

Second Supplement to Memorandum 88-42

Subject: Study L-2009 - AB 2841 (Probate Referees and other problems)

Attached to this Memorandum as Exhibit 1 are new and revised Comments for the provisions of AB 2841. The new Comments explain provisions that were added to the bill after the Commission's report was printed in December. See, e.g., Prob. C. §§ 350-388 (Fiduciaries' Wartime Substitution Law). The revised Comments either correct errors in the Commission's printed report (see, e.g., Prob. C. § 8003, deleting obsolete material) or reflect amendments made during the legislative process (see, e.g., Prob. C. § 8113 (notice involving foreign citizen)).

If the Commission adopts the amendments proposed in Memorandum 88-42, the additional Comments set out in Exhibit 2 will need to be revised. There will also need to be further revisions in light of any actions the Commission takes on probate referees.

Respectfully submitted,

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EXHIBIT 1

CUMULATIVE NEW AND REVISED COMMENTS FOR AB 2841

Code of Civil Procedure § 1443 (amended). Payment to state

Comment. Section 1443 is amended to reflect the repeal of Probate Code Section 738 and its replacement by Probate Code Section 11428 (deposit for missing creditor), the repeal of Probate Code Section 1027 and its replacement, in part, by Probate Code Section 11900 (distribution to State of California), the repeal of Probate Code Section 1148 and its replacement by Probate Code Section 7643 (deposit with county treasurer), and the repeal of Probate Code Section 1144 and its replacement, in part, by Probate Code Section 7663 (distribution of property), which provides for escheat to the county.

Code of Civil Procedure § 1700 (repealed). Short title

Comment. Former Section 1700 is restated in Probate Code Section 350 without substantive change.

Code of Civil Procedure § 1700.1 (repealed). Construction of title

Comment. The part of former Section 1700.1 relating to definitions is restated in Probate Code Section 351 without substantive change. The parts of former Section 1700.1 relating to rules of construction and general provisions are omitted as unnecessary. See Prob. Code § 361 (provision in instrument controls).

Code of Civil Procedure § 1700.2 (repealed). Gender

Comment. Former Section 1700.2 is omitted as unnecessary.

Code of Civil Procedure § 1700.3 (repealed). Fiduciary

Comment. Former Section 1700.3 is restated in Probate Code Section 39 and generalized to apply to the entire Probate Code. See also Prob. Code § 82 ("trust" defined).

Code of Civil Procedure § 1700.4 (repealed). Trusts

Comment. Former Section 1700.4 is omitted as unnecessary in view of the definition in Probate Code Section 82.

Code of Civil Procedure § 1700.5 (repealed). Court trusts; private trusts

Comment. Former Section 1700.5 is omitted as unnecessary. As revised, the Fiduciaries' Wartime Substitution Law does not make any distinction between court trusts and private trusts.

Code of Civil Procedure § 1700.6 (repealed). Consultant

Comment. Former Section 1700.6 is restated in Probate Code Section 352 without substantive change.

Code of Civil Procedure § 1700.7 (repealed). War service

Comment. Former Section 1700.7 is restated in Probate Code Section 356 without substantive change, except that the former reference to the part of the continental United States below the 49th

parallel is replaced by a reference to the fifty states. Some obsolete references have been omitted in favor of general language in the new statute. Subdivision (e) of former Section 1700.7 is divided into subdivisions (e) and (f) in Probate Code Section 356 and subdivision (f) is designated as subdivision (g) in Probate Code Section 356.

Code of Civil Procedure § 1700.8 (repealed). Residence of corporate fiduciary

Comment. Former Section 1700.8 is omitted. The residence of corporate fiduciaries for purposes of determining venue is governed by other law. See Prob. Code §§ 2202 (guardianship and conservatorship), 7051-7052 (decendent's estate administration), 17005 (trusts). See also Prob. Code § 365 (jurisdiction of proceedings).

Code of Civil Procedure § 1701 (repealed). Petition

Comment. The first sentence of former Section 1701 is restated in Probate Code Section 370(a) without substantive change. The second sentence is superseded by Probate Code Section 365. See the Comment to Prob. Code § 365.

Code of Civil Procedure § 1701.1 (repealed). Notice

Comment. Former Section 1701.1 is superseded by Probate Code Section 366.

Code of Civil Procedure § 1701.2 (repealed). Accounting; suspension of powers

Comment. The first sentence of former Section 1701.2 is superseded by Probate Code Section 370(b)-(c). See the Comment to Prob. Code § 370. The second and third sentences are restated in Probate Code Section 373 without substantive change, except that the part of the second sentence relating to notice is superseded by Probate Code Section 366.

Code of Civil Procedure § 1701.3 (repealed). Cofiduciary

Comment. Former Section 1701.3 is restated in Probate Code Section 370(a) without substantive change.

Code of Civil Procedure § 1701.4 (repealed). Powers of substitute

Comment. Former Section 1701.4 is restated in Probate Code Section 371 without substantive change. The reference to cofiduciaries is omitted as unnecessary. See Prob. Code §§ 370, 380, and the Comments thereto.

Code of Civil Procedure § 1701.5 (repealed). Multiple trustees

Comment. Former Section 1701.5 is omitted as unnecessary. This section appears to be intended to avoid the application of the doctrine of merger. However, since the enactment of the Fiduciaries' Wartime Substitution Law in 1943, the doctrine has been severely restricted. See Prob. Code § 15209 (exception to doctrine of merger).

Code of Civil Procedure § 1701.6 (repealed). Bond of substitute

Comment. Former Section 1701.6 is restated in Probate Code Section 372, except that the new provision adds court authority to vary the bond requirement.

Code of Civil Procedure § 1701.7 (repealed). Responsibility for acts of predecessor

Comment. Former Section 1701.7 is restated in Probate Code Section 374 without substantive change, except that the provision relating to the duty to inquire into the acts of the predecessor is omitted for consistency with Probate Code Sections 383 (which restates former Section 1702.4) and 388 (which restates former Section 1703.3).

Code of Civil Procedure § 1702 (repealed). Delegation of powers

Comment. The first and second sentences of former Section 1702 are restated in Probate Code Section 380(a) without substantive change. The third sentence is superseded by Probate Code Section 365. See the Comment to Prob. Code § 365.

Code of Civil Procedure § 1702.1 (repealed). Petitions for delegation and resumption

Comment. The first sentence of former Section 1702.1 is superseded by Probate Code Sections 365 (jurisdiction of proceedings) and 380(b) (delegation authorized). The second sentence is superseded by Probate Code Section 366. See the Comment to Prob. Code § 366. The third sentence is restated in Probate Code Section 382 without substantive change.

Code of Civil Procedure § 1702.2 (repealed). Exceptions to right of delegation

Comment. The introductory clause and subdivision (a) of former Section 1702.2 are restated in Probate Code Section 381 without substantive change.

Subdivision (b) is omitted as unnecessary. See the Comment to former Section 1701.5.

Code of Civil Procedure § 1702.3 (repealed). Personal powers

Comment. Former Section 1702.3 is omitted as unnecessary. By definition, personal powers may not be exercised by a person other than the one to whom they were given. The provisions relating to the absence of a power to delegate are unnecessary, since the procedure for substitution of fiduciaries is applicable by its terms. The availability of the substitution procedure does not depend upon a finding that the original fiduciary is not precluded by the governing instrument from voluntarily delegating powers.

Code of Civil Procedure § 1702.4 (repealed). Liability for acts or omissions of delegate

Comment. Former Section 1702.4 is restated in Probate Code Section 383 without substantive change.

Code of Civil Procedure § 1703 (repealed). Delegation by consultant

Comment. Former Section 1703 is restated in Probate Code Section 385 without substantive change.

Code of Civil Procedure § 1703.1 (repealed). Substitution of consultant

Comment. The introductory part of former Section 1703.1 is superseded by Probate Code Sections 365 (jurisdiction) and 366 (notice). See the Comments to Prob. Code §§ 365, 366.

Subdivisions (a) and (b) are restated in Probate Code Section 386 without substantive change.

Code of Civil Procedure § 1703.2 (repealed). Reinstatement of consultant

Comment. Part of the first sentence of former Section 1703.2 is superseded by Probate Code Section 366 (notice). The remainder of Section 1703.2 is restated in Probate Code Section 387 without substantive change.

Code of Civil Procedure § 1703.3 (repealed). Responsibility of consultant

Comment. Former Section 1703.3 is restated in Probate Code Section 388 without substantive change.

