

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**Revised and Supplemental Comments**

**to the**

**New Probate Code**

**September 1990**

**California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739**

# THE CALIFORNIA LAW REVISION COMMISSION

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## NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 20 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1991.

Cite this pamphlet as *Revised and Supplemental Comments to the New Probate Code*, 20 Cal. L. Revision Comm'n Reports 2001 (1990).

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## PREFACE

Upon recommendation of the Law Revision Commission, the 1990 session of the California Legislature enacted a new Probate Code. The new code (enacted by Chapter 79 of the Statutes of 1990) replaced the former Probate Code, which was repealed. The new code becomes operative on July 1, 1991.

The Commission's *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990), included a Law Revision Commission Comment to each section of the new code as recommended by the Commission.

The official Comments contained in the Commission's *Recommendation Proposing New Probate Code* have been revised and supplemented in this book to reflect revisions made in the new code before its enactment and to reflect amendments, additions, and repeals of provisions of the new code made by other legislation (listed below) enacted upon Commission recommendation in 1990:

1990 Cal. Stat. ch. 140, effectuating *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990)

1990 Cal. Stat. ch. 324, effectuating *Recommendation Relating to Disposition of Small Estate by Public Administrator*, 20 Cal. L. Revision Comm'n Reports 529 (1990)

1990 Cal. Stat. ch. 710, effectuating the following recommendations: *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990); *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990); *Recommendation Relating to Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990); *Recommendation Relating to Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding*, 20 Cal. L. Revision Comm'n Reports 565 (1990); *Recommendation Relating to Priority of Conservator or Guardian for Appointment as Administrator*, 20 Cal. L. Revision Comm'n

Reports 607 (1990); *Recommendation Relating to Notice in Probate Where Address Unknown*, 20 Cal. L. Revision Comm'n Reports 2245 (1990), published in Annual Report (December 1990); *Recommendation Relating to Jurisdiction of Superior Court in Trust Matters*, 20 Cal. L. Revision Comm'n Reports 2253 (1990), published in Annual Report (December 1990)

1990 Cal. Stat. ch. 1307, effectuating *Recommendation Relating to Uniform Management of Institutional Funds Act*, 20 Cal. L. Revision Comm'n Reports 2265 (1990), published in Annual Report (December 1990)

The Comments in this book replace the Comments set out in the recommendations listed above. A Comment in this book includes a reference to the recommendation listed above that is relevant to the particular section. The recommendation will provide useful background information concerning the section.

Any defect believed to exist in the new Probate Code should be brought to the attention of the Commission so that the Commission can study the matter and present any necessary corrections for legislative consideration.



## HOW TO USE THIS BOOK

This book is designed to be used with the Commission's *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990).<sup>1</sup> The official Comments contained in that recommendation remain applicable to the new code as it will become operative on July 1, 1991, except to the extent otherwise indicated in this book.

This book contains Comments that supplement or replace those contained in the Commission's *Recommendation Proposing New Probate Code*. An "Outline of New Probate Code" follows. This Outline can be used to quickly determine the status of a Comment in that recommendation. For an explanation, see the note at the beginning of the Outline.

**Substitute Comments.** Some of the Comments contained in the Commission's *Recommendation Proposing New Probate Code* are no longer accurate because of changes made in the recommended legislation before it was enacted. In these cases, a new Comment has been prepared and is included in this book. The new Comment is to be substituted for the Comment contained in the Commission's recommendation. This type of Comment, which *entirely replaces* the corresponding Comment in the Commission's recommendation, is designated a "Substitute Comment."

A "Substitute Comment" may also be included in this book in some cases where an amendment to a section of the new code was made by other legislation enacted upon Commission recommendation in 1990. Here again, the "Substitute Comment"

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1. This 996 page softcover book contains a Commission prepared Comment to each section of the new Probate Code as recommended for enactment by the Commission. The book can be purchased from California Law Revision Commission, 4000 Middlefield Road, Suite D-2, Palo Alto, CA 94303-4739. The price is \$35.00. California residents add \$2.54 sales tax. The price is subject to change without notice. Checks or money orders should be made payable to the California Law Revision Commission. All sales are subject to payment in advance of shipment, with the exception of purchases by federal, state, county, city, and other governmental agencies.

replaces the original Comment to the section contained in the Commission's recommendation.

**Supplemental Comments.** Where a section of the new code is affected by an amendment made by other legislation enacted in 1990, a Comment that explains *only the amendment* may be included in this book. These supplemental Comments, which are to be used in conjunction with the official Comment contained in the Commission's recommendation, are designated by "1990 Amendment."

**1990 Additions.** Where a section was added to the new code by other legislation enacted upon Commission recommendation in 1990, a new Comment is included in this book. This type of Comment is designated by "1990 Addition" and often will include a reference to the Commission recommendation proposing the section for enactment.

## OUTLINE OF NEW PROBATE CODE

(Reflects Amendments, Additions, and Repeals Made in 1990)

You can determine from this Outline those sections for which this book contains a supplemental or substitute Comment. If you are interested in a particular section, find the section number in the Outline. The Outline will indicate in bold face type whether there is a supplemental or substitute Comment for the section. If there is no such indication, the only relevant Comment is found in the *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990).

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**Chapter 2.5 (consisting of Sections 9680 to 9686, inclusive, was recommended for enactment by the California Law Revision Commission. See *Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative*, 20 Cal. L. Revision Comm'n Reports 31 (1990). The *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990), included Comments to those sections. However, since the sections recommended by the Commission were not enacted by the Legislature, the Comments to the provisions of Chapter 2.5 (commencing with Section 9680) are no longer relevant to the new Probate Code which does not contain the sections.**

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- § 21540. Charitable remainder unitrusts and annuity trusts
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## REVISED AND SUPPLEMENTAL COMMENTS

### § 221 (amended). Exceptions to applicability of chapter

#### 1990 Amendment

**Comment.** Section 221 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 1. The amendment added a reference to Section 6211 (120-hour survival requirement under California statutory will). For background on the 1990 amendment, see *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990).

### § 230 (amended). Petition for purpose of determining survival

#### 1990 Amendment

**Comment.** Section 230 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 2. The amendment added a reference to Section 6211 (120-hour survival requirement under California statutory will). For background on the 1990 amendment, see *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990).

### § 551 (amended). Statute of limitations

#### 1990 Amendment

**Comment.** Section 551 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 3.1 to make clear that the general one-year limitation period for commencement of an action on a cause of action against a decedent under Code of Civil Procedure Section 353 does not apply to an action under this chapter. For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

### § 554 (amended). Damages

#### 1990 Amendment

**Comment.** Section 554 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 3. The 1990 amendment revised subdivision (b)(2) to make clear that the claim must comply with the requirements of Section 9390. This was a technical, nonsubstantive revision.

## § 900 (amended). Applicability of repealed or amended provisions

### 1990 Amendment

**Comment.** Section 900 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 3.5. The section, as enacted by Chapter 79 of the Statutes of 1990, was based on the assumption that Law Revision Commission recommended legislation substituting an agreed attorney fee system for the statutory attorney fee system (Assembly Bill 831 of the 1989-90 regular session) would be enacted in 1990 and would become operative on January 1, 1991. However, Assembly Bill 831 was not enacted.

Assembly Bill 831 would have effectuated the Commission's *Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative*, 20 Cal. L. Revision Comm'n Reports 31 (1990). Although the recommended legislation relating to probate attorney fees was not enacted, other provisions of the same recommendation, such as the provisions relating to compensation of personal representatives, were enacted as a part of the new Probate Code by Chapter 79 of the Statutes of 1990, which became operative on July 1, 1991. Section 900 is amended to reflect that the operative date of the provisions that were enacted as a part of the new Probate Code is July 1, 1991, rather than January 1, 1991.

For another provision having the same effect as Section 900, see Section 10850. See the Comment to that section.

## § 1212 (added). Manner of mailing notice of hearing

### 1990 Addition

**Comment.** Section 1212 (added by 1990 Cal. Stat. ch. 710 § 4) generalizes former Section 17102 (enacted by 1990 Cal. Stat. ch. 79 and repealed by 1990 Cal. Stat. ch. 710 § 45) (manner of giving notice under Trust Law where address is unknown). For background on this section, see *Recommendation Relating to Notice in Probate Where Address Unknown*, 20 Cal. L. Revision Comm'n Reports 2245 (1990).

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

### Substitute Comment

**Comment.** Section 1215 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 5.



As enacted, Section 1215 continued Section 1215 of the repealed Probate Code without substantive change, but subdivision (d) made clear that the rule provided by that subdivision is limited to proceedings under this code concerning the administration of a decedent's estate. The 1990 amendment revised subdivision (d) to delete the authority to mail notice to the person at the county seat where the proceedings are pending and to provide a cross reference to Section 1212 governing the manner of giving notice to a person whose address is unknown. For background on the 1990 amendment, see *Recommendation Relating to Notice in Probate Where Address Unknown*, 20 Cal. L. Revision Comm'n Reports 2245 (1990).

Deposit for collection in the United States mail includes deposit in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service.

The introductory clause makes clear that this section does not apply to the extent that the applicable mailing provision expressly provides a different rule. This section does not apply where service is required to be made by mail in the manner authorized in Section 415.30 of the Code of Civil Procedure. See Section 1467 and the Comment thereto. This section does not apply where service is made out-of-state in the manner provided in Section 415.40 of the Code of Civil Procedure. For special notice provisions relating to guardianships and conservatorships, see Sections 1460-1467. See also Section 5 (certified mail sufficient compliance with requirement of use of registered mail).

Subdivision (e) makes clear that the applicable period of notice is not extended where a notice or other paper is mailed.

This part does not apply to the giving of a particular notice where the notice was delivered, mailed, posted, or first published before July 1, 1991. See Section 1200(c). As to the application of any amendments made after that date, see Section 3.

#### **Background on Section 1215 of Repealed Code**

Section 1215 was a new provision added by 1987 Cal. Stat. ch. 923 § 60. The section was amended by 1988 Cal. Stat. ch. 1199 § 60.7. The section was drawn in part from Section 1465 (Guardianship-Conservatorship Law) of the repealed Probate Code and also generalized part of former Probate Code Section 328 (repealed by 1988 Cal. Stat. ch. 1199 § 40).

## **§ 1220 (amended). General manner of mailing notice of hearing**

### **1990 Amendment**

**Comment.** Section 1220 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 6. The 1990 amendment revised subdivision (a)(3) to adopt the general

rule applicable where notice is required to be mailed to a person whose address is unknown. See the Comment to Section 1212. For background on the 1990 amendment, see *Recommendation Relating to Notice in Probate Where Address Unknown*, 20 Cal. L. Revision Comm'n Reports 2245 (1990).

### **§ 2333 (amended). Limitation period for suit against sureties on bond**

#### **1990 Amendment**

**Comment.** Section 2333 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 7. The amendment deleted subdivision (c) to make the rule under Section 2333 consistent with the rule for decedents' estates. See Section 8488. For background on the 1990 amendment, see *Recommendation Relating to Limitation Period for Action Against Surety in Guardianship or Conservatorship Proceeding*, 20 Cal. L. Revision Comm'n Reports 565 (1990).

### **§ 2356 (amended). Prohibited treatment and drugs**

#### **1990 Amendment**

**Comment.** Section 2356 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 8. The 1990 amendment revised subdivision (a) to resolve an inconsistency in language between the first and second sentences. This amendment recognizes that the provisions of the Welfare and Institutions Code (part of the Lanterman-Petris-Short Act) cited in the second sentence govern situations where a person may be involuntarily placed (e.g., Welf. & Inst. Code §§ 5150, 5350.1), detained (e.g., Welf. & Inst. Code § 5151), confined (e.g., Welf. & Inst. Code § 5260), or committed (e.g., Welf. & Inst. Code § 5300). The language as revised is also consistent with Section 3211(a). The 1990 amendment also recognizes the court's power under Section 2357 to authorize treatment in the case of a serious threat to the mental health of the ward or conservatee. See Section 2357. For background on the 1990 amendment, see *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990).

## **§ 2357 (amended). Court-authorized medical treatment for ward or conservatee**

### **1990 Amendment**

**Comment.** Section 2357 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 9. The amendment expanded subdivision (h)(2) to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 3208. For background on the 1990 amendment, see *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990).

## **§ 2501 (amended). Matters relating to real property**

### **1990 Amendment**

**Comment.** Section 2501 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 10. The amendment revised subdivision (b) to increase the limit on extending, renewing, or modifying a lease without court approval from \$1,500 to \$5,000. See also Section 2555 (execution of lease by guardian or conservator). For a comparable provision relating to personal representatives, see Section 9832. For background on the 1990 amendment, see *Recommendation Relating to Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990).

