Excerpts from

California Practice Guide PROBATE

CHAPTERS 1-12

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of estate heirs and beneficiaries. The result turns on public policy considerations, most significantly the purpose for retaining counsel . . . i.e., for *whose benefit* counsel was employed. [See *Goldberg v. Frye,* supra; *Schick v. Bach* (1987) 193 CA3d 1321, 1329-1330, 238 CR 902, 907-908—distinguishing general rule of no attorney liability to third persons; and *Sooy v. Peter* (1990) 220 CA3d 1305, 270 CR 151 (same)]

In probate matters, counsel is normally retained to represent the estate's *executor or administrator . . . not* the beneficiaries: "Typically in estate administration conflicting interests vie for recognition. The very purpose of the fiduciary [estate representative] is to serve the interests of the estate, not to promote the objectives of . . . conflicting claimants . . . The beneficiaries are entitled to evenhanded and fair administration by the fiduciary. [But] *they are not owed a duty directly by the fiduciary's attorney*." [*Goldberg v. Frye,* supra, 217 CA3d at 1269, 266 CR at 489 (emphasis added); see also *Shannon v. Sup.Ct. (First Interstate Bank)* (1990) 217 CA3d 986, 993, 266 CR 242, 246 (dictum)]

(In effect, as mere *incidental* beneficiaries of probate counsel's services, estate heirs and beneficiaries ordinarily have *no standing* to sue for legal malpractice in the estate administration; *but see* ¶*1:15.3*.)

☞[1:17] ***PRACTICE POINTER:*** Even so, in an appropriate case, estate beneficiaries may request the court to *surcharge* the *personal representative* for any deficiencies in the estate's administration (*see* ¶*1:19, 16:183 ff.*).

1) [1:18] **Compare—allegedly negligent will drafting:** Heirs and beneficiaries will be *intended beneficiaries* (with standing to sue for attorney malpractice) where counsel negligently drafted decedent's will . . . *provided counsel was retained by the testator for the purpose of benefiting the aggrieved heirs and beneficiaries*. [See *Lucas v. Hamm* (1961) 56 C2d 583, 589-590, 15 CR 821, 824-825; *Osornio v. Weingarten* (2004) 124 CA4th 304, 321, 21 CR3d 246, 255; *Garcia v. Borelli* (1982) 129 CA3d 24, 32, 180 CR 768, 772 (*discussed further at* ¶*1:24*)]

   By contrast, an attorney who drafts a will is not subject to malpractice liability to nonclient potential beneficiaries in the absence of an executed will *expressly reflecting* the testator's intent to benefit

Bucquet v. Livingston (1976) 57 CA3d 914, 923-926, 129 CR 514, 519-521—inter vivos trust beneficiaries had cause of action against attorney whose allegedly negligent tax advice to settlor in drafting trust instrument ultimately resulted in reduction of beneficiaries' shares; *Lombardo v. Huysentruyt* (2001) 91 CA4th 656, 665-669, 110 CR2d 691, 699-702—intended beneficiaries of attempted trust amendment had malpractice cause of action against settlor's attorney who failed to obtain court approval prior to attempted amendment as required by conservatorship order]

As in the case of a will, however, the drafting attorney is not subject to malpractice liability to nonclient potential beneficiaries of the trust absent an executed trust instrument that *expressly reflects* the settlor's intent to benefit the potential beneficiary. [*Chang v. Lederman* (2009) 172 CA4th 67, 84-86, 90 CR3d 758, 772-774]

(For further discussion of these issues in the trust context, see *Lasky, Haas, Cohler & Munter v. Sup.Ct.* (1985) 172 CA3d 264, 282-286, 218 CR 205, 216-218; but also see dictum in *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 CA3d 307, 316, 160 CR 239, 244—trustee's attorney assumes relationship with beneficiary akin to that between trustee and beneficiary; *and* ¶*1:15.3*.)

(c) [1:19] **No attorney surcharge liability; but indemnification action likely:** Probate counsel may not be *surcharged* for damages caused by the estate representative's negligence or misconduct in estate administration. The executor or administrator is *personally* liable for any surcharge assessment. [*Estate of Lagios* (1981) 118 CA3d 459, 463, 173 CR 506, 508]

However, a personal representative surcharged for actions taken (or not taken) in *reliance on the advice of probate counsel* will likely look to counsel for *indemnification* (i.e., expect the surcharged representative to attempt to shift their liability to *you* through a *malpractice* action).

1) [1:19.1] **Malpractice action maintainable by successor fiduciary:** A successor personal representative effectively "steps into the shoes" of the predecessor representative, with the same powers and duties regarding continued estate

administration that the predecessor would have had—including the power to sue (Prob.C. §§8524(c), 9820(a)). Consequently, a successor personal representative may bring suit against the predecessor's attorney for malpractice causing loss to the estate. [*Borissoff v. Taylor & Faust* (2004) 33 C4th 523, 530, 15 CR3d 735, 739; *Smith v. Cimmet* (2011) 199 CA4th 1381, 1396-1397, 132 CR3d 276, 287; see also *Stine v. Dell'Osso* (2014) 230 CA4th 834, 840-841, 178 CR3d 895, 900 (same re successor conservator)]

c. [1:20] **Potential conflict of interest pitfalls:** Heirs and beneficiaries often do not obtain independent counsel unless and until an *adversarial* situation arises—e.g., conflicting claims to estate assets. Therefore, probate counsel must be especially sensitive to potential conflicts between one or more heirs and beneficiaries and the estate representative (who owes all of them a duty of impartiality and "evenhanded and fair administration"; ¶*1:16*).

(1) **"Dual representation" problems**

(a) [1:21] **Single attorney or law firm representing executor who is also beneficiary:** The situation becomes even more risky and complex when, as is frequently the case, the estate representative wears two hats—both as executor *and* as a successor in interest (testate or intestate) to decedent's property (e.g., the surviving spouse): In their fiduciary capacity, the executor must act in the best interests of the estate as a whole; yet, as heir or testate beneficiary, they will want to maximize their own inheritance, which may require decisions adverse to others having claims against the estate. [Cf. *Butler v. State Bar* (1986) 42 C3d 323, 326, 329, 228 CR 499, 500, 502-503—decedent's child named as executor was also a surviving joint tenant of property decedent had purported to devise in trust to surviving husband]

1) [1:21.1] **No absolute duty to decline representation where only a *potential* conflict:** There is no absolute bar against counsel undertaking representation of the executor in this situation . . . at least for so long as *no actual conflict* develops. [See *Estate of Kafitz* (1921) 51 CA 325, 329-330, 196 P 790, 791-792—attorney for special administrator permitted to receive compensation even though he had acted for one heir against others; but see also *Goldberg v. Frye* (1990) 217 CA3d 1258, 1263, 266 CR

is *valid*—that it was duly executed as required by law. As will be seen, the procedure is routine . . . unless there is a "will contest."

