



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### *MOTIONS IN PROBATE PROCEEDINGS*

#### **LEGISLATIVE PROPOSAL (T&E-2012-08)**

To: Saul Bercovitch, Legislative Counsel  
State Bar Office of Governmental Affairs

From: Margaret G. Lodise, Chair, Trusts and Estates Section Executive Committee  
Edward J. Corey, Vice Chair, Trusts and Estates Section Executive Committee  
David W. Baer, Co-Chair, Litigation Subcommittee  
Marc L. Sallus, Co-Chair, Litigation Subcommittee

Date: January 22, 2011

Re: A proposal to amend § 1000 of the Probate Code, relating to motions in probate proceedings

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

Date of Approval by Section Executive Committee: January 22, 2011

Approval Vote: For: 14 Against: 9 Abstain: 7

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## **SUMMARY OF PROPOSAL**

This proposal would harmonize procedures in probate litigation and general civil litigation by clarifying that, subject to three specific exceptions, the motions available in general civil litigation (e.g., motions for judgment on the pleadings, motions for summary judgment, applications for temporary restraining orders and injunctions) are also available in litigation under the Probate Code.

## **ISSUES AND PURPOSE**

This proposal recommends changes to Probate Code section 1000, under which the same rules of practice applicable in civil actions also apply in proceedings under the Probate Code except where *a specific* procedural provision in the Probate Code is inconsistent with the Code of Civil Procedure. The purpose of this “borrowing” statute is to conform probate proceedings as nearly as is possible to general civil proceedings, absent some good reason for having a different procedure in probate proceedings. Thus, for example, the procedures for conducting discovery in civil litigation also apply in probate litigation.

Although there is no case directly on point, most litigators interpret Probate Code section 1000 to make the same motions available in a civil lawsuit also available in a probate proceeding. Supporting this interpretation, no statute in the Probate Code specifically precludes filing such motions. Certain trial judges, however, have ruled otherwise. Thus, for example, a judge in Riverside County declined to consider a demurrer in a probate matter, finding the procedure unnecessary in that context. Rulings like this pose several problems.

First, and most importantly, at a practical level the motions used in civil practice can also be very useful in probate proceedings by obviating the need to engage in discovery, narrowing the issues or eliminating claims. A motion for judgment on the pleadings and a motion for summary judgment can obviate the need for any trial at all. All of these motions not only have the potential to spare litigants substantial expense, but can reduce the burden on scarce judicial resources at the trial court level.

Numerous other civil motions are potentially useful in probate proceedings and precluding litigants from making them would have negative consequences. For example, if a litigant wrongly clouds title to real property based on the pendency of a probate matter, the property owner should be able to file a motion to expunge under Code of Civil Procedure section 405.30 et seq. Were a motion to expunge unavailable, the owner would need to wait until the conclusion of the litigation before he or she could sell or refinance the property. The inability to clear title until the conclusion of the litigation could unfairly pressure the property owner into an unfavorable settlement. This is just one of countless examples demonstrating the importance of civil motions in both probate and general civil litigation.

Second, something as basic as the availability of civil motions should not vary from county to county and judge to judge. This is particularly true because local rules usually do not

address this issue, in which case only local counsel will be aware of the motion practice followed by a particular probate department or an individual judge.

Third, precluding litigants in Probate Court from making the motions available in civil practice appears to be inconsistent with the Probate Code's statutory scheme. Since the Probate Code contains no *specific* rule precluding the use of civil motions, under existing Section 1000 the nature of civil motion practice in probate litigation and general civil litigation should not differ. The proposed amendment, accordingly, would clarify rather than change existing law except to the extent that specific concerns applicable to probate proceedings justify creating limited differences in law and motion and pleading procedures.

Finally, no policy justification exists for having a fundamental difference between probate litigation practice and general civil litigation practice. To the contrary, the basic purpose of Section 1000 is to conform probate proceedings as nearly as is consistently possible with civil proceedings. Because, however, probate proceedings raise certain unique concerns, the proposal includes three exceptions to the applicability of Code of Civil Procedure provisions as described below.

Probate proceedings are characterized by a large number of pleadings because, among other things, each petition raising a new issue is filed in the same matter and there are frequently many hearings on the same matter. In addition, probate jurisdiction is generally in rem (i.e., relating to property), whereas civil jurisdiction is generally in personam (i.e., relating to the parties). These differences in the nature of probate proceedings justify limited departures from the pleading and law and motion procedures applicable in civil actions with respect to: 1) demurrers; 2) compulsory cross-complaints; and 3) the amendment of pleadings.