## **§ 2555 (amended). Leases permitted without court authorization**

### **1990 Amendment**

**Comment.** Section 2555 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 11. The amendment increased the limit on executing a lease without court approval from \$1,500 to \$5,000. See also Section 2501 (extension, renewal, or modification of lease by guardian or conservator). For a comparable provision relating to personal representatives, see Section 9941. For background on the 1990 amendment, see *Recommendation Relating to Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990).

## **§ 3208 (amended). Court-authorized medical treatment for person unable to consent to treatment**

### **1990 Amendment**

**Comment.** Section 3208 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 12. The amendment expanded subdivision (a)(2) to include a serious threat to mental health as a condition that justifies court authorization of medical treatment. See also Section 2357. For background on the 1990 amendment, see *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990).

## **§ 6111 (amended). Holographic will**

### **1990 Amendment**

**Comment.** Section 6111 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 13 to continue language added to the repealed Probate Code by 1990 Cal. Stat. ch. 263 § 1.

## **§ 6111.5 (added). Admissibility of extrinsic evidence**

### **1990 Addition**

**Comment.** Section 6111.5 was added to the new Probate Code by 1990 Cal. Stat. ch. 710 § 14. The section continues Section 6111.5 of the repealed Probate Code (added by 1990 Cal. Stat. ch. 263 § 2) without change.

## **§ 6140. Intention of testator**

### **Substitute Comment**

**Comment.** Section 6140 continues Section 6140 of the repealed Probate Code without change. This section is drawn from Section 2-603 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2. Nothing in the section limits the extent to which extrinsic evidence admissible under former law may be used to determine the testator's intent as expressed in the will. See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 160-62, at 5676-79 (8th ed. 1974). See also Section 6111.5 (admissibility of extrinsic evidence). Section 6140 does not apply if the testator died before January 1, 1985. See Section 6103. As to the application of any amendments made after that date, see Section 3. See also Section 12206 (limitation in will of time for administration of estate is directory only).

**Background on Section 6140 of Repealed Code**

Section 6140 was added by 1983 Cal. Stat. ch. 842 § 55 and amended by 1984 Cal. Stat. ch. 892 § 24. The section superseded the second sentence of former Probate Code Section 101 (repealed by 1983 Cal. Stat. ch. 842 § 18). For background on the provisions of this part, see the Comment to this part under the part heading. The 1984 amendment substituted language drawn from Section 2-603 of the Uniform Probate Code (1987) for the former language of the section. This change was nonsubstantive. See *Communication of Law Revision Commission Concerning Assembly Bill 2290*, 18 Cal. L. Revision Comm'n Reports 77, 86 (1986). See also *Recommendation Relating to Revision of Wills and Intestate Succession Law*, 17 Cal. L. Revision Comm'n Reports 537 (1984).

**§ 6211 (added). 120-hour survival requirement****1990 Addition**

**Comment.** Section 6211 was added to the new Probate Code by 1990 Cal. Stat. ch. 710 § 15 to provide a 120-hour survival rule for the beneficiary of a statutory will. Section 6211 is the same in substance as Section 6403 (requirement that heir survive decedent by 120 hours). Section 6211 does not apply if the testator died before the operative date of the section. See Section 6247. See also Section 230 (petition to determine for the purposes of Section 6211 whether one person survived another). For background on this section, see *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990).

**§ 6247 (amended). Will includes only texts of clauses as they exist when will is executed****Substitute Comment**

**Comment.** Section 6247 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 16 to add the second sentence to subdivision (b). See Section 6211 (120-hour survival requirement). For background on the 1990 amendment, see *Recommendation Relating to Survival Requirement for Beneficiary of Statutory Will*, 20 Cal. L. Revision Comm'n Reports 549 (1990).

The 1990 amendment to Section 6247 also inadvertently deleted language found in new Probate Code Section 6247 that was not found in Section 6247 of the repealed Probate Code: The new Probate Code had added references in subdivision (b) to Sections 6243, 6245, and 6246. Those sections were been revised in the new Probate Code to restore the substance of the language found in the provisions when they were enacted by 1982 Cal. Stat. ch. 1401, § 1 (later repealed by 1983 Cal. Stat. ch. 842).

Subdivision (c) validates California statutory wills executed on or after January 1, 1985, on a form prepared for use under the prior law; such wills are governed by the prior law except as provided in subdivision (b). Subdivision (d) makes clear that a California statutory will executed on a form which incorporates a reference to former Section 1120.2 of the repealed Probate Code is not invalid for that reason. Section 6247 does not apply if the testator died before January 1, 1985. See Section 6103. As to the application of any amendments made after that date, see Section 3. See also Section 6226(d) (effect of marriage dissolution or annulment on disposition and nomination provisions).

**Background on Section 6247 of Repealed Code**

Section 6247 was added by 1983 Cal. Stat. ch. 842 § 55 and was amended by 1984 Cal. Stat. ch. 892 § 37 and 1987 Cal. Stat. ch. 923 § 85.7. Subdivision (a) continued the substance of former Probate Code Section 56.14 (repealed by 1983 Cal. Stat. ch. 842 § 18). For background on the provisions of this part, see the Comment to this part under the part heading. The 1984 amendment added subdivisions (b) and (c). See *Communication of Law Revision Commission Concerning Assembly Bill 2290*, 18 Cal. L. Revision Comm'n Reports 77, 88-89 (1986). See also *Recommendation Relating to Revision of Wills and Intestate Succession Law*, 17 Cal. L. Revision Comm'n Reports 537 (1984). The 1987 amendment added subdivision (d). See *Communication from California Law Revision Commission Concerning Assembly Bill 708*, 19 Cal. L. Revision Comm'n Reports 545, 559 (1988).

**§ 6522 (amended). Property out of which homestead selected**

**1990 Amendment**

**Comment.** Section 6522 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 17 to remove any implication that the decedent's separate property may not be used for a probate homestead for both the surviving spouse and the minor children.

**§ 6611 (amended). Liability for unsecured debts of decedent**

**1990 Amendment**

**Comment.** Section 6611 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 4.1 to delete former subdivision (c), which conflicted with Code of Civil Procedure Section 353 (statute of limitations), and to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 6611. For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## § 7622. Manner of administration; compensation of public administrator

### Substitute Comment

**Comment.** Section 7622 continues Section 7622 of the repealed Probate Code without substantive change, except that the reference to the court fixing the compensation of the public administrator's attorney in the first sentence of subdivision (b) has been omitted. The public administrator must file an inventory, commence actions for the recovery or protection of property, render accounts, and deliver the property of the estate in the same manner as personal representatives generally. See also Sections 7621(d) (bond fee), 7623 (additional compensation), 7666 (compensation when summary disposition procedure used).

### Background on Section 7622 of Repealed Code

Section 7622 was added by 1988 Cal. Stat. ch. 1199 § 80.5. The section restated former Probate Code Section 1142 (repealed by 1988 Cal. Stat. ch. 1199 § 57.5) without substantive change. The section was amended by 1989 Cal. Stat. ch. 21 § 16 to make clear that the section applies in estate administration proceedings throughout the code, whether pursuant to this division or any other division of the code, and to incorporate provisions added by Chapter 280 of the Statutes of 1988. See *Communication from the California Law Revision Commission Concerning Assembly Bill 156*, 20 Cal. L. Revision Comm'n Reports 227, 230 (1990). For background on the provisions of this chapter, see the Comment to this chapter under the chapter heading.

## § 7623. Additional compensation

### Substitute Comment

**Comment.** Section 7623 continues Section 7623 of the repealed Probate Code without substantive change.

### Background on Section 7623 of Repealed Code

Section 7623 was added by 1988 Cal. Stat. ch. 1199 § 80.5. The section restated former Probate Code Section 1142.3 (repealed by 1988 Cal. Stat. ch. 1199 § 57.5) without substantive change. For background on the provisions of this chapter, see the Comment to this chapter under the chapter heading.

## § 7662 (amended). Priority for payments from estate

### Substitute Comment

**Comment.** Section 7662 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 18. The section as amended continues Section 7662 of the repealed Probate Code revised to incorporate the order of payment prescribed by Section 11420.

Tax and other claims of public entities are entitled to priority under Section 11420. Because no notice to creditors is given pursuant to this article, the time for making claims is extended to the time of distribution

of the decedent's property, and recipients of the property remain liable for creditor claims. See Section 7664 (liability for decedent's unsecured debts). Distribution may not be made until at least four months after commencement of administration. See Section 7663 (distribution of property).

#### **Background on Section 7662 of Repealed Code**

Section 7662 was added by 1988 Cal. Stat. ch. 1199 § 80.5. The section restated the second sentence of subdivision (a) of former Probate Code Section 1143 and a portion of subdivision (b) of former Probate Code Section 1143 (provisions repealed by 1988 Cal. Stat. ch. 1199 § 57.5), with the addition of specific references to fees and costs of administration. For background on the provisions of this chapter, see the Comment to this chapter under the chapter heading.

### **§ 7663 (amended). Distribution of property**

#### **1990 Amendment**

**Comment.** Section 7663 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 324 § 2 to make clear that the procedure for disposition of unclaimed funds in the county treasury provided by Government Code Sections 50050-50056 applies to funds deposited by the public administrator under subdivision (b). Although the county treasurer has the duty to administer the funds deposited, a public record of the deposit is maintained by the State Controller under this section as well as by the public administrator pursuant to Section 7665.

It should be noted that, while claims for funds deposited under subdivision (b) are processed under the general Government Code provisions, claims for funds deposited with the county treasurer under Section 11850 are processed by the court under Section 11854. Deposit with the county treasurer under subdivision (b) is an exception to the deposit procedure generally applicable in estate administration. See Sections 11900 (distribution to state) and 7622 (general administration rules apply except as otherwise provided in this chapter). For background on the 1990 amendment, see *Recommendation Relating to Disposition of Small Estate by Public Administrator*, 20 Cal. L. Revision Comm'n Reports 529 (1990).

### **§ 7664 (amended). Liability for decedent's unsecured debts**

#### **1990 Amendment**

**Comment.** Section 7664 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 5.1 to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to



liability for the decedent's debts under Section 7664. For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 7666 (amended). Compensation of public administrator and attorney for public administrator**

### **Substitute Comment**

**Comment.** Section 7666 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 19. The section as amended continues Section 7666 of the repealed Probate Code without substantive change.

### **Background on Section 7666 of Repealed Code**

Section 7666 was added by 1988 Cal. Stat. ch. 1199 § 80.5. The section superseded subdivision (c) of former Probate Code Section 1143 and the second sentence of former Probate Code Section 1144 (provisions repealed by 1988 Cal. Stat. ch. 1199 § 57.5). The 1990 amendment added language found in the repealed code section relating to the compensation of the attorney of the public administrator. As originally enacted in the new Probate Code, Section 7666 had been revised to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 7666 was amended by 1990 Cal. Stat. ch. 710 § 19 to reflect this fact. See the Comment to Section 900. For background on the provisions of this chapter, see the Comment to this chapter under the chapter heading.

## **§ 8404. Statement of duties and liabilities**

### **Substitute Comment**

**Comment.** Section 8404 continues Section 8404 of the repealed Probate Code with the following revisions:

(1) Subdivision (a) has been revised to except the public administrator from the requirement of filing an acknowledgment of receipt of the statement of duties and liabilities.

(2) The second sentence of subdivision (a) has been revised to eliminate the reference to the form provided in former subdivision (c).

(3) The form stating the personal representative's duties and liabilities in former subdivision (c) has been omitted because the form was superseded by the Judicial Council Form DE 147 (July 1, 1989).

Although the statement of duties and liabilities must be in the form prescribed by the Judicial Council, the attorney for the personal representative may supplement, explain, or otherwise address the subject matter separately, where appropriate.

### **Background on Section 8404 of Repealed Code**

Section 8404 was added by 1988 Cal. Stat. ch. 1199 § 81.5. The section was a new provision drawn from general instructions given to personal representatives by a

number of courts. Section 8404 was amended by 1989 Cal. Stat. ch. 21 § 17 to amend item 4 in subdivision (c) to conform with Section 8800. See *Communication from the California Law Revision Commission Concerning Assembly Bill 156*, 20 Cal. L. Revision Comm'n Reports 227, 230 (1990). For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 8461 (amended). Priority for appointment**

### **1990 Amendment**

**Comment.** Section 8461 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 20. The amendment revised subdivision (o) to limit the priority for a conservator or guardian of the estate to the case where a first account has been filed (Section 2620) and the conservator or guardian is not acting in that capacity for any other person. See also Section 8469 (court discretion to give priority to conservator or guardian where requirements of Section 8461 not met). For background on the 1990 amendment, see *Recommendation Relating to Priority of Conservator or Guardian for Appointment as Administrator*, 20 Cal. L. Revision Comm'n Reports 607 (1990).