b. [3:229] **Challenging admission to probate:** Challenge to a will or to its admission to probate is made by a statutory "will contest." The contest may be initiated either before hearing on the petition for probate (by written objection to the petition for probate) *or* within 120 days after the will is admitted to probate (by petition to *revoke* the probate). [Prob.C. §§8004, 8250-8254, 8270-8272; and see *Estate of Horn* (1990) 219 CA3d 67, 73, 268 CR 41, 44-45 & fn. 7—belated preprobate contest filed after order admitting will to probate may be treated as post-probate contest on timely motion to amend]

Of course, if there is a timely objection to the petition for probate, no proffered will may be probated until the contest is resolved by court trial; and an order admitting a will to probate (or revoking the probate thereof) is appealable (¶*3:592*). [Prob.C. §1303(b); *Estate of Weber* (1991) 229 CA3d 22, 24, 280 CR 22, 23; *Estate of Guerrero* (1986) 183 CA3d 723, 727, 228 CR 408, 410; and see *Estate of Horn*, supra, 219 CA3d at 71, 268 CR at 43—order sustaining demurrer to preprobate will contest not appealable]

Cross-refer: Will contests are discussed in detail in *Ch. 15*; *see ¶15:1 ff.*

c. [3:230] **"Conclusive" effect of order admitting will to probate:** Absent timely contest (either *before* hearing on the petition for probate or by subsequent petition to *revoke* the probate), the court's order admitting decedent's will to probate is *conclusive*, subject to collateral attack only on limited statutory grounds. [Prob.C. §8226(a); and see *Estate of Horn*, supra, 219 CA3d at 72, 268 CR at 44—final order admitting will to probate eliminates possibility of a preprobate contest]

(1) [3:230.1] **Exception—"fraud in procurement" of court order:** The order may be set aside if procured by "extrinsic fraud" . . . meaning some sort of deception that effectively deprived the aggrieved party of a fair opportunity to fully present their case. [Prob.C. §§8226(a), 8007(b)(1) (¶*3:47*); *Estate of Sanders* (1985) 40 C3d 607, 614, 221 CR 432, 436; *Estate of Charters* (1956) 46 C2d 227, 234, 293 P2d 778, 783; *and see detailed discussion at ¶15:216 ff.*]

(a) [3:230.2] **Application—fraud practiced by personal representative:** Courts are more inclined to grant equitable relief where there is a breach of some "confidential" or *fiduciary* relationship. The personal representative of the estate, as a fiduciary, must observe a particularly high standard. [*Estate of Sanders*, supra—executor intentionally misled

decedent's grandchildren as to their rights under decedent's will and compounded deception by assuring them they had no reason to contact probate counsel or attend probate hearing: These acts amounted to extrinsic fraud, permitting set-aside of prior orders for probate and final distribution; *also see* ¶*15:219 ff.*]

(2) [3:230.3] **Exception—erroneous determination of death:** Additionally, an order admitting a will to probate is subject to collateral attack if based on an *erroneous determination of death*. [Prob.C. §§8226(a), 8007(b)(2) (¶*3:48*)]

(3) [3:230.4] **Compare—admitting another will to probate:** A will may be admitted to probate notwithstanding prior admission of a different will or a prior property distribution in the proceeding. [Prob.C. §8226(b)]

The subsequently-admitted will may *not* affect any property previously distributed pursuant to court order. But the court may determine how any of the will's provisions affect property not yet distributed as well as the first will's provisions. [Prob.C. §8226(b)]

(a) [3:230.5] **Limitation on admission:** If the will's proponent received notice of a petition for probate or petition for letters of administration for a general representative, they may petition for probate of the will *only* within the later of the following time periods:

- 120 days after issuance of the order admitting the first will to probate or determining the decedent to be intestate;
- 60 days after the will's proponent first obtains knowledge of the will. [Prob.C. §8226(c); *Estate of Earley* (2009) 173 CA4th 369, 377, 92 CR3d 577, 581; and see *Estate of Kelly* (2009) 172 CA4th 1367, 1375, 91 CR3d 674, 679—§8226(c) time limitations apply only to those who have received formal notice of the petition by mail or personal service (informal correspondence or other nonstatutory notice insufficient)]

d. [3:231] **Interpretation of will distinguished:** An order admitting a will to probate does *not interpret* the will. [*Estate of Cuneo* (1969) 1 CA3d 1008, 1011, 82 CR 261, 263] Interpretation may be contested in a proceeding to determine entitlement to distribution (¶*15:635 ff.*). [Prob.C. §11700 et seq.]

d. [3:424] **Accompanying acknowledgment of receipt of statement of duties and liabilities:** Estate representatives occupy a *fiduciary* office, requiring the exercise of due care, good faith and loyalty in the performance of their duties. [See Prob.C. §9600, *and* ¶*5:23 ff.*]

To ensure that representatives *understand* the fiduciary nature of their position and the duties involved, the Code requires that, *prior to issuance of letters*, they file an *acknowledgment of receipt* of a "statement of duties and liabilities of office." [Prob.C. §8404; CRC 7.150]

The §8404 statement sets forth generally the representative's fiduciary duties in the management and administration of decedent's estate. It must be in the form prescribed by the Judicial Council (which also contains the requisite acknowledgment to be filed with the court). [See *Estate of Justesen* (1999) 77 CA4th 352, 360-361, 91 CR2d 574, 580]

- ***FORM:*** Statement of Duties and Liabilities of Personal Representative (DE-147), available online at the California Courts website (*www.courts.ca.gov*).

(1) [3:424.1] **Trust company and public administrator representatives exempt:** The §8404 acknowledgment need not be filed by *trust company* or *public administrator representatives*. [Prob.C. §8404(a); CRC 7.150]

(2) [3:424.2] **Legal effect—not preemptive of governing law:** The §8404 statement is simply a *summary* of the representative's obligations—it is *not a complete statement of the law*. Indeed, the statement does not supersede the law on which it is based: i.e., the representative's conduct is governed by the *Code* provisions, not by the §8404 statement of duties and liabilities. [Prob.C. §8404(c)]

(3) [3:424.3] **May be supplemented:** The representative's attorney may "supplement, explain, or otherwise address" the subject matter contained in the §8404 statement . . . and, as a matter of *prudent practice, should* do so (*see* ¶*5:8 ff. and Form 5:A*). [Prob.C. §8404, Law Rev. Comm'n Comment]

[3:424.4] *Reserved.*

(4) [3:424.5] **Acknowledgment of receipt procedure:** Again, letters may not issue until the representative files the signed acknowledgment of receipt of the §8404 statement (*see form DE-147*). The signed acknowledgment should be submitted along with the completed letters form. [Prob.C. §8404(a)]

(a) [3:424.6] **Confidential disclosure of representative's birth date and driver's license number:** Courts by local rule may require representatives to disclose their birth date and driver's license number when acknowledging receipt of the §8404(a) Statement of Duties and Liabilities of Personal Representative, *provided* the court ensures the confidentiality of that information. [Prob.C. §8404(b)]

Local rules regarding this disclosure requirement are varied. [See L.A. Sup.Ct. Rule 4.30(c)]

1) [3:424.7] **Confidential disclosure form:** The Judicial Council has adopted for *mandatory use* a form "Confidential Supplement to Duties and Liabilities of Personal Representative," to be submitted with the §8404 acknowledgment (*form DE-147*) in courts requiring the birth date/ driver's license information.

