

Memorandum 87-42

Subject: Study L-1027 - Rules of Procedure (Staff Draft of Tentative Recommendation)

Attached to this memorandum is a staff draft of general rules of procedure. This draft tentative recommendation implements decisions made by the Commission at several earlier meetings, the last being February 1987. At that time these the general procedural provisions were drafted for inclusion in Division 7 relating to decedents' estates. In this draft, these provisions have been split into two groups: provisions that should apply to the entire Probate Code and provisions that apply only to Division 7 (and perhaps Division 6).

In view of the substantial reorganization and redrafting that has occurred, we plan to consider this material section by section. We need to distribute this tentative recommendation for comment so that we can prepare a final recommendation before the 1988 legislative session.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

STAFF DRAFT

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

PROBATE LAW AND PROCEDURE

RULES OF PROCEDURE

June 1987

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1987. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN [] 1987.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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

LETTER OF TRANSMITTAL

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.

This tentative recommendation sets forth the Commission's proposed revisions relating to general rules of procedure in the Probate Code.

The explanatory text of this tentative recommendation explains the principal revisions it would make in existing law. Additional changes are noted in the comments following the sections of the proposed legislation. The comment gives the source of the section and indicates the nature of the changes the section would make in existing law.

The proposed legislation is drafted as a part of the new code. In some cases, you will find a reference to other parts of the new code that are still being prepared and are not yet available.

Comments showing the disposition of each section of existing law that would be repealed in the proposed legislation can be found at the end of this tentative recommendation.

Respectfully submitted,

Arthur K. Marshall
Chairperson

Staff Draft**TENTATIVE RECOMMENDATION***relating to***RULES OF PROCEDURE****Introduction**

This tentative recommendation is concerned with general procedural provisions. Most of these provisions are redrafted and reorganized provisions of the existing Probate Code. Included in this tentative recommendation are general rules that may be appropriately applied to the entire code and some additional rules that apply to the new division governing decedent estate administration.¹ The following discussion notes important changes and policy issues that are involved in the proposed legislation. Minor and technical changes are noted in the comments following the proposed sections.

Pleadings

The proposed law provides as a general rule that petitions, reports, and accounts are to be in writing and signed by the person filing the paper. This rule generalizes provisions found in several procedures in the Probate Code.² As a general rule, responses and

1. See Division 7 (commencing with Section 7000). Much of Division 7 is included in Assembly Bill 708 introduced in the 1987 legislative session. The remainder of the material to be included in Division 7 is planned to be introduced in the 1988 legislative session. A new Division 3 (commencing with Section 1000) will be composed of general provisions including proposed Sections 1000-1049 and 1210 included in this tentative recommendation and the general notice provisions set out in Sections 1200-1265 which are included in Assembly Bill 708.

2. See, e.g., Prob. Code §§ 380 (will contest after probate), 440 (petition for letters of administration), 522 (removal of personal representative), 921 (filing of verified account), 1025.5 (report of status of administration).

objections may also be made in writing.³ If an oral response or objection is permitted in particular circumstances, the statute governing the particular procedure will so provide. In addition, the rule on written responses and objections is phrased in a fashion that permits local court rules to allow oral responses or objections.⁴

Guardian ad Litem

General provisions in the Code of Civil Procedure provide for the appointment of a guardian ad litem to represent the interests of a minor, an incompetent person, or a person for whom a conservator has been appointed.⁵ A guardian ad litem may also be appointed to represent the interests of unknown persons, persons not in being, or persons in a class that is unascertained.⁶ These general provisions are applicable to appointment of a guardian ad litem in estate administration proceedings and in other proceedings under the Probate Code except for proceedings relating to trusts. For many years, the statutes governing trust administration have provided separate statutory authority for appointment of a guardian ad litem.⁷

3. See, e.g., Prob. Code §§ 370 (written grounds of opposition to probate of will), 442 (opposition to petition for administration), 927 (written exceptions to account), 1041 (written objection to delivery of estate of nonresident).

4. The usual practice is to grant a continuance if an objection is made orally at a hearing, although it appears that the court has discretion to permit oral objections in some cases. See, e.g., Probate Policy Memorandum, Los Angeles County, 3.05, in California Local Probate Rules 19-13 (Cal. Cont. Ed. Bar 1987); Probate Policy Memorandum, Orange County, 1.04, in *id.* at 30-18; Probate Policy Memoranda, Riverside County, 6.0105, in *id.* at 33-11; Probate Rules, Santa Barbara County, 414.J, in *id.* at 42-11. Some local court rules appear to allow consideration of oral objections at the hearing. See, e.g., Rules of Probate Practice, Marin County, 107, in *id.* at 21-5.

5. Code Civ. Proc. § 372.

6. Code Civ. Proc. § 373.5.

7. See former Prob. Code §§ 1120 (as amended by 1963 Cal. Stat. ch. 863, § 1) (testamentary trusts), 1138.7 (as added by 1970 Cal. Stat. ch. 849, § 2) (living trusts), 1215.3 (as added by 1974 Cal. Stat. ch. 171, § 1) (notice in trust proceedings). These provisions are generally restated without substantive change in Section 17208 of the new Trust Law.

The proposed law generalizes the guardian ad litem provision as it has developed in the area of trust law and applies it to the entire Probate Code. This is largely a technical revision, but it has the effect of making probate practice consistent. The special Probate Code section would apply in place of the general provisions in the Code of Civil Procedure. Thus, the rules relating to minors who are 14 years of age or older, and to minors who are under 14 years old,⁸ would not apply in probate proceedings.

Jurisdiction and Power of Court

The proposed law continues the rule that proceedings for administration of decedents' estates are within the exclusive jurisdiction of the superior court.⁹ The proposed law also provides that the court has concurrent jurisdiction of actions and proceedings by or against creditors or debtors of the decedent or estate and of other actions and proceedings involving the estate or the personal representative and third persons. This provision is intended to make clear that the probate court has full power to resolve the matters before it, even if they involve third persons such as creditors and claimants to estate property. While recognizing the power of a superior court to organize in distinct departments to handle different types of cases, the proposed law eliminates any question as to the equitable powers of the court when it considers questions relating to estate administration.¹⁰

8. Code Civ. Proc. § 373. These rules are made inapplicable by Probate Code Section 17208 (as well as by its predecessor sections) for the purpose of trust proceedings. There does not appear to be any reason to treat a 14-year-old differently in trust proceedings than in probate proceedings generally.

9. See Prob. Code §§ 300, 301.

10. This proposal is consistent with Probate Code Sections 17000-17001 in the Trust Law. For additional background, see *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501, 575-82 (1986); see also Goldberg, *The Sterilization of Incompetents and the "Late Probate Court" in California: How Bad Law Makes Hard Cases*, 18 Pac. L.J. 1, 7-15 (1986).

