

Memorandum 88-32

Subject: Study L-1036/1055 - Personal Representative and Attorney Fees  
in Probate

Attached to this Memorandum is a staff draft of provisions concerning compensation of the personal representative and estate attorney. This draft is based on Commission decisions at the last meeting. The staff draft of revisions to the Business and Professions Code concerning the written fee contract and the disclosure to the client of the negotiability of the statutory probate fee is attached to Memorandum 88-33.

At the last meeting, the Commission asked the staff to draft a statement of standards or factors to be considered by the court in fixing fees for extraordinary services. This statement is in Section 10822 of the staff draft, and is drawn from the Los Angeles County probate rules. Is Section 10822 satisfactory?

Existing Section 902 has a partial listing of services that are extraordinary. The Commission decided not to continue this list in the statute, but rather to put it in the Comment. The staff has done this in the Comment to Section 10812. Is the Comment to Section 10812 satisfactory?

Reduce "Reasonable Fee" Bracket From \$25 Million to \$10 Million?

In Memorandum 88-12 considered at the last meeting, the staff recommended reducing the estate size defining the highest bracket (reasonable fee) from \$25 million to \$10 million. The Commission did not discuss this recommendation, and made no decision concerning it. Does the Commission want to make this change?

The Commission's probate questionnaire did not address this question directly, but it did ask whether the statutory fee for an estate of \$10 million is excessive. Of the attorneys who responded, about half thought it was excessive and half did not.

Attorney Performing Duties of Personal Representative

Section 10816 in the draft statute authorizes the personal representative to employ a member of the State Bar of California to perform some or all of the duties of the personal representative, and

to pay the attorney out of the personal representative's own funds, if a written contract is made that satisfies the requirements of the Rule of Professional Conduct concerning adverse interests between attorney and client. Section 10816 is needed because the personal representative may be unable or unwilling to perform his or her duties. The personal representative may not live in California or may lack skills needed to inventory decedent's property, to pay creditors, to manage the estate, or to keep records of receipts and expenditures. In such a case, the personal representative may want to hire the estate attorney to perform some of these duties, and may be willing to use his or her own personal funds to pay the attorney for doing so.

Section 10816 is consistent with existing practice as expressed in local probate rules of Fresno and Los Angeles Counties, except that under Section 10816 court approval of the contract between the personal representative and the attorney is not required. Fresno County Probate Policy Memoranda § 9.4 provides:

The personal representative may hire the attorney or other agent to perform duties of the representative and separately compensate the attorney or agent from his or her own funds. If such a contract is entered into with an attorney, the attorney must comply with Rule 5-101 of the California Rules of Professional Conduct, and enter into a written agreement setting forth the basis of compensation and the consent of the representative. The agreement is subject to Court approval, and must be filed with the court when the first fee petition is filed.

If enacted, Section 10816 would invalidate the last sentence of this Fresno County rule.

Rule 5-101 referred to above provides that, when a transaction may be adverse to the client, the transaction must be fair and reasonable and be disclosed in writing to the client, the client must have an opportunity to seek independent counsel, and the client must consent in writing to the transaction. The substance of Rule 5-101 is contained in Section 10816.

The Los Angeles Superior Court Guidelines contain a sample agreement between a nonresident executor and her attorney:

3. The Executor lives outside the State of California, and finds it difficult to perform some of her duties as Executor, including collecting the decedent's bank accounts and other assets, depositing income checks, preparing checks to pay

debts and administration expenses, maintaining books for court accounting and income tax purposes, preparing accountings, etc.

4. The Executor desires that her attorney, MARY ROE, and her attorney's staff, perform these duties for the Executor.

5. To compensate her attorney, the Executor will, from her own funds, pay Attorney MARY ROE when billed, at the hourly rate for the person performing the services disclosed on the bills.

The only other local court rule in California on this subject that the staff has found is Alameda County Probate Policy Manual § 1008. This rule merely forbids the personal representative from spending estate funds to hire someone else to perform his or her ordinary duties, for example, "ordinary accounting and bookkeeping services, including the preparation of the schedules for Court accountings," and authorizes the court to deduct from the personal representative's compensation any amounts so spent by the personal representative. The substance of this rule is contained in subdivision (b) of proposed Section 10810.

Respectfully submitted,

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**PART 7. COMPENSATION OF PERSONAL REPRESENTATIVE AND ESTATE ATTORNEY**

**CHAPTER 1. COMPENSATION OF PERSONAL REPRESENTATIVE**

**§ 10800. Compensation for ordinary services**

10800. (a) Subject to Sections 10802 and 10805, for ordinary services the personal representative shall receive compensation upon the value of the estate accounted for by the personal representative, as follows:

(1) Three percent on the first one hundred thousand dollars (\$100,000).

(2) Two percent on the next nine hundred thousand dollars (\$900,000).

(3) One percent on the next nine million dollars (\$9,000,000).