Code of Civil Procedure § 1704 (repealed). Notice

Comment. Former Section 1704 is superseded by Probate Code Section 366. See the Comment to Prob. Code § 366.

Code of Civil Procedure § 1704.1 (repealed). Finding

Comment. Former Section 1704.1 is omitted as unnecessary. The general provisions governing proof of notice and conclusiveness of orders in Probate Code Sections 1260-1265 are applicable to the Fiduciaries' Wartime Substitution Law as located in Probate Code Sections 350-388.

Code of Civil Procedure § 1705 (repealed). Instrument controls

Comment. Former Section 1705 is superseded by Probate Code Section 361.

Code of Civil Procedure § 1706 (repealed). Application of title

Comment. Former Section 1706 is superseded by Probate Code 360. See the Comment to Prob. Code § 360.

Government Code § 27433 (added). Termination of authority of public guardian

Comment. The first sentence of Section 27433 restates former Welfare and Institutions Code Section 8005 without substantive change. The second sentence is new; it recognizes that letters may be issued to the office instead of the individual (Section 2922) pursuant to existing practice in some counties.

Probate Code § 3 (added). General transitional provision

Comment. Section 3 provides general transitional rules applicable to changes in the Probate Code. The general rule prescribed in subdivision (c) is that a new law applies immediately on its operative date to all matters, including pending proceedings. The general rule is qualified by the exceptions listed in subdivisions (d) (contents, execution, and notice of papers and documents are governed by the law applicable when the paper or document was filed), (e) (orders are governed by the law applicable when the order was made, subject to any applicable modification procedures in the new law), and (f) (acts are governed by the law applicable when the act was done).

Where a new law fails to address a matter that occurred before its

operative date, subdivision (g) makes clear that old law continues to govern the matter.

The rules stated in Section 3 are general provisions that apply absent a special rule stated in the new law. Special rules may defer or accelerate application of the new law despite the general rules stated in Section 3. See subdivision (b).

Because it is impractical to attempt to deal with all the possible transitional problems that may arise in the application of the new law to various circumstances, subdivision (h) provides a safety-valve that permits the court to vary the application of the new law where there would otherwise be a substantial impairment of procedure or justice. This provision is intended to apply only in the extreme and unusual case, and is not intended to excuse compliance with the basic transitional provisions simply because of minor inconveniences or minor impacts on expectations or other interests.

In addition to governing other substantive provisions, Section 3 also governs itself. It therefore becomes operative on July 1, 1989, and applies to provisions enacted and operative before, on, or after that date.

Probate Code § 39 (added). "Fiduciary" defined

Comment. Section 39 continues former Section 21100(a) without change and restates former Code of Civil Procedure Section 1700.3 without substantive change. Section 39 expands the scope of the former provisions, however, since it applies to all parts of the code to which the definitions apply. See Section 20 (application of definitions). The defined term is used in Sections 360-388 (substitution and delegation of powers of fiduciaries) as well as in Division 11 (commencing with Section 21101) (construction of wills, trusts, and other instruments).

Probate Code § 45 (added). "Instrument" defined

Comment. Section 45 continues former Section 21100(b) without change. Section 45 expands the scope of the former provision, however, since it applies to all parts of the code to which the definitions apply. See Section 20 (application of definitions). The defined term is used in Sections 360-388 (substitution and delegation of powers of fiduciaries) as well as in Division 11 (commencing with Section 21101) (construction of wills, trusts, and other instruments).

Probate Code § 52 (amended). Letters

Comment. Section 52 is amended by adding subdivision (b) for drafting convenience.

Probate Code § 58 (amended). Personal representative

Comment. Section 58 is amended to correct terminology and a section reference.

Probate Code § 81 (added). "Transferor" defined

Comment. Section 81 continues former Section 21100(c) without change. Section 81 expands the scope of the former provision, however, since it applies to all parts of the code to which the definitions apply. See Section 20 (application of definitions).

Probate Code § 303 (repealed). Disqualification; transfer

Comment. Subdivision (a) of former Section 303 is restated in Section 7060 (disqualification of judge) without substantive change.

Subdivision (b) 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 § 321 (repealed). Production of will; attendance of witnesses

Comment. Former Section 321 is restated in Sections 8201 (order for production of will), 7050 (authority of court or judge), and 1000 (general rules of practice).

Probate Code § 327 (repealed). Publication of notice

Comment. Former Section 327 is restated in Section 8003 (setting and notice of hearing), except that the petitioner rather than the clerk has the duty of giving notice.

Probate Code § 328 (repealed). Service of notice

Comment. The first sentence of the first paragraph of former Section 328 is restated in Sections 8110 (persons on whom notice served), 1201 (notice not given to petitioner), 1215 (manner of mailing), 1217 (service by mail or personal delivery), with the addition of a provision limiting service to known heirs. The second sentence is restated in Section 8100 (form of notice).

The second paragraph is restated in Sections 8111 (service on Attorney General) and 1215 (manner of mailing) without substantive change.

Probate Code § 328.7 (repealed). Conditional validity of will

Comment. Former Section 328.7 is restated in Section 6105 (conditional will) without substantive change.

Probate Code § 350 (added). Short title

Comment. Section 350 restates former Code of Civil Procedure Section 1700 without substantive change.

Probate Code § 351 (added). Application of definitions

Comment. Section 351 restates part of former Code of Civil Procedure Section 1700.1 without substantive change.

Probate Code § 352 (added). Consultant

Comment. Section 352 restates former Code of Civil Procedure Section 1700.6 (consultant under a trust) without substantive change.

Probate Code § 353 (added). Estate

Comment. Section 353 is intended for drafting convenience.

Probate Code § 354 (added). Interested person

Comment. Section 354 is intended for drafting convenience.

Probate Code § 355 (added). Original fiduciary

Comment. Section 355 is intended for drafting convenience.

Probate Code § 356 (added). War service

Comment. Section 356 restates former Code of Civil Procedure Section 1700.7 without substantive change, except that the former

reference to the part of the continental United States below the 49th parallel is replaced by a reference in subdivision (c) to the fifty states. In subdivision (a), the reference to the Air Force is new and the references to certain auxiliary organizations have been omitted as unnecessary in light of the general language. In subdivision (b), the reference to time of war is new.

Probate Code § 360 (added). Application of part

Comment. Section 360 supersedes former Code of Civil Procedure Section 1706. This part applies to personal representatives, trustees, guardians, conservators, and other legal representatives. See Section 39 ("fiduciary" defined).

Probate Code § 361 (added). Provision in instrument controls

Comment. Section 361 supersedes former Code of Civil Procedure Section 1705.

Probate Code § 365 (added). Jurisdiction of proceedings

Comment. Section 365 supersedes the second sentence of former Section 1701, the third sentence of former Code of Civil Procedure Section 1702, and part of the first sentence of former Code of Civil Procedure Section 1702.1. For the proper court in a decedent's estate, see Section 301. For the proper court in a guardianship or conservatorship estate, see Sections 2200-2203. For the proper court in a trust estate, see Sections 17000-17005.

Probate Code § 366 (added). Notice of hearing

Comment. Section 366 supersedes former Code of Civil Procedure Section 1701.1, part of the second sentence of former Code of Civil Procedure Section 1701.2, the second sentence of former Code of Civil Procedure Section 1702.1, the introductory part of former Code of Civil Procedure Section 1703.1, part of the first sentence of former Code of Civil Procedure Section 1703.2, and former Code of Civil Procedure Section 1704. Notice under this part is subject to general provisions governing notice under this code. See, e.g., Sections 1201 (notice not required to be given to oneself or persons joining in petition), 1202 (additional notice on court order), 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1260-1265 (proof of giving notice).

Probate Code § 370 (added). Petition for appointment of substitute, suspension of powers, or account

Comment. Subdivision (a) of Section 370 restates the first sentence of former Code of Civil Procedure Section 1701 and former Code of Civil Procedure Section 1701.3 without substantive change. Subdivisions (b) and (c) supersede the first sentence of former Code of Civil Procedure 1701.2. Where there is a cofiduciary, appointment of a substitute fiduciary may be unnecessary, since the cofiduciary may be authorized to act. See, e.g., Sections 2105 (authority of joint guardian or conservator to act), 9630 (authority of joint personal representative to act), 15622 (temporary incapacity of cotrustee). This section does not apply to the extent the will, trust, or other instrument provides a different rule. Section 361 (provision in instrument controls).