Jury Trial

The proposed law continues the general rule in estate administration that there is no right to a jury trial unless the right is expressly granted by statute.¹¹ For a jury trial to be available under the proposed law, however, a particular proceeding must expressly provide for a jury trial. The proposed law does not continue the rule that a jury trial is available by virtue of the provision applying the rules of practice in civil actions in any case where there the Probate Code provides for issues of fact to be framed.¹²

The proposed law thus rejects the line of cases that found the framing of factual issues to be an independent statutory ground for requiring a jury trial. This change is in line with the reasoning of *Estate of Beach*¹³ and *Heiser v. Superior Court*¹⁴ which applied a stricter standard for determining whether factual issues required a jury trial under former Probate Code Section 1230. These cases require an issue analysis whereby the court determines whether the factual issues are appropriate for determination in the particular case. The proposed law avoids the need to engage in this issue analysis by eliminating the factual issue jury right that the courts in *Beach* and *Heiser* had to confront.

The proposed revision would not impinge on a constitutional right. The jury right that would be restricted by this proposal is the offspring of an unclear general statute. The proposed law would

11. *Estate of Beach*, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); *Heiser v. Superior Court*, 88 Cal. App. 3d 276, 278-80, 151 Cal. Rptr. 745 (1979); see generally, 7 B. Witkin, *California Procedure Trial* §§ 82-83, at 84-85, §§ 87-88, at 87-88, § 96, at 94-95 (3d ed. 1985).

12. See Prob. Code § 1230 (continued in Prob. Code § 1280 [AB 708]); see, e.g., *Budde v. Superior Court*, 97 Cal. App. 2d 615, 218 P.2d 103 (1950).

13. 15 Cal. 2d 623, 642-44, 542 P.2d 994, 125 Cal. Rptr. 570 (1975).

14. 88 Cal. App. 3d 276, 279-81, 151 Cal. Rptr. 745 (1979).

restore the jury in probate proceedings to its more traditional role.¹⁵ Where a specific public policy extends the right into probate, it should be within clearly defined circumstances, such as is will contests. It is undesirable to legislate a vague statute that forces parties to litigate whether in that particular case an appropriate factual issue has been framed.

Appealable Orders

Under existing law, there is no right to appeal an order in proceedings involving a decedent's estate unless specifically so provided.¹⁶ Appealable orders are listed in Probate Code Section 1297 [AB 708]. The proposed law continues this approach but makes the following revisions in the list of appealable orders.

The proposed law makes clear that an order granting or revoking letters of administration with the will annexed is appealable and that an order granting or revoking letters of special administration or special administration with general powers is not appealable.¹⁷

The authority to appeal an order granting or modifying a family allowance¹⁸ is expanded in the proposed law to permit appeal of an order terminating a family allowance. This is consistent with the

15. This proposal is consistent with the recently enacted Trust Law. See Prob. Code § 17006. The Uniform Probate Code would also limit jury trials to cases where they are constitutionally required. See Uniform Probate Code § 1-306 (1982).

16. See the cases cited in 9 B. Witkin, California Procedure Appeal § 115, at 132 (3d ed. 1985).

17. Probate Code Section 1240(a) refers simply to granting or revoking letters testamentary or of administration. The more detailed provision in the new code codifies rules provided in the cases and in other sections. See Estate of Smith, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of order appointing public administrator as administrator with the will annexed); Estate of Hughes, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); Prob. Code §§ 461, 465.

18. Prob. Code § 1240(e).

appealability of an order modifying a family allowance or refusing to grant a family allowance.¹⁹

Existing law permits the appeal of an order directing or authorizing the grant of an option to purchase real property.²⁰ The proposed law extends the provision to options to purchase personal property since the basic considerations are the same.

Existing law permits the appeal of an order determining that property is community property passing or belonging to the surviving spouse under Probate Code Section 655.²¹ The proposed law extend this provision property of any character since the confirmation procedure is not limited to community property.

Existing law permits the appeal of an order fixing an inheritance tax or determining that none is due.²² The proposed law omits this provision in view of the repeal of the inheritance tax.²³

Stay on Appeal

The proposed law provides general rules governing stay on appeal that are drawn from guardianship and conservatorship law.²⁴ Existing statutes relating to administration of decedents' estates do not provide special stay rules. Instead, reliance must be placed on general rules in the Code of Civil Procedure²⁵ and in the cases.²⁶

19. See Lyon, *Statutory Protections for Family Members*, in 2 California Decedent Estate Practice § 16.22 (Cal. Cont. Ed. Bar 1986).

20. Prob. Code § 1240(g).

21. Prob. Code § 1240(o).

22. Prob. Code § 1240(p).

23. A transitional provision will provide for appeals under the law prior to June 8, 1982, when the inheritance tax was repealed by an initiative. See the discussion under ["Transitional Provisions"], *infra*.

24. See Prob. Code § 2751.

25. See Code Civ. Proc. §§ 916-917.9.

26. See, e.g., *Estate of Hultin*, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947) (order appointing executor); *Estate of Gibson*, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965) (order appointing administrator); *Estate of Sam Lee*, 26 Cal. 2d 295, 296, 158 P.2d 193 (1945) (order appointing public administrator).

The proposed law does not attempt to revise the substance of this law, but makes it more accessible to probate practitioners.

Effect of Reversal of Appointment of Personal Representative

Existing law provides that where the appointment of an executor or administrator is reversed on appeal for error, lawful acts of the executor or administrator are as valid as though the order had been confirmed.²⁷ This rule is ambiguous and can be misleading. The proposed law limits this rule to the determination of rights of persons dealing with the personal representative.²⁸

Judgment Roll

An appeal may be made on the papers in the judgment roll.²⁹ The contents of the judgment roll for purposes of the Probate Code are specified by statute.³⁰ The proposed law adds the statement of decision to the judgment roll; this reflects the practice in probate courts.³¹

27. Prob. Code § 1241. This rule does not apply where the order is reversed for lack of jurisdiction. *Estate of Schwartz*, 87 Cal. App.2d 569, 573, 197 P.2d 223 (1948); *Security-First Nat'l Bank v. Superior Court*, 100 Cal. App. 702, 704-06, 280 P. 995 (1929).

28. This rule is drawn from case law. See *Estate of Gibson*, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965).

29. See Cal. R. Court 5; Abbott, *Designating the Record*, in *California Civil Appellate Practice* § 8.1, at 208, § 8.47-8.48, at 239-40 (Cal. Cont. Ed. Bar 2d ed. 1985).

30. Prob. Code § 1242. The contents of the judgment roll in civil proceedings generally are specified in Code of Civil Procedure Section 670.