FORM: Confidential Supplement to Duties and Liabilities of Personal Representative (Probate) (DE-147S), available online at the California Courts website (*www.courts.ca.gov*).

e. [3:425] **Time to file:** If the qualification requirements are met, letters may issue as soon as the probate petition is granted. Thus, the letters form and §8404 acknowledgment (¶*3:424*) should be ready for filing on the hearing date. [Prob.C. §8403(a)]

[3:426] ***PRACTICE POINTER:*** Prob.C. §8403(a) allows the personal representative to sign and date the oath (which appears on the form of letters) any time on or after the date the *petition* for probate or for letters of administration is signed. Thus, counsel should obtain the client's signature early on, to insure expeditious issuance of letters. (Note, however, that the letters may not be *filed* until the petition is granted by the court.)

f. [3:427] **Copies to obtain:** Certified copies of letters will be needed to transfer property such as bank accounts and securities into the estate representative's name; a certified copy of letters of appointment will also be required for permission to remove any contents from decedent's safe deposit box (¶*1:240.2*). Thus, enough certified copies should be requested from the clerk to accomplish these objectives.

[3:428] ***PRACTICE POINTER:*** Because of the possibility of suspension of powers or revocation of appointment (¶*3:429*), most transfer agents, banks and other institutions will not honor a certification of letters dated more than 60 days before its presentation.

b. [5:8] **Comprehensive written explanation recommended:** Before the court may issue letters, the personal representative (other than a trust company or public administrator) must file an acknowledgment of receipt of a *statutory* "statement of duties and liabilities of office" (Prob.C. §8404; *see* ¶*3:424 ff.*). [*Estate of Justesen* (1999) 77 CA4th 352, 360-361, 91 CR2d 574, 580]

The §8404 statement sets forth generally the representative's fiduciary duties in the management and administration of decedent's estate. However, it is simply a *summary*—not a complete statement of the law. Indeed, the §8404 statement does not supersede the law on which it is based: i.e., the representative's conduct is governed by the *Code* provisions, *not* by the §8404 statement of duties and liabilities. [Prob.C. §8404(c)]

For these reasons, it is prudent practice for probate counsel to provide the personal representative with a more *comprehensive* letter of instructions at the commencement of probate; and it may be advisable to furnish the same letter to decedent's immediate family as well. (The Law Revision Comm'n Comment to §8404 states that "Although the [§8404] 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* . . ." (emphasis added).)

(1) [5:9] Use this letter to summarize the significant steps involved in probate administration, laying out an estimated timetable of what to expect over the next six months, year, or longer period as the case may be.

(2) [5:10] Continue in this letter with advice about the estate representative's rights, duties and responsibilities (e.g., the general obligation to use "ordinary care and diligence" in managing and controlling the estate, Prob.C. §9600 et seq., ¶*5:24 ff.*).

(3) [5:10.1] Likewise, stress important estate administration *deadlines* (e.g., deadline for *paying estate taxes*, ¶*10:267, 10:364 ff.*; for *notifying creditors* to file their claims, Prob.C. §§9050 & 9051, ¶*8:8 ff.*).

(4) [5:10.2] The letter should also explain, if applicable, any *fees* and *costs* that will be charged to the client for the performance of "nonprobate" legal services (i.e., fees not chargeable against the estate and not subject to court approval). Recall that if "reasonably foreseeable" expense *to the client* will exceed $1,000, the fees and costs arrangement ordinarily must be committed to a *signed writing* and must contain the minimum standard provisions required by Bus. & Prof.C. §6148. *See* ¶*1:47 ff.*

[Representatives] occupy trust relations toward the legatees, and are bound to the utmost good faith in their transactions with the beneficiary . . .” [*Estate of Martin* (1999) 72 CA4th 1438, 1439-1440, 86 CR2d 37, 40 (internal quotes and citations omitted); see *Graham-Sult v. Clainos* (9th Cir. 2014) 756 F3d 724, 743 (applying Calif. law)—because executor was a fiduciary, estate beneficiaries were entitled to rely on “statements and advice” he gave them]

Some representatives may even be tempted to treat the assets under administration as their own—for example, by making unannounced advances from estate assets to themselves or by commingling estate assets with their own. Such activities can lead to serious trouble and, possibly, *surcharge* liability against the representative (¶*5:25.1 ff.*). [See *Estate of Sanders* (1985) 40 C3d 607, 616-619, 221 CR 432, 437-439—executor’s serious breach of duties amounted to “extrinsic fraud” for purposes of setting aside orders admitting will to probate and for final distribution]

(1) [5:24] **Explain fiduciary standard of care:** Probate counsel must play “watchdog” to prevent such abuses. Explain the nature of the estate representative’s statutory standard of care: As fiduciary for the benefit of those “interested in the estate,” the representative is obligated to use “ordinary care and diligence” in managing and controlling the estate and its assets. [Prob.C. §9600(a)]

(a) [5:24.1] **Reasonable prudence and diligence guideline:** An estate representative’s standard of care is not as high as that placed on trustees (although *professional* personal representatives are held to a higher standard of care than are lay representatives, based on their “presumed” expertise). But in any event, the representative is bound to exercise that degree of “prudence and diligence” which a person of “ordinary judgment would be expected to bestow upon his [or her] own affairs of a like nature.” [*Estate of Beach* (1975) 15 C3d 623, 631, 125 CR 570, 574; *Lobro v. Watson* (1974) 42 CA3d 180, 189, 116 CR 533, 539; see *Graham-Sult v. Clainos*, supra, 756 F3d at 746—allegations that executor lacked good faith held sufficient to overcome executor’s assertion that business judgment rule protected him from liability]

(b) [5:24.2] **Exercising powers:** “Ordinary care and diligence” may require the personal representative to exercise a specific power. For example, they are obligated to take all steps reasonably necessary for the *protection and preservation* of estate property (¶*13:422 ff.*)—including the duty to *obtain and maintain insurance* on the property to the extent

reasonably necessary (Prob.C. §9656). [Prob.C. §9600(b)(1), Law Rev. Comm'n Comment]

By the same token, the extent to which a power should be exercised is limited to what is required by the exercise of ordinary care and diligence under all of the circumstances—i.e., "ordinary care and diligence" may require the representative to *refrain* from exercising a power. (E.g., although insurance may be required, the representative is not authorized to obtain and maintain *more* insurance on estate property than is *reasonably necessary*.) [Prob.C. §9600(b)(2), Law Rev. Comm'n Comment]

(c) [5:24.3] **Same level of responsibility even if representative is sole beneficiary or heir:** No lesser standard of care applies when the representative is the sole beneficiary of the estate. [*Lobro v. Watson*, supra, 42 CA3d at 188-189, 116 CR at 539] Until the property is distributed by court order and the estate closed, third parties—e.g., creditors, the tax authorities, and the court—have legitimate interests that must be protected. Make sure your client understands this principle.