Probate Code § 371 (added). Powers and duties of substitute fiduciary

Comment. Section 371 restates former Code of Civil Procedure Section 1701.4 without substantive change. The reference to duties is new.

Probate Code § 372 (repealed). Witnesses

Comment. Former Section 372 is restated in Section 8253 (evidence of execution), except that the limitation on production of witnesses outside the county is not continued. See also Section 1000 (general rules of practice govern) and Code Civ. Proc. § 1989 (compelling attendance of witnesses).

Probate Code § 372 (added). Bond of substitute fiduciary

Comment. Section 372 restates former Code of Civil Procedure Section 1701.6 without substantive change, except for the addition of court authority to vary the bond requirement. This would be appropriate, for example, where the instrument has waived the bond for the original fiduciary and it would be inappropriate to waive bond for the substitute fiduciary.

Probate Code § 373 (added). Reinstatement of original fiduciary

Comment. Section 373 restates the second and third sentences of former Code of Civil Procedure Section 1701.2 without substantive change, except that the court is given discretion not to remove the substitute fiduciary. In certain circumstances, the court may determine that it is advisable to retain the substitute as a cofiduciary upon reinstatement of the original fiduciary.

Probate Code § 374 (added). Fiduciary's immunity for predecessor's acts

Comment. Section 374 restates part of former Code of Civil Procedure Section 1701.7 without substantive change. Unlike former law, this section is phrased in terms of liability rather than responsibility.

Probate Code § 380 (added). Delegation of fiduciary's powers

Comment. Subdivision (a) of Section 380 restates the first and second sentences of former Code of Civil Procedure Section 1702 without substantive change. Where there is a cofiduciary, delegation of power may be unnecessary, since the cofiduciary may be authorized to act. See, e.g., Sections 15622 (temporary incapacity of cotrustee), 9630 (authority of joint personal representative to act), 2105 (authority of joint guardian or conservator to act). The authority to delegate powers to a cofiduciary under this chapter is an exception to the usual duty not to delegate. See Section 16012 (duty not to delegate to cotrustee). This section does not apply to the extent the will, trust, or other instrument provides a different rule. See Section 361 (provision in instrument controls).

Subdivision (b) supersedes the first sentence of former Code of Civil Procedure Section 1702.1.

Probate Code § 381 (added). Limitations on delegation

Comment. Section 381 restates the introductory clause and subdivision (a) of former Code of Civil Procedure Section 1702.2 without substantive change. Where there is a cofiduciary, delegation

of power may be unnecessary, since the cofiduciary may be authorized to act. See, e.g., Sections 2105 (authority of joint guardian or conservator to act), 9630 (authority of joint personal representative to act), 15622 (temporary incapacity of cotrustee).

Probate Code § 382 (repealed). Revocation of probate

Comment. Former Section 382 is superseded by Section 8271(b) (summons) and 8272 (revocation). The provision for a jury trial is not continued. See Section 7200 (trial by jury).

Probate Code § 382 (added). Resumption of fiduciary's powers

Comment. Section 382 restates the third sentence of former Code of Civil Procedure Section 1702.1 without substantive change.

Probate Code § 383 (added). Fiduciary's immunity for delegate's acts

Comment. Section 383 restates former Code of Civil Procedure Section 1702.4 without substantive change. Unlike former law, this section is phrased in terms of liability rather than responsibility.

Probate Code § 385 (added). Delegation of consultant's powers

Comment. Section 385 restates former Code of Civil Procedure Section 1703 without substantive change. This section does not apply to the extent the will, trust, or other instrument provides a different rule. Section 361 (provision in instrument controls).

Probate Code § 386 (added). Suspension of consultant's powers

Comment. Section 386 restates former Code of Civil Procedure Section 1703.1 without substantive change.

Probate Code § 387 (added). Resumption of consultant's powers

Comment. Section 387 restates former Code of Civil Procedure Section 1703.2 without substantive change.

Probate Code § 388 (added). Consultant's immunity for delegate's acts

Comment. Section 388 restates former Code of Civil Procedure Section 1703.3 without substantive change. Unlike former law, this section is phrased in terms of liability rather than responsibility.

Probate Code § 402. Qualification examination

Comment. Section 402 restates former Section 1306, deleting the references to the State Personnel Board. The State Personnel Board no longer administers the examination. The Controller currently contracts with Cooperative Personnel Services, an agency created through a joint powers agreement, for administration of the examination.

Probate Code § 405. Revocation of appointment of probate referee

Comment. Section 405 continues the first sentence of former Section 1308(b) without substantive change. Revocation of appointment under Section 405 is independent of revocation under Section 404 (standards for probate referee).

Probate Code § 407 (added). Political activities of probate referees

Comment. Subdivisions (a) and (d) of Section 407 restate former Section 1311, with the addition of references to incumbency,

reappointment, and committees, and the deletion of references to campaigns and seeking appointment. The two hundred dollar limitation of subdivision (a)(1) is extended to apply during a person's tenure as probate referee as well as during the time a person is an applicant for appointment. The two hundred dollar limitation does not apply to the State Controller; solicitation, receipt, or contribution of any amount to a State Controller campaign is absolutely prohibited.

Subdivision (b) is new. It is intended to facilitate compliance with the other requirements of this section.

Subdivision (c) restates former Section 1312, with the added requirement of removal from office. The former transitional provision is replaced by a new transitional provision in subdivision (e).

Probate Code § 408 (added). Appointment of probate referee before operative date

Comment. Section 408 is new. It is a transitional provision intended to save an appointment made under the old law that could not necessarily be made under the new law. Revocation of an appointment under the new law is authorized only if there are independent grounds for revocation, under the revocation provisions of the new law.

Probate Code § 409 (repealed). Administrators with will annexed

Comment. The first sentence of former Section 409 is restated in Section 8442 (authority of administrator with will annexed), with the addition of court discretion to permit exercise of a discretionary power or authority. The second and third sentences are superseded by Section 8441 (priority for appointment).

Probate Code § 422 (repealed). Priority for appointment as administrator

Comment. Former Section 422 is restated in Sections 8460(b) (appointment of administrator), 8461 (priority for appointment), 8462 (priority of relatives), and 8463 (surviving spouse), with the addition of provisions to reflect changes in the law governing intestate succession and language recognizing the priority of relatives of a predeceased spouse, and expansion to include any lineal relative of the decedent who satisfies prescribed conditions.

Probate Code § 440 (repealed). Petition for letters

Comment. The introductory portion of former Section 440 is superseded by Section 1020 (petitions, reports, accounts). The first paragraph is superseded by Section 8002(a) (contents of petition). The last paragraph is restated in Section 8006(b) (court order) without substantive change.

Probate Code § 441 (repealed). Notice of hearing

Comment. The first two sentences of former Section 441 are restated in Sections 8003 (setting and notice of hearing), 8110 (persons on whom notice served), and 1041 (clerk to set matters for hearing), except that the petitioner rather than the clerk has the duty of giving notice. See also Section 1215 (manner of mailing). The third sentence is restated in Section 8100 (form of notice) without substantive change.

Probate Code § 462 (repealed). Bond and oath

Comment. Subdivisions (a) and (b) of former Section 462 are restated in Section 8542 (issuance of letters) without substantive change. Subdivision (c)(1) is restated in Section 8481 (waiver of bond) without substantive change. Subdivision (c)(2) is restated in Section 8543 (waiver of bond) without substantive change.

Probate Code § 467 (repealed). Account, fees, commissions

Comment. The first sentence of former Section 467 is restated in Section 8546(c) (termination of authority), with the addition of language expressly permitting a consolidated account where the special administrator and general personal representative are the same person. The second sentence is restated in Section 8547(a)-(c) (fees and commissions), with the addition of provisions limiting payment of the special administrator until close of administration (except for extra allowances) and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions.

Probate Code § 468 (repealed). Division of commissions and fees

Comment. Former Section 468 is restated in Section 8547(b)-(c) (fees and commissions), with the addition of provisions limiting payment of the special administrator until close of administration (except for extra allowances) and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions.

Probate Code § 501 (repealed). Form of letters testamentary or with will annexed

Comment. Former Section 501 is superseded by Sections 8405 (form of letters) and 1001 (Judicial Council to prescribe forms).

