



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### ***COMMENCEMENT OF DISCOVERY AND ENHANCED NOTICE IN PROBATE PROCEEDINGS***

#### **LEGISLATIVE PROPOSAL (T&E 2017-4)**

TO: Office of Governmental Affairs

FROM: Patrick Kohlmann, Chair, Trusts and Estates Section Executive Committee  
Gina Lera, Vice Chair, Trusts and Estates Section Executive Committee  
Herbert A. Stroh, Chair, Commencement of Discovery Sub-Committee

DATE: January 15, 2016

RE: Proposal to amend Probate Code sections 851 and 1000  
(Commencement of Discovery and Enhanced Notice)

#### **SECTION ACTION AND CONTACTS:**

Date of Approval by Section Executive Committee: January 15, 2016

Approval vote: For 25, Against 0, Abstain 0

<b>Section Members:</b>	<b>Section Legislative Co-Chairs:</b>
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## **PURPOSE:**

Trust and estate litigation procedures are generally controlled by the Code of Civil Procedure. Some variation exists to accommodate substantive differences between trust and estate and civil litigation. However, in some instances there are divergent procedures which are not warranted and are likely unintended. As much as reasonably possible, there should be conformity between trust and estate and civil litigation procedures.

The timing upon which discovery may be commenced in civil and trust proceedings is out of sync. The purpose of this proposal is to bring greater conformity to the timing rules for commencement of discovery by adding three subdivisions to Probate Code 1000 as described below.

In addition, under Probate Code section 850 an order may be sought from the court determining rights and claims to property that is in the control or possession of the estate or another party. Although the rights and claims of interested persons are being determined in the proceeding, the notice of hearing as prescribed under current law fails to convey the significance of the action, raising a due process issue. A further purpose of this proposal is to provide enhanced notice to better identify the property at issue, advise whether additional relief is sought under Probate Code section 859, and inform the recipient that there is a right to file a response to the Petition.

## **PROPOSAL AND REASONS FOR PROPOSAL:**

This issue was referred to the Trusts and Estates Section Executive Committee (“TEXCOM”) by the California Law Revision Commission, which had received a comment from an attorney noting a significant discrepancy in the commencement of discovery in trust litigation proceedings and civil actions.

The discovery procedures set forth in the Code of Civil Procedure are equally applicable to proceedings under the Probate Code (Probate Code section 1000). The triggering event for commencement of discovery is the service of a summons or appearance by the defendant (Code of Civil Procedure sections 2025.210(b); 2030.020(b); 2031.020(b); 2033.020(b)).

A *will contest* easily mirrors the civil law structure due to the issuance of a summons (Probate Code section 8250, 8271). In *trust proceedings* there is no statutory authority for issuance of a summons and therefore no triggering event to commence discovery prior to formal appearance by the Respondent. This can result in a delay and possible prejudice to a petitioning party if crowded court calendars force the initial hearing to be set months after filing.

One possible solution would be to amend the code to equate service of a trust or probate petition with service of a summons for discovery purposes. However, this ignores the difference in jurisdiction between civil and trust and estate proceedings. In a civil action, generally the court must have jurisdiction over the subject matter and authority over the parties to decide the case. But trust and estate proceedings are in rem in nature, that is, they are proceedings over the

property in the estate of the decedent, and determine interests in that property. *Abels v. Frey* (1932) 126 Cal.App. 48, 53.

When a summons is issued, the court has asserted personal jurisdiction over the defendant, compelling participation in order to protect the defendant's personal rights and interests. The court must have sufficient minimum contacts to sustain personal jurisdiction (*International Shoe Co. v. Washington* (1945) 326 US 310, 316), and the defendant may challenge that jurisdiction by a motion to quash service of summons. (Code Civ. Proc., § 418.10). An in rem proceeding asserts jurisdiction over the property, affecting the interests of all persons in that property (2 Witkin, California Procedure, Jurisdiction section 243 (5th Ed 2008) but will not result in a personal judgment against the defendant.

Given these differences, a court sitting in probate lacks jurisdiction over all "interested persons" (Prob. Code, § 48) who are otherwise entitled to notice of a particular proceeding such that they could be compelled to respond to discovery absent establishing personal jurisdiction or their voluntary participation in the action. Unless the court has personal jurisdiction over the interested person, it does not have the right to enforce rights of discovery.