(d) [5:24.4] **No abrogating fiduciary responsibilities to corepresentatives:** Similarly, where there are *joint* personal representatives for the estate, they are *equally* bound by the fiduciary standard of care. In effect, they must "watchdog" each other's acts (and omissions to act) in managing the estate (*see* ¶*5:25.5* on liability for *improper delegation*):

1) [5:24.5] **Concurrence to exercise powers:** Where there are *two* personal representatives, *both* must concur to exercise a power. [Prob.C. §9630(a)(1)] And, where there are *more than two* joint representatives, a *majority* must concur to exercise a power. [Prob.C. §9630(a)(2)]

2) [5:24.6] **Enforcing corepresentative's fiduciary obligations:** However, a corepresentative should not "blindly" follow the will of the majority if they have reason to think that the majority action might compromise or breach the standard of "ordinary care and diligence."

a) [5:24.7] Thus, any *one* of two or more representatives may *oppose* a petition made by one or more of the others or by any other person. [Prob.C. §9630(d)(1)]

b) [5:24.8] And, any *one* of two or more representatives may *petition the court* for an order requiring the corepresentatives to

take a specific action for the benefit of the estate *or* directing them *not* to take a certain action. [See Prob.C. §9630(d)(2)]

(2) [5:25] **Explain liability exposure for breach of fiduciary duty:** Clarify the extent of the representative's *liability* exposure for a breach of the statutory standard of care (this may drive home the importance of adhering to fiduciary principles).

(a) [5:25.1] **Statutory surcharge risks, generally:** For a breach of fiduciary duty, the representative is chargeable by statute with "any of the following that is appropriate under the circumstances" (Prob.C. §9601(a); *Kampen v. Flickinger* (2011) 201 CA4th 971, 988, 135 CR3d 410, 423; and see *Nickel v. Bank of America Nat'l Trust & Sav. Ass'n* (9th Cir. 2002) 290 F3d 1134, 1137 (applying Calif. law) (same standard applies to trustees under Prob.C. §16440(a)):

- Any *loss or depreciation in value* of the estate caused by the breach, *with interest* (¶*5:25.3 ff.*). [Prob.C. §9601(a)(1)]
- Any *personal profit* made by the representative through the breach, *with interest*. [Prob.C. §9601(a)(2), Law Rev. Comm'n Comment]
- Any *lost profit that would have accrued to the estate* but for the breach. [Prob.C. §9601(a)(3)]

The representative is not liable for lost profits that would have accrued to the *beneficiary personally* (as opposed to the trust) but for the representative's breach. [*Williamson v. Brooks* (2017) 7 CA5th 1294, 1302, 213 CR3d 388, 394]

1) [5:25.2] **Court discretion—"good faith" protection:** Generally, if the representative acts reasonably and in *good faith* under the circumstances known, they may be safe from these surcharge risks. The court has *discretion* to "excuse" a representative's §9601 liability if it would be "equitable to do so." [Prob.C. §9601(b); *Kampen v. Flickinger*, supra; see *Orange Catholic Found. v. Arvizu* (2018) 28 CA5th 283, 293-294, 239 CR3d 60, 68-69—no abuse of discretion in excusing trustee from liability where substantial evidence showed that trustee acted reasonably and in good faith in using trust funds to pay expenses that should have been borne by life tenant, not evicting him when he could not pay those expenses, and not promptly renting or selling the property after his death; life tenant was a

longtime family friend of trustor, trustee believed she was carrying out trustor's wishes and charitable remainder beneficiary was not financially harmed (applying Prob.C. §16440(b)); also see Prob.C. §9657—"The personal representative shall not . . . suffer loss by the decrease or destruction without his or her fault, of any part of the estate"]

(b) [5:25.3] **Interest liability:** If the personal representative is answerable for interest (¶*5:25.1*), their liability is for the greater of the following:

- Amount of interest accruing at the legal rate on money judgments (currently 10%); *or*
- Amount of interest actually received. [Prob.C. §9602(a); *Kampen v. Flickinger*, supra; and see *Nickel v. Bank of America Nat'l Trust & Sav. Ass'n*, supra, 290 F3d at 1137 (applying same standard to trustee under Prob.C. §16441)]

1) [5:25.4] **"Good faith" protection:** As with surcharge risks generally (¶*5:25.1*), the personal representative may be "excused" from liability for interest provided he or she acted reasonably and in *good faith* under the circumstances known. Again, courts have *discretion* to forgive a representative's §9602 liability when it is "equitable to do so." [Prob.C. §9602(b)]

(c) [5:25.5] **Liability exposure of joint representatives:** Joint personal representatives face a *double-threat* of potential liability. They may be surcharged for their *own* breaches of fiduciary duty (¶*5:25.1 ff.*) *and*, in an appropriate case, for a breach of fiduciary duty committed by a *corepresentative*. [Prob.C. §9631]

Specifically, a joint personal representative is liable for a breach of fiduciary duty committed by a corepresentative under any of these circumstances (Prob.C. §9631(b)):

- Where the personal representative *participates* in a breach of fiduciary duty committed by the other representative (Prob.C. §9631(b)(1));
- Where the personal representative *improperly delegates* estate administration to the other representative (Prob.C. §9631(b)(2));
- Where the personal representative *approves, knowingly acquiesces in* or *conceals* a breach of fiduciary duty committed by the other representative (Prob.C. §9631(b)(3));

- Where the personal representative's negligence *enables* the other representative to commit a breach of fiduciary duty (Prob.C. §9631(b)(4)); and/or
- Where the personal representative knows or has information from which they *reasonably should have known* of the other representative's breach of fiduciary duty and *fails to take reasonable steps to compel* the other representative to *redress* that breach (Prob.C. §9631(b)(5)).

(d) [5:25.6] **Other statutory or common law liabilities:** The statutory surcharge remedies (¶*5:25.1 ff.*) are not exclusive. Even if the court is willing to excuse minor breaches under §§9601 and 9602, the representative is still exposed to *other* statutory *or common law* liabilities: i.e., a beneficiary harmed by a particular breach may have an *independent cause of action* for damages against the representative. [Prob.C. §9603]

Cross-refer: Particular risks of surcharge liability and the representative's damages exposure are discussed in later Chapters of this Practice Guide (see especially *Ch. 13*, dealing with sales, leases, investments and loans; and *Ch. 16*, dealing with surcharge litigation in connection with representative's accounting).