Probate Code § 502 (repealed). Form of letters of administration or special administration

Comment. Former Section 502 is superseded by Sections 8405 (form of letters) and 1001 (Judicial Council to prescribe forms).

Probate Code § 540 (repealed). Oath

Comment. Former Section 540 is restated in Section 8403 (oath), with the addition of authority to sign the oath at the time the petition is signed.

Probate Code § 541 (repealed). Bond

Comment. The first sentence of subdivision (a) of former Section 541 is restated in Sections 8480 (bond required) and 8481(a) (waiver of bond), and in Code of Civil Procedure Section 166 (actions in chambers), without substantive change. The second sentence is superseded by Section 8482(a)-(b) (amount of bond), which makes explicit the authority of the court to impose a fixed minimum bond.

Subdivision (b) is restated in Section 8481(a) (waiver of bond) without substantive change.

Probate Code § 542 (repealed). Bond for sale of real property

Comment. Former Section 542 is superseded by Section 8482(c) (amount of bond).

Probate Code § 543 (repealed). Bond required by court

Comment. Former Section 543 is restated in Section 8481(b) (waiver of bond) without substantive change.

Probate Code § 554 (added). Damages

Comment. Subdivision (a) of Section 554 restates former Section 721(a) without substantive change, but makes clear that the rule limiting recovery is subject to the exception provided in subdivision (b). Subdivision (b) is generalized from the second sentence of former Section 707(b). See also the Comment to Section 550.

Probate Code § 600 (repealed). Filing inventory and appraisal

Comment. The first part of the first sentence of former Section 600 is superseded by Section 8800 (inventory and appraisal required) without substantive change. See also Code Civ. Proc. § 166 (actions in chambers). The last part of the first sentence is superseded by Section 8404 (statement of duties and liabilities).

The second sentence is omitted because it no longer serves a useful purpose. The third and fourth sentences are restated in Section 8850 (contents of inventory) without substantive change. The fifth sentence is restated in Section 8802 (form of inventory and appraisal) without substantive change.

Probate Code § 602 (repealed). Testator's claim against executor

Comment. Former Section 602 is continued in Section 9605 (claims against personal representative) without substantive change. See also Section 8851 (discharge or devise of claims).

Probate Code § 611 (repealed). Newly discovered property

Comment. Former Section 611 is superseded in part by Section 8801 (supplemental inventory and appraisal) and restated in part in Section 8804 (failure to timely file inventory and appraisal) without substantive change.

Probate Code § 608.5 (repealed). Objection to appraisal

Comment. Former Section 608.5 is restated in Section 8906 (objection to appraisal) without substantive change.

Probate Code § 662 (repealed). Kinds of legacies

Comment. The first part of subdivision (a) of former Section 662 is restated in Section 6154(a) (specific devise) without substantive change. The last part of subdivision (a) (if specific gift fails, resort cannot be had to testator's other property) is superseded by Sections 21401 (order of abatement) and 6171-6173 (ademption).

Subdivision (b) is restated in Section 6154(c) (demonstrative devise) without substantive change.

The first part of subdivision (c) is restated in Section 6154(e) (annuity) without substantive change. The last part of subdivision (c) is restated in Section 21403(b) (abatement within classes) without substantive change.

Subdivision (d) is restated in Section 6154(f) (residuary devise) without substantive change.

Subdivision (e) is superseded by Section 6154(b) (general devise).

Probate Code § 707 (repealed). Insured claim

Comment. Former Section 707 is replaced by Sections 550-555 (liability of decedent covered by insurance) and 9390 (claim covered by insurance).

Probate Code § 709 (repealed). Claim pending against decedent

Comment. The first two sentences of former Section 709 are restated in Section 9370 (claim prerequisite to continuing action) with the addition of a requirement that the plaintiff act to substitute the personal representative as a party within three months after rejection of the claim. The third sentence is replaced by Sections 550-555 (liability of decedent covered by insurance) and 9390 (claim covered by insurance).

The fourth sentence of the first paragraph and the second and third paragraphs of former Section 709 are restated in Section 9103 (late claim), with clarifying and generalizing changes made to combine it with former Section 720.

Probate Code § 709.1 (repealed). Continuation of pending action against estate

Comment. Former Section 709.1 is replaced by Sections 550-555 (liability of decedent covered by insurance) and 9390 (claim covered by insurance).

Probate Code § 716 (repealed). Enforcement of lien

Comment. Former Section 716 is restated in Section 9391 (enforcement of security interest), omitting the provision relating to attorney's fees.

Probate Code § 721 (repealed). Claim for liability covered by liability insurance

Comment. Former Section 721 is replaced by Sections 550-555 (liability of decedent covered by insurance) and 9390 (claim covered by insurance).

Probate Code § 900 (amended). Compensation of personal representative

Comment. Section 900 is amended to delete the portion relating to allowance of the necessary expenses in the care, management, and settlement of the estate. That portion is continued without substantive change in Section 11004. The other revisions in Section 900 are nonsubstantive.

Probate Code § 926 (repealed). Settlement of account

Comment. The first sentence of subdivision (a) of former Section 926 is restated in Section 1041 (clerk to set matter for hearing). The second sentence is restated in Sections 11000(c) (notice of hearing), 11641 (distribution under). Subdivisions (b) and (c) are restated in Section 11000 (notice of hearing) without substantive change.

Probate Code § 927 (repealed). Exceptions to account

Comment. The first sentence of former Section 927 is restated in Sections 11001 (contest of account) and 1043 (response or objection) without substantive change. The second sentence is superseded by Section 11003 (litigation expenses). The third and fifth sentences are

restated in Section 11002(a) (hearing on account) without substantive change. The fourth sentence is restated in Section 11001 (contest of account) without substantive change. The last sentence is not continued because it is no longer necessary.

Probate Code § 933 (repealed). Waiver of accounting

Comment. Former Section 933 is restated in Section 10954 (when account is not required).

Probate Code § 1000 (repealed). Petition for preliminary distribution

Comment. The introductory part of the first half of subdivision (a) of former Section 1000 is restated in Sections 11620 (time for petition), 11621 (order for distribution), and 11622 (bond). The remainder of the first half of subdivision (a) is restated without substantive change in Section 11600 (petition for distribution). The part of subdivision (a) of former Section 1000 applicable to estates of nondomiciliary decedents is superseded by Section 12540.

Subdivision (b) is restated without substantive change in Section 11601 (notice of hearing). Subdivision (c) is restated without substantive change in Section 11602 (opposition to petition).

Probate Code § 1002 (added). Costs

Comment. Section 1002 restates former Section 1282 without substantive change. For special provisions relating to costs, see, e.g., Sections 6544 (costs of proceedings for family allowance), 9255 (costs where creditor contests amount of allowed claim), 9257 (disallowed creditor's claim by representative), 9653 (costs in action to recover fraudulently conveyed property), 11624 (costs on preliminary distribution). See also Code Civ. Proc. § 1026 (costs in actions involving fiduciary estate).

Probate Code § 1004 (repealed). Petition by personal representative

Comment. Former Section 1004 is restated without substantive change in Sections 11623 (distribution under Independent Administration of Estates Act), 1041 (clerk to set matters for hearing), and 11621 (order for distribution).

Probate Code § 1020 (repealed). Petition for final distribution

Comment. The first sentence of subdivision (a) of former Section 1020 is restated without substantive change in Sections 11640 (petition and order) and 11600 (petition for distribution). The second sentence is restated without substantive change in Sections 11602 (opposition to petition) and 9630(d)(1) (authority of joint personal representatives to act).

Subdivisions (b) and (c) are restated in Section 11601 (notice of hearing).

Probate Code § 1020.1 (repealed). Distribution to transferees

Comment. Former Section 1020.1 is restated in Section 11604 (distribution to person other than heir or devisee), standardizing the manner of notice with other provisions in the code.

Probate Code § 1022 (repealed). Intestate minor

Comment. Former Section 1022 is restated in Sections 11801-11802 (deceased distributee), which substitute emancipation for marriage.

Probate Code § 1027 (repealed). Time for petition for distribution

Comment. The first sentence of subdivision (a) of former Section 1027 is restated without substantive change in Section 11640 (petition and order). The remainder of subdivision (a) is restated without substantive change in Section 11900 (distribution to State of California).

Subdivision (b) is continued without change in Section 11601(a) (notice of hearing). Subdivision (c) is continued without change in Section 11601(b) (notice of hearing).