31. The new code also omits the provision in Probate Code Section 1242 that the papers making up the judgment roll need not be attached together. Until 1939, Code of Civil Procedure Section 670 required that the papers constituting the judgment roll be attached together. See 1939 Cal. Stat. ch. 733, § 1. The nonattachment provision derives from a cautious transitional provision apparently intended to make clear that the attachment requirement was in fact repealed. By now, it can safely be assumed that court clerks have become accustomed to the new practice of not attaching the judgment roll papers together; consequently, this provision is surplus.

The Law Revision Commission solicits opinions on whether the contents of the judgment roll should be left to Judicial Council rule. Basing an appeal on the judgment roll appears to be a function of court rule, rather than statute, and court rules also give the superior court the authority to augment the record whenever necessary to prevent a miscarriage of justice.³²

32. See Cal. R. Court 5(f).

DIVISION 3. GENERAL PROVISIONS OF A PROCEDURAL NATURE

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DIVISION 3. GENERAL PROVISIONS OF A PROCEDURAL NATURE

PART 1. GENERAL PROVISIONS

CHAPTER 1. RULES OF PRACTICE

§ 1000. General rules of practice

1000. Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions apply to and constitute the rules of practice in proceedings under this code.

Comment. Section 1000 replaces the first through the fourth sentences of former Section 1280 [AB 708] and the first paragraph of former Section 1283 [AB 708]. This section provides a default rule that applies in circumstances where there is no special rule applicable in probate proceedings. For example, the general rules of practice apply to discovery, trials, new trials, appeals, and other matters of procedure. General rules of the Code of Civil Procedure do not apply, however, where this code provides a special rule. For example, jury trials are strictly limited in proceedings under this code. See Sections 1452 (jury trials in guardianship and conservatorship proceedings), 7200 (jury trials in estate administration), 17006 (jury trials in trust administration). The right to make a motion for a new trial in proceedings for administration of a decedent's estate is limited in Section 7220. The right to appeal in decedent estate administration is limited to the orders set out in Section 7240. Many other limitations are provided in this chapter and in other provisions throughout this code.

Note. At the February meeting, it was suggested that the staff attempt to delineate in this comment which rules of practice in the Code of Civil Procedure are picked up by this section. The staff does not believe that is practical to attempt to identify every rule of civil procedure and then decide whether it may apply in some area governed by the Probate Code. Particular problems that have arisen in the past are dealt with in the following sections and elsewhere in the code. Similarly, local probate rules have developed in part as a response to the need to adapt general procedures to the needs of probate practice.

§ 1001. Actions in chambers

1001. (a) A judge of the court may, in chambers, do any of the following:

(1) Grant all orders and writs that are usually granted in the first instance upon an ex parte application, and may, in chambers, hear and dispose of such orders and writs.

(2) Hear and determine all motions made pursuant to Section 657 or 663 of the Code of Civil Procedure.

(3) Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court.

(4) Hear and determine motions to tax costs of enforcing a judgment.

(5) Approve bonds and undertakings.

(6) Appoint appraisers [probate referees].

(7) Require, receive, and order notice of settlement of inventories and accounts.

(8) Suspend the powers of personal representatives, [guardians, and conservators] in the cases allowed by law.

(9) Appoint a special administrator [and grant letters of temporary guardianship or conservatorship].

(10) Approve or reject claims.

(11) Direct the issuance from the court of all writs and process necessary in the exercise of the powers of the court in matters under this code.

(b) A judge of the court may not, in chambers, hear or determine applications for confirmation of sale of real property in proceedings under this code.

Comment. Section 1001 restates and elaborates provisions of Section 166 of the Code of Civil Procedure. See also Section 1457 (guardianship and conservatorship). It should be noted that a Commissioner acting on probate matters may hear and determine ex parte motions and take other actions as provided in Section 259 of the Code of Civil Procedure. See Section 1000 (general rules of practice govern).

Note. Draft Section 1001 has been moved from Division 7 where it was formerly located to this general division so that it is applicable to the entire Probate Code. The substance of each subdivision of this section will be reviewed at the time the related substantive provisions are reviewed.

§ 1002. Judicial Council authority

1002. (a) The Judicial Council may provide by rule for the practice and procedure under this code. Unless disapproved by the Judicial Council, a court may provide by local rule for the practice and procedure under this code. Judicial Council and local court rules

shall be consistent with the applicable statutes.

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

Comment. Section 1002 is consistent with Section 6 of Article 6 of the California Constitution and with Government Code Section 68511. Cf. Section 1456 (guardianship and conservatorship).

§ 1003. Costs

1003. Unless it is otherwise provided 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 1003 restates former Section 1282 [AB 708] without substantive change. For special provisions relating to costs, see, e.g., Sections 383 (costs in probate revocation), 1003 (costs on preliminary distribution), 6544 (costs of proceedings for family allowance), 9255 [AB 708] (costs where creditor contests amount of allowed claim), 9257 [AB 708] (disallowed creditor's claim by representative), 9653 [AB 708] (costs in action to recover fraudulently conveyed property). See also Code Civ. Proc. § 1026 (costs in actions involving fiduciary estate).

§ 1004. Appointment of guardian ad litem

1004. (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 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 involved or by the petitioner.

Comment. Section 1004 is a new provision that generalizes former Section 17208 (guardian ad litem in trust proceedings). Section 1004 is also comparable to Section 1-403(4) of the Uniform Probate Code (1982). The general provisions for appointment of a guardian ad litem in Sections 372-373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this code. See Section 1000 (general rules of civil practice apply unless this code provides a different rule). 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. See Section 1455 (guardianship and conservatorship law does not limit authority to appoint guardian ad litem). 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 a beneficiary has an interest in only part of an estate, the court may not charge expenses to the whole estate, but only to 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

§ 1005. Lis pendens

1005. If a proceeding affects the title to or the right of possession of real property, notice of the pendency of the proceeding may be filed pursuant to Section 409 of the Code of Civil Procedure.

Comment. Section 1005 is new. It generalizes former Sections 2523 (guardianship and conservatorship) and 9863 [AB 708] (claims of title in estate administration).

CROSS-REFERENCES

Definitions

Real property § 68

Note. Code of Civil Procedure Section 409 uses the phrase "in an action concerning real property or affecting the title or the right of possession of real property." The version of draft Section 1005 considered at the February meeting referred only to actions "affecting" real property. This section has been revised to refer to actions "affecting the title or right of possession" in order avoid the possibility that lis pendens may be recorded involving an personal representative's accounting where the estate has real property. This

section is not really necessary, but may be helpful. It also avoids the possibility that the "concerning" language in Code of Civil Procedure Section 409 could be thought to cover objections to accounts. The broader question is whether this section is needed at all. *Lis pendens* does not appear to play a significant role in probate proceedings. Probate Code Section 851.5 was the source of Probate Code Section 2523 involving guardianship and conservatorship proceedings and is continued in Section 9863 in AB 708 involving claims of title by third persons.