(4) One-half of one percent on the next fifteen million dollars (\$15,000,000).

(5) For all above twenty-five million dollars (\$25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the inventory, plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on estate property. This subdivision applies whether or not a sale of property has taken place during the probate of the estate.

Comment. Subdivision (a) of Section 10800 supersedes the first sentence of former Section 901. The four percent rate on the first \$15,000 in former Section 901 is not continued; the highest rate under Section 10800 is the three percent rate on the first \$100,000. Subdivision (b) restates the last two sentences of former Section 901 without substantive change.

A court order allowing the compensation to the personal representative is required before the compensation may be paid, and the compensation allowed is paid out of funds of the estate. See Sections 10820 and 10821. As to allowing a portion of the compensation of the personal representative, on account of services rendered up to the time of allowance, see Section 10820. See also Section 12205 [AB 2841] (reduction of fees for delay in closing estate administration).

As to the right of an attorney to receive dual compensation for services as personal representative and as estate attorney, see Section 10814.

**§ 10801. Additional compensation for extraordinary services**

10801. Subject to Sections 10802 and 10805, in addition to the compensation provided by Section 10800, the court may allow additional compensation for extraordinary services by the personal representative in the amount the court determines is just and reasonable.

Comment. Section 10801 restates the first paragraph of former Section 902 without substantive change. See also Section 12205 [AB 2841] (reduction of fees for delay in closing estate administration).

The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. Omission of the list is not intended to change the law, but rather to recognize that case law is well developed in this area. As to what services are extraordinary, see the Comment to Section 10812. See also Section 10822 (factors to be considered by court in allowing compensation for extraordinary services).

**§ 10802. Compensation provided by decedent's will**

10802. (a) Subject to subdivision (b), if the decedent's will makes provision for the compensation of the personal representative, the compensation provided by the will shall be the full and only compensation for the services of the personal representative.

(b) If the personal representative files with the court a written instrument renouncing the compensation provided for in the will, the personal representative shall be compensated as provided in this chapter.

Comment. Section 10802 restates the last portion of former Section 900 and a portion of the first sentence of former Section 901 without substantive change.

**§ 10803. Agreement for higher compensation void**

10803. An agreement between the personal representative and an heir or devisee for higher compensation than that provided by this chapter is void.

Comment. Section 10803 restates former Section 903 without substantive change. This section applies to compensation for both ordinary and extraordinary services. Nothing prevents the personal representative from agreeing to take less than the statutory compensation. See *In re Estate of Marshall*, 118 Cal. 379, 381, 50 P. 540 (1897) (statutory compensation allowed when evidence of alleged agreement for lower compensation was insufficient). See also Duque & Watts, *Fees and Commissions*, in 1 California Decedent Estate Administration § 18.5, at 719 (Cal. Cont. Ed. Bar 1971).

#### § 10804. Employment of tax specialists

10804. The personal representative may employ or retain tax counsel, tax auditors, accountants, or other tax experts for the providing of services in the computation, reporting, or making of tax returns, or in negotiations which may be necessary for the final determination and payment of taxes, and may pay for such services out of funds of the estate.

Comment. Section 10804 restates without substantive change the second paragraph of former Section 902. The tax expert employed or retained pursuant to Section 10804 is paid out of funds of the estate; the compensation to which the personal representative is entitled under this chapter is not reduced because the tax expert is employed or retained to assist the personal representative to perform duties in connection with taxes. The attorney for the personal representative also is paid out of funds of the estate. However, if the personal representative hires others to assist in the performing of the duties of the personal representative, they are compensated out of the personal representative's own funds. See *Estate of LaMotta*, 7 Cal. App. 3d 960, 86 Cal. Rptr. 880 (1970) (expenditure to compensate an investigator for locating estate assets not allowable because this is a statutory duty of the representative). On the other hand, if the execution of the particular duty requires extraordinary services, then the personal representative may be allowed additional compensation for the extraordinary services which could include an allowance to cover the cost of compensating another to assist in performing the extraordinary services. See also Section 10816 (contract with estate attorney to perform some duties of personal representative).

*Note.* If there are other experts the personal representative may employ and pay out of estate funds rather than out of the personal representative's own funds, an express statutory provision should be added to make this clear. The existing statute--Prob. Code § 902 (second paragraph), continued as Section 10804--strongly implies that only tax experts and the estate attorney may be paid out of estate funds; any other persons who assist the personal representative to perform his or her duties must be paid out of the personal representative's own funds.

#### § 10805. Apportionment of compensation

10805. If there are two or more personal representatives, the compensation provided for the personal representative shall be apportioned among them by the court according to the services actually rendered by each or as agreed to by them.

Comment. Section 10805 restates the second sentence of former Section 901 without substantive change, with the addition of the reference to an agreement between the personal representatives concerning apportionment of their compensation. The added language is

drawn from Section 8547 (division of compensation between special administrator and general personal representative) [AB 2841].