Subdivision (d) is restated without substantive change in Section 11601 (notice of hearing), except that the provision for 30 days notice is not continued. Subdivision (e) is restated without substantive change in Section 11901 (distribution in trust for a class).

Subdivisions (f) and (g) are restated without substantive change in Section 11902 (disposition of property distributed to state). Subdivision (h) is restated without substantive change in Sections 11904 (no deposit in county treasury) and 7622 (general rules governing administration of estates apply to public administrator). Subdivisions (i) and (j) are restated without substantive change in Section 11903 (claims against property distributed to state).

Probate Code § 1041 (repealed). Petition; notice; objections

Comment. The first sentence of former Section 1041 is superseded by Section 12540. The part of the second sentence of former Section 1041 that required the clerk to set the petition for hearing is continued in Section 1041. The part of the second sentence of former Section 1041 concerning notice and all of the third sentence are superseded by Section 12540.

Probate Code § 1050 (added). Judgment roll

Comment. Section 1050 restates former Section 1299 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 former Section 1299(c) to partial and ratable distributions has been replaced by a reference to preliminary distributions in subdivision (d).

Probate Code § 1068 (repealed). Discharge

Comment. Former Section 1068 is restated without substantive change in Sections 12251 (discharge without administration), 1021 (verification required), and 1041 (clerk to set matter for hearing).

Probate Code § 1081 (repealed). Trial

Comment. The first sentence of the first paragraph of former Section 1081, providing for jury trial, is not continued. The second and third sentences are restated without substantive change in Sections 11704 (hearing) and 11705 (court order). The second paragraph is superseded by Section 1000 (general rules of practice govern).

Probate Code § 1101 (repealed). Filing; citation

Comment. The first and second sentences of Section 1101 are restated in Section 11951 (petition). The third, fourth, and fifth sentences are superseded by subdivision (a) of Section 11952 (parties and notice).

Probate Code § 1280 (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 1048 (entry and filing) and 1049 (enforcement of order).

Probate Code § 1306 (repealed). Qualification examinations

Comment. Former Section 1306 is restated in Section 402 (qualification examination), deleting the references to the State Personnel Board. The State Personnel Board no longer administers the examination. The Controller currently contracts with Cooperative Personnel Services, an agency created through a joint powers agreement, for administration of the examination.

Probate Code § 2100 (amended). Law governing guardianships and conservatorships

Comment. Section 2100 is amended to refer to the general provisions in Division 3 and to other relevant provisions governing administration of decedents' estates.

Probate Code § 2430 (amended). Payments from principal and income

Comment. Subdivision (a)(4)(v) is added to Section 2430 to ensure court review of the public administrator's costs and fee for taking possession or control of property where another person is ultimately appointed guardian or conservator.

Probate Code § 2903 (added). Transitional provision

Comment. Section 2903 is a specific application of portions of the general operative date and transitional provision. See Section 3.

Probate Code § 6154 (added). Classification of devises

Comment. Subdivision (a) of Section 6154 restates part of former Section 662(a) without substantive change. See also Estate of Ehrenfels, 241 Cal. App. 2d 215, 221, 50 Cal. Rptr. 358 (1966).

Subdivision (b) supersedes former Section 662(e) and is consistent with case law under the former provision. See, e.g., Estate of Jones, 60 Cal. App. 2d 795, 798, 141 P.2d 764 (1943).

Subdivision (c) restates former Section 662(b) without substantive change. The reference in subdivision (c) to a demonstrative devise as a "general" devise is new, but is consistent with prior law. See former Section 662(c) (if indicated fund fails, resort may be had to general assets as in case of general devise); 7 B. Witkin, Summary of California Law Wills and Probate § 214, at 5725 (8th ed. 1974) (same); Estate of Cline, 67 Cal. App. 2d 800, 155 P.2d 390 (1945) (demonstrative devise is "in the nature of" a general devise; reference to particular fund is for convenient method of payment); King, Outright

Testamentary Gifts, in California Will Drafting § 8.68, at 372 (Cal. Cont. Ed. Bar 1982) (demonstrative gift is type of general gift). For the priority that a demonstrative devise has over other general devises, see Section 21403(b).

Subdivision (d) is new. It incorporates the definition of "pecuniary gift" provided in Section 21120(b) ("pecuniary gift" means a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument).

Subdivision (e) restates the first clause of former Section 662(c) without substantive change. The reference in subdivision (e) to an annuity as a "general" devise is new, but is consistent with the last clause of former Section 662(c) (if indicated fund fails, resort may be had to general assets as in case of general devise) and with case law. See Estate of Luckel, 151 Cal. App. 2d 481, 493-95, 312 P.2d 24 (1957) (annuity is a "general charge on the testator's whole estate"). For the priority that an annuity has over other general devises, see Section 21403(b).

Subdivision (f) restates former Section 662(d) without substantive change.

Probate Code § 7050 (added). Jurisdiction and authority of court or judge

Comment. Subdivision (a) of Section 7050 restates a provision of former Section 300 and the introductory part of former Section 301 without substantive change. Subdivision (a) is comparable to Section 2200 (jurisdiction of guardianship and conservatorship proceedings). Proceedings concerning administration of a decedent's estate include the probate of wills (Sections 8200-8272), appointment of personal representatives (Sections 8400-8577), and estate management (Sections 9600-10382). Where appropriate, the reference to the superior court in subdivision (a) means the department or judge of the court that deals with probate matters.

Subdivision (b) 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) and abandons 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). Subdivision (b) 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, 106-07, 145 Cal. Rptr. 437 (1978). See also Section 17001 (full-power court under Trust Law).

Probate Code § 7060 (added). Disqualification of judge

Comment. Section 7060 restates subdivision (a) of former Section 303 without substantive change. For general provisions on disqualification, see Code Civ. Proc. §§ 170-170.8.

Probate Code § 7070 (added). Grounds for transfer

Comment. Section 7070 restates part of subdivision (b) of former Section 303 without substantive change. Transfer of a proceeding under this article is in the same manner and with the same effect as transfer of actions and proceedings under the Code of Civil Procedure. See Section 1000 (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.

Probate Code § 7071 (added). Place of transfer

Comment. Section 7071 is new. The provision for transfer to an adjoining county continues a provision of subdivision (b) of former Section 303.

Probate Code § 7240 (added). Appealable orders and refusals to make orders

Comment. Section 7240 restates former Section 1297 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) Subdivision (g) relating to options is not limited to real property options as was former subdivision (g).

(4) The right to appeal from an order relating to determination of heirship is omitted because this procedure is not continued. See the Comment to former Section 1190.

(5) Former subdivision (p) relating to appeals concerning inheritance tax is replaced by Section 7242 (transitional provision).

Probate Code § 8003 (added). Setting and notice of hearing

Comment. Section 8003 restates former Sections 327 (probate of will) and 441 (application for letters), except that the petitioner rather than the clerk has the duty of giving notice.

Probate Code § 8110 (amended). Persons on whom notice served

Comment. Section 8110 restates the first part of the first sentence of former Section 328 and a portion of the second sentence of former Section 441, limiting service to known heirs. See also Section 1202 (additional notice on court order). Cf. Section 9050 (notice to creditors).

Probate Code § 8113 (added). Notice involving foreign citizen

Comment. Section 8113 is drawn from Section 7.06 of the Los Angeles County Probate Policy Memorandum (1985). Whether a country has recognized diplomatic or consular representation in the United States may be ascertained from the United States Department of State.

Probate Code § 8200 (added). Delivery of will

Comment. Section 8200 supersedes former Section 320. Section 8200 requires delivery of the original will in all cases, precludes charging a filing fee, and adds a procedure for production of the delivered will.

Probate Code § 8201 (added). Order for production of will

Comment. Section 8201 restates a portion of former Section 321. The court or judge has general authority to enforce the production of wills and the attendance of witnesses. See Section 7050 (authority of court or judge).

Probate Code § 8220 (added). Evidence of subscribing witness

Comment. Section 8220 restates the first two sentences of former Section 329 and the last sentence of former Section 1283 without substantive change.

Probate Code § 8270 (added). Petition for revocation

Comment. Subdivision (a) of Section 8270 restates former Section 380 but omits reference to some of the specific grounds of opposition. A will is admitted to probate when it is recorded in the minutes by the clerk. Section 8225 (admission of will to probate).

Subdivision (b) supersedes the last portion of former Section 384. It limits the previously indefinite right of minors and incompetents to petition for revocation.