## **§ 8469 (added). Conservator or guardian who does not meet requirements of Section 8461**

### **1990 Addition**

**Comment.** Section 8469 was added to the new Probate Code by 1990 Cal. Stat. ch. 710 § 21. The section permits the court to allow the priority given by Section 8461 to a conservator or guardian of the estate of the decedent serving in that capacity at the time of death, notwithstanding that the conservator or guardian fails to satisfy the other requirements of Section 8461. For background on this section, see *Recommendation Relating to Priority of Conservator or Guardian for Appointment as Administrator*, 20 Cal. L. Revision Comm'n Reports 607 (1990).

## **§ 8547 (amended). Compensation of special administrator and attorney for special administrator**

### **Substitute Comment**

**Comment.** Section 8547 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 22. The section as amended continues Section 8547 of the repealed Probate Code without substantive change.

### **Background on Section 8547 of Repealed Code**

Section 8547 was added by 1988 Cal. Stat. ch. 1199 § 81.5. Subdivisions (a)-(c) of Section 8547 of the repealed Probate Code restated former Probate Code Sections 467-

468 (repealed by 1988 Cal. Stat. ch. 1199 § 46), 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) of Section 8547 of the repealed Probate Code superseded former Probate Code Section 469 (repealed by 1988 Cal. Stat. ch. 1199 § 46), and was amended by 1989 Cal. Stat. ch. 21 § 20 to incorporate material omitted in the recodification of former Section 469. See *Communication from the California Law Revision Commission Concerning Assembly Bill 156*, 20 Cal. L. Revision Comm'n Reports 227, 230 (1990). The 1990 amendment added a reference in subdivision (a) to fixing the compensation of the attorney for the special administrator and restored subdivisions (c) and (d) so that the amended section conformed to Section 8547 of the repealed code. As originally enacted in the new Probate Code, Section 8547 had been revised to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 8547 was amended by 1990 Cal. Stat. ch. 710 § 22 to reflect this fact. See the Comment to Section 900. For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 8907. Fee for appraisal by personal representative**

### **Substitute Comment**

**Comment.** Section 8907 continues Section 8907 of the repealed Probate Code with the omission of the reference to the personal representative's attorney. It should be noted that the limitation in this section applies only to appraisal of property; it does not affect estate tax work performed by the attorney.

#### **Background on Section 8907 of Repealed Code**

Section 8907 was added by 1988 Cal. Stat. ch. 1199 § 82.5. The section restated subdivision (c) of former Probate Code Section 605 (repealed by 1988 Cal. Stat. ch. 1199 § 51) and expanded it to preclude extra compensation not only for appraising cash items but also for appraising other property in the estate. For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 9050 (amended). Notice required**

### **1990 Amendment**

**Comment.** Section 9050 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 6.1 to require the personal representative to give notice to a creditor if the personal representative has knowledge of the creditor at any time during estate administration. If the personal representative first has knowledge of the creditor more than four months after letters were issued, the personal representative must give notice within 30 days after the personal representative first has knowledge of the creditor. See Section 9051(c) (time of notice). Such a notice does not extend the creditor's time to file a claim. See Section 9100 (claim period). However, the creditor may petition to file a late claim. See Section 9103 (late claims). For

background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

### **§ 9051 (amended). Time of notice**

#### **1990 Amendment**

**Comment.** Section 9051 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 7.1 to require the personal representative to give notice to a creditor within 30 days after the personal representative first has knowledge of the creditor, in cases where the personal representative first has knowledge of the creditor more than four months after letters were issued. This implements the requirement of Section 9050 (notice required) that the personal representative must give notice to the creditor even if the personal representative first has knowledge of the creditor after expiration of the claim filing period. Such a notice does not extend the creditor's time to file a claim. See Section 9100 (claim period). However, the creditor may petition to file a late claim. See Section 9103 (late claims). For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

### **§ 9052 (amended). Form of notice**

#### **1990 Amendment**

**Comment.** Section 9052 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 8.1 to revise the form of notice of administration so that it would inform the creditor of the opportunity to petition to file a late claim. This implements the requirement of Section 9050 that the personal representative give notice to the creditor even if the personal representative first has knowledge of the creditor after expiration of the claim filing period. Such a notice does not extend the creditor's time to file a claim. See Section 9100 (claim period). However, the creditor may petition to file a late claim. See Section 9103 (late claims). For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 9100 (amended). Claim period**

### **1990 Amendment**

**Comment.** Section 9100 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 9.1 to make clear that notice to a creditor given after expiration of the claim filing period under Sections 9050 (notice required) and 9051 (time of notice) does not extend the creditor's time to file a claim. However, the creditor may petition to file a late claim. See Section 9103 (late claims). For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 9103 (amended). Late claims**

### **1990 Amendment**

**Comment.** Section 9103 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 10.1 to delete former subdivision (b), which limited the types of claims eligible for late claim treatment. It should be noted that a creditor who is omitted because the creditor had no knowledge of the administration is not limited to the remedy provided in this section. If assets have been distributed, a remedy may be available against distributees under Section 9392 (liability of distributee). If the creditor can establish that the lack of knowledge is a result of the personal representative's bad faith failure to notify known creditors under Chapter 2 (commencing with Section 9050) (notice to creditors), recovery may be available against the personal representative personally or on the bond, if any. See Section 11429 (unpaid creditor). See also Section 9053 (immunity of personal representative).

The 1990 amendment renumbered former subdivision (c) to be subdivision (b) and revised new subdivision (b)(2) to make clear that a late claim should not be permitted if the statute of limitations has run on the claim. This is the consequence of the rule stated in Section 9253 that a claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge. Under Code of Civil Procedure Section 353, the statute of limitations runs one year after the decedent's death.

For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 9201 (amended). Claims governed by special statutes**

### **1990 Amendment**

**Comment.** Section 9201 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 11.1 to make clear that the section applies notwithstanding statutes located in places other than this part. Specifically, Section 9201 applies notwithstanding Code of Civil Procedure Section 353 (general statute of limitations running one year from the decedent's death). For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 9390 (amended). Claim covered by insurance**

### **1990 Amendment**

**Comment.** Section 9390 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 23. The 1990 amendment amended subdivision (c) to make clear that the subdivision is not an independent authorization for reimbursement of the insurer's costs and attorney's fees, but only a procedure for recovering those costs and attorney's fees if the decedent is liable under the contract. This amendment is a clarification of, and not a change in, existing law.

## **§ 9391 (amended). Enforcement of security interest**

### **1990 Amendment**

**Comment.** Section 9391 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 12.1 to except an action to enforce a lien from the one-year statute of limitations in Code of Civil Procedure Section 353. The statute of limitations otherwise applicable to an action to enforce the lien continues to apply notwithstanding Section 353. For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 9392 (added). Liability of distributee**

### **1990 Addition**

**Comment.** Section 9392 was added to the new Probate Code by Section 13.1 of Chapter 140 of the Statutes of 1990. The section implements the rule of *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), that the claim of a known or reasonably ascertainable creditor whose claim is not merely conjectural but who is

not given actual notice of administration may not be cut off by a short claim filing requirement. Section 9392 is intended as a limited remedy to cure due process failures only, and is not intended as a general provision applicable to all creditors.

A creditor who has knowledge of estate administration must file a claim or, if the claim filing period has expired, must petition for leave to file a late claim. See Sections 9100 (time for filing claims) and 9103 (late claims). This rule applies whether the creditor's knowledge is acquired through notification under Section 9050 (notice required), by virtue of publication under Section 8120 (publication required), or otherwise.

Under Section 9392, a creditor who has no knowledge of estate administration before an order is made for distribution of property has a remedy against distributees to the extent payment cannot be obtained from the estate. There is a one year statute of limitations, commencing with the date of the decedent's death, for an action under this section by the creditor. See Code Civ. Proc. § 353. Subdivision (c) is a specific application of the general purpose of this section to subject a distributee to personal liability but not to require rescission of a distribution already made.

An omitted creditor may also have a cause of action against a personal representative who in bad faith fails to give notice to a known creditor. See Sections 9053 (immunity of personal representative) and 11429 (unpaid creditor).

For background on this section, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 9651. Taking possession of property in good faith**

### **Substitute Comment**

**Comment.** Section 9651 continues Section 9651 of the repealed Probate Code except that the section omits the language that provided for the court awarding the attorney for the personal representative reasonable compensation for services rendered in connection with the duties specified in the section. As to orders made, or actions taken, before July 1, 1988, and matters pending on July 1, 1988, see Section 9645.

### **Background on Section 9651 of Repealed Code**

Section 9651 was added by 1987 Cal. Stat. ch. 923 § 93. The section restated subdivision (c) of former Probate Code Section 571 (repealed by 1987 Cal. Stat. ch. 923 § 35) without substantive change. For background on the provisions of this part, see the Comment to this part under the part heading.

Chapter 2.5 (consisting of Sections 9680 to 9686, inclusive, was recommended for enactment by the California Law Revision Commission. See *Recommendations*

*Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative*, 20 Cal. L. Revision Comm'n Reports 31 (1990). The *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm'n Reports 1001 (1990), included Comments to those sections. However, since the sections recommended by the Commission were not enacted by the Legislature, the Comments to the provisions of Chapter 2.5 (commencing with Section 9680) are no longer relevant to the new Probate Code which does not contain the sections.

## **§ 9832 (amended). Matters relating to real property**

### **1990 Amendment**

**Comment.** Section 9832 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 24 to increase the limit on extending, renewing, or modifying a lease without court authorization from \$1,500 to \$5,000. See also 9941 (execution of lease by personal representative). For a comparable provision relating to guardians and conservators, see Section 2501. For background on the 1990 amendment, see *Recommendation Relating to Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990).

## **§ 9941 (amended). Leases permitted without court authorization**

### **1990 Amendment**

**Comment.** Section 9941 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 25 to increase the limit on executing a lease without court authorization from \$1,500 to \$5,000. See also Section 9832 (extension, renewal, or modification of lease by personal representative). For a comparable provision relating to guardians and conservators, see Section 2555. For background on the 1990 amendment, see *Recommendation Relating to Execution or Modification of Lease Without Court Order*, 20 Cal. L. Revision Comm'n Reports 557 (1990).

## **§ 10168 (added). Agreement dividing compensation between cooperating agents and brokers**

### **1990 Addition**

**Comment.** Section 10168 was added to the new Probate Code by 1990 Cal. Stat. ch. 710 § 26. The section provides a general rule consistent with the special rules concerning division of compensation between cooperating agents and brokers in Sections 10162.7(b), 10164(c), and 10165(c)(3).



**§ 10404.5 (repealed). Hiring and paying attorney and others authorized whether or not independent administration authority granted**

**Substitute Comment**

**Comment.** Section 10404.5 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was repealed by 1990 Cal. Stat. ch. 710 § 27. Section 10404.5 was included in the new Probate Code because Assembly Bill 831 of the 1989-1990 regular session would have extended the independent administration provisions to cover probate attorney fees. However, Assembly Bill 831 was not enacted, and as a result Section 10404.5 became unnecessary. See the Comment to Section 900.

**§ 10406 (amended). Application of part where independent administration authority granted under repealed Probate Code**

**Substitute Comment**

**Comment.** Section 10406 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 28.

The 1990 amendment deleted subdivision (c). This subdivision was included in the new Probate Code section because Assembly Bill 831 of the 1989-1990 regular session would have extended the independent administration provisions to cover probate attorney fees. However, Assembly Bill 831 was not enacted, and as a result subdivision (c) became unnecessary. See the Comment to Section 900.

Section 10406 as amended in 1990 continues Section 10406 of the repealed Probate Code with the changes described below.

Subdivision (a) supersedes subdivisions (a) and (b) of Section 10406 of the repealed Probate Code. Under the superseded provisions, a personal representative who was granted authority prior to January 1, 1985, to administer the estate under the Independent Administration of Estates Act was governed by the provisions of the Independent Administration of Estates Act that were applicable at the time the petition requesting independent administration authority was granted. But the superseded provisions included an exception that allowed a personal representative who was granted independent administration authority prior to January 1, 1985, to exercise the authority granted by this part of the repealed Probate Code where a petition was filed after that date requesting authority to administer the estate under the independent administration statute in effect at the time the petition was filed and the

petition was granted. Subdivision (a) Section 10406 abandons this now obsolete scheme and simplifies the law by providing that—subject to subdivision (b)—this part applies to all proceedings where independent administration authority has been granted, whether under the new Probate Code, under the provisions of the repealed Probate Code, or under the provisions of the Probate Code in effect prior to January 1, 1985. As to the application of any amendments made after that date, see Section 3.