[5:26] ***PRACTICE POINTER:*** Your comprehensive written letter of instructions to the client (*Form 5:A*) should clearly explain these fiduciary responsibilities and liability risks. Indeed, as mentioned, letters will not be issued until the representative files with the court an acknowledgment of receipt of the Prob.C. §8404 "statement of duties and liabilities of office" summarizing the significant "dos and don'ts." [*Estate of Justesen* (1999) 77 CA4th 352, 360-361, 91 CR2d 574, 580; *see* ¶*5:8; and detailed discussion in Ch. 3*]

In addition, maintaining *regular contact* with the representative (¶*5:11*) will help avoid potential breaches of fiduciary responsibilities. Just as important, your *written* periodic advice to the representative is likely to be an important "stop-gap" against your own potential *malpractice* exposure . . . should the representative seek to hold *you* responsible for their liability on the ground that you failed to advise of the appropriate standard of care.

4. [5:27] **Working With Corporate Estate Representatives:** Most banks and trust companies handling probate administration employ highly trained personnel; the responsibilities assumed by a corporate

MARSHALING AND INVENTORYING ASSETS

Scope Note: After letters are issued, one of the estate representative's initial—and most important—responsibilities is the "marshaling" of all assets and property interests held in decedent's name or *owned* by decedent . . . including decedent's separate property and one-half interest in community and quasi-community property that will be probated, regardless of how title to such property is held. In the estate administration context, "marshaling" is the process of discovering, identifying, and taking possession and control of the decedent's assets so they may be managed and administered in an orderly fashion, used to pay taxes, creditors' claims and expenses of administration, and, ultimately, distributed to the estate beneficiaries.

Once marshaled, all assets subject to probate administration must be reported to the court (inventoried) and appraised. In some cases, appraisal is made by the court-appointed probate referee and in others by the representative personally. Also, in the process of obtaining financial information about the estate, the representative will have to collect all relevant information regarding decedent's liabilities and make arrangements for payment of all proper creditors' claims (*Ch. 8*). This Chapter discusses the asset marshaling, reporting and appraisal procedures.

A. MARSHALING ASSETS

1. [6:1] **Nature of Duty to Marshal Assets:** Subject to limited statutory exceptions, the personal representative "has the right to, and shall take possession or control of, all the property of the decedent to be administered in the decedent's estate and shall collect all debts due to the decedent or the estate." The "property" for this purpose includes *rents, issues* and *profits* generated from estate property throughout the period of administration and until the estate is distributed. [Prob.C. §9650(a)(1) & (2)]

   Further, the representative "shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in their possession." [Prob.C. §9650(b)]

   Thus, estate administration basically consists of:

   - Collecting, managing and *preserving* decedent's assets;
   - Paying debts, taxes and expenses of administration; and ultimately
   - Distributing the net (remaining) estate to the beneficiaries and/or heirs.

   Given these responsibilities, the proceedings necessarily depend on the identification, collection and valuation of decedent's "probate estate." This marshaling of estate assets is one of the personal

representative's main functions. [*Lobro v. Watson* (1974) 42 CA3d 180, 189, 116 CR 533, 539]

a. **Maintaining action to recover possession**

(1) [6:1.1] **Generally:** Where necessary, the duty to "take possession or control of" the probate estate *may* require the representative to *bring a third party action to recover possession* of estate property or to determine title thereto. [See Prob.C. §§9820(a) (action or proceeding for benefit of estate), 9654 (action by heirs or devisees, alone or jointly with representative, for possession of property or to quiet title to property), & 850 et seq. (action to determine title to property held by another)] *See further discussion at ¶6:3.20 ff.*

(2) [6:1.2] **Duty to recover certain property for benefit of creditors:** On application of a *creditor* of the estate, the representative must commence and prosecute an action to recover decedent's property for the benefit of creditors *if* (a) the representative has insufficient assets to pay creditors *and* (b) decedent during lifetime did any of the following with respect to the property:

- Made a *conveyance* of the property or any interest therein that is voidable as to creditors under the Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act) (Civ.C. §3439 et seq.);
- Made a *gift* of the property "*in view of impending death*" (Prob.C. §§5700-5705, *discussed in Ch. 12*); *or*
- Directed transfer of a vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home to a designated beneficiary on the decedent's death pursuant to Health & Saf.C. §18102.2 or Veh.C. §§5910.5, 9916.5 (¶*2:29.14 ff.*) and the property has been transferred as directed. [Prob.C. §9653(a)]

Cross-refer: The nature of the §9653 obligation and the applicable procedure and representative's responsibilities thereunder are fully explained in *Ch. 15. See ¶15:848 ff.*

b. [6:1.3] **Special "discovery" procedures:** The ability to properly marshal and inventory decedent's assets necessarily presupposes that the estate representative *knows what* those assets are and *where* they are, *and* is able to obtain control of them. When the representative (or other interested person) *suspects* (but is not certain) that *third persons* are *withholding* estate property or *have knowledge* about property of the decedent (including a possible will), special estate administration "discovery" procedures are available to require

or desirable for administration, the heir or devisee in possession *must surrender* the asset to the representative upon request. [Prob.C. §9650(c); *and see* ¶*6:3.20*]

[6:3.3] ***PRACTICE POINTER:*** Whether to leave assets in the possession of heirs or beneficiaries ultimately entitled to receive them (or to turn assets over to them) pending administration is often a close judgment call. The decision may turn on the nature of the asset (whether it is likely to deteriorate in value, etc.) and on how *responsible* the devisee or heir is likely to be in taking good care of the asset. In either event, the personal representative should confirm that estate property, including any vehicles, is appropriately insured.