Probate Code § 8401 (added). Deposit in controlled account

Comment. Section 8401 restates subdivision (b) of former Section 541.1 without substantive change. See also Section 2328 (guardianship and conservatorship).

Probate Code § 8405 (added). Form of letters

Comment. Section 8405 supersedes former Sections 500, 501, and 502. The Judicial Council may prescribe the form of letters. Section 1001 (Judicial Council and local court rules).

Probate Code § 8441 (added). Inventory and appraisal required

Comment. Section 8441 supersedes the second and third sentences of former Section 409. The express references to nominees are new.

Subdivision (b) gives priority to devisees, who need not be entitled to succeed to all or part of the estate under the law of succession in order to have priority. However, subdivision (b) also gives the court discretion to disregard the priority of a devisee in an appropriate case where another person would take a substantial statutory intestate or omitted heir share.

Probate Code § 8461 (added). Priority for appointment

Comment. Section 8461 restates subdivision (a) of former Section 422, with the addition of subdivisions (d), (g), (h), and (i) to reflect changes in the law governing intestate succession. See Section 6402. The general order of priority prescribed in Section 8461 is subject to limitation in the succeeding sections of this article. See, e.g., Sections 8462 (priority of relatives), 8463 (surviving spouse). A person appointed must be legally competent. Section 8402 (qualifications).

Probate Code § 8465 (added). Nominee of person entitled to appointment
Comment. Section 8465 restates without substantive change provisions found in former Sections 409 and 423. "Grandparent" and "issue" have been added to subdivision (b) consistent with Section 8461. The nominee is not entitled to appointment unless legally competent. Section 8401 (qualifications).

Probate Code § 8466 (added). Priority of creditor
Comment. Section 8466 restates the last portion of former Section 425 but omits the requirement that there be a request of another creditor before the court may appoint another person. Any person appointed under this section must be legally competent. Section 8402 (qualifications).

Probate Code § 8482 (added). Amount of bond
Comment. Subdivisions (a) and (b) of Section 8482 supersede the last sentence of former Section 541(a), making explicit the authority of the court to impose a fixed minimum bond. Subdivision (c) supersedes former Section 542.

Probate Code § 8483 (added). Reduction of bond by deposit of assets
Comment. Section 8483 restates subdivision (a) of former Section 541.1 without substantive change. See also Section 2328 (guardianship and conservatorship). For authority of a petitioner for appointment as personal representative to make a deposit described in this section, see Section 8401.

Probate Code § 8542 (added). Issuance of letters
Comment. Subdivisions (a) and (b) of Section 8542 restate subdivisions (a) and (b) of former Section 462 without substantive change. The bond must be conditioned that the special administrator will faithfully execute the duties of the office according to law. Section 8480 (bond required). The judge may approve the bond in chambers. Code Civ. Proc. § 166 (actions in chambers).
Subdivision (c) is new.

Probate Code § 8547 (added). Fees and commissions
Comment. Subdivisions (a)-(c) of Section 8547 restate former Sections 467-468, with the addition of provisions limiting payment of the special administrator until close of administration (except for extra allowances) and recognizing agreements of the special administrator, personal representative, and attorneys as to division of fees and commissions. Subdivision (d) supersedes former Section 469.

Probate Code § 8571 (added). Bond of nonresident personal representative
Comment. Section 8571 is new. It is a specific application of subdivision (b) of Section 8481 (waiver of bond).

Probate Code § 8800 (added). Inventory and appraisal required
Comment. Section 8800 supersedes the first portion of the first sentence of former Section 600. It extends the time for filing the inventory and appraisal from three to four months. The four-month period may be extended by the court either on prior authorization or by

subsequent excuse. A further time might be reasonable, for example, in an estate for which a federal estate tax return is necessary and additional time is required in order to ensure that the property is valued consistently.

The inventory and appraisal procedure provided in this part applies to valuation in administration of decedents' estates, but may be incorporated in other proceedings. For example, in a small estate set-aside proceeding under Chapter 6 (commencing with Section 6600) of Part 3 of Division 6, an inventory and appraisal of the decedent's estate is required as provided in Section 6608. No inventory and appraisal of the decedent's estate is required where it is disposed of without administration under Division 8 (commencing with Section 13000) except to the extent an inventory and appraisal is required pursuant to Section 13103 (real property), subdivision (b) of Section 13152 (real property), subdivision (c) of Section 13200 (affidavit procedure), or Section 13658 (property passing or belonging to surviving spouse).

See also Code Civ. Proc. § 166 (actions in chambers).

Probate Code § 8801 (added). Supplemental inventory and appraisal

Comment. Section 8801 supersedes former Section 611, extending the two-month time for filing to four months, parallel to Section 8800 (inventory and appraisal required). For enforcement of this requirement, see Section 8804 (failure to timely file inventory and appraisal).

Probate Code § 8804 (added). Failure to timely file inventory and appraisal

Comment. Section 8804 restates former Section 610 and a portion of former Section 611 without substantive change. The time allowed under this chapter for filing an inventory and appraisal includes any court extension of the statutory times under Sections 8800 (inventory and appraisal required) and 8801 (supplemental inventory and appraisal). Section 8804 is limited to negligent or willful noncompliance by the personal representative and is not intended to apply where the personal representative was unable to file the inventory and appraisal due to the probate referee's delay, or where the personal representative made a good faith effort to file but was unable to due to circumstances beyond the personal representative's control. For delay caused by the probate referee, see Article 3 (commencing with Section 8940) of Chapter 3.

Subdivision (a) is new. It incorporates the procedure for compelling an account.

Subdivision (b) provides for removal as an independent sanction. For the removal procedure, see Article 4 (commencing with Section 520) of Chapter 6 of Division 3. This supplements the removal sanction that is part of the procedure under subdivision (a) to compel a filing.

Under subdivision (c) liability for injury arising from the refusal or failure of the personal representative to timely file the inventory and appraisal may include attorney's fees incurred in proceedings to compel the filing. Liability of the personal representative and of the sureties on the bond is joint and several. See Code Civ. Proc. § 996.410 et seq.

Probate Code § 8903 (added). Waiver of appraisal by probate referee

Comment. Section 8903 restates former Section 605(a)-(b), with changes to make clear that the application for waiver is made by petition, to specify the time within which the petition must be made, and to make clear that the inventory and appraisal attached to the petition is to be filed pursuant to Section 8800 (inventory and appraisal required). Section 8903 also adds a requirement that notice of the waiver petition be given to any appointed referee and, if a referee has not been appointed and the estate includes real property, a referee must be appointed for the purpose of receiving notice. However, any referee who objects to the waiver may not thereafter receive a fee out of the estate.

A waiver petition may be made under Section 8903 at any time before an inventory is delivered to the probate referee, including a combined waiver and petition to open administration or a combined waiver and petition for final distribution.

Probate Code § 8961 (added). Amount of commission and expenses

Comment. Section 8961 restates a portion of the first sentence and the second sentence of the first paragraph, and the second paragraph, of former Section 609 without substantive change. The commission provided by this section is subject to a maximum and minimum pursuant to Section 8963.

Probate Code § 8962 (added). Limitation on commission and expenses for publicly traded stock

Note. This section was deleted from the bill.

Probate Code § 8980 (added). Transitional provision

Comment. Section 8980 is an exception to the general rule that all provisions of this part apply immediately on its operative date to pending proceedings. See Section 3.

Probate Code § 9103 (amended). Late claims

Comment. Section 9103 is amended to combine it with the fourth sentence of the first paragraph and the second and third paragraphs of former Section 709, which related to late claims in pending actions, and with former Section 720, which related to late claims involving causes of action not pending. The combination of provisions results in changes for purposes of clarification, generalization, and uniformity.

This section does not excuse the duty of the personal representative to give timely notice to a known creditor pursuant to Chapter 2 (commencing with Section 9050). A creditor has knowledge of the administration of an estate within the meaning of subdivision (a)(1) if the creditor has actual knowledge of the administration through receipt of notice given under Section 9050 or otherwise, such as information from a newspaper clipping service that comes to the attention of the creditor. Constructive knowledge through publication of a notice of death or other information that does not come to the attention of the creditor is not knowledge for the purpose of subdivision (a)(1). The standard applicable to the creditor's attorney is different. The attorney is not held responsible for any actual knowledge the attorney may have of the decedent's death unless the attorney is representing the creditor in the matter involving the decedent.

