

First Supplement to Memorandum 87-42

Subject: Study L-1041 - Rules of Procedure (Costs)

Section 1003 of the draft rules of procedure in Memorandum 87-42 is a provision governing costs in proceedings under the Probate Code. The Commission had previously approved this provision at its May 1986 meeting in Sacramento. Attached to this supplementary memorandum are conforming changes in other statutes, together with explanatory material, to be inserted in appropriate places in the tentative recommendation.

Respectfully submitted,

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Liability for Costs

Several provisions of existing law deal in general terms with the liability of a personal representative for costs of litigation.¹ Probate Code Section 719 makes the personal representative personally liable for costs, but permits reimbursement from the estate unless the suit or proceeding in which costs were awarded was prosecuted or defended "without just cause." On the other hand, Probate Code Section 1232 provides for costs to be paid by a party to proceedings or out of assets of the estate "as justice may require."

The new code adopts the general rule provided in Probate Code Section 1232 in preference to the rule of Probate Code Section 719. This eliminates the inconsistency under existing law and adopts the more general of the two rules. As under existing law,² the general statutory rule is subject to any contrary rule provided by statute or court rule.

Code of Civil Procedure Section 1026, as it applies to executors, administrators, and trustees, makes the estate liable for costs unless the court directs costs to be paid by the fiduciary personally "for mismanagement or bad faith in the action or defense." The new code retains this rule without substantive change.³

1. See Code Civ. Proc. § 1026; Prob. Code §§ 719, 1232. Special provisions govern the liability for costs in certain circumstances. See, e.g., Prob. Code §§ 383 (costs in probate revocation), 580 (costs in action to recover fraudulently conveyed property), 703 (disallowed creditor's claim by representative), 717 (costs not allowed where creditor contests amount allowed in satisfaction of claim unless creditor prevails), 718 (authority to adjudge costs in reference proceedings), 1002 (costs on preliminary distribution), 6544 (costs of proceedings for family allowance).

2. See Prob. Code § 1232.

3. Section 1026 also applies to persons "expressly authorized by statute" to prosecute or defend an action. Section 1026 would be amended to add guardians and conservators to the list of fiduciaries covered by the section.

Conforming Revision

Code of Civil Procedure § 1026 (amended). Costs in actions by or against fiduciaries

1026. In (a) Except as provided in subdivision (b), in an action prosecuted or defended by an ~~executor, administrator~~ a personal representative, trustee of an express trust, guardian, conservator, or a person expressly authorized by statute, costs may be recovered as in an action by ~~and~~ or against a person prosecuting or defending in ~~his~~ the person's own right; ~~but such, except that the costs must,~~

(b) Costs allowed under subdivision (a) shall, by the judgment, be made chargeable only upon the estate, fund, or party represented unless the court directs the same costs to be paid by the ~~plaintiff or~~ defendant, fiduciary personally, for mismanagement or bad faith in the action or defense.

Comment. Section 1026 is subdivided and amended to cover actions prosecuted or defended by a guardian or a conservator. The former reference to an executor or administrator is replaced by a reference to a personal representative. This is a non-substantive change. See Prob. Code § 58 ("personal representative" defined). For provisions governing liability for costs in proceedings under the Probate Code, see Prob. § 1003 and the Comment thereto.

Comment to Repealed Probate Code Section

Probate Code § 719. Personal representative's liability for costs

Comment. Former Section 719 is not continued. See Prob. Code § 1003 (costs under Probate Code); see also Code Civ. Proc. § 1026 (costs in actions by or against fiduciaries).