Allowing heirs or beneficiaries to keep physical custody of estate property during probate does *not* relieve the representative of their fiduciary standard of care in regard to that property. Where the property is in possession of the person who *ultimately* will receive it, the representative will not be liable to that person for losses caused by its damage or destruction. On the other hand, if the representative fails to take possession of estate property that is subsequently lost, they may be liable to those who would have been entitled to it. [*Estate of Boggs* (1939) 33 CA2d 30, 33, 90 P2d 814, 816]

Given the potential for liability, cautious representatives should opt for taking physical custody of assets (and, if necessary, maintaining suit to recover property of the estate, ¶*6:1.1 ff.*) whenever there is any doubt as to who ultimately will be entitled to receive the assets or where *liquidation* of the property might be required to pay creditors. When early distributions are deemed appropriate, the representative may be better off proceeding under the Code provisions for *preliminary distribution* (¶*16:1 ff.*). *See further discussion at* ¶*6:41 ff.*

(1) [6:3.4] **Compare—temporary possession of family dwelling and exempt personalty by spouse/domestic partner and children:** Until the inventory is filed, and for 60 days thereafter, decedent's surviving spouse or registered domestic partner (see Fam.C. §297.5(c)) and minor children are entitled to remain in possession of the family dwelling, family wearing apparel, household furniture and other personal property exempt from enforcement of a money judgment. [See Prob.C. §6500, ¶*7:10 ff.*]

b. [6:3.5] **Abandonment of tangible personal property:** The Code allows the representative to "dispose of or abandon"

tangible personal property that is *not specifically devised* where the cost of collecting, maintaining and safeguarding it would exceed its fair market value. [Prob.C. §9780; *Estate of Barreiro* (1932) 125 CA 153, 178-179, 13 P2d 1017, 1027]

This authority may be exercised in the first instance without court approval, unless decedent's will otherwise provides (Prob.C. §9781). But *notice* and opportunity to object must be given to specified interested persons (Prob.C. §9782); and, if objection is timely made, the abandonment or other disposition may ordinarily proceed only with prior court approval (Prob.C. §9783).

Cross-refer: The statutory abandonment procedure is discussed in detail in *Ch. 13; see ¶13:120 ff.*

[6:3.6-3.9] *Reserved.*

3. [6:3.10] **Protection for "Good Faith" Mistakes in Taking Possession of Estate Property:** As noted in earlier chapters, the personal representative must exercise "ordinary care and diligence" in the management and control of estate property (Prob.C. §9600). A "prudent person" standard normally applies, meaning that the representative is bound to exercise "good faith" and "reasonableness" . . . but not necessarily "error-free" judgment (*see generally*, ¶*5:24 ff.*).

   Pursuant to this standard of care, the representative will not be held criminally or civilly liable for *erroneously* taking possession of property later determined *not* to be part of the decedent's estate . . . provided that, in taking custody of such property, the representative acted in *good faith* and under a *reasonable belief* that the property was in fact part of the estate. [Prob.C. §9651(a)]

   a. [6:3.11] **"Good faith" requires reasonable investigation:** To satisfy this "good faith" requirement, the representative must make "reasonable efforts" to determine the "true nature of, and title to" property taken into their possession. The §9651 protection may be forfeited if the representative fails to verify the ownership status of assets brought under their control purportedly as property of the estate. [Prob.C. §9651(b)] (*See ¶6:4 ff. on obtaining information about specific types of property.*)

   b. [6:3.12] **Duty to deliver nonestate property to proper persons:** Once an error is discovered, the representative must deliver the property found not to be part of the estate (or cause such property to be delivered) to the person "legally entitled to it," together with all rents, issues and profits thereon (if any) received in the interim. However, the representative may *deduct* expenses incurred "in protecting and maintaining the property and in collecting [its] rents, issues, and profits." [Prob.C. §9651(c)]

      (1) [6:3.13] **Option to request court approval:** Delivery to someone perceived to be "legally entitled" to the property might itself be erroneous. If the error was in "good faith"

and "reasonable," the representative will normally be protected from liability (Prob.C. §9601(b)). However, the safest course, whenever it is not entirely clear who is "legally entitled" to the property, how the property should be delivered, or how much of the property should be delivered (i.e., what related *expenses* may be deducted), is to request *court approval*. Section 9651 gives the representative the *discretionary* right (not obligatory) to "request court approval before delivering the property pursuant to this subdivision." [Prob.C. §9651(c)]

If the representative is unsure how to proceed, the proper recourse is to file a "petition for instructions" (Prob.C. §9611, ¶*14:265 ff.*) or, in the face of adverse claims to property in the representative's possession, to file a petition to determine the title dispute under Prob.C. §850(a)(2) (¶*15:555 ff.*).

[6:3.14] ***PRACTICE POINTER:*** Although recourse to the court is discretionary, it may behoove representatives to obtain court approval of a transfer of property supposedly included in the estate by mistake: A final probate court order or judgment generally *releases* the personal representative and their sureties from "all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order." [Prob.C. §7250(a)] Absent court order, if the property is released to a third person *not* entitled to it, the representative may be liable to heirs or devisees who suffer loss as a result (¶*6:3.3*).

(2) [6:3.15] **Compensation for services rendered in connection with §9651 duties:** To the extent services rendered in connection with property later determined not to be part of the estate are found by the court to be "of benefit to the estate" or "essential to preserve, protect, and maintain" such property, the representative may be awarded compensation for such services. If the compensation is based on services "of benefit to the estate," it is treated as an expense of administration; and if based on preservation, protection and maintenance of the property, it is reimbursed to the estate by way of a deduction from the rents, issues and profits received from such property or (if that is insufficient) as a *lien* against the property. [Prob.C. §9651(d); *see* ¶*16:286*]

[6:3.16-3.19] *Reserved.*

4. [6:3.20] **Remedies to Perfect Representative's Right to Possession:** As indicated, third persons holding decedent's property are bound to surrender it to the representative upon the representative's request (this includes heirs and devisees who might ultimately be entitled to the property upon final decree of distribution, ¶*6:3.2*). [Prob.C. §9650(c)] If a holder of the property refuses to surrender it after request, the representative may commence appropriate legal action to obtain the property. [See generally, Prob.C. §9820(a)—personal representative may "commence and maintain actions and proceedings for the benefit of the estate"]

   [6:3.21] ***CAVEAT*—Representative May Have *DUTY* to Bring Suit; Petition for Instructions When in Doubt:** If the failure to recover property for the benefit of the estate causes loss to decedent's heirs, beneficiaries or creditors, the representative may be held accountable. [See *Estate of Boggs* (1939) 33 CA2d 30, 33, 90 P2d 814, 816] Hence, the general fiduciary obligation of "ordinary care and diligence" applicable under the circumstances (Prob.C. §9600) may impose an *affirmative duty* on the representative to bring appropriate legal action to recover estate property from a holder who refuses to surrender it. [See *Hill v. Goldberg* (1994) 22 CA4th 265, 272, 27 CR2d 298, 302—representative has duty to bring suit to set aside property conveyance or transfer obtained from decedent by fraud or undue influence]

   If in doubt about whether litigation should be maintained and/or about the appropriate remedy, the representative may file a *petition for instructions* asking the court for directions on how to proceed. [Prob.C. §9611; ¶*14:265 ff.*]

   (Compare: A petition for instructions may *not* be used where the Probate Code clearly dictates the appropriate procedure or remedy in the circumstances; Prob.C. §9611 (¶*14:274*). However, where the Code provides for a particular procedure but the representative is not sure whether that procedure applies to the particular case, a petition for instructions may be filed *in the alternative*; *see* ¶*14:275.5*.)

   a. [6:3.22] **Probate Code actions:** Under some circumstances, the representative's remedy may be specifically prescribed by the Probate Code (e.g., a petition under Prob.C. §850(a)(2)(D) where decedent died having a claim to real or personal property, title to or possession of which is held by another, ¶*15:555 ff.*).

