

STATE OF CALIFORNIA

California Law Revision Commission

TENTATIVE RECOMMENDATION

relating to

THE NEW ESTATE AND TRUST CODE

ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

September 1986

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

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN NOVEMBER 15, 1986.

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

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LETTER OF TRANSMITTAL

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

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

The explanatory text of this tentative recommendation indicates the background of this proposal and indicates the principal revisions it would make in existing law.

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

A comment follows each section of the proposed legislation. The comment gives the source of the section and indicates the nature of the changes the section would make in existing law.

Comments showing the disposition of each section of existing law that would be repealed in the proposed legislation can be found at the end of this tentative recommendation.

TENTATIVE RECOMMENDATION
relating to
ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

Existing law provides that a person who has been missing for five years is presumed dead,¹ and provides a procedure for administration of the missing person's estate.²

The new code continues this procedure with a few minor changes:

- The new code adopts the general four-month limitation on preliminary distribution of the estate³ in place of the one-year delay of distribution applicable under existing law.⁴ This change is made in the interest of uniformity. In view of the length of time that must pass before the missing person's property can be distributed, the additional eight months' delay provided by existing law is not a necessary protection. In addition, a missing person who reappears may recover his or her property or its value from distributees to the extent it would be equitable at any time until five years after the distribution.

- Existing law permits the spouse, a member of the missing person's family, an interested person, or a friend of the missing person to petition for administration.⁵ The new code requires that friends show that they have a right in or claim against the estate.⁶ This is consistent with the general approach of granting persons with an interest in a matter the right to petition.

1. Prob. Code § 1351.

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

3. See the discussion under [] *supra*.

4. Prob. Code § 1352.

5. Prob. Code § 1354.

6. See Prob. Code § 48.

- The three-month hearing date and 90-day publication provision of existing law⁷ are not continued in the new code. Hearing dates and notices are governed by general provisions.⁸

- Under existing law, the petitioner is liable for the cost of a search for the missing person where there is no administration; the estate is liable if there is administration.⁹ The new code makes the estate presumptively liable, but permits the court in its discretion to order the petitioner to pay the costs of a search if there is no administration. This rule recognizes that the person whose status as a missing person has necessitated the search should be liable for the cost of the search in the normal case.

7. See Prob. Code § 1355.

8. See the discussion under [] *supra*.

9. Prob. Code § 1356(c).

OUTLINE OF STATUTE

PART 12. ADMINISTRATION OF ESTATES OF MISSING PERSONS PRESUMED DEAD

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

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

§ 12400. "Missing person" defined

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

Comment. Section 12400 continues former Probate Code Section 1350 without substantive change.

§ 12401. Presumption of death for purposes of administration

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

Comment. Section 12401 continues former Probate Code Section 1351 without change. Section 12401 is the same in substance as Uniform Probate Code Section 1-107(3) (1977). See also Evid. Code §§ 667 (general presumption of death), 1282 (finding of presumed death by federal employee).

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

12402. The estate of a missing person may be administered, as though the person were dead, in the manner provided generally for the administration of estates of deceased persons, subject to the provisions of this part.

Comment. Section 12402 continues former Probate Code Section 1352 without substantive change, except that the former provision delaying distribution of property until one year after appointment and qualification of the personal representative is not continued. The general four-month limitation on preliminary distribution applies to distribution under this part. See Section []. In addition, the reference to distribution of the estate is omitted; administration of the estate includes distribution. See Section []. See also Section 12408 (recovery of property by missing person upon reappearance).

CROSS-REFERENCES

Definitions

Missing person § 12400
Personal representative § 58

§ 12403. Jurisdiction of court

12403. (a) If the missing person was a resident of this state at the time of the person's disappearance, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of this part.

(b) If the missing person was a nonresident of this state at the time of the person's disappearance, the superior court of a county where real property of the missing person is located, or of a county where personal property is located if the missing person has no real property in this state, has jurisdiction for the purposes of this part.

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

CROSS-REFERENCES

Definitions

Missing person § 12400
Personal property § 57
Real property § 68

Note. The general venue rules will be reviewed to see whether they should be made consistent with this section.

§ 12404. Petition for administration

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

(b) The petition may be filed by any one or more of the following:

- (1) The spouse of the missing person.
- (2) A relative of the missing person.
- (3) A person interested in the estate of the missing person.

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

- (1) The last known place of residence of the missing person.
- (2) The time and circumstances of the person's disappearance.