## CHAPTER 2. COMPENSATION OF ESTATE ATTORNEY

### § 10810. Compensation a matter of agreement between estate attorney and personal representative; limitation on amount of compensation

10810. Subject to Sections 6148 and 6148.5 of the Business and Professions Code, the compensation of the attorney for the personal representative is a matter of agreement between the attorney and the personal representative, but the compensation shall not exceed the amount allowed under this chapter. An agreement between the personal representative and the attorney for higher compensation for the attorney than that permitted under this chapter is void.

Comment. Section 10810 is new and recognizes that the compensation of the attorney for the personal representative is a matter of agreement between the attorney and the personal representative. See also Bus. & Prof. Code § 6148 (written contract required where reasonably foreseeable that total expense to client, including attorney fees, will exceed \$1,000). The written contract requirement does not apply to a corporate personal representative and in certain other circumstances. See Bus. & Prof. Code § 6148(d). See also Bus. & Prof. Code § 6148.5 (required disclosure statement concerning probate attorney fees in written contract).

Section 10810 makes clear that the compensation provided for in this chapter is the maximum compensation allowed. This continues the substance of the principle of former Section 903 which may have been made applicable to estate attorneys by the first sentence of former Section 910. See Duque & Watts, *Fees and Commissions*, in 1 California Decedent Estate Administration § 18.5, at 719 (Cal. Cont. Ed. Bar 1971) ("principle of Prob. C §903 should apply to contracts between an attorney and the decedent, even though the section is not expressly applicable"). Section 10810 makes clear that the personal representative and the estate attorney can make an agreement for lower compensation than that provided for in this chapter. See Estate of Morrison, 68 Cal. App. 2d 280, 285, 156 P.2d 473 (1945); Duque & Watts, *supra*.

A court order allowing the compensation to the attorney is required before the compensation may be paid, and the compensation is paid out of funds of the estate. See Sections 10820 and 10821. As to allowing a portion of the compensation of the attorney on account of services rendered up to the time of allowance, see Section 10820. See also Section 12205 [AB 2841] (reduction of fees for delay in closing estate administration).

As to the right of an attorney to receive dual compensation for services as personal representative and as estate attorney, see Section 10814.

**§ 10811. Compensation for ordinary services**

10811. (a) Subject to Sections 10810, 10813, and 10814, for ordinary services the attorney for the personal representative shall receive compensation upon the value of the estate accounted for by the personal representative, as follows:

(1) Three percent on the first one hundred thousand dollars (\$100,000).

(2) Two percent on the next nine hundred thousand dollars (\$900,000).

(3) One percent on the next nine million dollars (\$9,000,000).

(4) One-half of one percent on the next fifteen million dollars (\$15,000,000).

(5) For all above twenty-five million dollars (\$25,000,000), a reasonable amount to be determined by the court.

(b) For the purposes of this section, the value of the estate accounted for by the personal representative is the total amount of the inventory, plus gains over appraisal value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on estate property. This subdivision applies whether or not a sale of property has taken place during the probate of the estate.

Comment. Section 10811 supersedes the portion of the first sentence of former Section 910 which provided in substance that the attorney for the personal representative was allowed for ordinary services the same amounts as were allowed the personal representative for ordinary services under Section 901. The four percent rate on the first \$15,000 in former Section 901 is not continued. The highest rate under Section 10811 is the three percent rate on the first \$100,000. See also Section 12205 [AB 2841] (reduction of fees for delay in closing estate administration).

**§ 10812. Additional compensation for extraordinary services**

10812. Subject to Sections 10810, 10813, and 10814, in addition to the compensation provided by Section 10811, the court may allow additional compensation for extraordinary services by the attorney for the personal representative in the amount the court determines is just and reasonable.

Comment. Section 10812 continues the last portion of the first sentence of former Section 910 without substantive change. Even though services are extraordinary, the court still has discretion whether or not to award compensation for them. Estate of Walker, 221 Cal. App. 2d



792, 795-96, 34 Cal. Rptr. 832 (1963). As to the factors to be considered by the court in allowing additional compensation for extraordinary services, see Section 10822. See also Section 12205 [AB 2841] (reduction of fees for delay in closing estate administration).

The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. Omission of the list is not intended to change the law, but rather to recognize that the case law is well developed in this area. Under Sections 10801 and 10812, the following services are extraordinary:

(1) Sales or mortgages of real or personal property. Estate of Fraysher, 47 Cal. 2d 131, 301 P.2d 848 (1956); Estate of McSweeney, 123 Cal. App. 2d 787, 798, 268 P.2d 107 (1954).

(2) Contested or litigated claims against the estate. In re Estate of Keith, 16 Cal. App. 2d 67, 68-69, 60 P.2d 171 (1936); In re Estate of Dunton, 15 Cal. App. 2d 729, 734, 60 P.2d 159 (1936).

(3) Tax services. Estate of Bray, 230 Cal. App. 2d 136, 144, 40 Cal. Rptr. 750 (1964).