Subdivision (b) continues subdivision (c) of Section 10405 of the repealed Probate Code without change. Subdivision (b) preserves the authority of a personal representative prior to July 1, 1988, to borrow money secured by real property where the personal representative was granted authority that did not include the authority to sell, exchange, or grant an option to purchase real property. Under the law in effect prior to July 1, 1988, such a personal representative had authority to borrow money with the loan secured by an encumbrance upon real property of the estate. This part of the repealed Probate Code (which became operative on July 1, 1988) added an additional limitation on the authority of a personal representative whose authority does not include authority to sell, exchange, or grant an option to purchase real property: Such a personal representative does not have authority to borrow money with the loan secured by an encumbrance upon real property of the estate. See Section 10403 (defining “limited authority”) and the Comment to that section; see also Section 10501(b) and the Comment to that section. Subdivision (b) of Section 10406 makes clear that this additional limitation does not apply to a personal representative who was granted independent administration authority prior to July 1, 1988. Such a personal representative may borrow money on or after July 1, 1988, on a loan secured by real property of the estate, notwithstanding that the personal representative does not have authority to sell real property of the estate.

#### **Background on Section 10406 of Repealed Code**

Section 10406 was a new provision added by 1987 Cal. Stat. ch. 923 § 93. For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 10500. Administration without court supervision**

### **Substitute Comment**

**Comment.** Section 10500 continues Section 10500 of the repealed Probate Code without change.

As the introductory clause of subdivision (a) recognizes, a personal representative who has been granted only limited authority under this part may not exercise authority with respect to matters not included within the

scope of the authority granted. See Section 10501(b) (limited authority excludes power to sell, exchange, or grant option to purchase real property, or to borrow money with the loan secured by an encumbrance upon real property, using independent administration procedure). See also Sections 10403, 10450(b)(2), 10452 (limited authority); Section 10502 (decedent's will may restrict powers exercisable under independent administration authority).

Notwithstanding that full authority has been granted, some actions can be taken only under court supervision. See Section 10501 (court supervision required for allowance of compensation of the personal representative and attorney for personal representative, settlement of accounts, preliminary and final distributions and discharge, and certain transactions involving a possible conflict of interest on the part of the personal representative or the personal representative's attorney). See also Section 10401 (defining "court supervision").

The introductory clause of subdivision (a) also recognizes that independent administration authority must be exercised in compliance with the provisions of this part. Some actions can be taken only if the notice of proposed action procedure is followed. See Article 2 (commencing with Section 10510), Article 3 (commencing with Section 10530) (actions requiring notice of proposed action); see also Chapter 4 (commencing with Section 10580) (notice of proposed action procedure). For a general provision concerning the exercise of powers under this part, see Section 10502. See also the Comment to Section 10502.

Subdivision (b) makes clear that the personal representative may obtain court supervision of an action even though the personal representative is authorized to take the action using the independent administration procedure. For example, even though the personal representative has been granted full authority (full authority includes the power to sell real property using the independent administration procedure), the personal representative may nevertheless determine to sell the real property using the court supervised procedure for a real property sale. If the personal representative determines to use the court supervised procedure, all the requirements of the court supervised procedure apply to the same extent that they would apply if the personal representative had not been granted independent administration authority. See Section 10401 (defining "court supervision"). For example, except as provided in Sections 10301-10303, the requirement that notice of sale be published must be satisfied. See Section 10300. See also Section 10303 (notice of sale need not be published where decedent's will directs or authorizes the sale).

Where the personal representative decides to obtain court supervision of an action even though the personal representative is authorized to take the action using the independent administration procedure and no other procedure is provided by statute for court supervision of the particular proposed action, the personal representative may petition for instructions under Section 9611. For example, there being no specific procedure for obtaining authority under supervised administration for incorporation of the decedent's unincorporated business (see Section 10512), the personal representative may elect to petition for instructions under Section 9611 rather than using the notice of proposed action procedure under Chapter 4 (commencing with Section 10580). See also Section 10580(b) (personal representative may use notice of proposed action procedure for an action that could be taken without giving notice of proposed action).

As to the application of this part where independent administration authority was granted under the repealed Probate Code, see Section 10406.

**Background on Section 10500 of Repealed Code**

Section 10500 was added by 1987 Cal. Stat. ch. 923 § 93. Subdivision (a) restated the first sentence and the first portion of the second sentence of subdivision (a) of former Probate Code Section 591.2 (repealed by 1987 Cal. Stat. ch. 923 § 35) without substantive change. See also Section 10401 (defining "court supervision"). Subdivision (b) restated the first sentence of subdivision (b) of former Section 591.2 (repealed by 1987 Cal. Stat. ch. 923 § 35) without substantive change. For background on the provisions of this part, see the Comment to this part under the part heading.

**§ 10501 (amended). Matters requiring court supervision**

**Substitute Comment**

**Comment.** Section 10501 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 29.

As originally enacted, Section 10501 had revised the language taken from Section 10501 of the repealed Probate Code to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have extended the independent administration provisions to cover probate attorney fees. However, Assembly Bill 831 was not enacted, and as a result the revisions the new Probate Code made in Section 10501 became unnecessary and were deleted by the 1990 amendment. See the Comment to Section 900.

Section 10501 as amended continues Section 10501 of the repealed Probate Code without substantive change.

The types of actions described in paragraphs (5)-(10) of subdivision (a) are ones where there often will be a conflict of interest.

Paragraphs (5)-(7) of subdivision (a) make clear that the personal representative cannot use the independent administration procedure to do any of the following:

(1) Sell estate property to the personal representative or the personal representative's attorney.

(2) Exchange estate property for property of the personal representative or the personal representative's attorney.

(3) Grant an option to purchase estate property to the personal representative or the personal representative's attorney.

The prohibitions of paragraphs (5)-(7) are subject to the qualification that the independent administration procedure may be used for the transaction when it is between the personal representative as such and the personal representative as an individual and the requirements of subdivision (c) of Section 10501 are satisfied. Special supervised administration provisions govern the transactions described in paragraphs (5)-(7). See, e.g., Sections 9880-9885. A purchase by or exchange with the personal representative or the personal representative's attorney may be accomplished only to the extent allowed under these special provisions and is subject to their limitations and requirements. Under these provisions, the purchase is permitted only if all known heirs or devisees give written consent to the purchase (Section 9881) and the court approves the purchase (Section 9883). The personal representative or personal representative's attorney may purchase property of the estate pursuant to a contract made during the lifetime of the decedent only if the statutory supervised administration requirements are satisfied. See Sections 9860-9868, 9884. The personal representative or personal representative's attorney may exercise an option to purchase property of the estate given in the will of the decedent only if the statutory supervised administration requirements are satisfied. See Sections 9885, 9980-9983.

Paragraph (8) of subdivision (a) makes clear that the personal representative may not use the independent administration procedure for a claim against the estate by the personal representative or the personal representative's attorney. The personal representative must submit the claim for allowance or rejection by the judge pursuant to Section 9252. Paragraph (8) is subject to the qualification that the independent administration procedure may be used for a claim of the personal representative against the estate if the requirements of subdivision (c) are satisfied.

Paragraphs (9) and (10) of subdivision (a) preclude the use of independent administration to compromise or settle a claim, action, or proceeding of the estate against the personal representative or the

personal representative's attorney or to modify the terms of a debt or similar obligation of the personal representative or the personal representative's attorney to the estate. A special provision governs these transactions. See Sections 9830, 9834. Independent administration procedure may be used for the actions described in paragraphs (9) and (10) between the personal representative as such and the personal representative as an individual if the requirements of subdivision (c) are satisfied.

Paragraph (4) of subdivision (b) requires court supervision if the personal representative has limited authority and proposes to borrow money with the loan secured by an encumbrance upon real property of the estate. This limitation on borrowing money does not affect the powers of a personal representative who was granted independent administration authority prior to July 1, 1988. See Section 10406(b). In connection with subdivision (b), see Sections 10403, 10450(b)(2), 10452 (limited authority). See also Section 10502 (decedent's will may restrict powers exercisable under independent administration authority).

Subdivision (c) permits the use of the independent administration procedure for a transaction between the personal representative as such and the personal representative as an individual under the circumstances described in the subdivision. Subdivision (c) does not permit use of the independent administration procedure where the transaction involves the personal representative's attorney; such a transaction is subject to the applicable court supervision provisions referred to above.

The term "the attorney for the personal representative" is used in a broad sense and includes the associates, partners, and attorneys of counsel with the law firm of the attorney selected by the personal representative and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney selected by the personal representative.

As to the application of this part where independent administration authority was granted under the repealed Probate Code, see Section 10406.

#### **Background on Section 10501 of Repealed Code**

Section 10501 was added by 1987 Cal. Stat. ch. 923 § 93.

Paragraphs (1)-(4) of subdivision (a) restated without substantive change clauses (1)-(3) of the second sentence of subdivision (a) of former Probate Code Section 591.2 (repealed by 1987 Cal. Stat. ch. 923 § 35). Paragraphs (5)-(10) of subdivision (a) were new. Prior law did not expressly provide that the independent administration procedure could not be used for the types of actions listed in those paragraphs.

Paragraphs (1)-(3) of subdivision (b) restated without substantive change clause (4) of the second sentence of subdivision (a) of former Section 591.2 (repealed by 1987 Cal. Stat. ch. 923 § 35). Paragraph (4) of subdivision (b) was new and required court

supervision if the personal representative had limited authority and proposed to borrow money with the loan secured by an encumbrance upon real property of the estate. Under former law, the personal representative with limited authority could use independent administration authority to borrow money with the loan secured by an encumbrance upon real property.

Subdivision (c) was new.

For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 10565 (repealed). Hiring and paying attorneys, advisers, and others**

#### **Substitute Comment**

**Comment.** Section 10565 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was repealed by 1990 Cal. Stat. ch. 710 § 30. This section was included in the new Probate Code because Assembly Bill 831 of the 1989-1990 regular session would have extended the independent administration provisions to cover probate attorney fees. However, Assembly Bill 831 was not enacted, and as a result Section 10565 became unnecessary. See the Comment to Section 900.

### **§ 10585.5 (repealed). Estimated amount of compensation to be included in notice of proposed action; copy of contract**

#### **Substitute Comment**

**Comment.** Section 10585.5 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was repealed by 1990 Cal. Stat. ch. 710 § 31. This section was included in the new Probate Code because Assembly Bill 831 of the 1989-1990 regular session would have extended the independent administration provisions to cover probate attorney fees. However, Assembly Bill 831 was not enacted, and as a result Section 10585.5 became unnecessary. See the Comment to Section 900.

### **§ 10589. Court supervision and notice of hearing required if personal representative has notice of objection**

#### **Substitute Comment**

**Comment.** Section 10589 continues Section 10589 of the repealed Probate Code without substantive change.

Where notice of proposed action is required, subdivision (a) requires that the proposed action be taken only under court supervision if the personal representative has notice of a written objection or a restraining

order with respect to the proposed action. And, when the proposed action is taken under court supervision, all the requirements of the court supervised procedure apply to the same extent that they would apply if the personal representative had not been granted independent administration authority. See Section 10401 (defining “court supervision”). For example, except as provided in Sections 10301-10303, if the proposed action is the sale of real property, notice of sale must be published. See Section 10300.

Subdivision (a) applies not only to a case where notice of proposed action is required but also to a case where notice of proposed action is not required to be given for a proposed action that would require court supervision if independent administration authority had not been granted. See Section 10580(b) (personal representative may give notice of proposed action with respect to a proposed action that could be taken without giving notice of proposed action). If the personal representative elects to give notice of proposed action in such a case, even though not required, subdivision (a) permits the personal representative to take the proposed action only under court supervision if the personal representative has notice of a written objection to the proposed action or of a restraining order issued with respect to the proposed action.

Subdivision (b) applies where the personal representative decides to give notice of proposed action in a case where the personal representative would be authorized to take the proposed action without court supervision even if the personal representative had not been granted independent administration authority. In such a case, if the personal representative has notice of a written objection to the proposed action or of a restraining order issued with respect to the proposed action, subdivision (b) requires that the proposed action be taken only after authorization by court order obtained in a proceeding on a petition for instructions.

The benefit of the procedure provided by subdivision (b) of Section 10580 and subdivisions (a) and (b) of Section 10589 is that the procedure permits a court review of the proposed action before it is taken if the personal representative has notice of an objection rather than having the objection first made after the action has been taken. For further discussion, see the Comment to Section 10580.