The Commission should decide whether a *lis pendens* incorporation provision is needed in the Probate Code in light of the general incorporation accomplished by draft Section 1000. If the Commission decides that Section 1005 is useful, the staff recommends that it be located in these general provisions applicable to the whole Probate Code and that Section 2523 in the guardianship and conservatorship law be repealed.

CHAPTER 2. PETITIONS AND OTHER PAPERS

§ 1020. Petitions, reports, accounts

1020. Except as otherwise specifically provided in this code, a petition, report, or account shall be in writing, signed by the person filing the petition, report, or account, and filed with the court clerk.

Comment. Section 1020 generalizes several former provisions. See, e.g., former Sections 380 (will contest after probate), 440 (petition for letters of administration), 522 (removal of personal representative), 921 (filing of verified account), 1025.5 (report of status of administration).

§ 1021. Verification required

1021. (a) Except as otherwise specifically provided in this code, all of the following shall be verified:

(1) A petition, report, or account filed pursuant to this code.

(2) An objection or response filed pursuant to this code to a petition, report, or account.

(b) The verification of a petition shall be made by the petitioner or, if there are two or more parties joining in the petition, by any of them. The verification of a report or account shall be made by the person who has the duty to make the report or account. The verification of an objection or response shall be made by the objector or respondent.

Comment. Section 1021 restates former Section 1284 [AB 708] without substantive change. Subdivision (a) is comparable to Sections

1450 (guardianship and conservatorship law) and 11004(a) (trust law). Subdivision (b) continues former Section 1284(b) without change. In the case of a corporate fiduciary, a responsible person, such as a corporate officer, should verify a report or account.

§ 1022. Affidavit or verified petition as evidence

1022. An affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code.

Comment. Section 1022 generalizes the first sentence of the second paragraph of former Section 1283 [AB 708]. The declaration of an attorney would be admissible as an affidavit under this section. 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).

CHAPTER 3. HEARINGS AND ORDERS

§ 1040. General hearing procedure

1040. The provisions of this chapter govern the hearing of all matters under this code, except where the statute that provides for the hearing of the matter prescribes a different procedure.

Comment. Section 1040 is new. It is intended to simplify the procedural statutes of this code and eliminate duplication and unnecessary variances by prescribing a uniform hearing procedure.

§ 1041. Clerk to set matters for hearing

1041. When a petition, report, account, or other matter that requires a hearing is filed with the court clerk, the clerk shall set the matter for hearing.

Comment. Section 1041 restates former Section 1285 [AB 708] without substantive change.

§ 1042. Notice of hearing

1042. A hearing under this code shall be on notice unless the statute that provides for the hearing dispenses with notice.

Comment. Section 1042 is new. For provisions permitting ex parte hearings, see, e.g., Sections 203 (proceedings to establish fact of death), 461 (appointment of special administrator), 9735 [AB 708] (purchase of securities or commodities sold short), 10200 [AB 708]

(sale or surrender for redemption or conversion of securities). See also Section 1220(f) [AB 708] (mailed notice dispensed with for good cause).

§ 1043. Response or objection

1043. An interested person may, at or before the hearing, make a response or objection in writing.

Comment. Section 1043 generalizes a number of former provisions. See, e.g., former Sections 370 (written grounds of opposition to probate of will), 442 (opposition to petition for administration), 927 (written exceptions to account), 1041 (written objection to delivery of estate of nonresident). Section 1043 does not apply where a particular statute provides a different procedure. See Section 1040. For exceptions to the rule stated in this section, see [to be supplied].

Note. *The general authorization to make a response or objection orally was deleted at the February meeting, but the permissive nature of this provision has been retained. Thus, where local rules permit oral objections (instead of granting a continuance for the purpose of preparing written objections), such rules will not be overridden by draft Section 1043.*

§ 1044. Plaintiff and defendant

1044. The petitioner or other party affirming is the plaintiff and the party objecting or responding is the defendant.

Comment. Section 1044 restates the second sentence of former Section 1280 [AB 708] without substantive change.

Note. *This provision was relegated to the comment to the general incorporation provision (draft Section 1000) in the earlier draft. However, the staff proposes to restore it here in light of the remarks of Charles Collier who suggests that this provision is useful in determining the burden of proof in probate proceedings. (Letter attached to Second Supplement to Memorandum 86-91.) What does the Commission wish to do?*

§ 1045. Continuance or postponement

1045. The court may continue or postpone any hearing, from time to time, in the interest of justice.

Comment. Section 1045 continues former Section 1286 [AB 708] without change.

§ 1046. Hearing and order

1046. The court shall hear and determine any matter at issue and any response or objection presented and shall make appropriate orders.

Comment. Section 1046 restates former Section 1287 [AB 708] without substantive change.

§ 1047. Recital of jurisdictional facts unnecessary

1047. Except as otherwise provided in this code, an order made in a proceeding under this code need not recite the existence of facts, or the performance of acts, upon which jurisdiction depends, but need only contain the matters ordered.

Comment. Section 1047 restates former Section 1290 [AB 708] without substantive change.

§ 1048. Entry and filing

1048. (a) Except as provided in subdivision (b), orders shall be either entered at length in the minute book of the court or 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 1048 restates former Section 1291 [AB 708] and part of the fourth sentence of former Section 1280 [AB 708] without substantive change.

§ 1049. Enforcement of order

1049. An order may be enforced as provided in Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure.

Comment. Section 1049 restates part of the last sentence of former Section 1280 [AB 708] without substantive change. It elaborates one aspect of Section 1000 (general rules of practice govern).

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. NECESSITY OF ADMINISTRATION

§ 7000. Passage of decedent's property

7000. Subject to Section 7001, title to a decedent's property passes upon the decedent's death to the person to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession.

Comment. Section 7000 restates the first part of former Section 300 without substantive change. The term "property" includes real and personal property and "devise" includes a bequest. The decedent's heirs are determined as provided in Part 2 (commencing with Section 6400) of Division 6 (intestate succession). The rules stated in Section 7000 are subject to limitations. See, e.g., Section 7001 and Comment thereto (limitations on passage of property).

CROSS-REFERENCES

Definitions

Devise § 32
Heirs § 44
Person § 56
Property § 62
Will § 88

§ 7001. Limitations on passage of property

7001. The power of a decedent to leave property by will, and the rights of beneficiaries and creditors to the decedent's property, are subject to the restrictions and limitations contained in this code or otherwise provided by law.