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

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

Comment. Section 12404 restates former Probate Code 1354(a)-(c) without substantive change, except as noted. The reference to probate of the will in former Probate Code Section 1354(a) is eliminated as surplusage in light of Section 8000 (petition for administration). The list of persons who may petition under former Probate Code Section 1354(b) has been revised by referring to a "relative" instead of "member of the family" and deleting the reference to a friend of the missing person. The first change is not substantive; the second change means that a friend may petition only if he or she is an interested person. Pursuant to subdivision (c) and Section 12402, the general requirements for a petition for administration of the estate (see Section 8002) are applicable. Subdivision (b) does not affect the order of priority of appointment of an administrator; this is controlled by provisions governing administration generally. See, e.g., Sections 8441 (priority for appointment of administrator with will annexed), 8446 (priority for appointment of administrator).

CROSS-REFERENCES

Definitions

Interested person § 48

Missing person § 12400

Verification required § 7203

§ 12405. Notice of hearing

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

Comment. Section 12405 supersedes former Probate Code Section 1355. Section 12405 no longer provides for a three-month hearing date or a 90-day publication provision.

CROSS-REFERENCES

Certified mail equivalent of registered mail § 5

Clerk to set matter for hearing § 7202

Definition

Missing person § 12400

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

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

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

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

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

(3) Engaging the services of an investigator.

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

Comment. Subdivisions (a) and (b) of Section 12406 restate former Probate Code Section 1356(a) and (b) without substantive change. The reference in subdivision (b)(1) to newspapers is new; this is not a substantive change. Subdivision (c) replaces former Probate Code Section 1356(c) which required that costs be paid by the petitioner, if there was no administration, or by the estate, if there was administration. The new rule makes the estate presumptively liable for costs, but gives the court discretion to order the petitioner to pay costs if there is no administration.

CROSS-REFERENCES

Definition

Missing person § 12400

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

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

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

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

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

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

CROSS-REFERENCES

Definitions

Missing person § 12400

Personal representative § 58

§ 12408. Recovery of property by missing person upon reappearance

12408. (a) If the missing person reappears:

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

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

(b) The remedies available to the missing person under subdivision (a) are in addition to any remedies available to the missing person by reason of fraud or intentional wrongdoing.

(c) Except as provided in subdivisions (a) and (b), the order for final distribution, when it becomes final, is conclusive as to the

rights of the missing person and the rights of the heirs and devisees of the missing person.

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

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

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

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

Subdivision (d) was drawn from a portion of former Probate Code Section 287, the predecessor of former Probate Code Section 1358(d).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Devisee § 34
Heirs § 44
Missing person § 12400
Personal representative § 58
Property § 62

§ 12409. Application of part

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

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

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

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

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

CROSS-REFERENCES

Definition

Missing person § 12400

COMMENTS TO REPEALED SECTIONS

CHAPTER 24. ADMINISTRATION OF MISSING PERSONS PRESUMED DEAD

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

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

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

Comment. Former Section 1351 is continued in Estate and Trust Code Section 12401 (presumption of death for purposes of administration) without change.

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

Comment. Former Section 1352 is restated without substantive change in Estate and Trust Code Section 12402 (manner of administration and distribution of missing person's estate), except that the one-year delay of distribution is not continued. Under Estate and Trust Code Section 12402, the general four-month limitation on preliminary distribution applies. The reference to distribution of the estate is also omitted; distribution is continued in administration under Estate and Trust Code Section 12402.

Probate Code § 1353 (repealed). Jurisdiction of court

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

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

Comment. Subdivisions (a)-(c) of former Section 1354 are restated in Estate and Trust Code Section 12404 (petition for administration) without substantive change, except that (1) the reference to probate of the missing person's will is omitted as unnecessary in light of Estate and Trust Code Section 8000 (petition for administration), (2) "relative" is substituted for "member of the family", and (3) the reference to a friend of the missing person is not continued. Subdivision (d) is restated and generalized in Estate and Trust Code Section 7203 (verification required).

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

Comment. Former Section 1355 is replaced by Estate and Trust Code Section 12405 (notice of hearing). Section 12405 no longer provides for a three-month hearing date or a 90-day publication provision.

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

Comment. Subdivisions (a) and (b) of former Section 1356 are restated in Estate and Trust Code Section 12406(a) and (b) (determination whether person is person presumed to be dead; search for

missing person) without substantive change. Subdivision (c) is replaced by Estate and Trust Code Section 12406(c).

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

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

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

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

Probate Code § 1359 (repealed). Application of chapter

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