What are the consequences if the personal representative goes ahead with the proposed transaction without court supervision after the personal representative has notice of a written objection to the transaction? As far as the third party to the transaction is concerned, the third party is protected if the third party is a bona fide purchaser or a third person



dealing in good faith with the personal representative who changes his or her position in reliance upon the action, conveyance, or transfer, without actual notice of the failure of the personal representative to comply with the court supervision requirements. See Section 10591. As far as the personal representative is concerned, there are two sanctions that would apply where the personal representative goes ahead with a transaction knowing that there is a written objection to the transaction. First, the personal representative can be surcharged if the personal representative violates the standard of ordinary care and diligence established by Section 9600. In view of the objection, the burden is on the personal representative to establish that the action taken satisfied the requirements of Section 9600. Second, taking an action without obtaining court supervision where there has been an objection to the proposed action is grounds for removal of the personal representative. See Section 10592 and the Comment thereto. If the objection was made by serving a restraining order with respect to the proposed action, the personal representative also would be subject to sanctions for violation of the court order.

Subdivision (c) of Section 10589 requires that notice of hearing be given to a person who has made a written objection under Section 10587 or has served a restraining order under Section 10588. Subdivision (c) requires that notice of hearing be given of the hearing on a petition for instructions, or a petition under Section 9684, for an order authorizing a proposed action described in subdivision (b) as well as of a hearing on a petition for court authorization or confirmation of a proposed action described in subdivision (a).

As to the application of this part where independent administration authority was granted under the repealed Probate Code, see Section 10406.

#### **Background on Section 10589 of Repealed Code**

Section 10589 was added by 1987 Cal. Stat. ch. 923 § 93. Subdivision (a) restated the first sentence of subdivision (b) of former Probate Code Section 591.5 (repealed by 1987 Cal. Stat. ch. 923 § 35) without substantive change. Subdivision (b) was new. Subdivision (c) restated subdivision (e) of former Section 591.5 (repealed by 1987 Cal. Stat. ch. 923 § 35) without substantive change. For background on the provisions of this part, see the Comment to this part under the part heading.

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

### **Substitute Comment for Part 7**

**Comment.** This part supersedes Sections 900, 901, 902, 903, 904, 910, and 911 of the repealed Probate Code. For background, see

*Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative*, 20 Cal. L. Revision Comm'n Reports 31 (1990); *Revised and Supplemental Comments to the New Probate Code*, 20 Cal. L. Revision Comm'n Reports 2001 (1990). See also the Comment to Section 900.

## **§ 10800. Compensation for ordinary services**

### **Substitute Comment**

**Comment.** Subdivision (a) of Section 10800 restates a portion of the first sentence of Section 901 of the repealed Probate Code without substantive change. Subdivision (b) restates the first sentence of the second paragraph of Section 901 of the repealed Probate Code without substantive change.

Compensation is computed using the total amount of the appraisal of property in the inventory (see Sections 8800-8802, 8850, 8900), plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property. Property is appraised at its fair market value at the time of the decedent's death. See Section 8802. The amount of any liens or encumbrances on the property is not subtracted from the fair market value used for the purpose of computing the compensation under this section.

A court order allowing the compensation to the personal representative is required before the compensation may be paid, and the compensation allowed is paid out of funds of the estate. See Sections 10830, 10831. As to allowing a portion of the compensation of the personal representative (on account of services rendered up to the time of allowance), see Section 10830. See also Section 12205 (reduction of compensation for delay in closing estate administration).

As to the right of an attorney to receive dual compensation for services as personal representative and as estate attorney, see Section 10804.

Under the introductory clause of Section 10800, the section is subject to Section 10802. Section 10802 provides that, if the decedent's will makes provision for the compensation of the personal representative and the court does not relieve the personal representative from those provisions, the compensation provided by the will shall be the full and only compensation for the services of the personal representative. See also the discussion in the Comment to Section 10802.

As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

Section 10800 does not continue the last sentence of former Probate Code Section 901. Before 1965, the usual practice was to use gross value of real property to calculate the statutory fee unless the property was sold during probate, in which case only the decedent's equity in the property was used. Under the 1965 revision to former Probate Code Section 901 (amended 1965 Cal. Stat. ch. 115), gross value was used, whether or not a sale had taken place. See *Review of Selected 1965 Code Legislation 222* (Cal. Cont. Ed. Bar 1965). Subdivision (b) of Section 10800 continues the substance of the 1965 revision. The last sentence of former Section 901 was included in 1965 to make clear that the former practice was being changed; it is no longer necessary to continue this sentence.

For background on the provisions of this part, see the Comment to this part under the part heading.

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

### **Substitute Comment**

**Comment.** Section 10801 restates the first sentence of Section 902 of the repealed Probate Code without substantive change. See also Section 12205 (reduction of compensation for delay in closing estate administration). As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

Even though services are extraordinary, the court has discretion whether or not to award compensation for them. *Estate of Walker*, 221 Cal. App. 2d 792, 795-96, 34 Cal. Rptr. 832 (1963) (extraordinary services by executor and estate attorney).

The listing in Section 902 of the repealed Probate Code of examples of what constituted extraordinary services is not continued in Section 10801. The former list was incomplete. See *Estate of Buchman*, 138 Cal. App. 2d 228, 236, 291 P.2d 547 (1955) (special administrator and estate attorney). Omission of the list is not intended to change the law.

For background on the provisions of this part, see the Comment to this part under the part heading.

Under Sections 10800 and 10801, the following services by the personal representative may be considered as extraordinary:

(1) Sales or mortgages of real or personal property. *Estate of McSweeney*, 123 Cal. App. 2d 787, 798, 268 P.2d 107 (1954) (extraordinary fees of executor and estate attorney).

(2) Carrying on decedent's business. *Estate of King*, 19 Cal. 2d 354, 358-60, 121 P.2d 716 (1942) (extraordinary fees of executrix); *Estate of Scherer*, 58 Cal. App. 2d 133, 136 P.2d 103 (1943) (extraordinary fees of

executor); *In re Estate of Allen*, 42 Cal. App. 2d 346, 353, 108 P.2d 973 (1941) (extraordinary fees of administratrix and estate attorney).

(3) Court proceedings to determine testator's intention concerning undisclosed beneficiaries. *Estate of Feldman*, 78 Cal. App. 2d 778, 793-94, 178 P.2d 498 (1947) (extraordinary fees of executor and estate attorney).

(4) Defense of personal representative's account (answering interrogatories; attending depositions; conferring with attorneys to prepare for depositions, interrogatories, and trial; attending trial). *Estate of Beach*, 15 Cal. 3d 623, 644-45, 542 P.2d 994, 125 Cal. Rptr. 570 (1975), cert. denied, 434 U.S. 1046 (1978) (extraordinary fees of executor and estate attorney).

(5) Securing a loan to pay debts of the estate. *In re Estate of O'Connor*, 200 Cal. 646, 651, 254 P. 269 (1927) (extraordinary fees of executor and estate attorney).

The foregoing is not an exhaustive list. Other extraordinary services are or may in the future be added to this list by case law or court rule. See generally Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.28 (Cal. Cont. Ed. Bar, Feb. 1989); Los Angeles County Probate Policy Memorandum § 15.08, reprinted in California Local Probate Rules (10th ed. Cal. Cont. Ed. Bar 1989).

Under the introductory clause of Section 10801, the section is subject to the provisions of this part. Thus, for example, Section 10801 is subject to Section 10802. Section 10802 provides that, if the decedent's will makes provision for the compensation of the personal representative and the court does not relieve the personal representative from those provisions, the compensation provided by the will shall be the full and only compensation for the services of the personal representative. See also the discussion in the Comment to Section 10802. Likewise, Section 10801 is subject to Section 10804. Section 10804 provides that, unless expressly authorized by the decedent's will, a personal representative who is an attorney may not receive compensation for services as estate attorney.

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

### **Substitute Comment**

**Comment.** Section 10802 is a new provision. Subdivision (a) restates a portion of Section 900 of the repealed Probate Code without substantive change. The remainder of the section supersedes the portions of Sections 900 and 901 of the repealed Probate Code that permitted the personal representative to renounce the compensation provided by the

will. The former ability to renounce the compensation provided by the will has been replaced by a new requirement that court approval must be obtained for the personal representative to receive greater compensation than provided under the will.

Subdivision (a) gives the testator the ability to provide for alternative methods of compensation in the will. For example, the will can eliminate the distinction between ordinary and extraordinary services and substitute an hourly rate or rates for the various services to be provided by the personal representative. The statutory compensation provisions are thus default provisions that apply where the will does not make provision for the compensation of the personal representative. Subdivision (a) also permits the personal representative to receive a greater amount of compensation than the statutory compensation if the decedent's will makes provision for the greater amount of compensation. Cf. *Estate of Van Every*, 67 Cal. App. 2d 164, 153 P.2d 614 (1944) (\$4,000 bequest to attorney in lieu of \$1,696.33 statutory fee).

As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

For general provisions, see Sections 1000-1004 (rules of practice), 1020-1023 (petitions and other papers), 1040-1050 (hearings and orders). For general provisions relating to notice of hearing, see Sections 1200-1220. See also Sections 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1250-1252 (request for special notice), 1260-1265 (proof of giving notice). The court for good cause may dispense with the notice otherwise required to be given pursuant to this section. See Section 1220(c).

For background on the provisions of this part, see the Comment to this part under the part heading.

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

#### **Substitute Comment**

**Comment.** Section 10803 restates Section 903 of the repealed Probate Code without substantive change. This section applies to compensation for both ordinary and extraordinary services. Nothing prevents the personal representative from waiving all compensation or agreeing to take less than the statutory compensation. See *In re Estate of Marshall*, 118 Cal. 379, 381, 50 P. 540 (1897) (statutory compensation allowed when evidence of alleged agreement for lower compensation was insufficient). See also Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.5 (Cal. Cont. Ed. Bar, Feb. 1989). As to

the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3. For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 10804. No compensation as estate attorney unless authorized by will or court order**

#### **Substitute Comment**

**Comment.** Section 10804 is a new provision that codifies the general case law rule that the personal representative cannot serve as the estate attorney and receive dual compensation. See *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926); *Estate of Downing*, 134 Cal. App. 3d 256, 184 Cal. Rptr. 511 (1982); *Estate of Haviside*, 102 Cal. App. 3d 365, 368-69, 162 Cal. Rptr. 393 (1980). The provision that dual compensation may be paid if expressly authorized by the decedent's will also codifies case law. See *Estate of Thompson*, 50 Cal. 2d 613, 328 P.2d 1 (1958); *Estate of Crouch*, 240 Cal. App. 2d 801, 49 Cal. Rptr. 926 (1966). See generally Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice §§ 20.10-20.12 (Cal. Cont. Ed. Bar, Feb. 1989).

The term "estate attorney" is to be given a broad meaning for the purposes of this section and includes the associates, partners, and attorneys of counsel with the law firm of the attorney retained by the personal representative as estate attorney, and also associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney retained by the personal representative as estate attorney; if the personal representative will share in the compensation that would be paid to the law firm. See also *In re Estate of Parker*, 200 Cal. 132, 251 P. 907 (1926). As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 10805. Apportionment of compensation**

#### **Substitute Comment**

**Comment.** Section 10805 restates the second sentence of Section 901 of the repealed Probate Code without substantive change, with the addition of the reference to an agreement between the personal representatives concerning apportionment of their compensation. The added language was drawn from Section 8547 (division of compensation

between special administrator and general personal representative). For background on the provisions of this part, see the Comment to this part under the part heading. As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

### **§ 10810 (added). Compensation of estate attorney**

#### **1990 Addition**

**Comment.** Section 10810, which was added to the new Probate Code by 1990 Cal. Stat. ch. 710 § 34, continues the substance of the language of Section 910 of the repealed Probate Code. As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

### **§ 10830 (amended). Partial allowance of compensation**

#### **Substitute Comment**

**Comment.** Section 10830 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 35. The section as amended is drawn from Sections 904 and 911 of the repealed Probate Code. As originally enacted in the new Probate Code, Section 10830 had been revised to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 10830 was amended by 1990 Cal. Stat. ch. 710 § 35 to reflect this fact. See the Comment to Section 900.

As to the priority for payment, see Section 11420. As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

For general provisions, see Sections 1000-1004 (rules of practice), 1020-1023 (petitions and other papers), 1040-1050 (hearings and orders). For general provisions relating to notice of hearing, see Sections 1200-1220. See also Sections 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1250-1252 (request for special notice), 1260-1265 (proof of giving notice). The court for good cause may dispense with the notice otherwise required to be given to a person under Section 10830. See Section 1220(c). For a limitation on the court's authority to award a partial allowance of fees for extraordinary services, see Section 10832. See also Sections 8547 (compensation of special administrator),

10954(c) (final report to show compensation), 12205 (reduction of compensation for delay in closing estate administration). See also Section 52 (defining “letters”).