(4) Defense of eminent domain proceeding involving estate property. Estate of Blair, 127 Cal. App. 2d 130, 273 P.2d 349 (1954).

(5) Litigation to defend the estate against imposition of a constructive trust on estate assets. Estate of Turino, 8 Cal. App. 3d 642, 87 Cal. Rptr. 581 (1970).

(6) Other litigation concerning estate property. In re Estate of Keith, 16 Cal. App. 2d 67, 70, 60 P.2d 171 (1936) (shareholders' liability suit).

(7) Carrying on decedent's business. Estate of Scherer, 58 Cal. App. 2d 133, 136 P.2d 103 (1943); Estate of King, 19 Cal. 2d 354, 358-60, 121 P.2d 716 (1942); In re Estate of Allen, 42 Cal. App. 2d 346, 353, 108 P.2d 973 (1941).

(8) Successful defense of a will contest. In re Estate of Dunton, 15 Cal. App. 2d 729, 731-33, 60 P.2d 159 (1936).

(9) Litigation to construe or interpret a will. Estate of Halsell, 138 Cal. App. 2d 680, 292 P.2d 300 (1956); Estate of Feldman, 78 Cal. App. 2d 778, 793-94, 178 P.2d 498 (1947).

(10) Defense of personal representative's account. Estate of Beach, 15 Cal. 3d 623, 644, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); Estate of Beirach, 240 Cal. App. 2d 864, 866-68, 50 Cal. Rptr. 5 (1966); Estate of Raphael, 128 Cal. App. 2d 92, 97, 274 P.2d 880 (1954).

(11) Securing a loan to pay debts of the estate. In re Estate of O'Connor, 200 Cal. 646, 651, 254 P. 269 (1927).

(12) Heirship proceedings. Estate of Harvey, 103 Cal. App. 2d 192, 195, 199, 229 P.2d 68 (1951).

(13) Legal services in connection with authorized sale of bonds in the estate. Estate of Neff, 56 Cal. App. 2d 728, 133 P.2d 413 (1943).

(14) Appeal from a judgment adverse to the estate. Ludwig v. Superior Court, 217 Cal. 499, 19 P.2d 984 (1933).

(15) Successful defense of personal representative in removal proceeding. Estate of Fraysher, 47 Cal. 2d 131, 136, 301 P.2d 848 (1956).

(16) Unlawful detainer action for the estate. Estate of Isenberg, 63 Cal. App. 2d 214, 217-18, 146 P.2d 424 (1944).

The foregoing is not an exhaustive list. Other extraordinary services may be added to this list by case law or court rule. See generally Duque & Watts, *Fees and Commissions*, in 1 California Decedent

Estate Administration § 18.27, at 730-32 (Cal. Cont. Ed. Bar 1971); Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988).

Extraordinary services for which the attorney may apply to the court for compensation include services by a paralegal performing the extraordinary services under the direction and supervision of the attorney. See Section 10823.

#### § 10813. Compensation provided by decedent's will

10813. (a) Subject to subdivision (b), if the decedent's will makes provision for the compensation of the attorney for the personal representative, the compensation provided by the will shall be the full and only compensation for the services of the attorney for the personal representative.

(b) Subject to Section 10810, if the attorney files with the court a written instrument renouncing the compensation provided for in the will, the attorney shall be compensated as provided in this chapter.

Comment. Section 10813 continues the substance of the last portion of former Section 900 and a portion of the first sentence of former Section 901 insofar as those provisions were made applicable to estate attorneys by the first sentence of former Section 910. See also Estate of Van Every, 67 Cal. App. 2d 164, 153 P.2d 614 (1944) (\$4,000 bequest to attorney in lieu of \$1,696.33 statutory fee).

#### § 10814. No dual compensation

10814. Unless expressly authorized by the decedent's will, a personal representative who is an attorney may receive the personal representative's compensation but not compensation for services as the estate attorney.

Comment. Section 10814 codifies case law. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); *Estate of Havside*, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393, 395 (1980). The provision that dual compensation may be paid if expressly authorized by the decedent's will also codifies case law. See *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966).

An attorney who serves as personal representative may not become entitled to compensation as attorney by waiving compensation as personal representative. *Estate of Hart*, 204 Cal. App. 2d 634, 22 Cal. Rptr. 495 (1962). See generally Duque & Watts, *Fees and Commissions*, in 1 California Decedent Estate Administration §§ 18.10-18.12, at 722-25 (Cal. Cont. Ed. Bar 1971).

**§ 10815. Apportionment of compensation**

10815. If there are two or more attorneys for the personal representative, the compensation provided for the attorney shall be apportioned among them by the court according to the services actually rendered by each or as agreed to by them.

Comment. Section 10815 continues the substance of the second sentence of former Section 901 as it was applied to estate attorneys by the first sentence of former Section 910, with the addition of the reference to an agreement between the attorneys concerning apportionment of their compensation. The added language is drawn from Section 8547 (division of compensation between attorneys for special administrator and general personal representative) [AB 2841].