Comment. Section 7001 is the same in substance as the first sentence of Section 3-101 of the Uniform Probate Code. For express limitations on the passage of the decedent's property, see, e.g., Sections 7002 (property subject to administration), 100-104 (effect of death of married person on community and quasi-community property), 6145 (lapsed gifts), 260-295 (disclaimers), 6560-6573 (omitted spouse and children).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Devisee § 34
Heirs § 44

§ 7002. Property subject to administration

7002. Except as otherwise provided by law, all of the decedent's property is subject to administration under this code.

Comment. Section 7002 restates the last part of former Section 300 without substantive change. Administration of the decedent's estate includes possession by the personal representative, control by the court, sale and other disposition of the property, charges of administration, and payment of debts and family allowance. Section 7002 is a specific application of the general rule stated in Section 7001 (limitations on passage of property). The introductory proviso makes clear that the rule stated in Section 7002 is subject to exceptions. See, e.g., Sections 5100-5405 (multiple party accounts), 13000-13660 (disposition without administration), 15000-18201 (trusts), and the law governing joint tenancy.

CHAPTER 2. JURISDICTION AND COURTS

Article 1. Jurisdiction and Venue

§ 7050. Jurisdiction in superior court

7050. (a) The superior court has exclusive jurisdiction in proceedings under this division.

(b) The superior court has concurrent jurisdiction of the following:

(1) Actions and proceedings by or against creditors or debtors of the decedent or estate.

(2) Other actions and proceedings involving the estate or the personal representative and third persons.

Comment. Subdivision (a) of Section 7050 restates a provision of former Section 300 and the introductory part of former Section 301 without substantive change. Proceedings under this division include probate of wills (Sections [8200 et seq.]), appointment of personal representatives (Sections [8400 et seq.]), and estate management proceedings (Sections 9600 et seq. [AB 708]).

Subdivision (b) is new and is drawn from Section 17000(b) relating to trusts.

The reference to the superior court in this section means the department of the court that deals with probate matters; it does not mean a court of limited power. See Section 7060 (authority of court or judge).

§ 7051. Venue

7051. (a) If the decedent was domiciled in this state at the time of death, the proper county for proceedings under this division is the

county in which the decedent resided, regardless of where the decedent died.

(b) If the decedent was not domiciled in this state at the time of death, the proper county for proceedings under this division is:

(1) The county in which the decedent died if property of the decedent is located in that county.

(2) Any county in which property of the decedent is located, regardless of where the decedent died, if no property of the decedent is located in the county in which the decedent died or if the decedent did not die in this state. If property of the decedent is located in more than one county, the proper county is the county in which a petition for administration of the decedent's estate is first filed, and the superior court of that county has exclusive jurisdiction of the administration of the estate.

Comment. Section 7051 restates the venue provisions of former Section 301 without substantive change. The substitution of "domicile" for "residence" codifies existing law.

CROSS-REFERENCES

Petition for administration of estate § 7500

Article 2. Courts and Judges

§ 7060. Authority of court or judge

7060. The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including but not limited to the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Section 7060 expands a provision of former Section 321 (the judge may make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses) by reversing the former rule that the superior court "sitting in probate" was a court of limited jurisdiction. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 233-34, at 5741-43 (8th ed. 1974). Section 7060 makes clear that the probate court, when considering cases brought before it under this division, has all the powers of the superior court exercising its general jurisdiction. Hence, while preserving the division of business among different departments of the superior court, this section rejects the limitation on the powers of the probate court that has been cited in appellate decisions. See, e.g., *Copley v.*

Copley, 80 Cal. App. 3d 97, 106, 145 Cal. Rptr. 437 (1978). See also Section 17001 (full-power court under Trust Law).

§ 7061. Disqualification of judge

7061. (a) In addition to any other ground provided by law for disqualification of a judge, a judge is disqualified from acting under this division, except to order the transfer of a proceeding as provided in Article 3 (commencing with Section 7070), in any of the following cases:

- (1) The judge is interested as a beneficiary or creditor.
- (2) The judge is named as executor or trustee in the will.
- (3) The judge is otherwise interested.

(b) A judge who participates in any manner in the drafting or execution of a will, including acting as a witness to the will, is disqualified from acting in any proceeding prior to and including the admission of the will to probate or in any proceeding involving its validity or interpretation.

Comment. Section 7061 is the same in substance as the first paragraph of former Section 303. For general provisions on disqualification, see Code Civ. Proc. §§ 170-170.8.

CROSS-REFERENCES

Definitions

Beneficiary § 24

Article 3. Transfer of Proceedings

§ 7070. Grounds for transfer

7070. The court or judge shall order a proceeding under this division transferred to another county if there is no judge of the court qualified to act. This section does not apply if a judge qualified to act is assigned by the chairman of the Judicial Council to sit in the county and hear the proceeding.

Comment. Section 7070 restates part of the second paragraph of former Section 303 without substantive change. Transfer of a proceeding pursuant to this article is in the same manner and with the same effect as transfer of actions and proceedings pursuant to the Code of Civil Procedure. See Section 7200 (general rules of practice govern); Code Civ. Proc. § 399 (transmittal of papers; jurisdiction of receiving court). These provisions supersede parts of former Sections 303 and 305.

§ 7071. Place of transfer

7071. Transfer of a proceeding pursuant to this article shall be to another county in which property of the decedent is located or, if there is no other county in which property of the decedent is located, to an adjoining county.

Comment. Section 7071 is new. The provision for transfer to an adjoining county continues a provision of the second paragraph of former Section 303.

§ 7072. Retransfer

7072. Upon petition of an interested person before the administration of the estate is closed, a proceeding transferred pursuant to this article may be retransferred to the court in which the proceeding was originally commenced if the court determines that both of the following conditions are satisfied:

(a) Another person has become judge of the court where the proceeding was originally commenced who is not disqualified to act in the administration of the estate.

(b) The convenience of the parties interested would be promoted by the retransfer.

Comment. Section 7072 is the same in substance as part of former Section 305.

CROSS-REFERENCES

Definition

Interested person § 48

CHAPTER 3. RULES OF PROCEDURE

Article 1. General Provisions

§ 7200. Trial by jury

7200. Except as otherwise expressly provided in this division, there is no right to a jury trial in proceedings under this division.

Comment. Section 7200 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); Heiser v. Superior Court, 88 Cal. App. 3d 276, 278-80, 151 Cal. Rptr. 745 (1979). [Some provisions of this division do grant the right to trial by jury. See Sections 371, 382, 928, 1081, 1280 [AB 708], and 1281 [AB 708].] See also Sections 1452 (guardianship and conservatorship) and 17006 (trusts).

Note. As currently drafted, this provision applies only to Division 7 relating to estate administration. Similar provisions appear in the divisions governing guardianships and conservatorships and trusts. There is as yet no provision like this that covers the entire code, so some divisions are not covered by the draft provisions. E.g., see Prob. Code §§ 203 (establishing fact of death), 234 (determining survival), 6525 (probate homestead), 6541 (family allowance), 6609 (small estate set-aside). Should a general provision like draft Section 7200 be made applicable to the entire code?