For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 10831 (amended). Final compensation**

### **Substitute Comment**

**Comment.** Section 10831 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 36. As originally enacted in the new Probate Code, Section 10831 had been drafted to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 10831 was amended by 1990 Cal. Stat. ch. 710 § 36 to reflect this fact. See the Comment to Section 900.

Amended Section 10831 is a new provision drawn from Probate Code Section 10830 and is in accord with existing practice. See Feinfeld, *Fees and Commissions*, in 2 California Decedent Estate Practice § 20.34 (Cal. Cont. Ed. Bar, Feb. 1989). Final compensation is not to be paid until there is a final account and a final distribution. As to the priority for payment, see Section 11420. As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3.

For general provisions, see Sections 1000-1004 (rules of practice), 1020-1023 (petitions and other papers), 1040-1050 (hearings and orders). For general provisions relating to notice of hearing, see Sections 1200-1220. See also Sections 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1250-1252 (request for special notice), 1260-1265 (proof of giving notice). See also Sections 8547 (compensation of special administrator), 10954(c) (final report to show compensation), 12205 (reduction of compensation for delay in closing estate administration).

For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 10832. Limitation on allowance of compensation for extraordinary services**

### **Substitute Comment**

**Comment.** Section 10832 is a new provision drawn from local court rules. In some cases, present payment will benefit the estate. For



example, compensation may be allowed near the end of a tax year to absorb estate income so that the income will not be taxable. Partial payment also may be allowed at any time during the year if good cause is shown. As to the law applicable to a proceeding commenced before July 1, 1991, see Section 10850. As to the application of any amendments made after that date, see Section 3. For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 10850 (amended). Application of provisions of this part**

#### **Substitute Comment**

**Comment.** Section 10850 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 37. The amended section limits the application of this part to proceedings commenced on or after July 1, 1991. Thus, for example, the allowance of compensation of the personal representative or the attorney for the personal representative in a proceeding commenced before July 1, 1991, is governed by the applicable law in effect before July 1, 1991. See former Prob. Code §§ 900, 901, 902, 903, 904, 910, and 911 (repealed by 1990 Cal. Stat. ch. 79 § 13) (compensation of personal representative and attorney for personal representative). For background, see *Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others; Compensation of Personal Representative*, 20 Cal. L. Revision Comm'n Reports 31 (1990); *Revised and Supplemental Comments to the New Probate Code*, 20 Cal. L. Revision Comm'n Reports 2001 (1990).

## **PART 8. ACCOUNTS**

#### **Substitute Comment**

**Comment.** This part supersedes Part 8 (commencing with Section 10900) of Division 7 of the repealed Probate Code. The superseded part was enacted upon recommendation of the California Law Revision Commission. See *Recommendation Relating to Accounts*, 19 Cal. L. Revision Comm'n Reports 877 (1988). See also *Communication from the California Law Revision Commission Concerning Assembly Bill 2841*, 19 Cal. L. Revision Comm'n Reports 1201, 1241-42 (1988); *Communication from the California Law Revision Commission Concerning Assembly Bill 158*, 20 Cal. L. Revision Comm'n Reports 235, 242 (1990).

## § 10900 (amended). Contents of account

### Substitute Comment

**Comment.** Section 10900 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 38. As originally enacted in the new Probate Code, Section 10900 had been revised to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 10900 was amended by 1990 Cal. Stat. ch. 710 § 38 to reflect this fact. See the Comment to Section 900.

Section 10900 as amended continues Section 10900 of the repealed Probate Code without change. See also Sections 9657 (personal representative not to profit from increase, nor to suffer loss from decrease or destruction of estate without fault), 9839 (paying claim for less than its full amount), 10005 (sale for more or less than appraised value).

Subdivision (b) is based on concepts developed in Note, *California Probate Accounting Procedures*, 39 S. Cal. L. Rev. 316 (1966). In the financial statement, each schedule should contain a breakdown of the summary item into its component parts. For instance, the summary item of receipts might be broken down into the totals of interest income, dividend income, royalties received, and miscellaneous receipts. The exact breakdown will vary, depending on the nature of the estate. It would be unnecessary to show in the summary item more than the total amount of each component part making up the total. For illustrative material, see National Fiduciary Accounting Standards Project: *Uniform Fiduciary Accounting Principles and Model Accounting Formats*, in 9 Probate Notes 224-47 (American College of Probate Counsel 1984).

Since the purpose of the report of administration (subdivisions (c) and (d)) is to provide a complete summary of the estate's administration, additional statements may be necessary in order to clarify certain events or circumstances and to permit interested persons to understand the report. In certain instances, the report of administration may include such information as a statement that cash was invested in interest-bearing accounts or other proper investments (Section 9652). If a final account is waived, the final report of administration must include the amount of the compensation paid or payable to the personal representative and the attorney for the personal representative and must set forth the basis for determining the amount of the compensation. See Section 10954(c). See also Section 10831 (request for compensation may be included in the final account).

Likewise, the financial statement must include the information required by this section. This section does not, however, preclude a financial statement from including any other relevant information, such as a separate statement of account as to specific gifts, allocation of principal and income, taxable income and distributable net income, and current values of property in the estate.

**Background on Section 10900 of Repealed Code**

Section 10900 was added by 1988 Cal. Stat. ch. 1199 § 91. The section superseded former Probate Code Section 920.3 and the first sentence of former Probate Code Section 921 (provisions repealed by 1988 Cal. Stat. ch. 1199 § 54.5). For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 10954 (amended). When account is not required**

### **Substitute Comment**

**Comment.** Section 10954 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 39. As originally enacted in the new Probate Code, Section 10954 had been revised to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 10954 was amended by 1990 Cal. Stat. ch. 710 § 39 to reflect this fact. See the Comment to Section 900.

Section 10954 as amended continues Section 10954 of the repealed Probate Code with the following revisions:

(1) Paragraph (7) of subdivision (b) is added to recognize the authority of an attorney in fact to execute a waiver or acknowledgment under Section 10954.

(2) The phrase “fees and commissions” is changed to “compensation”, consistent with the terminology used in Part 7 (commencing with Section 10800) (compensation of personal representative and estate attorney).

Section 10954 supersedes local court rules. The section applies notwithstanding any other provision of this part, including but not limited to Section 10950 (court-ordered account).

Under paragraph (2) of subdivision (b), a waiver may be made on behalf of a minor by the minor’s parent or guardian of the estate. The minor’s parent or guardian of the estate is the person authorized to receive money or property belonging to the minor. See Sections 3400-3402. If waiver is by the guardian of the estate of the minor, approval of the guardianship court is not required. Similarly, paragraph (3) of subdivision (b) permits a conservator of the estate to waive the account without approval of the conservatorship court. Paragraph (4) of subdivision (b) permits a trustee who has consented to act to waive the account on behalf of the trust.

A guardian, conservator, trustee, or personal representative who waives accounting under this section acts in a fiduciary capacity and is held to the same standard that applies to other actions taken in the fiduciary capacity.

**Background on Section 10954 of Repealed Code**

Section 10954 was added by 1988 Cal. Stat. ch. 1199 § 91. The section restated former Probate Code Section 933 (repealed by 1988 Cal. Stat. ch. 1199 § 54.5), but excluded from those whose waiver is required beneficiaries whose interest will be satisfied in full. The section also made clear that an unpaid creditor may seek to require an account notwithstanding a waiver by beneficiaries. In subdivision (b)(4) of Section 10954, a reference to the trustee's written acceptance of the trust replaced the former reference to a trustee's consent to act, and a provision excusing court approval was added for court-supervised trusts. See Section 15600 (acceptance of trust by trustee). Court approval was also excused in subdivision (b)(5) for waiver by the personal representative. Subdivision (b)(6) was substituted for the former provision precluding waiver if a person entitled to distribution is unascertained.

For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 11000 (amended). Notice of hearing**

### **Substitute Comment**

**Comment.** Section 11000 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 40. As originally enacted in the new Probate Code, Section 11000 revised Section 11000 of the repealed Probate Code to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 11000 of the new Probate Code was amended by 1990 Cal. Stat. ch. 710 § 40 to reflect this fact. See the Comment to Section 900.

Section 11000 as amended continues Section 11000 of the repealed Probate Code without change. For general provisions relating to notice of hearing, see Sections 1200-1220. See also Sections 1206 (notice to known heirs or devisees), 1215-1217 (mailing in general), 1250-1252 (request for special notice), 1260-1265 (proof of giving notice).

**Background on Section 11000 of Repealed Code**

Section 11000 was added by 1988 Cal. Stat. ch. 1199 § 91. Subdivisions (a) and (b) restated subdivisions (b) and (c) of former Probate Code Section 926 (repealed by 1988 Cal. Stat. ch. 1199 § 54.5) without substantive change. Subdivisions (b)(4) and (c) were new. Subdivision (d) restated the first portion of the second sentence of subdivision (a) of former Probate Code Section 926 (repealed by 1988 Cal. Stat. ch. 1199 § 54.5) without substantive change. For background on the provisions of this part, see the Comment to this part under the part heading.

## § 11003. **Litigation expenses**

### **Substitute Comment**

**Comment.** Section 11003 continues Section 11003 of the repealed Probate Code without change. Litigation costs under Section 11003 include the costs of a referee appointed under Section 11002.

### **Background on Section 11003 of Repealed Code**

Section 11003 was added by 1988 Cal. Stat. ch. 1199 § 91. Subdivision (a) superseded the second sentence of former Probate Code Section 927 (repealed by 1988 Cal. Stat. ch. 1199 § 54.5). Subdivision (b) was a new provision. For background on the provisions of this part, see the Comment to this part under the part heading.

## § 11429 (amended). **Unpaid creditor**

### **1990 Amendment**

**Comment.** Section 11429 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 14.1.

Subdivision (a) was amended to recognize the liability of distributees provided by Section 9392 (liability of distributee).

Subdivision (b) was amended to make specific reference to the statutory immunity of the personal representative for actions and omissions in notifying creditors. This amendment is not a change in law, but is intended for cross-referencing purposes only. The reference to the specific immunity provided in Section 9053 should not be construed to limit the availability of any other applicable defenses of the personal representative.

For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## § 11623 (amended). **Distribution under Independent Administration of Estates Act**

### **1990 Amendment**

**Comment.** Section 11623 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 41 to add subdivision (b) to make clear that the section is not the exclusive means by which a personal representative with independent administration authority may make distribution. This is a clarification, not a change, of existing law.

## **§ 12205 (amended). Sanction for failure to timely close estate**

### **Substitute Comment**

**Comment.** Section 12205 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 42. As originally enacted, Section 12205 of the new Probate Code revised Section 12205 of the repealed Probate Code to reflect the fact that Assembly Bill 831 of the 1989-1990 regular session would have substituted an agreed fee system for the statutory fee system for probate attorney fees. However, Assembly Bill 831 was not enacted, and Section 12205 was amended by 1990 Cal. Stat. ch. 710 § 42 to reflect this fact. See the Comment to Section 900.

Section 12205 as amended continues Section 12205 of the repealed Probate Code without substantive change.

### **Background on Section 12205 of Repealed Code**

Section 12205 was added by 1988 Cal. Stat. ch. 1199 § 93. The section restated the fourth paragraph of former Probate Code Section 1025.5 (repealed by 1988 Cal. Stat. ch. 1199 § 55.5), with the addition of a direction to the court to consider prior delays in setting sanctions. For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 13109 (amended). Liability for decedent's unsecured debts**

### **1990 Amendment**

**Comment.** Section 13109 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 15.1 to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13109. For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

## **§ 13156 (amended). Liability for decedent's unsecured debts**

### **1990 Amendment**

**Comment.** Section 13156 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 16.1 to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13156. For background on the 1990 amendment, see *Recommendation Relating to Notice to*

*Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

### **§ 13204 (amended). Liability for decedent's unsecured debts**

#### **1990 Amendment**

**Comment.** Section 13204 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 17.1 to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13204. For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

### **§ 13554 (amended). Enforcement of liability**

#### **1990 Amendment**

**Comment.** Section 13554 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 140 § 18.1 to make clear that the general one-year statute of limitations applicable to all causes of action against a decedent is applicable to liability for the decedent's debts under Section 13554. Cf. former Code Civ. Proc. § 353.5 and Comment thereto. For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

### **§ 15003 (amended). Effect of division on constructive and resulting trusts, fiduciary relationships, and entities and relationships not included in definition of "trust"; substantive law of constructive and resulting trusts not affected**

#### **1990 Amendment**

**Comment.** Section 15003 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 43. The 1990 amendment revised subdivision (a) to avoid any implication that this provision is a limitation on the jurisdiction of the superior court in proceedings under this division. This amendment is intended to reject dicta in *Estate of Mullins*, 206 Cal. App. 3d 924, 931, 255 Cal. Rptr. 430 (1988). For provisions governing jurisdiction in proceedings under this division, see Sections 17000, 17001, and 17004. For background on the 1990 amendment, see *Recommendation Relating*

*to Jurisdiction of Superior Court in Trust Matters*, 20 Cal. L. Revision Comm'n Reports 2253 (1990).