**§ 10816. Contract to perform duties of personal representative**

10816. (a) The personal representative may employ a member of the State Bar of California to perform some or all of the duties of the personal representative and to be compensated out of the personal representative's own funds if all of the following requirements are satisfied:

(1) The personal representative and the attorney make a written contract setting forth the terms of the agreement, including but not limited to a statement of the duties of the personal representative that the attorney is to perform and a statement of the compensation the attorney is to be paid for performing those services or how the attorney's compensation will be determined.

(2) The terms of the contract are fair and reasonable.

(3) If the attorney or the attorney's agent or employee performs services that are clerical in nature pursuant to the contract, the compensation provided for in the contract is appropriate for clerical services.

(4) The contract recites that the personal representative has had reasonable opportunity to seek advice of independent counsel of the personal representative's choice before making the contract.

(b) The contract referred to in subdivision (a) need not be approved by the court.

(c) Nothing in this section precludes the personal representative from employing a person who is not a member of the State Bar of California to perform duties of the personal representative.

Comment. Subdivision (a) of Section 10816 is new and is consistent with existing practice. See Fresno County Probate Policy Memoranda § 9.4(c), reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988); Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, Part E, § 11.1, reprinted in California Local Probate Rules, *supra*; Rules of Professional Conduct of the State Bar of California, Rule 5-101.

Subdivision (b) is new and is consistent with the sample contract in Los Angeles Superior Court Guidelines on Attorney Fees in Decedents' Estates, *supra*. Contra, Fresno County Probate Policy Memoranda § 9.4(c), *supra* (court approval of contract required).

Subdivision (c) makes clear that the personal representative may employ a person who is not a lawyer to perform or assist in performing duties. See also Section 10804 (employment of tax specialists).

### CHAPTER 3. ALLOWANCE OF COMPENSATION BY COURT

#### § 10820. Partial allowance of compensation

10820. (a) At any time after four months from the issuance of letters:

(1) The personal representative may file a petition requesting an allowance on the compensation of the personal representative.

(2) The attorney for the personal representative may file a petition requesting an allowance on the compensation of the attorney for the personal representative.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following:

(1) Each person listed in subdivision (c) of Section 1220.

(2) Each known heir whose interest in the estate is affected by the payment of the compensation.

(3) Each known devisee whose interest in the estate is affected by the payment of the compensation.

(4) The State of California if any portion of the estate is to escheat to it and its interest in the estate is affected by the payment of the compensation.

(c) On the hearing, the court may make an order allowing the portion of the compensation of the personal representative or attorney, on account of services rendered up to that time, that the court determines is proper. In the case of an allowance to the personal representative, the compensation allowed may thereupon be charged against the estate. In the case of an allowance to the attorney, the

order shall require the personal representative to pay the attorney the amount allowed out of the estate, and the personal representative shall pay the attorney that amount forthwith.

Comment. Section 10820 continues the substance of former Sections 904 and 911. The court for good cause may dispense with the notice otherwise required to be given to a person under Section 10820. See Section 1220(f). Nothing in Section 10820 excuses compliance with the requirements for notice to a person who has requested special notice. See Section 1220(e). The court may require further or additional notice, including a longer period of notice. See Section 1202. The court may, for good cause, shorten the time of for giving notice. See Section 1203. For additional provisions relating to notice, see Sections 1200 to 1265. For the matters to be considered in determining the amount of compensation for extraordinary services, see Section 10822. If extraordinary services are performed by a paralegal, the petition for compensation must include additional information. See Section 10823. For a limitation on the court's authority to award a partial allowance of fees for extraordinary services, see Section 10824. See also Sections 8547 [AB 2841] (fees of special administrator and attorney for special administrator), 10954(c) [AB 2841] (final report to show fees), and 12205 [AB 2841] (reduction of fees for delay in closing estate administration). See also Section 52 (defining "letters").

#### § 10821. Final compensation

10821. (a) At the time of the filing of the final account and petition for an order for final distribution, the personal representative, or the attorney who has rendered services to the personal representative, may petition the court for an order fixing and allowing his or her compensation for all services rendered in the estate proceeding. The request for compensation may be included in the final account or the petition for final distribution, or may be filed in a separate petition.

(b) Notice of the hearing on the petition shall be given as provided in Section 1220 to all of the following:

- (1) Each person listed in subdivision (c) of Section 1220.
- (2) Each known heir whose interest in the estate is affected by the payment of the compensation.
- (3) Each known devisee whose interest in the estate is affected by the payment of the compensation.
- (4) The State of California if any portion of the estate is to escheat to it and its interest in the estate is affected by the payment

of the compensation.

(c) On the hearing, the court shall make an order fixing and allowing the compensation provided by this part. The compensation of the personal representative may thereupon be charged against the estate. In the case of the attorney's compensation, the order shall require the personal representative to pay the attorney the amount allowed out of the estate, and the personal representative shall pay the attorney that amount forthwith.