A different situation exists as to a trustee of a California trust, who under the code is deemed to have submitted to personal jurisdiction by administering the trust in this state. (Prob. Code, § 17003). Since personal jurisdiction already exists, it is appropriate that service of a petition and notice of hearing alone should suffice to trigger the obligation to respond to discovery. TEXCOM recommends amendment of Probate Code section 1000 to add new subdivision (b) to effectively provide that service of a petition and notice of hearing on a trustee of a California trust will have the same impact as service of a summons for purposes of the Civil Discovery Act.

Proposed new subdivision (b) of Probate Code section 1000 would read:

(b) A petitioner in a proceeding under Section 17200 that does not require issuance of a summons may commence discovery upon a trustee who is subject personally to the jurisdiction of the court under Section 17003 in accordance with the same time periods set forth in the Civil Discovery Act, except that such time periods shall commence to run upon service of the petition and notice of hearing upon the trustee, or the trustee's appearance in the proceeding, whichever first occurs.

The above proposed amendment addresses the issue of commencement of discovery against a trustee over whom the Probate Court has personal jurisdiction by statute, but does not necessarily impact other trust and estate litigation such as a Probate Code section 850 Petition. Under Probate Code section 850, an order may be sought from the court determining rights and claims to property that is in the control or possession of the estate or another party. Probate Code section 851(a) requires notice of the hearing and the petition to be served "in the manner provided in Chapter 4 (commencing with Section 413.10)" upon a personal representative, conservator, guardian, trustee, or person claiming an interest in or having title or possession of

the property in question in a manner consistent with service of a summons in a civil proceeding. All other persons entitled to notice may be served by mail under Probate Code section 851.

Since notice in a Probate Code section 850 proceeding is served in a manner commensurate with a civil summons upon those persons considered most likely to have the greatest interest in the outcome of the proceeding, it is logical that the same rules as to commencement of discovery should apply.

TEXCOM does not believe the concerns regarding in rem jurisdiction discussed above are present in regard to Probate Code section 850 Petitions because of their already broad scope. Under current law, a Probate Code section 850 Petition may include related causes of action and claims normally raised in a civil action (Prob. Code, § 855). The court may issue an order compelling conveyance or transfer of property, “or granting other appropriate relief.” In addition, if the court determines there was a wrongful taking, concealment, disposition of property, or disposition by undue influence, the offender “shall be liable for twice the value of the property recovered . . .” (Prob. Code, § 859). Thus, Probate Code section 850 Petitions currently have the potential to reach beyond mere in rem jurisdiction. The commencement of discovery rules should recognize that fact and be harmonized with the Civil Discovery Act.

Proposed new subdivision (c) of Probate Code section 1000 would read:

(c) A petitioner in a proceeding under Section 850 may commence discovery upon any person who receives notice of the hearing pursuant to Section 851(a) in accordance with the same time periods set forth in the Civil Discovery Act, except that such time periods shall commence to run upon service of the petition and notice of hearing.

Finally, commencement of discovery as to third parties is likewise tied by the Civil Discovery Act to issuance of a summons. This includes subpoenaing of business, financial, and medical records retained by third parties. As this process is always time consuming, postponing initiation until after an appearance by the Respondent further delays prosecution of the case. These records are often critical to the underlying dispute.

To address this problem, TEXCOM recommends the following additional subdivision to Probate Code 1000:

(d) For purposes of determining when a petitioner in a proceeding under this code may commence discovery as to non-parties, the time periods set forth in the Civil Discovery Act shall apply, except that such time periods shall commence to run upon service of the petition and notice of hearing upon all parties entitled to such notice.

To third parties, the timing of commencement of discovery is generally immaterial. TEXCOM believes this proposed subdivision will bring the discovery procedures in trust and estate proceedings more closely in alignment with civil discovery, enhancing efficiency without adversely affecting the rights of litigants.

While working on this project TEXCOM was also alerted to concerns regarding the Notice of Hearing as it relates to Probate Code section 850 Petitions. A due process issue was raised by an attorney and echoed by litigators on TEXCOM. Counsel had a client who was served with a Probate Code section 850 Petition and a Notice of Hearing concerning property in his possession that was claimed to belong to the petitioning estate. The language of a standard Notice of Hearing fails to convey the potential seriousness of the proceeding to an interested holder of property. It states: "This notice is required by law. This notice does not require you to appear in court, but you may attend the hearing if you wish."

Counsel's client did not realize the significance of the hearing, did not retain counsel, and when he failed to appear, the court defaulted him and entered judgment resulting in the loss of the property. Counsel was then in the position of attempting to set aside the default.