§ 7201. United States as interested person

7201. Where compensation, pension, insurance, or other allowance is made or awarded by a department or bureau of the United States government to a decedent's estate, the department or bureau has the same right as an interested person to request special notice, to commence and prosecute an action on the bond of a personal representative, and to file written exceptions to a personal representative's account or contest the account.

Comment. Section 7201 restates former Section 1288 [AB 708] without substantive change. See Section 58 ("personal representative" defined).

Article 2. New Trials

§ 7220. New trial

7220. 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 7220 restates former Section 1281 [AB 708] 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 7220. 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. See Section 7200 (trial by jury).

Article 3. Appeals

§ 7240. Appealable orders and refusals to make orders

7240. An appeal may be taken from the making of, or the refusal to make, any of the following orders:

(a) Granting or revoking letters testamentary, letters of administration, or letters of administration with the will annexed, but not letters of special administration or letters of special administration with general powers.

(b) Admitting a will to probate or revoking the probate of a will.

(c) Setting aside a small estate under Section 6609.

(d) Setting apart a probate homestead or property claimed to be exempt from enforcement of a money judgment.

(e) Granting, modifying, or terminating a family allowance.

(f) Directing or authorizing the sale or conveyance or confirming the sale of property.

(g) Directing or authorizing the granting of an option to purchase property.

(h) Adjudicating the merits of a claim under Chapter 11 (commencing with Section 9860) of Part 5 of Division 7.

(i) Allocating debts under Chapter 3 (commencing with Section 11440) of Part 9 of Division 7.

(j) Settling an account of a personal representative.

(k) Instructing or directing a personal representative.

(l) Directing or allowing the payment of a debt, claim, devise, or attorney's fee.

(m) Determining the persons to whom distribution should be made.

(n) Distributing property.

(o) Determining that property passes to, or confirming that property belongs to, the surviving spouse under Section 13656.

(p) Authorizing a personal representative to invest or reinvest surplus money under Section 9732.

Comment. Section 7240 restates former Section 1297 [AB 708] without substantive change, except as follows:

(1) Subdivision (a) codifies the former rules that orders granting or revoking letters of administration with the will annexed are appealable, but that letters of special administration or letters of special administration with general powers are not. See Estate of Smith, 175 Cal. App. 2d 803, 805, 1 Cal. Rptr. 46 (1959) (appeal of

order appointing public administrator as administrator with the will annexed); Estate of Hughes, 77 Cal. App. 3d 899, 901-02, 143 Cal. Rptr. 858 (1978) (order refusing to revoke letters of special administration not appealable); former Sections 461, 465.

(2) Language in subdivision (e) permitting the appeal of an order terminating a family allowance is new.

(3) The part of subdivision (m) of former Section 1297 relating to determination of heirship is replaced by Section 325 (appeal of order determining membership in a class).

(4) Subdivision (g) relating to options is not limited to real property options as was former subdivision (g).

(5) Subdivision (o) is not limited to orders determining that property is community property passing to the surviving spouse as was former subdivision (o).

(6) Former subdivision (p) relating to appeals concerning inheritance tax is replaced by Section ____ (transitional provision).

CROSS-REFERENCES

Definitions

Community property § 28

Devise § 32

Family allowance § 38

Probate homestead § 60

Property § 62

Surviving spouse § 78

Will § 88

Guardian ad litem § 1004

Judgment roll contents § 95

§ 7241. Stay on appeal

7241. (a) Except as provided in subdivision (b), an appeal pursuant to Section 7240 stays the operation and effect of the order.

(b) Notwithstanding that an appeal is taken from the order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the personal representative, or may appoint a special administrator to exercise the powers, from time to time, as though no appeal were pending. Acts of the personal representative or special administrator pursuant to the directions of the court made under this subdivision are valid, regardless of the result of the appeal.

Comment. Section 7241 is new and is drawn from Section 2751 (stay on appeal in guardianship and conservatorship law). Subdivision (a) is consistent with the case-law rule under former law that the appeal of an order appointing a personal representative suspends the powers of the personal representative and stays proceedings in the probate court. See Estate of Hultin, 29 Cal. 2d 825, 833, 178 P.2d 756 (1947); Estate of Gibson, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965). However, the powers of a personal representative that are not the

subject of an appeal are not affected by the appeal and may be exercised as appropriate. See also Code Civ. Proc. § 917.9 (discretion to require undertaking in case of automatic stay); Prob. Code § 9612 [AB 708] (effect of final order).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

§ 7242. Protection of person dealing with personal representative whose appointment is reversed

7242. If an order appointing a personal representative is reversed on appeal for error, with respect to a person dealing with the personal representative who acts in good faith and without actual knowledge that the personal representative is exceeding the personal representative's powers or improperly exercising them, acts of the personal representative performed between the time letters are issued and the reversal are as valid as though the order were affirmed.

Comment. Section 7242 replaces former Section 1298 [AB 708] and is drawn in part from Section 18100 (protection of third person dealing with trustee). Section 7242 revises former Section 1298 by making clear that it is intended to protect third persons. See Estate of Gibson, 233 Cal. App. 2d 125, 130, 43 Cal. Rptr. 302 (1965) (interpreting the predecessor of former Section 1298). This provision does not apply where the appointment of the personal representative is reversed for lack of jurisdiction. See Estate of Schwartz, 87 Cal. App. 2d 569, 573, 197 P.2d 223 (1948). The reference in former Section 1298 to the time of qualification of the personal representative has been replaced by the reference to the time letters are issued. See Section [8400(a)] (appointment of personal representative effective upon issuance of letters).

CROSS-REFERENCES

Definition

Letters § 52

Personal representative § 58

Article 4. Orders and Transactions Affecting Property

§ 7260. "Transaction" defined

7260. As used in this article, "transaction" means a transaction affecting title to property in the estate, including but not limited to the following:

(a) 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.

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

Comment. Section 7260 is a new provision drawn from Section 2111(a) (guardianship and conservatorship law). This section is intended to simplify drafting in the other sections of this article.

CROSS-REFERENCES

Definitions

Probate homestead § 60
Property § 62
Real property § 68

§ 7261. Execution of instruments authorized or directed by court order

7261. If a transaction affecting real property in the estate is executed by the personal representative in accordance with the terms of a court order, the instrument shall include a statement that the transaction is made by authority of the order authorizing or directing the transaction and shall give the date of the order.

Comment. Section 7261 is drawn from Section 2111(c) (guardianship and conservatorship law) and is consistent with several provisions in other parts of the code. See Sections 9805 [AB 708] (execution of encumbrance), 9948 [AB 708] (execution of lease), 10314 [AB 708] (conveyance or assignment after confirmation).