Comment. Section 10821 is new. The court for good cause may dispense with the notice otherwise required to be given to a person under Section 10821. See Section 1220(f). Nothing in Section 10821 excuses compliance with the requirements for notice to a person who has requested special notice. See Section 1220(e). The court may require further or additional notice, including a longer period of notice. See Section 1202. The court may, for good cause, shorten the time of for giving notice. See Section 1203. For additional provisions relating to notice, see Sections 1200 to 1265. For the matters to be considered in determining the amount of compensation for extraordinary services, see Section 10822. See also Sections 8547 [AB 2841] (fees of special administrator and attorney for special administrator), 10954(c) [AB 2841] (final report to show fees), and 12205 [AB 2841] (reduction of fees for delay in closing estate administration). If extraordinary services are performed by a paralegal, the petition for compensation must include additional information. See Section 10823.

Section 10821 is drawn from existing practice and local court rules. See Duque & Watts, *Fees and Commissions*, in 1 California Decedent Estate Administration § 18.31, at 733-34 (Cal. Cont. Ed. Bar 1971); Alameda County Probate Policy Manual § 1002 (fees must be stated in petitions for distribution); Contra Costa County Probate Policy Manual §§ 603 (petition for distribution must show computation of fees), 605 (total fees not allowed before approval of final account and decree of distribution); Fresno County Probate Policy Memoranda § 9.3 (total fees ordinarily not allowed before approval of final account and decree of distribution); Humboldt County Probate Rules § 12.15(c) (petition for final distribution must show computation of fees requested); Lake County Probate Rules § 13.4(g) (extraordinary fees ordinarily not allowed before court approval of final accounting); Los Angeles County Probate Policy Memorandum §§ 15.02, 16.01 (total fees not fixed until approval of final account and decree of distribution); Madera County Probate Rules §§ 10.14 (total fees not allowed until approval of final account and decree of distribution), 10.19 (petition for final distribution must contain computation of fees requested); Marin County Rules of Probate Practice § 1203 (extraordinary fees usually not allowed before court approval of final accounting; partial allowance of fees not allowed before filing of inventory); Merced County Probate Rules §§ 1103 (petition for distribution must show calculation of fees), 1104 (total fees ordinarily not allowed until approval of final accounting), 1108 (court prefers to consider extra compensation at time of final account); Monterey County Probate Rules § 4.31 (total fees normally not allowed until approval of final account

and decree of distribution); Orange County Probate Policy Memorandum § 8.04 (court prefers to fix fees when an account is considered; total fees not allowed before approval of final account and decree of distribution; court prefers to consider extraordinary fees at time of final distribution); Riverside County Probate Policy Memoranda § 6.1004 (accounts or petitions for distribution must show computation of fees requested; total fees ordinarily not allowed before approval of final account and judgment of distribution; court prefers to consider extraordinary fees at time of final distribution); Sacramento County Probate Policy Manual §§ 706 (petition for distribution must show calculation of fees), 707 (total fees normally not fixed before approval of final account and judgment of distribution), 708 (court prefers to consider extra fees with final account); San Bernardino County Probate Policy Memorandum § 906 (petition for distribution must show calculation of fees; extraordinary fees ordinarily requested with petition for final distribution)); San Diego County Probate Rules §§ 4.110, 4.111 (no partial allowance of fees before first accounting; total fees not allowed before approval of final account and decree of distribution); San Francisco Probate Manual §§ 13.03 (total fees generally not allowed before final distribution), 13.04 (application for fees may be included in petition for settlement of account or for distribution, or in separate petition); San Joaquin County Probate Rules §§ 4-705 (petition for distribution must show calculation of fees), 4-706 (total fees ordinarily not allowed before approval of final accounting), 4-1001 (petition for final distribution must contain computation of fees or waiver); San Mateo County Probate Rules, Rules 486 (total fees generally not allowed before final distribution), 487 (application for fees may be included in petition for settlement of account or for distribution, or in separate petition); Santa Barbara County Probate Rules § 414(H) (petition for distribution must state fees requested; total fees normally not allowed before approval of final account and decree of distribution); Santa Clara County Probate Rules §§ 5.6(c) (unless waived, computation of fees must be included in petition for final distribution), 5.7(d) (allowances on extraordinary fees ordinarily not allowed); Santa Cruz County Probate Rules § 405 (ordinarily extraordinary fees not allowed before approval of final accounting); Solano County Probate Rules § 8.11(d) (partial payment of fees ordinarily disallowed until first accounting and showing of need for additional administration; total fees not allowed before approval of final account and final distribution); Stanislaus County Probate Policy Manual §§ 1003 (petition for distribution must show calculation of fees), 1004 (total fees ordinarily not allowed before approval of final accounting), 1008(b) (court prefers to consider extraordinary fees at time of final account), 1102(e) (petition for final distribution must contain computation of fees requested or waiver); Tuolumne County Probate Rules, Rules 12.11(e) (no allowance of extraordinary fees will be made except for good cause shown), 12.14 (final account or petition for final distribution must contain computation of fees requested); Ventura County Probate Rules § 11.12(c) (account or petition for distribution must show fees paid and calculation; total fees ordinarily not allowed before approval of final accounting and decree of distribution); Yolo County Probate Rules § 20.5 (petition for distribution seeking approval of fees must show calculation); Probate Rules of Third District Superior Courts, Rules

12.12(E) (no allowance of extraordinary fees made except for good cause shown), 12.15 (petition for final distribution shall contain computation of fees requested).