It should be noted that a petition under this section must be verified. See Section 1021. This section does not apply to certain public entity claims which involve a written notice or request to the public entity and a response time governed by other law. See Sections 9201 (claims governed by special statutes) and 9202 (claim by Director of Health Services).

Probate Code § 9255 (amended). Partial allowance

Comment. Section 9255 is amended to correct a section reference.

Probate Code § 9350 (added). Application of article

Comment. Section 9350 is new. Provisions governing claims on pending actions or proceedings are located in Section 9370 (claims on pending action or proceeding), not in this article.

Probate Code § 9351 (added). Claim prerequisite to bringing action

Comment. Section 9351 restates former subdivision (c) of Section 9002 (claim requirement) with the addition of the implied requirement that the claim was rejected in whole or in part. For the time within which a claim must be filed, see Section 9100 (claim period). For late claims, see Section 9103. An action may be brought to enforce a liability of the decedent without first filing a claim in the case of a secured obligation. Section 9391 (enforcement of security interest).

This section relates only to an action against the personal representative. It does not affect actions against other persons who may be liable for the decedent's debts. See, e.g., Sections 13109 (affidavit procedure) and 13550-13554 (debts of deceased spouse). See also Sections 550-554 (liability of decedent covered by insurance).

Probate Code § 9352 (added). Tolling of statute of limitations

Comment. Section 9352 restates former subdivisions (a) and (c) of Section 9253 without substantive change.

Probate Code § 9370 (added). Claim prerequisite to continuing action

Comment. Subdivision (a) of Section 9370 restates the first sentence of former Section 709 with the addition of the implied requirement that the claim be rejected in whole or in part and that the plaintiff act to substitute the personal representative as a party within three months after rejection of the claim. The personal representative must notify creditors, including plaintiffs in actions against the decedent, if the personal representative has actual knowledge of the creditor. Section 9050 (notice required). For late claims, see Section 9103.

Subdivision (b) restates the second sentence of former Section 709 without substantive change.

Probate Code § 9390 (added). Claim covered by insurance

Comment. Section 9390 replaces part of the first sentence of former Section 707, the third sentence of former Section 709, part of former Section 709.1, and subdivision (a) of former Section 721. Section 9390, in conjunction with Section 550, makes the following significant changes in the former scheme:

- (1) The new provisions apply uniformly to actions pending at the death of the decedent and actions commenced after the decedent's death.

(2) Court approval is not required before the plaintiff may commence an action against the estate for the insured amount.

(3) The estate of the decedent need not otherwise qualify for treatment under Section 13100-13115 (affidavit procedure for collection or transfer of personal property).

(4) The new provisions apply in any case where there is a claim for damages for which the decedent was insured, whether for injury to or death of a person caused by the wrongful act or neglect of the decedent, or otherwise.

(5) The new provisions excuse a claim in probate only where the plaintiff is proceeding under Section 550, whether or not the insurer has otherwise accepted the defense of the cause or an appearance has been made on behalf of the decedent.

Nothing in Section 9390 affects any applicable statutes of limitation relating to the action. Cf. Code Civ. Proc. § 353; Prob. Code § 551.

Probate Code § 9391 (added). Enforcement of security interest

Comment. Section 9391 restates former Section 716, omitting the provision relating to attorney's fees.

Probate Code § 9605 (added). Claims against personal representative

Comment. Section 9605 restates parts of former Section 602 and extends the provisions from executors to all personal representatives. See also Section 8851 (discharge or devise of claims).

Probate Code § 10954 (added). When account is not required

Comment. Section 10954 restates former Section 933, with the elimination of beneficiaries whose interest will be satisfied in full from those whose waiver is required. The section also makes clear that an unpaid creditor may seek to require an account notwithstanding a waiver by beneficiaries.

In subdivision (b)(4) a reference to the trustee's written acceptance of the trust replaces the former reference to a trustee's consent to act, and a provision excusing court approval is added for court-supervised trusts. See Section 15600 (acceptance of trust by trustee). Court approval is also excused in subdivision (b)(5) for waiver by the personal representative. Subdivision (b)(6) is substituted for the former provision precluding waiver if a person entitled to distribution is unascertained. This section applies notwithstanding any other provision of this part, including but not limited to Section 10950 (court-ordered account).

Probate Code § 11001 (added). Contest of account

Comment. Section 11001 restates the first and fourth sentences of former Section 927, with the addition of a provision making clear the right of an interested person to obtain court review of actions by the personal representative through a contest of an account. See also Section 1043 (response or objection).

Subdivision (b) permits a contest of the value of property for purposes of distribution only, and not of the inventory and appraisal;

a separate procedure is provided for a direct contest of appraisal values. See Section 8906 (objection to appraisal).

Probate Code § 11004 (added). Expenses of personal representative

Comment. Section 11004 restates a provision formerly found in the first sentence of Section 900. It generalizes the former language that provided for allowance of expenses in the care, management, and settlement of the estate.

Probate Code § 11600 (added). Petition for distribution

Comment. Section 11600 restates without substantive change a portion of subdivision (a) of former Section 1000, with the exception of the reference to distribution of "priorities," and a portion of subdivision (a) of former Section 1020. For the time and manner prescribed for making a petition, see Sections 11620 (petition for preliminary distribution) and 11640 (petition for final distribution). See also Sections 12200-12206 (time for closing estate).

Probate Code § 11601 (added). Notice of hearing

Comment. With the exception of subdivision (b)(4), Section 11601 restates subdivisions (b) and (c) of former Sections 1000, 1020, and 1027.

Subdivision (b)(4) restates subdivision (d) of former Section 1027, except that the time of notice is reduced from 30 days to 15.

Probate Code § 11602 (added). Opposition to petition

Comment. Section 11602 restates without substantive change subdivision (d) of former Section 1000 and a portion of the second sentence of subdivision (a) of former Section 1020.

Probate Code § 11604 (added). Distribution to person other than beneficiary

Comment. Section 11604 restates former Section 1020.1, standardizing the manner of notice with other provisions in the code.

Probate Code § 11620 (added). Time for petition

Comment. Section 11620 restates a portion of subdivision (a) of former Section 1000. Distribution of all or a portion of the share to which a beneficiary is entitled includes a payment on account of the share. The petition may be made by the personal representative, a beneficiary, or other interested person. Section 11600 (petition for distribution). If distribution is made before four months have elapsed, the distributee must give a bond in the amount of the distribution. Section 11622(a) (bond). If distribution is made after four months have elapsed, the court may require the distributee to give a bond. See Section 11622(b) (bond).

Probate Code § 11640 (added). Petition and order

Comment. Subdivision (a) of Section 11640 restates portions of former Section 956 and subdivision (a) of former Sections 1020 and 1027 with the addition of a reference to the insolvency of the estate. The petition may be made by the personal representative, a beneficiary, or other interested person. Section 11600 (petition for distribution).

Subdivision (b) restates a portion of former Section 1054 without

substantive change. Unless there has been a waiver of accounts, the estate is not in a condition to be closed until final settlement of the accounts of the personal representative.

Subdivision (c) restates a portion of former Section 956, with the addition of a reference to the provisions governing the time for closing the estate. See Section 12201 (report of status of administration).

Probate Code § 11702 (added). Responsive pleading

Comment. Subdivision (a) of Section 11702 restates the fourth and fifth sentences of former Section 1080 without substantive change, with the clarification that the written statement may be in support of or in opposition to the petition. Subdivision (b) is new and is comparable to Section 8251(c) (will contest).

Probate Code § 11704 (added). Hearing

Comment. Section 11704 restates without substantive change the second sentence and the first portion of the third sentence of former Section 1081, except that prior court order is not required for participation of the personal representative. The provisions of former Section 1081 for jury trial and special rules of evidence are not continued. The procedure applicable in a proceeding under this chapter is that applicable to civil actions generally. Section 1000 (general rules of practice).

Probate Code § 11802 (added). Manner of distribution

Comment. Subdivision (a) of Section 11802 restates the first paragraph of former Section 1023 without substantive change. Subdivision (b) restates former Section 1022, substituting emancipation for marriage. Subdivision (c) is new.

Probate Code § 11900 (added). Distribution to State of California

Comment. Section 11900 restates the last portion of subdivision (a) of former Section 1027 without substantive change.