## § 15640. Resignation of trustee

### Substitute Comment

**Comment.** Section 15640 continues Section 15640 of the repealed Probate Code with the following revisions:

(1) The section has been revised to make clear that court approval is not required to accomplish a resignation except under subdivision (d). This revision made explicit what was implicit under former law.

(2) The last two sentences have been added to subdivision (c) for consistency with Section 15660(c) (appointment of trustee to fill vacancy) and to make clear that a conservator may consent to the resignation without the need to obtain approval of the court in which the conservatorship is pending.

Subdivisions (a), (c), and (d) are similar to Section 106 of the Restatement (Second) of Trusts (1957), except that the class of persons whose consent is needed under subdivision (c) is more restricted. For a provision governing acceptance of the trust, see Section 15600. For provisions relating to consent by beneficiaries who lack capacity, see, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 1003 (guardian ad litem), 2580 (conservator).

Whether court approval is required under subdivision (a) depends on the terms of the trust. Subdivision (b) recognizes that the person holding the power to revoke a revocable trust has control over the trust rather than the beneficiaries. See Section 15800. Under subdivision (d), the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation.

For general provisions relating to petitions and other papers, see Sections 1020-1023, 17201; see also Sections 1021 (petition to be verified), 1041 (clerk to set petition for hearing). For general provisions relating to notice of hearing, see Sections 1200-1221, 15802-15804, 17100-17105, 17203-17205; see also Sections 1260-1265 (proof of giving notice). For general provisions relating to hearings and orders, see Sections 1040-1050, 17000-17006, 17201-17202, 17206-17207. See also Section 17200(b)(11) (petition to accept resignation of trustee).

### Background on Section 15640 of Repealed Code

Section 15640 was added by 1986 Cal. Stat. ch. 820 § 40. Subdivision (a)(1) continued part of the second sentence of former Probate Code Section 1138.8 (repealed by 1986 Cal. Stat. ch. 820 § 31) without substantive change. Subdivision (a)(3) superseded former Civil Code Section 2282(d) (repealed by 1986 Cal. Stat. ch. 820 § 7) which permitted discharge from the trust with the consent of "the beneficiary, if the beneficiary has capacity to contract."



Subdivision (a)(4) restated authority of the court under prior law. See former Civil Code §§ 2282(e), 2283 (provisions repealed by 1986 Cal. Stat. ch. 820 § 7); former Prob. Code §§ 1125.1, 1138.1(a)(9), 1138.8 (provisions repealed by 1986 Cal. Stat. ch. 820 § 31). Under subdivision (a)(4), the court had authority to accept a resignation regardless of whether the trust provides a manner of resignation. Former Probate Code Section 1138.8 permitted the court to act where the trust was silent.

The provision in subdivision (b) that the trustee's resignation shall be accepted by the court restated part of the fifth sentence of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8 (provisions repealed by 1986 Cal. Stat. ch. 820 § 31). The authority in subdivision (b) for protective orders restated part of the last sentence of the first paragraph of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8 (provisions repealed by 1986 Cal. Stat. ch. 820 § 31). See also Section 17206 (general authority to make necessary orders).

For background on the provisions of this division, see the Comment to this division under the division heading. For background on the 1990 revision of this section, see *Recommendation Relating to Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 185 (1990).

## § 15642. Removal of trustee

### Substitute Comment

**Comment.** Section 15642 continues Section 15642 of the repealed Probate Code with the following revisions:

(1) Subdivision (a) has been revised to give the settlor of an irrevocable living trust the right to petition for removal of a trustee.

(2) New paragraph (5) has been added to subdivision (b)—and former paragraph (5) has been redesignated to be paragraph (6)—to make clear that a trustee may be removed in the court's discretion where the trustee's compensation is excessive under the circumstances. The addition of new paragraph (5) is a clarification of the law, rather than a new principle. For background on these revisions, see *Recommendation Relating to Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 185 (1990).

Subdivision (a) is the same in substance as Section 107 of the Restatement (Second) of Trusts (1957) except that it gives the settlor of an irrevocable living trust the right to petition for removal of a trustee. As to the rights of a settlor of a revocable trust, see Sections 15401 (revocation by settlor), 15402 (modification by settlor of revocable trust), 15800 (rights of person holding power of revocation). The right to petition for removal of a trustee does not give the settlor any other rights, such as the right to an account or to receive information concerning administration of the trust.

The statement of grounds for removal of the trustee by the court is drawn from the Texas Trust Code and the Restatement. See Tex. Prop. Code Ann. § 113.082(a) (Vernon 1984); Restatement (Second) of Trusts § 107 comments b-d (1957). As to the authority to remove as provided in

the trust instrument, see Restatement (Second) of Trusts § 107 comment h (1957). If a trustee is removed, another trustee may be appointed to fill the vacancy as provided in Section 15660. See also Section 17206 (general authority to make necessary orders).

For general provisions relating to petitions and other papers, see Sections 1020-1023, 17201; see also Sections 1021 (petition to be verified), 1041 (clerk to set petition for hearing). For general provisions relating to notice of hearing, see Sections 1200-1221, 15802-15804, 17100-17105, 17203-17205; see also Sections 1260-1265 (proof of giving notice). For general provisions relating to hearings and orders, see Sections 1040-1050, 17000-17006, 17201-17202, 17206-17207. See also Section 17200(b)(10) (petition to remove trustee).

**Background on Section 15642 of Repealed Code**

Section 15642 was added by 1986 Cal. Stat. ch. 820 § 40. The authority of the court under Section 15642 to remove trustees continued authority found in former law. See former Civil Code §§ 2233, 2283 (provisions repealed by 1986 Cal. Stat. ch. 820 § 7); former Prob. Code §§ 1123.5, 1138.1(a)(10) (Probate Code provisions repealed by 1986 Cal. Stat. ch. 820 § 31). The authority for removal on the court's own motion was drawn from the third sentence of former Probate Code Section 1123.5 (repealed by 1986 Cal. Stat. ch. 820 § 31). Paragraphs (1) and (2) of subdivision (b) of Section 15642 superseded parts of former Civil Code Sections 2233 and 2283 and part of the first sentence of former Probate Code Section 1123.5 (repealed by 1986 Cal. Stat. ch. 820 § 31). The general language relating to a trustee being otherwise unfit to administer the trust subsumed the reference in former Probate Code Section 1126 (repealed by 1986 Cal. Stat. ch. 820 § 31) to a trustee who is incapable of acting. Paragraph (3) of subdivision (b) continued part of the second sentence of former Probate Code Section 1123.5 (repealed by 1986 Cal. Stat. ch. 820 § 31) without substantive change, except that the reference to "ill feeling" was omitted as redundant with "hostility," and the word "continued" was omitted since the test is whether the administration of the trust is impaired. Paragraph (4) of subdivision (b) continued part of the first sentence of former Probate Code Section 1126 and part of the first sentence of former Probate Code Section 1138.9 (provisions repealed by 1986 Cal. Stat. ch. 820 § 31) without substantive change. Paragraph (5) of subdivision (b) continued authority found in former Probate Code Sections 1126 and 1138.9 (provisions repealed by 1986 Cal. Stat. ch. 820 § 31). Subdivision (c) continued former Probate Code Section 1138.2 (repealed by 1986 Cal. Stat. ch. 820 § 31) without substantive change and restated former Probate Code Section 1123.6 (repealed by 1986 Cal. Stat. ch. 820 § 31) without substantive change.

For background on the provisions of this division, see the Comment to this division under the division heading.

**§ 15645. Costs and attorney's fees in proceedings for transfer of trust to successor trust company**

**Substitute Comment**

**Comment.** Section 15645 is a new provision intended to encourage an out of court solution where the beneficiaries of a trust want to transfer administration of the trust to a successor corporate trustee. For

provisions concerning consent to transfer of the trust to a successor trust company, see Sections 15640 (resignation of trustee) and 15660 (appointment to fill vacancy in office of trustee). For background on the section, see *Recommendation Relating to Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 185 (1990). For background on the provisions of this division, see the Comment to this division under the division heading.

## § 15660. Appointment of trustee to fill vacancy

### Substitute Comment

**Comment.** Section 15660 continues Section 15660 of the repealed Probate Code with the addition of new subdivision (c) and the redesignation of former subdivision (c) as subdivision (d). For a provision governing the occurrence of vacancies in the office of trustee, see Section 15643.

Subdivision (a) makes clear that the vacancy in the office of a cotrustee must be filled only if the trust so requires. If the vacancy in the office of cotrustee is not filled, the remaining cotrustees may continue to administer the trust under Section 15621, unless the trust instrument provides otherwise.

Subdivision (c) was added to permit a vacancy in the office of trustee to be filled, without the need for court approval, by a trust company selected by agreement of the adult beneficiaries of the trust. For background on subdivision (c), see *Recommendation Relating to Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 185 (1990). The persons who must agree to the new trustee under subdivision (c) are the same as those who must consent to a resignation under subdivision (c) of Section 15640. A vacancy may be filled under subdivision (c) whether or not the former trustee was a trust company. If the trustee resigns pursuant to subdivision (c) of Section 15640, the trust may be transferred to a trust company pursuant to subdivision (c) of Section 15660, all without court approval.

Subdivision (d) gives the court discretion to fill a vacancy in a case where the trust does not name a successor who is willing to accept the trust, where the trust does not provide a practical method of appointment, or where the trust does not require the vacancy to be filled. For a limitation on the rights of certain beneficiaries of revocable trusts, see Section 15800.

The provision in subdivision (d) requiring the court to give consideration to the wishes of the beneficiaries is consistent with the Restatement rule. See Restatement (Second) of Trusts § 108 comments d, i (1957).

For general provisions relating to petitions and other papers, see Sections 1020-1023, 17201; see also Sections 1021 (petition to be verified), 1041 (clerk to set petition for hearing). For general provisions relating to notice of hearing, see Sections 1200-1221, 15802-15804, 17100-17105, 17203-17205; see also Sections 1260-1265 (proof of giving notice). For general provisions relating to hearings and orders, see Sections 1040-1050, 17000-17006, 17201-17202, 17206-17207. See also Section 17200(b)(10) (petition to appoint trustee).

**Background on Section 15660 of Repealed Code**

Section 15660 was added by 1986 Cal. Stat. ch. 820 § 40.

Section 15660 superseded the following provisions:

(1) Former Civil Code Sections 2287 and 2289 (provisions repealed by 1986 Cal. Stat. ch. 820 § 7).

(2) Former Probate Code Sections 1125, 1126, and 1138.9 (provisions repealed by 1986 Cal. Stat. ch. 820 § 31).

The provision in subdivision (b) of Section 15660 relating to a "practical" method of appointing a trustee continued language found in former Civil Code Section 2287 and superseded part of former Probate Code Section 1138.9 (repealed by 1986 Cal. Stat. ch. 820 § 31).

The authority of the court to appoint the same or a lesser number of trustees in subdivision (d) of Section 15660 continued the second sentence of former Civil Code Section 2289 without substantive change. The provision in subdivision (d) requiring the court to give consideration to the wishes of the beneficiaries superseded the second sentence of former Civil Code Section 2287.

For background on the provisions of this division, see the Comment to this division under the division heading.

## **§ 15686. Notice of increased trustee's fee**

### **Substitute Comment**

**Comment.** Section 15686 is a new provision. For background on the section, see *Recommendation Relating to Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 185 (1990). See also Section 16060 (duty of the trustee to keep beneficiaries of trust reasonably informed of the trust and its administration).

## **§ 17001 (amended). Full-power court**

### **1990 Amendment**

**Comment.** Section 17001 (enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was amended by 1990 Cal. Stat. ch. 710 § 44. The 1990 amendment deletes unnecessary language from which a negative implication could be drawn, i.e., that the court would not have "all the powers of the superior court" when exercising concurrent jurisdiction, as well as exclusive jurisdiction. This amendment is needed to reject dicta in recent cases as to limitations on the power and jurisdiction of the court in proceedings properly commenced under this

division. See *Estate of Mullins*, 206 Cal. App. 3d 924, 930-31, 255 Cal. Rptr. 430 (1988); *Johnson v. Tate*, 215 Cal. App. 3d 1282, 1285-87, 264 Cal. Rptr. 68 (1989). This amendment also reaffirms the original intent of this section, along with Sections 17000 and 17004, to eliminate any limitations on the power of the court hearing matters under this division, whether or not it is called the “probate court,” to exercise jurisdiction over all parties constitutionally before it and completely dispose of the dispute. This section, along with Sections 17000 and 17004, is intended to eliminate any notion that the “probate court” is one of limited power or that it cannot dispose of matters properly brought before it, while preserving the power of the superior court in a particular county to organize itself into divisions for the efficient conduct of judicial business. If a court determines that it is not the appropriate forum or division of the court to hear a case, the court should transfer the matter to the appropriate court or division. See Code Civ. Proc. § 396. For background on the 1990 amendment, see *Recommendation Relating to Jurisdiction of Superior Court in Trust Matters*, 20 Cal. L. Revision Comm’n Reports 2253 (1990).