**§ 10822. Matters to be considered in determining compensation for extraordinary services**

10822. In determining what is just and reasonable compensation for extraordinary services, the court shall consider all the circumstances, including the following:

- (a) The nature and difficulty of the task performed.
- (b) The results achieved.
- (c) The benefit to the estate as a whole, rather than to the interests of particular beneficiaries.
- (d) A detailed description of the services performed, demonstrating the productivity of the hours spent.
- (e) The expertise, experience, and professional standing in the community of the person performing the services.
- (f) The amount of the fee provided by Section 10800 or 10811, and whether it constitutes adequate compensation for ordinary and extraordinary services rendered.
- (g) The hours spent.
- (h) The usual hourly rate of the person who performed the services.
- (i) The total amount requested.
- (j) The size of the estate and the length of administration.

Comment. Section 10822 is new and is drawn from the attorney fee standard in Los Angeles County. See Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (9th ed., Cal. Cont. Ed. Bar 1988). Cf. Estate of Nazro, 15 Cal. App. 3d 218, 93 Cal. Rptr. 116 (1971) (factors in determining reasonable compensation of trustee). As to what constitutes an extraordinary service, see the Comment to Section 10812. See also Section 10823 (paralegal performing extraordinary services).

Even though services are extraordinary, the court still has discretion whether or not to award compensation for them. Estate of Walker, 221 Cal. App. 2d 792, 34 Cal. Rptr. 832 (1963).

**§ 10823. Services of paralegal performing extraordinary services**

10823. The attorney for the personal representative may be allowed compensation for extraordinary services by a paralegal



performing the extraordinary services under the direction and supervision of an attorney. The petition for allowance of compensation for extraordinary services shall include a statement of the hours spent and services performed by the paralegal. In determining the amount of compensation to be allowed, the court shall take into consideration the extent to which the services were provided by the paralegal and the extent of the direction, supervision, and responsibility of the attorney.

Comment. The first two sentences of Section 10823 restate without substantive change the second and third sentences of former Section 910. The third sentence, which is new, makes clear that the compensation awarded to the attorney for extraordinary services is to take into consideration the extent to which the services were performed by the paralegal and the fact that the attorney is responsible for directing and supervising the paralegal and for the work produced by the paralegal.

**§ 10824. Limitation on allowance of compensation for extraordinary services**

10824. Notwithstanding Sections 10820 and 10821, the court may allow compensation for extraordinary services before final distribution only when one of the following requirements is satisfied:

(a) It appears likely that administration of the estate will continue, whether due to litigation or otherwise, for an unusually long time.

(b) Present payment will benefit beneficiaries of the estate.

(c) Other good cause is shown.

Comment. Section 10824 is new and is drawn from local court rules. See Lake County Probate Rules § 13.4(g); Marin County Rules of Probate Practice § 1203; Merced County Probate Rules § 1108; Orange County Probate Policy Memorandum § 8.04; Riverside County Probate Policy Memoranda § 6.1004; Sacramento County Probate Policy Manual § 708; San Bernardino County Probate Policy Memorandum § 906; San Francisco Probate Manual § 13.03(a); San Mateo County Probate Rules, Rule 486(a); Santa Clara County Probate Rules § 5.7(d); Santa Cruz County Probate Rules § 405; Stanislaus County Probate Policy Manual § 1008(b); Tuolumne County Probate Rules, Rules 12.11(e); Probate Rules of Third District Superior Courts, Rule 12.12(E).

CONFORMING REVISIONS

Probate Code § 8547 (technical amendment). Fees and commissions

8547. (a) Subject to the limitations of this section, the court shall fix the ~~commission and allowanees~~ compensation of the special administrator and the fees of the attorney of the special administrator.

(b) The ~~commission and allowanees~~ compensation of the special administrator shall not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's ~~commission and allowanees~~ compensation or the court in its discretion so allows. The total ~~commission~~ compensation paid and extra allowanees made to the special administrator and general personal representative shall not, together, exceed the sums provided in this division for ~~commission and extra allowanees~~ compensation for the services of a personal representative. If the same person does not act as both special administrator and general personal representative, the ~~commission and allowanees~~ compensation shall be divided in such proportions as the court deems just or as may be agreed to by the special administrator and general personal representative.

