 12409. Application of part

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

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

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

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

The reference to December 31, 1983, continues the operative date provision applicable to former Sections 1350-1359 because this part restates the substance of the former provisions and makes no substantive change that would require a separate operative date.

CROSS-REFERENCES

Definition

Missing person § 12400

COMMENTS TO REPEALED SECTIONS

CHAPTER 24. ADMINISTRATION OF MISSING PERSONS PRESUMED DEAD

Probate Code § 1350 (repealed). "Missing person" defined

Comment. Former Section 1350 is restated in Section 12400 ("missing person" defined) without substantive change.

Probate Code § 1351 (repealed). Presumption of death for purposes of administration

Comment. Former Section 1351 is restated in Section 12401 (presumption of death for purposes of administration) without substantive change.

Probate Code § 1352 (repealed). Manner of administration and distribution

Comment. Former Section 1352 is restated without substantive change in Section 12402 (manner of administration and distribution of missing person's estate), except that the one-year delay of distribution is not continued. Under Section 12402, the general limitations on distribution of estates apply. The reference to distribution of the estate is also omitted; distribution is included in the process of administration under Section 12402.

Probate Code § 1353 (repealed). Jurisdiction of court

Comment. Former Section 1353 is restated in Section 12403 (jurisdiction of court) without substantive change.

Probate Code § 1354 (repealed). Petition for administration or probate

Comment. Subdivisions (a)-(c) of former Section 1354 are restated in Section 12404 (petition for administration) without substantive change, except as noted in the Comment to Section 12404. Subdivision (d) is restated and generalized in Section 7203 (verification required).

Probate Code § 1355 (repealed). Time for hearing; notice of hearing

Comment. Former Section 1355 is replaced by Section 12405 (notice of hearing). Section 12405 no longer delays the hearing for three months nor requires publication 90 days before hearing. See the Comment to Section 12405.

Probate Code § 1356 (repealed). Determination whether person is person presumed to be dead; search for missing person

Comment. Subdivisions (a) and (b) of former Section 1356 are restated in Section 12406(a) and (b) (determination whether person is person presumed to be dead and search for missing person) without substantive change. Subdivision (c) is replaced by Section 12406(c).

Probate Code § 1357 (repealed). Appointment of executor or administrator and determination of date of disappearance

Comment. Former Section 1357 is restated in Section 12407 (appointment of personal representative and determination of date of disappearance) without substantive change.

Probate Code § 1358 (repealed). Recovery of property by missing person upon reappearance

Comment. Former Section 1358 is restated in Section 12408 (recovery of property by missing person upon reappearance) without substantive change, except that the five-year period runs from the time of distribution rather than the time of the petition and the term "beneficiaries" is substituted for "heirs and devisees."

Probate Code § 1359 (repealed). Application of chapter

Comment. Former Section 1359 is restated in Section 12409 (application of part) without substantive change.