### **§ 17102 (repealed). Manner of notice where address is unknown**

#### **Substitute Comment**

**Comment.** Former Section 17102 enacted as a part of the new Probate Code by 1990 Cal. Stat. ch. 79 § 14) was repealed by 1990 Cal. Stat. ch. 710 § 45. The repealed section is generalized in Section 1212 (manner of mailing notice where address is unknown). See Section 17100 (general notice provision apply to Trust Law). For background on this repeal, see *Recommendation Relating to Notice in Probate Where Address Unknown*, 20 Cal. L. Revision Comm’n Reports 2245 (1990).

### **§ 17200. Petitioners; grounds for petition**

#### **Substitute Comment**

**Comment.** Section 17200 continues Section 17200 of the repealed Probate Code with the revision of subdivision (b)(9) to make clear that the reasonableness of the trustee’s compensation is subject to review on petition under this section. This revision is a clarification of prior law and not a substantive change. For background on this revision, see *Recommendation Relating to Trustees’ Fees*, 20 Cal. L. Revision Comm’n Reports 185 (1990).

The introductory clause of subdivision (a) has the effect of giving the right to petition concerning the internal affairs of a revocable living trust

to the settlor (or other person holding the power to revoke) instead of the beneficiaries during the time that the settlor (or other person holding the power to revoke) is competent. See Section 15800 and the Comment thereto.

The list of grounds for a petition concerning the internal affairs of a trust under subdivision (b) is not exclusive and is not intended to preclude a petition for any other purpose that can be characterized as an internal affair of the trust. Paragraphs (1) and (2) of subdivision (b) are drawn from Section 7-201(a) of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

Various provisions elsewhere in this division relate to proceedings under this chapter. For limitations on the right of a beneficiary to compel the trustee to account or report under paragraph (7), see Sections 15800 and 16060-16064. As to granting powers to the trustee under paragraph (8), see Section 16201. As to the trustee's compensation under paragraph (9), see Sections 15680-15683; see also Section 15645 (costs and attorney's fees in proceedings for transfer of trust to successor trust company). As to breaches of trust involved in paragraph (12), see Sections 16400-16462. As to modification and termination of trusts under paragraph (13), see Sections 15400-15410. As to combining or dividing trusts under paragraph (14), see Sections 15411 and 15412. As to transfers of trusts under paragraph (16), see Sections 17400-17405 and 17450-17457. As to transfers of certain testamentary trusts within California under paragraph (17), see Section 17304. As to removal of certain testamentary trusts from continuing court jurisdiction under paragraph (18), see Section 17352.

The procedure provided in this chapter is available to determine matters concerning the administration of trusts notwithstanding a purported limitation or exclusion in the trust instrument. The provision in subdivision (b) of former Section 1138.1 of the repealed Probate Code (repealed by 1986 Cal. Stat. ch. 820 § 31) to the effect that the trust could restrict the availability of remedies is not continued.

See also Sections 24 ("beneficiary" defined), 82 ("trust" defined), 17005 (venue).

#### **Background on Section 17200 of Repealed Code**

Section 17200 was added by 1986 Cal. Stat. ch. 820 § 40. The section restated the substance of subdivision (a) of former Probate Code Section 1138.1 and superseded parts of former Probate Code Section 1120 (provisions repealed by 1986 Cal. Stat. ch. 820 § 31). The reference to determining the existence of a trust in subdivision (a) was new. Subdivision (a) also restated without substantive change part of former Probate Code Section 1139.1 and the first sentence of former Probate Code Section 1139.2 (petition for transfer of trust to another jurisdiction) and part of former Probate Code Section 1139.12 (petition for transfer to California) (provisions repealed by 1986 Cal.

Stat. ch. 820 § 31). The introductory clause of subdivision (a) (referring to Section 15800) was new.

Paragraphs (1), (2), and (3) of subdivision (b) were new. Paragraph (5) restated parts of subdivisions (b) and (d) of former Civil Code Section 2269 (repealed by 1986 Cal. Stat. ch. 820 § 7) (review of exercise of discretionary powers) without substantive change. See Sections 16080-16081 (duties with regard to discretionary powers). Paragraph (9) superseded the last sentence of former Civil Code Section 2274 (repealed by 1986 Cal. Stat. ch. 820 § 7).

For background on the provisions of this division, see the Comment to this division under the division heading.

## **PART 7. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT**

**Comment.** Part 7 (commencing with Section 18500) was added to Division 9 of the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4. For background on this part, see *Recommendation Relating to Uniform Management of Institutional Funds Act*, 20 Cal. L. Revision Comm'n Reports 2265 (1990).

### **§ 18500 (added). Short title**

#### **1990 Addition**

**Comment.** Section 18500 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) continues Education Code Section 94600 without change. The Uniform Management of Institutional Funds Act has been relocated from the Education Code, where it applied only to certain private institutions of higher education. See Section 18501(e) and its Comment. As to the construction of provisions drawn from uniform acts, see Section 2. See also Section 11 (severability). For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 18501 (added). Definitions**

#### **1990 Addition**

**Comment.** Section 18501 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) restates former Education Code Section 94601 without substantive change, except that the definition of "institution" has been substantially expanded. As revised, the definition of "institution" is the same as that provided in Section 1(1) of the Uniform Management of Institutional Funds Act (1972). Former Education Code Section 94601(a) defined "institution" as a "private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western

Colleges and Universities to the extent that it holds funds exclusively for any of such purposes.”

Section 18501 lists the definitions in alphabetical order, unlike former Education Code Section 94601. The definition of “historic dollar value” in subdivision (d) has been revised by adding “endowment” preceding “fund” in the second and third clauses.

Section 18501 is the same in substance as Section 1 of the Uniform Management of Institutional Funds Act (1972), except for the omission of the provision in Section 2(5) of the uniform act making conclusive a good faith determination of historic dollar value. As to the construction of provisions drawn from uniform acts, see Section 2.

For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 18502 (added). Expenditure of asset net appreciation for current use**

### **1990 Addition**

**Comment.** Section 18502 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) is the same in substance as Section 2 of the Uniform Management of Institutional Funds Act (1972). As to the construction of provisions drawn from uniform acts, see Section 2.

The provision in the first sentence permitting the appropriation of net appreciation, whether realized or unrealized, supersedes the first sentence of former Education Code Section 94602. The second sentence of Section 18502 continues the third sentence of former Education Code Section 94602 without change. The second sentence of former Education Code Section 94602, which provided a rolling five-year averaging rule, is not continued. For background on the provisions of this part, see the Comment to this part under the part heading.

## **§ 18503 (added). Construction of gift instrument**

### **1990 Addition**

**Comment.** Section 18503 was added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4. Subdivision (a) restates former Education Code Section 94603(a) without substantive change. Subdivisions (b) and (c)(1) restate former Education Code Section 94603(b) without substantive change. Subdivision (c)(2) applies a consistent rule of construction to institutions (as defined in Section 18501(e)) that were not covered by the former law. See the Comment to Section 18501.

Subdivisions (a) and (b) are the same in substance as the first two sentences of Section 3 of the Uniform Management of Institutional Funds



Act (1972). As to the construction of provisions drawn from uniform acts, see Section 2.

For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 18504 (added). Investment authority**

#### **1990 Addition**

**Comment.** Section 18504 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) continues former Education Code Section 94604 without change, except that in subdivision (a) a reference to deeds of trust has been added and an unnecessary comma following the word “associations” has been omitted. The forms of investment listed in subdivisions (a) and (d) following the word “including” are illustrations and not limitations on the general authority provided in these subdivisions. As to the construction of provisions drawn from uniform acts, see Section 2. For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 18505 (added). Delegation of investment management**

#### **1990 Addition**

**Comment.** Section 18505 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) continues former Education Code Section 94605 without change. This section is the same in substance as Section 5 of the Uniform Management of Institutional Funds Act (1972). As to the construction of provisions drawn from uniform acts, see Section 2. For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 18506 (added). Standard of care**

#### **1990 Addition**

**Comment.** Section 18506 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) restates former Education Code Section 94606 without substantive change. See the Comment to Section 18500. The standard of care in subdivision (a) is consistent with the general standard of care provided by Section 16040. For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 18507 (added). Release of restriction in gift instrument**

#### **1990 Addition**

**Comment.** Section 18507 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) restates former Education Code Section 94607

without substantive change. In the second sentence of subdivision (b), the phrase “release a restriction on” has been substituted for the phrase “modify any use of” in former Education Code Section 94607(b) for consistency with the remainder of this section. Section 18507 is the same in substance as Section 7 of the Uniform Management of Institutional Funds Act (1972), except for some variations in subdivision (b). As to the construction of provisions drawn from uniform acts, see Section 2. For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 18508 (added). Status of governing boards**

#### **1990 Addition**

**Comment.** Section 18508 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) continues former Education Code Section 94610 without change, except that the language relating to duties and liabilities of directors is new. The purpose of the new language is to make clear that the duties and liabilities of directors of incorporated institutions are governed by the relevant statute and not by this part. See, e.g., Corp. Code §§ 5231-5231.5 (directors of nonprofit public benefit corporations), 7231-7231.5 (directors of nonprofit mutual benefit corporations), 9240-9241 (directors of nonprofit religious corporations). For background on the provisions of this part, see the Comment to this part under the part heading.

### **§ 18509 (added). Laws relating to expenditure of public funds**

#### **1990 Addition**

**Comment.** Section 18509 (added to the new Probate Code by 1990 Cal. Stat. ch. 1307 § 4) is a new provision that makes clear the relation of the Uniform Management of Institutional Funds Act to any other law concerning expenditure of public funds. See, e.g., Gov’t Code § 53601. Thus, under Section 18509, if other law provides greater limitations on the expenditure of public funds, that law prevails over any provision of this part that might otherwise have been applicable. For background on the provisions of this part, see the Comment to this part under the part heading.

## COMMENTS TO PROVISIONS IN OTHER CODES

### Code of Civil Procedure § 353 (amended). Statute of limitations

#### 1990 Amendment

**Comment.** Subdivision (b) of Section 353 was amended by 1990 Cal. Stat. ch. 140 § 1 to impose a new statute of limitations on all actions against a decedent on which the statute of limitations otherwise applicable has not run at the time of death. The new statute of limitations is one year after the death of the decedent, regardless of whether the statute otherwise applicable would have expired before or after the one-year period.

If a general personal representative is appointed during the one-year period, the personal representative must notify known creditors, and the filing of a claim tolls the statute. Prob. Code §§ 9050 (notice required), 9352 (tolling of statute of limitations). If the creditor is concerned that the decedent's beneficiaries may not have a general personal representative appointed during the one-year period, the creditor may petition for appointment during that time. Prob. Code §§ 8000 (petition), 8461 (priority for appointment); see also Prob. Code § 48 ("interested person" defined).

The reference to the decedent's "representatives" is also deleted from subdivision (b). The reference could be read to imply that the one-year limitation is only applicable in actions against the decedent's personal representative. However, the one-year statute of limitations is intended to apply in any action on a debt of the decedent, whether against the personal representative under Probate Code Sections 9350-9354 (claim on cause of action), or against another person, such as a distributee under Probate Code Section 9392 (liability of distributee), a person who takes the decedent's property and is liable for the decedent's debts under Sections 13109 (affidavit procedure for collection or transfer of personal property), 13156 (court order determining succession to real property), 13204 (affidavit procedure for real property of small value), and 13554 (passage of property to surviving spouse without administration), or a trustee.

For background on the 1990 amendment, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).

**Code of Civil Procedure § 353.5 (repealed). Limitation on action against spouse of decedent**

**1990 Repeal**

**Comment.** Section 353.5 was repealed by 1990 Cal. Stat. ch. 140 § 2 because the section conflicted with Code of Civil Procedure Section 353 (general one-year statute of limitations). For background on the repeal of Section 353.5, see *Recommendation Relating to Notice to Creditors in Estate Administration*, 20 Cal. L. Revision Comm'n Reports 507 (1990).