      (Again, if it is unclear whether a particular Probate Code remedy or procedure is appropriate in the circumstances, the representative may file a §9611 petition for instructions in the alternative; *see* ¶*6:3.21*.)

   b. [6:3.23] **General civil action:** Where there is no appropriate Probate Code remedy, an independent civil action for pos-

and yet come to find out through a title search that the parcel was held by decedent in their name alone as decedent's sole and separate property.

As stated above (¶*6:5*), deeds are the most obvious source of reference. If the deeds or copies cannot be found, a title search should be conducted.

(2) [6:7] **Obtain legal descriptions:** Having pinpointed the property and the form of title, the exact legal description must be ascertained. Again, the most obvious source is the deed; but if this is unavailable, a lot book report with legal description usually can be obtained from a title company at nominal cost.

(3) [6:8] **Determine nature and extent of improvements:** Similarly, as to any improved property, a reasonably detailed description of the improvements should be obtained. This information is essential, as it affects the property's value for tax purposes.

(a) [6:9] ***Caveat*—use of property tax bills:** Decedent's recent property tax bills may be helpful—particularly in terms of allocating value between land and buildings. However, they are *not* conclusive (and rarely even probative) of current market value. Details relating to decedent's purchase of the property, especially if a recent purchase, are a more reliable source of valuation information. Ultimately, a competent appraiser's report may be needed (¶*6:11*).

(4) [6:10] **Ascertain nature and extent of mortgages, deeds of trust and other encumbrances:** It is also essential to determine whether there are any liens or encumbrances on the property, as well as any current and/or delinquent property tax assessments. These obviously affect value, and information about them is also necessary to arrive at a budget for the timely payment of such obligations.

(5) [6:10a] **Confirm adequate insurance:** The personal representative should confirm the continuing validity and sufficiency of insurance policies on all properties.

(6) [6:10.1] **Cash flow from income-producing realty:** The duty to take possession of estate property extends to all its "rents, issues and profits" as well (Prob.C. §9650(a)(2)). Indeed, to facilitate a proper appraisal, the probate referee will need the cash-flow details regarding apartment buildings and other residential and/or commercial income properties. It is therefore important to compile a tenants' rent schedule and a schedule of income and expenses (usually for the preceding three to five-year period) for all income-producing realty in the estate.

before they attempt to use them. New certified copies can be easily obtained from the court clerk through your attorney service at nominal cost.

(b) [6:20] **Forfeitures:** Amounts held in accounts subject to forfeitures or penalties on early withdrawal should not be touched until it is determined whether transfer of these funds to the estate account will cause such a forfeiture. To prevent a forfeiture, leave the money in the account until the maturity date, when withdrawal may be effected with full interest.

[6:21] ***PRACTICE POINTER:*** Amounts held in certificate or term accounts may be withdrawn and the accounts closed following decedent's death (up to one year thereafter) without risk of forfeiture. Hence, the representative should consider withdrawing these funds whenever currently available investment alternatives promise a higher yield. (*See discussion of estate investments at ¶13:421 ff.*)

(c) [6:22] **Cash deposits:** Money belonging to the estate may be deposited without prior court order into any *insured account* in a state or federal bank, savings and loan, credit union or like "financial institution" located in California. [Prob.C. §§9700, 40, 46]

Likewise, absent court order to the contrary, withdrawals from such accounts may be made without prior court approval as necessary to administer the estate using "ordinary care and diligence." [Prob.C. §9700] Even so, prior court approval may be requested and, indeed, may be advisable under the particular circumstances: When a withdrawal of estate funds is made on *court authorization*, the representative ordinarily is effectively insulated from liability that might otherwise have been imposed for a wrongful withdrawal. [Prob.C. §7250(a); *and see generally, ¶9:3.8*]

1) [6:23] **Amount of deposits:** Each deposit should be limited to the federally-insured ceiling (currently $250,000). Amounts above the ceiling should be placed in insured accounts with other authorized banking institutions.

2) [6:24] **Interest-bearing accounts:** All cash taken into the representative's possession must be invested in *interest-bearing* accounts or "other

investments authorized by law" . . . except to the extent the cash is reasonably necessary for orderly estate administration or decedent's will otherwise provides. Proper interest-bearing investments will have to be disclosed on each of the representative's accountings. [Prob.C. §9652; *see* ¶*13:433 ff.*]

For this purpose, note that interest-bearing *checking* accounts (¶*6:25*) are commonly available and are recommended.

3) [6:25] **Checking account:** The funds needed to meet the cash obligations of the estate (e.g., to pay creditors' claims, family allowance, last illness and funeral expenses, taxes and administration expenses) are kept in a checking account in the representative's name and identifying the estate. If the balance rises above the amount needed for administration, additional deposits should be made periodically into an interest-bearing savings account or other authorized form of investment.

[6:26] ***PRACTICE POINTER:*** Separate checks should be ordered for the estate accounts. Caution the estate representative not to commingle estate funds with their own accounts and not to draw checks for the estate on their personal accounts. [See Prob.C. §9657—"The personal representative shall not make profit by the increase . . . of any part of the estate"; *and* ¶*5:23 ff.*]

A fortiori, the same principle applies to probate *counsel:* Commingling personal funds with those belonging to the estate is a serious breach of ethics subjecting counsel to state bar discipline (suspension or disbarment) and *malpractice* liability if the misconduct causes loss to the estate. [See CRPC 1.15(c); *and* ¶*1:39*]

Cross-refer: A detailed discussion of obtaining and investing funds for the estate is presented in *Ch. 13.*

[6:27] *Reserved.*

c. [6:28] **Securities:** The estate representative must also make a thorough search for decedent's stocks and bonds, if any, and should take possession of the certificates to insure their safety (although the representative may later elect to deposit the certificates with a qualified broker or investment advisor for convenience or to facilitate sales).

(1) [6:29] **Determining existence of securities:** Examine decedent's personal effects, including the contents of

e. [6:39] **Tangible personalty:** Valuable jewelry, coin, stamp, art and other collections, silver, furs, automobiles, antiques, furniture and furnishings must be itemized, described, safeguarded and insured. All such items will have to be appraised—either by the probate referee or, at the representative's election in the case of "unique, artistic, unusual, or special" items of tangible personal property, by a qualified independent expert. [Prob.C. §§8902, 8904; *see* ¶*6:61.1 ff.*]

(1) [6:40] **Use of estate safe deposit box:** Small items of unique value (jewelry, etc.) are best safeguarded in an estate safe deposit box, which may simply be decedent's box transferred into the estate representative's name. Other valuable personalty, not susceptible to such storage (artwork, etc.), should be protected as well as possible (e.g., locked garage, warehouse, safe).