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62
Real property § 68
Transaction § 7260

§ 7262. Recordation of order affecting real property

7262. If a transaction affecting real property in the estate is executed by the personal representative in accordance with the terms of a court 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.

Comment. Section 7262 is drawn from Section 2111(c) (guardianship and conservatorship law) and replaces former Section 1292 (recordation of order affecting real property). This section applies to any transaction of an interest in real property of the estate that is accomplished pursuant to court authorization or direction. See Section 7260 ("transaction" defined). This section does not apply to a transaction, such as a lease pursuant to Section 9941 [AB 708], where court approval is not required. Recordation of an order for distribution of real property has the effect of a receipt by the distributee. Section 11751 (receipt for distributed property).

CROSS-REFERENCES

Definitions

Personal representative § 58
Probate homestead § 60
Property § 62
Real property § 68
Transaction § 7260

Note. The suggestion was made at the February meeting that the predecessor of this section include authority to record a memorandum of a lease or some other type of transfer document. The staff has not implemented this suggestion because it appears to be out of place. This provision, as well as existing Section 1222 and its successor in AB 708 (Section 1292), deals with the recordation of court orders, not the instrument that accomplishes the transfer. The general rules on what type of deeds, conveyances, transfer documents, memorandums, or other instruments may be recorded should not be altered in this code.

Note. What recording requirements should apply to transactions under the Independent Administration of Estates Act?

§ 7263. Transfer or conveyance of property pursuant to court order

7263. 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. Section 7263 is drawn from Section 2111(d) (guardianship and conservatorship) and is consistent with several provisions in other parts of the code. See also Sections 9806 [AB 708] (effectiveness of encumbrance), 9868 [AB 708] (effectiveness of order in proceedings involving property claimed by another), 9948 [AB 708] (effectiveness of lease), 10314 [AB 708] (conveyance or assignment after confirmation). 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, at 1840, § 160, at 1900-01 (8th ed. 1973).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Real property § 68

Transaction § 7260

CONFORMING REVISIONS AND REPEALS

Code of Civil Procedure § 153 (amended). Documents under seal

SEC. . Section 153 of the Code of Civil Procedure is amended to read:

153. Except as otherwise expressly provided by law, the seal of a court need not be affixed to any proceeding therein, or to any document, except to the following:

~~1. To a writ;~~

~~2. To a summons;~~

~~3. To a warrant of arrest;~~

~~4. To the certificate of probate of a will or of the appointment of an executor, administrator, guardian, or conservator.~~

(a) A writ.

(b) A summons.

(c) A warrant of arrest.

Comment. Section 153 is amended to delete the former reference to papers in probate. This provision was unnecessary, since the seal is expressly provided the relevant statutes in these cases. See Prob. Code §§ (certificate of probate), (letters of personal representative), (letters of guardianship or conservatorship).

Code of Civil Procedure § 166 (amended). Matters in chambers

SEC. . Section 166 of the Code of Civil Procedure is amended to read:

166. (a) The judge or judges of the superior, municipal and justice courts may, ~~at~~ in chambers, in the matters within the jurisdiction of their respective courts:

(1) Grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at in chambers, hear and dispose of such orders and writs; ~~and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, guardians, or conservators in the cases allowed by law, grant special letters of administration and letters of temporary guardianship or conservatorship, approve claims, and direct the issuance from the court~~

~~of all writs and process necessary in the exercise of their powers in matters of probate.~~

(2) Hear and determine all motions made pursuant to Section 657 or 663.

(3) Hear and determine all uncontested actions, proceedings, demurrers, motions, petitions, applications, and other matters pending before the court other than actions for dissolution of marriage, for legal separation, or for a judgment of nullity of the marriage, ~~and except also applications for confirmation of sale of real property in probate proceedings.~~

(4) Hear and determine motions to tax costs of enforcing a judgment.

(5) Approve bonds and undertakings.

(b) A judge may, out of court, anywhere in the state, exercise all the powers and perform all the functions and duties conferred upon a judge as contradistinguished from the court, or which a judge may exercise or perform at in chambers.

Comment. The provisions relating to probate formerly found in Section 166 are restated in Probate Code Section 1001 (actions in chambers) without substantive change. See also Prob. Code § 1457 (guardianship and conservatorship). Section 166 is also amended to change the phrase "at chambers" to "in chambers" in conformity with modern usage.

Code of Civil Procedure § 904.1 (technical amendment). Appealable judgments and orders of superior court

SEC. . Section 904.1 of the Code of Civil Procedure is amended to read:

904.1. An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an

appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order ~~or~~ decree made appealable by the provisions of the Probate Code.

Comment. Subdivision (j) of Section 904.1 is revised to conform to the terminology of the Probate Code. See Prob. Code § 7240 (appealable orders or refusals to make orders).

Probate Code § 95 (added). Judgment roll

SEC. . Section 95 is added to the Probate Code, to read:

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

(a) In all cases:

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

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

(3) Any notice of the hearing, and any order to show cause made in

the proceeding, with the affidavits showing publication, posting, or mailing of the notice or order as may be required by law or court order.

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

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

(6) The order or statement of decision made in the proceeding.

(7) Any letters of the personal representative.

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

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

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

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

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

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

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

(1) The will.

(2) The order admitting the will to probate.

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

Comment. Section 95 restates former Section 1299 [AB 708] without substantive change. However, the former provision stating that the papers constituting the judgment roll need not be attached together is omitted as unnecessary. The reference to the statement of decision in subdivision (a)(6) is new. The reference in subdivision (d) to partial and ratable distributions has been replaced by a reference to preliminary distributions.

CROSS-REFERENCES

Appealable orders

Decedent's estate administration § 7240

Guardianship and conservatorship § 2750

Insurance or employee benefit trust § 6327

Trust administration § 17207

Definitions

Letters § 52

Personal representative § 58

Will § 88

Note. The Commission is seeking the comments of interested persons on whether this section specifying the contents of the judgment roll should be retained in the Probate Code or should be determined by Judicial Council rules.

Probate Code §§ 300-305 (repealed). Jurisdiction

SEC. . Article 1 (commencing with Section 300) of Chapter 1 of Division 3 of the Probate Code is repealed.

Probate Code § 300 (repealed). Passage of decedent's property

Comment. The first clause of former Section 300 is restated in Section 7000 (passage of decedent's property) without substantive change. See also Sections 32 ("devise" defined), 44 ("heirs" defined), and 62 ("property" defined). The persons who succeed to the decedent's estate are prescribed in the laws governing intestate succession, Part 2 (commencing with Section 6400) of Division 6 of the Probate Code.

The last clause of former Section 300 is restated in Section 7002 (property subject to administration) without substantive change. Administration under the Probate Code includes possession by the personal representative, control by the court, sale and other disposition of the property, charges of administration, and payment of debts and family allowance. See Divisions 6 (commencing with Section 6100) and 7 (commencing with Section 7000) of the Probate Code.