Some probate judges are concerned that demurrers are overused or abused, in many instances serve little or an improper purpose, and, given the multiplicity of pleadings in probate proceedings, would potentially impose an undue burden on probate courts. This proposal would therefore eliminate demurrers in probate proceedings except to the extent the Probate Code expressly permits them. On the other hand, in some instances the availability of a remedy to dispose of claims at the pleading stage can be helpful in promptly resolving or limiting the scope of a case without expensive and time-consuming discovery. A motion for judgment on the pleadings will be available to serve this purpose. Experienced litigators should be aware of this and are less likely to misuse the remedy.

Because probate proceedings are generally in rem, to require compulsory cross-complaints is not consistent with due process principles. Moreover, other rules and deadlines already exist and suffice to ensure that all issues concerning the administration and distribution of a decedent's estate. Consequently, it also makes good sense to confirm that the Code of Civil Procedure provisions regarding compulsory cross-complaints do not apply in probate proceedings.

Given the liberality allowed litigants in amending pleadings, motions to amend a pleading are almost never denied unless the amendment would prejudice the other side. Moreover, in probate proceedings a petition raising a new claim must or at least can generally be

filed in an existing matter. It is often preferable, however, to instead amend an existing petition to state a new claim so that all claims are alleged in a single petition, and the responses and defenses to those claims are alleged in a single response. This facilitates the court's understanding of what issues are before it. It would therefore be preferable to allow the parties to freely amend their pleadings without court approval until 120 days before the date for a trial or evidentiary hearing. No prejudice should result from an amendment made within that deadline. In contrast, an amendment made within 120 days of a trial is more likely to interfere with the other side's ability to prepare for trial by, for example, requiring additional investigation and discovery in a limited timeframe. Requiring a motion to amend if the matter is already within 120 days of trial will enable the courts to ensure that the amendment will not be prejudicial or to impose such conditions as to eliminate the prejudice that would otherwise arise.

**HISTORY:** Affected statutes added and amended by: AB 759 (Friedman), Chapter 79, statutes of 1990; AB 3686 (Horcher), Chapter 806, statutes of 1994; AB 1172 (Kaloogian), Chapter 724, statutes of 1997; AB 1938 (Aroner, Reyes), Chapter 1118, statutes of 2002.

**IMPACT ON PENDING LITIGATION:** The Trusts and Estates Section Executive Committee is not aware of any pending lawsuits in which the issues addressed by the proposal are being litigated, but virtually all litigation under the Probate Code presents these issues.

**LIKELY SUPPORT & OPPOSITION:**

<p><u>Support:</u> Some judges and some probate litigators will support this proposal.</p>	<p><u>Reasons:</u> The proposed amendment avoids confusion by harmonizing procedures in probate and general civil litigation and precludes trial courts from limiting motion practice in probate proceedings, except as specified.</p>
<p><u>Oppose:</u> Some judges and some probate litigators are likely to oppose this proposal.</p>	<p><u>Reasons:</u> Some probate judges may contend that they should have more autonomy in fashioning procedures they deem appropriate. Some probate litigators may oppose the limitation on the use of demurrers, which are currently permitted by some probate judges to the full extent that they are permitted in general civil litigation.</p>

**FISCAL IMPACT:** The proposed amendments could result in savings by reducing the number of hearings necessary to resolve probate matters.

**GERMANENESS:** The members of the Trusts and Estates Section Executive Committee have an interest in and expertise concerning these issues in that they typically litigate matters arising under the Probate Code.

## TEXT OF PROPOSAL

SECTION 1. Section 1000 of the Probate Code is amended to read:

1000. ~~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.~~

(a) All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

(b) Except to the extent that this code provides applicable rules of practice, the rules of practice applicable to civil actions provided in the Code of Civil Procedure apply to, and constitute the rules of practice in, proceedings under this code.

(c) Except to the extent that this code provides applicable rules of practice, proceedings in connection with motions and discovery provided in the Civil Code or the Code of Civil Procedure, including motions to strike, motions for judgment on the pleadings, motions for summary judgment, motions for summary adjudication on the issues, and discovery motions, apply to, and constitute the rules of practice in, proceedings under this code.

(d) The following exceptions or limitations apply to civil action motion and pleading practice in proceedings under this code:

(1) Demurrers do not apply to such proceedings under this code, except as provided in the Probate Code.

(2) Provisions of the Code of Civil Procedure regarding compulsory cross-complaints do not apply to such proceedings.

(3) Provisions of the Code of Civil Procedure regarding answers and amendment of pleadings do not apply to such proceedings in which there has been no responsive pleading filed. In such proceedings in which a responsive pleading has been filed, the parties may amend their pleadings without court approval until one hundred twenty (120) days prior to the date set for a trial or other evidentiary hearing, except as otherwise ordered by the court. Any amendment to a pleading proposed within one hundred twenty (120) days of a trial or other evidentiary hearing shall be governed by the provisions of the Code of Civil Procedure.