Probate Code § 11901 (added). Distribution in trust for a class

Comment. Section 11901 restates subdivision (e) of former Section 1027 without substantive change. The title of the state under this section is subject to the right of persons to claim the property as provided in this chapter. See Section 11903 (claims against property distributed to state).

Probate Code § 11902 (added). Disposition of property distributed to state

Comment. Section 11902 restates without substantive change subdivisions (f) and (g) of former Section 1027 and former Section 1028.

Probate Code § 11903 (added). Claims against property distributed to state

Comment. Section 11903 restates subdivisions (i) and (j) of former Section 1027 without substantive change. It should be noted that under the general claim procedures of the Code of Civil Procedure, the limitations bar may be tolled as to minors and incompetent persons in some situations. See, e.g., Code Civ. Proc. § 1441.

Probate Code § 11904 (added). No deposit in county treasury

Comment. Section 11904 restates subdivision (h) of former Section 1027 without substantive change. See also Section 7642 (general rules governing administration of estates apply to public administrator). Section 11904 is intended for the convenience of the claimant of property in only having to deal with one governmental agency. In the case of deposit of distribution of property to the state, money is delivered to the State Treasurer and personal property is delivered to the State Controller. See Section 11902 (disposition of property distributed to state).

Probate Code § 11951 (added). Petition

Comment. Section 11951 restates the first and second sentences of former Section 1101 without substantive change, except that the petition may be filed before the time to make claims has expired and may not be filed after an order for distribution has become final.

Probate Code § 12001 (added). Rate of interest

Comment. Section 12001 supersedes portions of subdivisions (a) and (c) of former Section 663. Under former Section 663, the rate of interest was that payable on a money judgment entered in this state. Section 12001 provides a fixed rate based on the minimum Series EE United States Savings Bond rate in effect one year after the decedent's death, regardless whether interest commences to accrue before, on, or after the one year anniversary. The minimum rate payable on a Series EE United States savings bond may be obtained from a financial institution or from the U.S. Savings Bond Division of the Department of Treasury (1-800-U.S.BONDS).

The rule of Section 12001 is incorporated by reference in Section 16314 (interest and income on trust distributions). For this purpose, the relevant date for fixing the interest rate is the date interest commences to run on the distribution.

The rule of Section 12001 applies where the intention of the testator is not indicated by the will. Section 12000 (application of chapter).

Probate Code § 12002 (added). Income and expenses of specific devise

Comment. Section 12002 is new. Section 12002 applies to specific devises of real and personal property. See Section 32 ("devise" defined). The rule of Section 12002 applies where the intention of the testator is not indicated by the will. Section 12000 (application of chapter).

Subdivision (a) codifies case law. See, e.g., *In re Estate of Daly*, 202 Cal. 284, 287, 260 P. 296 (1927) (stock).

Subdivision (b) codifies case law. See *Estate of McKenzie*, 199 Cal. App. 2d 393, 399-400, 18 Cal. Rptr. 680 (1962) (inheritance from another estate). The expenses attributable to the property under subdivision (b) are those relating directly to the property, including maintenance, insurance, property taxes, and income taxes allocable to income from the property.

The first sentence of subdivision (c) is consistent with *Estate of Reichel*, 28 Cal. App. 3d 156, 103 Cal. Rptr. 836 (1972) (where specifically devised real property produces no income but is occupied rent free by the devisee from testator's death, expenses on the

property are chargeable to the devisee). The second sentence of subdivision (c) limits the burden on the estate to the first year after the decedent's death. Expenses paid out by the estate after the first year are ultimately borne by the distributee of the property. The equitable lien imposed by subdivision (c) is not good against a transferee of the property who gives fair consideration for the property without knowledge of the lien. See generally 1 J. Pomeroy, Equity Jurisprudence §§ 165, 168, 171(4) (5th ed. 1941); cf. Section 15685 and the Comment thereto (trustee's lien).

Subdivision (d) is an exception to the rule of subdivision (a).

Probate Code § 12005 (added). Interest on devise for maintenance

Comment. Section 12005 restates the portion of former Section 663(c) that related to devises for maintenance. A devise for maintenance, within the meaning of this section, includes a devise for support. The rule of Section 12005 applies where the intention of the testator is not indicated by the will. Section 12000 (application of chapter).

Probate Code § 12574 (added). Transitional provision

Comment. Section 12574 makes clear that the repeal of the former publication procedure and the enactment of a new affidavit procedure for the personal representative of a nondomiciliary decedent does not impair the ability to act under the former procedure if publication was made before the operative date. Nor does publication before the operative date limit the ability of the personal representative to act under the new procedure. In this situation the personal representative may use either or both procedures.

Probate Code § 15804 (amended). Notice in case involving future interest of beneficiary

Comment. Subdivision (c)(2) of Section 15804 is amended to correct a section reference.

Probate Code § 16315 (added). Transitional provision

Comment. Section 16315 is subject to contrary provisions in the trust instrument. See Section 16302.

Probate Code § 21100 (repealed). Definitions

Comment. Subdivision (a) of former Section 21100 is continued in Section 39 without change. Subdivision (b) is continued in Section 45 without change. Subdivision (c) is continued in Section 81 without change.

Probate Code § 21400 (added). Abatement subject to transferor's intent

Comment. Section 21400 generalizes a number of provisions in existing statutes, and is consistent with case law. See former Sections 736, 750-752; Estate of Jenanyan, 31 Cal. 3d 703, 646 P.2d 196, 183 Cal. Rptr. 525 (1982). The text of the section is drawn from subdivision (b) of Section 3-902 of the Uniform Probate Code.

The provisions of this part apply to trusts and other instruments as well as to wills. See Section 21101 (division applicable to wills, trusts, and other instruments).

Revenue & Taxation Code § 480 (amended). Change in ownership statement
Comment. Subdivision (b) of Section 480 is amended to conform
terminology.

Uncodified (added)

Note. This section was deleted from the bill.

EXHIBIT 2

Probate Code § 303 (repealed). Disqualification; transfer

Comment. Subdivision (a) of former Section 303 is restated in Section 7060 (disqualification of judge) without substantive change.

Subdivision (b) 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).

Subdivision (c) is restated in Section 7060(c) (disqualification of judge) without substantive change.

Probate Code § 1215 (amended). Manner of mailing; when mailing complete

Comment. Subdivision (d) is added to Section 1215 for completeness. It is drawn from Section 1220(d).

Probate Code § 1220 (amended). Manner of mailing notice of hearing

Comment. Subdivision (d) of Section 1220 is amended for conformity with Section 1215(d).

Probate Code § 7060 (added). Disqualification of judge

Comment. Subdivisions (a) and (b) of Section 7060 restate subdivision (a) of former Section 303 without substantive change. For general provisions on disqualification, see Code Civ. Proc. §§ 170-170.8.

Subdivision (c) restates former Section 303(c) without substantive change.

Probate Code § 8121 (added). Publication of notice

Comment. Section 8121 restates subdivision (a) of former Section 333 but omits the positing provision, which is no longer necessary. The reference to the first publication date clarifies the former provision that, "Publication of notice pursuant to this section shall be for at least 15 days." The former reference to the "community" where the decedent resided is replaced by a reference to the "area of the county", since some decedents do not reside in communities.

Probate Code § 9053 (amended). Immunity of personal representative or attorney

Comment. Subdivision (c) of Section 9053 is revised consistent with the holding of the United States Supreme Court in Tulsa Professional Collection Services, Inc. v. Pope (No. 86-1961, April 19, 1988), that termination of a claim in probate without actual notice to a known or reasonably ascertainable creditor violates due process of law.

Probate Code § 9399 (added). Transitional provision for claims in litigation

Comment. Section 9399 is an exception to the general rule of Section 3 that the new law applies on its operative date to pending probate proceedings. Where there has been litigation commenced before

the operative date either against the decedent or against the personal representative, any claim requirements applicable to the litigation are governed by the relevant law in effect before the operative date and not by the new law.

Probate Code § 12201 (added). Report of status of administration

Comment. Section 12201 restates the second, third, and fourth sentences of former Section 1025.5, with the addition of an estimate of the time needed to close administration. Section 12201 also makes specific reference to the availability of an account under Section 10950; however, the court may not order an account under Section 10950 if the waiver or satisfaction provisions of Section 10954 (when account is not required) are satisfied.

Section 12201 also supersedes a portion of former Section 956 ("administration may continue for such time as may be reasonable").

The report of status of administration must be verified. See Section 1021 (verification required).