Probate Code § 301 (repealed). Jurisdiction and venue

Comment. The introductory clause of former Section 301 is restated in Section 7050(a) (jurisdiction in superior court) without substantive change. The remainder of former Section 301 is restated in Section 7051 (venue) without substantive change.

Probate Code § 302 (repealed). Effect of order granting letters

Comment. Former Section 302 is restated in Section 8007 (determination of jurisdiction conclusive), which extends it to cover probate of a will as well as appointment of a personal representative.

Probate Code § 303 (repealed). Disqualification; transfer

Comment. The first paragraph of former Section 303 is restated in Section 7061 (disqualification of judge) without substantive change.

The second paragraph is restated in Sections 7070 (grounds for transfer) and 7071 (place of transfer). See also Section 1000 (general rules of civil practice govern); Code Civ. Proc. § 399 (transmittal of papers; jurisdiction of receiving court).

Probate Code § 304 (repealed). Right to letters upon transfer

Comment. Former Section 304 is omitted as unnecessary.

Probate Code § 305 (repealed). Retransfer

Comment. Former Section 305 is restated in Section 7072 (retransfer), which makes retransfer permissive rather than mandatory. See also Section 1000 (general rules of civil practice); Code Civ. Proc. § 399 (transmittal of papers).

Probate Code § 1210 (added). Guardian or conservator acting for ward or conservatee

SEC. . Section 1210 is added to the Probate Code, to read:

1210. If an interested person has a guardian or conservator of the estate who resides in this state, personal service on the guardian or conservator of any process, notice, or court order concerning a decedent's estate is equivalent to service on the ward or conservatee, and it is the duty of the guardian or conservator to attend to the interests of the ward or conservatee in the matter. The guardian or conservator may appear for the ward or conservatee and waive any process, notice, or order to show cause that a person not under legal disability might waive.

Comment. Section 1210 restates former Section 1289 [AB 708] without substantive change. See Section 48 ("interested person" defined).

Probate Code §§ 1280-1299 [AB 708] (repealed). Orders and procedure

SEC. . Chapter 22.5 (commencing with Section 1280) of Division 3 of the Probate Code is repealed.

Probate Code § 1280 [AB 708] (repealed). Trials

Comment. The first sentence of former Section 1280 is superseded by Section 1000 (general rules of practice). See the Comment to Section 1000. The second sentence is restated in Section 1044 without substantive change.

The third and fourth sentences are superseded by Sections 1000 (general rules of practice), 1452 (jury trial under guardianship and conservatorship law), 7200 (jury trial in estate administration), and 17006 (jury trial under Trust Law). See also Code Civ. Proc. §§ 309 (court may submit issue to jury not defined by pleadings), 631 (jury trial waived if not demanded).

The last sentence is restated in Sections 1047 (entry and filing) and 1048 (enforcement of order).

Probate Code § 1281 [AB 708] (repealed). New trials

Comment. Former Section 1281 is restated in Section 7220 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 1046. See the Comment to Section 1046.

Probate Code § 1282 [AB 708] (repealed). Costs

Comment. Former Section 1282 is restated in Section 1003 without substantive change.

Probate Code § 1283 [AB 708] (repealed). Rules of practice

Comment. The first paragraph of former Section 1283 is superseded by Section 1000 (general rules of practice govern). See the Comment to Section 1000; 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 Section 1022 (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.

Probate Code § 1284 [AB 708] (repealed). Verification required

Comment. Former Section 1284 is restated in Section 1021 without substantive change.

Probate Code § 1285 [AB 708] (repealed). Clerk to set matter for hearing

Comment. Former Section 1285 is restated in Section 1041 without substantive change.

Probate Code § 1286 [AB 708] (repealed). Continuance or postponement

Comment. Former Section 1286 is continued in Section 1045 without change.

Probate Code § 1287 [AB 708] (repealed). Hearing and order

Comment. Former Section 1287 is restated in Section 1046 without substantive change.

Probate Code § 1288 [AB 708] (repealed). United States as interested person

Comment. Former Section 1288 is restated in Section 7201 without substantive change.

Probate Code § 1289 [AB 708] (repealed). Guardian or conservator acting for ward or conservatee

Comment. Former Section 1289 is restated in Section 1210 without substantive change.

Probate Code § 1290 [AB 708] (repealed). Recital of jurisdictional facts

Comment. Former Section 1290 is restated in Section 1047 without substantive change.

Probate Code § 1291 [AB 708] (repealed). Entry and filing

Comment. Former Section 1291 is restated in Section 1048 without substantive change.

Probate Code § 1292 [AB 708] (repealed). Recordation of order affecting real property

Comment. Former Section 1292 is restated in Sections 7260 ("transaction" defined) and 7262 (recordation of order affecting real property) without substantive change. See also Section 7263 (transfer or conveyance of property pursuant to court order).

Probate Code § 1293 [AB 708] (repealed). Delivery to county treasurer

Comment. Former Section 1293 is superseded by Section 11853.

Probate Code § 1297 [AB 708]. Appealable orders

Comment. Former Section 1297 is restated in Section 7240 without substantive change, except that the part of subdivision (m) relating to determination of heirship is superseded by Section 325 (appeal of order determining membership in a class). See the Comment to Section 7240.

Probate Code § 1298 [AB 708]. Reversal of order appointing personal representative

Comment. Former Section 1297 is replaced by Section 7242. See the Comment to Section 7242.

Probate Code § 1299 [AB 708]. Judgment roll

Comment. Former Section 1299 is restated in Section 95 without substantive change. However, the former provision to the effect that the papers constituting the judgment roll need not be attached together is omitted as unnecessary.

Probate Code § 2523 (repealed). Lis pendens in guardianship and conservatorship

SEC. . Section 2523 of the Probate Code is repealed.

~~2523.---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. Former Section 2523 is generalized in Section 1005.

Note. If Section 1005 is not approved and the Commission decides that the incorporation of the Code of Civil Procedure adequately covers lis pendens, the comment will refer to Section 1000 and Code of Civil Procedure Section 409.

Probate Code § 9863 (repealed). Lis pendens in proceedings involving property claimed by another person

SEC. . Section 9863 of the Probate Code, as added by [AB 708], is repealed.

~~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. Former Section 9863 [AB 708] is generalized in Section 1005.

Note. See the Note following Probate Code Section 2523 above.

Probate Code § 17208 (repealed). Appointment of guardian ad litem

SEC. . Section 17208 of the Probate Code is repealed.

~~17208. (a) The court may, on its own motion or on request of a trustee or other person interested in the trust, appoint a guardian ad litem at any stage of a proceeding concerning the trust 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 trust property 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 17208 is restated without substantive change and generalized in Section 1004 which applies to the entire Probate Code.