(c) The total ~~fees~~ compensation paid to the attorneys both of the special administrator and the general personal representative shall not, together, exceed the sums provided in this division as compensation for the ordinary and extraordinary services of attorneys for personal representatives. When the same attorney does not act for both the special administrator and general personal representative, the ~~fees~~ compensation shall be divided between the attorneys in such proportions as the court deems just or as agreed to by the attorneys.

(d) Fees Compensation of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as for extraordinary services to a general personal representative, except that the award of ~~fees~~ compensation to the attorney may be made on settlement of the final account of the special administrator.

Comment. Section 8547 is amended to change "commission and allowances" and "fees" to "compensation", consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney).

Probate Code § 10954 (technical amendment). When account not required

10954. (a) Notwithstanding any other provision of this part, the personal representative is not required to file an account if any of the following conditions is satisfied as to each person entitled to distribution from the estate:

(1) The person has executed and filed a written waiver of account or a written acknowledgment that the person's interest has been satisfied.

(2) Adequate provision has been made for satisfaction in full of the person's interest. This paragraph does not apply to a residuary devisee or a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income.

(b) A waiver or acknowledgment under subdivision (a) shall be executed by the following persons:

(1) If the person entitled to distribution is an adult and competent, by that person.

(2) If the person entitled to distribution is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver is executed by a guardian of the estate of the minor, the waiver may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

(3) If the person entitled to distribution is a conservatee, by the conservator of the estate of the conservatee. The waiver may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the person entitled to distribution is a trust, by the trustee, but only if the named trustee's written acceptance of the trust is filed with the court.

(5) If the person entitled to distribution is an estate, by the personal representative of the estate.

(6) If the person entitled to distribution is incapacitated, unborn, unascertained, or is a person whose identity or address is unknown, or is a designated class of persons who are not ascertained or are not in being, and there is a guardian ad litem appointed to represent the person entitled to distribution, by the guardian ad litem.

(c) Notwithstanding subdivision (a):

(1) The personal representative shall file a final report of administration at the time the final account would otherwise have been required. The final report shall include the amount of fees and ~~commissions~~ compensation paid or payable to the personal representative and to the attorney and shall set forth the basis for determining the amount.

(2) A creditor whose interest has not been satisfied may petition under Section 10950 for an account.

Comment. Section 10954 is amended to change "fees and commissions" to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney).

Probate Code § 12205 (technical amendment). Sanction for failure to timely close estate

12205. If the time taken for administration of the estate exceeds the time required by this chapter or prescribed by the court, the court may, on the hearing for final distribution or for an allowance on the ~~commissions~~ compensation of the personal representative or on the fees of the attorney, reduce the ~~commissions~~ or fees compensation by an amount the court deems appropriate, regardless of whether the ~~commissions~~ or fees compensation otherwise allowable under the provisions of Sections 901 10800 and 910 10811 would be reasonable compensation for the services rendered, if the court determines that the time taken was within the control of the personal representative or attorney and was not in the best interest of the estate or interested persons. In making a determination under this section, the court shall take into account any action taken under Section 12202 as a result of a previous delay.

Comment. Section 12205 is amended to change "commissions" and "fees" to "compensation," consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney).

## COMMENTS TO REPEALED SECTIONS

### § 900 (repealed). Personal representative's expenses and compensation; renunciation of compensation provided by will

Comment. The first portion of former Section 900 is continued in Section [     ]. The last portion of former Section 900 is restated in Section 10802 without substantive change.

### § 901 (repealed). Percentage compensation; apportionment

Comment. The first sentence of former Section 901 is superseded by subdivision (a) of Section 10800. The second sentence is restated in Section 10805 without substantive change. The third and fourth sentences are restated in subdivision (b) of Section 10800 without substantive change.

### § 902 (repealed). Extraordinary services; employment of tax specialists

Comment. The first sentence of former Section 902 is restated in Section 10801 without substantive change. The listing in former Section 902 of examples of what constitutes extraordinary services is not continued. The former list was incomplete. Omission of the list is not intended to change the law, but rather to recognize that case law is well developed in this area. See the Comment to Section 10812.

The second sentence of former Section 902 is restated in Section 10804 without substantive change.

### § 903 (repealed). Contract for higher compensation void

Comment. Former Section 903 is restated in Section 10803 without substantive change.

### § 904 (repealed). Petition for allowance on compensation; notice

Comment. Former Section 904 is continued in substance in Section 10820. The authority in former Section 904 for the court to require further or additional notice is superseded by Section 1202.

### § 910 (repealed). Attorney's compensation; services by paralegal

Comment. The first sentence of former Section 901 is superseded by Sections 10810, 10811, and 10812. The second and third sentences are restated in the first two sentences of Section 10823 without substantive change.

### § 911 (repealed). Petition for allowance on compensation; notice

Comment. Former Section 911 is continued in substance in Section 10820.