In addition to its failure to convey urgency to the interested party, a Notice of Hearing in an 850 Petition does not clearly identify the property affected by the petition, whether or not a money judgment of double the value of the property in question is being sought, or alert the recipient of the right to file a response. Even though it may not go far enough, TEXCOM believes the proper approach is found in Local Rule 4.37 of the Los Angeles County Superior Court. That Rule mandates that the Notice of Hearing on an 850 Petition shall include a description of the property in question and advise that interested persons have a right to file a response.

To address the propriety of the notice, TEXCOM suggests the following new subdivision (c) to Probate Code section 851:

- (c) The Notice of Hearing must contain the following:
  - (1) A description of the subject property sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice must state the street address, or if none, a description of the property's location and assessor's parcel number.
  - (2) If the petition seeks relief pursuant to Section 859, a description of the relief sought sufficient to provide adequate notice to the party against whom such relief is requested.
  - (3) A statement advising any person interested in the property that he or she may file a response to the petition.

By mandating this additional language in the Notice of Hearing, a person reviewing the notice will be able to quickly determine if their interests are at risk and that they have the right to participate in the proceeding.

### **HISTORY:**

The Trusts and Estates Section Executive Committee is not aware of any similar bill that has been introduced.

**PENDING LITIGATION:**

None known.

**LIKELY SUPPORT & OPPOSITION:**

Trust and estate litigators are likely to support the commencement of discovery consistent with the Civil Discovery Act to respondent trustees and persons entitled to notice under Probate Code section 851(a). The proposals will allow earlier discovery upon trustees already subject to court jurisdiction as well as persons who have or claim interest to property which is the subject of a Probate Code section 850 Petition.

Litigators representing both Petitioners and Respondents are likely to be in favor of clarifying and expanding the notice provisions connected to Probate Code section 850 Petitions, assuring proper notice to interested persons with a material interest in the property.

Finally, we believe trust litigators will be in favor of harmonizing commencement of discovery in regard to third parties with the Civil Discovery Act. This will allow a faster and more efficient discovery process in trust litigation.

We are not aware of any opposition to these proposals.

**FISCAL IMPACT:**

No anticipated fiscal impact.

**GERMANENESS:**

The members of the Trusts and Estates Section Executive Committee have an interest in and expertise concerning these issues from their experience in trust and estate litigation.

**DISCLAIMER:**

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

## **TEXT OF PROPOSAL:**

### **§ 851. Notice of hearing**

(a) At least 30 days prior to the day of the hearing, the petitioner shall cause notice of the hearing and a copy of the petition to be served in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure on all of the following persons where applicable:

- (1) The personal representative, conservator, guardian, or trustee as appropriate.
- (2) Each person claiming an interest in, or having title to or possession of, the property.

(b) Except for those persons given notice pursuant to subdivision (a), notice of the hearing, together with a copy of the petition, shall be given as provided in Section 1220 if the matter concerns a decedent estate, as provided in Section 1460 if the matter concerns a conservatorship or guardianship, or as provided in Section 17203 if the matter concerns a trust to all of the following persons:

- (1) Each person listed in Section 1220 along with any heir or devisee whose interest in the property may be affected by the petition if the matter concerns a decedent estate.
- (2) Each person listed in Section 1460 if the matter concerns a conservatorship or guardianship.
- (3) Each person listed in Section 17203 if the matter concerns a trust.

(c) The Notice of Hearing must contain the following:

(1) A description of the subject property sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice must state the street address, or if none, a description of the property's location and assessor's parcel number.

(2) If the petition seeks relief pursuant to Section 859, a description of the relief sought sufficient to provide adequate notice to the party against whom such relief is requested.

(3) A statement advising any person interested in the property that he or she may file a response to the petition.

(ed) The court may not shorten the time for giving the notice of hearing under this section.

### **§ 1000. Civil action rules applicable**

(a) Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of

practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

(b) A petitioner in a proceeding under Section 17200 that does not require issuance of a summons may commence discovery upon a trustee who is subject personally to the jurisdiction of the court under Section 17003 in accordance with the same time periods set forth in the Civil Discovery Act except that such time periods shall commence to run upon service of the petition and notice of hearing upon the trustee or the trustee's appearance in the proceeding, whichever first occurs.

(c) A petitioner in a proceeding under Section 850 may commence discovery upon any person who receives notice of the hearing pursuant to Section 851(a) in accordance with the same time periods set forth in the Civil Discovery Act, except that such time periods shall commence to run upon service of the petition and notice of hearing.

(d) For purposes of determining when a petitioner in a proceeding under this code may commence discovery as to non-parties, the time periods set forth in the Civil Discovery Act shall apply, except that such time periods shall commence to run upon service of the petition and notice of hearing upon all parties entitled to such notice.