(2) [6:41] **Distribution in lieu of storage:** Many times, it may seem preferable to distribute certain items to the testate beneficiaries designated to receive them, rather than to incur the costs of storage. This approach is technically permissible. [See Prob.C. §9650(c), ¶*6:3.2*] However, each situation must be evaluated on a case-by-case basis. For instance, distribution is not advisable if there is any doubt as to who is entitled to the item. Nor is it advisable, at least until the appraisal is completed, if there is a risk that the beneficiary will dispose of, damage or lose the property.

[6:42] ***PRACTICE POINTER:*** Remember that the representative is held to fiduciary standards and is responsible for the estate property pending final accounting and distribution. Thus, at least in regard to unique items and assets of substantial value, the representative is better advised to keep possession and store them in a safe place until they are appraised and a determination can be made that their distribution will not prejudice others (such as creditors) possibly interested in the estate. (*See further discussion and "practice pointer" at* ¶*16:10.6.*)

f. **Insurance, pensions, and related benefits**

(1) **Life insurance**

(a) [6:43] **Policies on decedent's life:** Ordinarily, life insurance proceeds are not payable to decedent's estate but to a named beneficiary (i.e., life insurance proceeds usually escape probate). Even so, the representative must obtain full information on all policies on decedent's life. For this purpose, it may be necessary to contact the insurance carriers for copies of the policies and beneficiary designations.

(b) [6:46.18] **Custodian immunity on good faith compliance:** A custodian (and its officers, employees or agents) acting in good faith and in compliance with its duties under the Act will be immune from liability for those actions (or omissions). [Prob.C. §881(f)(1)]

However, *no* immunity attaches in the case of *gross negligence or willful or wanton misconduct* of the custodian (or its officers, employees or agents). [Prob.C. §881(f)(2)]

i. [6:47] **Other assets:** The above (¶*6:5 ff.*) describes the most common types of property owned by typical estates. But the representative should check for other forms of property holdings as well—such as mineral rights, patent interests, copyrights, rights of publicity, annuities, interests in trust, powers of appointment, etc. Even though some of these items may not be subject to probate, they *may* be subject to estate taxes and thus should be appraised.

6. [6:48] **Related Matters Requiring Representative's Attention:** In addition to collection, identification and preservation of the estate's assets, above, the representative must handle certain other matters:

a. [6:49] **Decedent's credit cards and debit accounts:** Immediately, all of decedent's credit card accounts and any automatic payments should be canceled and firms with which decedent conducted business should be notified of decedent's death. All creditors should be instructed to forward to the representative the final account statements (as well as the balances owing on the date of death). All credit cards in decedent's name should be destroyed. Consider obtaining a credit report to determine whether additional (potentially dormant) accounts exist in decedent's name.

b. [6:50] **Collecting debts due estate:** Like all other estate assets, debts due the decedent are part of the estate that must be "collected" and taken into the representative's possession. [Prob.C. §9650(a)(1)] Some of these debts may be owed in connection with decedent's business and should be treated accordingly (*see* ¶*14:64 ff. on handling decedent's business*). Other debts may be personal obligations (e.g., a loan from decedent to a friend or relative). The representative should examine decedent's personal effects for evidence of all outstanding obligations owed to the estate, including personal injury claims which survive to the estate under CCP §377.20 (¶*15:281 ff.*).

If the representative negligently fails to collect outstanding debts, they will be held accountable to the estate (conversely, the representative is *not* accountable for debts uncollectible *without* their fault). [Prob.C. §9650(a)(1)]

(1) [6:50.1] **Debts owed by personal representative:** No special allowance is made for debts owed by the *personal representative* to the decedent: i.e., the representative's appointment does *not* discharge any claim decedent has against the representative. Accordingly, the representative's debts to decedent must be collected as well. [Prob.C. §9605; *and see* ¶*6:87.1*]

(2) [6:50.1a] **Legal action may be required:** The duty of "marshaling" debts requires the representative to take the appropriate steps to *collect* obligations on behalf of the estate—including commencement of a *lawsuit* if necessary. [See generally, Prob.C. §9820(a)—personal representative may "commence and maintain actions and proceedings for the benefit of the estate"]

(3) [6:50.2] **Compromise and settlement; set-off against pecuniary devise:** In an appropriate case, a compromise and discharge of the estate's claims may be negotiated (but court approval is required for specified compromises and settlements; see Prob.C. §9830 et seq., ¶*15:890 ff.*). Or, if the debt is owed by a testate beneficiary given a *pecuniary* devise, it need not be collected at all but may be deducted from that devisee's share of the devise upon final distribution (*see* ¶*16:438*).

[6:51] ***PRACTICE POINTER:*** Generally, it is advisable to obtain an acknowledgment of the debt where collection will be postponed—i.e., in the case of beneficiary-debtors. This precaution will circumvent any potential statute of limitations bar when the estate's claim is asserted at time of distribution.

c. [6:52] **Decedent's income taxes:** Advise the representative to obtain copies of decedent's most recent state and federal income tax returns to make sure they were in fact filed. The returns may also reveal property that *otherwise might have gone undetected*—i.e., income tax returns typically reflect dividend and interest payments (thus identifying stocks, bonds and bank accounts owned by decedent) and schedule income-producing real property, other depreciable property, royalties, etc.

Tax refunds due but unpaid at death are includible in the estate inventory. The estate's payments of income taxes outstanding at death on income received during decedent's lifetime are deductible for federal estate tax purposes. [Treas.Reg. §20.2053-6(f)]

d. [6:53] **Decedent's real property taxes:** Similarly, inquiry should be made into the status of decedent's real property taxes, to make sure payments are current.

Also, the representative should ascertain whether the homeowner's property tax exemption was claimed ($7,000 of as-

sessed value, so long as decedent lived in the house on January 1 of the year of death). [Rev. & Tax.C. §§218, 2192] If the exemption was not claimed by decedent, the representative should file and record the appropriate papers to claim it on behalf of the estate.

e. [6:54] **Property and liability insurance:** The duty to use "ordinary care and diligence" in management of the estate may require the representative to obtain and maintain insurance against risk of damage or loss pending administration. [See Prob.C. §9656]

Decedent's automobile, homeowner and other property and liability insurance policies (e.g., insuring real property improvements against damage or loss) should be examined to determine whether they adequately protect the estate's insurable assets *and the representative*. Where there is no coverage (e.g., for jewelry), it should be obtained. And if existing policies do not *adequately* cover the fair market value of the property or are not sufficient to protect the representative from personal liability arising out of the duty to maintain the property (e.g., property used in a trade or business), *additional* coverage should be obtained. (The cost of reasonably necessary insurance for estate property or to protect the personal representative against liability is a proper expense of estate administration, *see ¶16:282 ff.*)

At a minimum, the respective insurance carriers should be informed in writing of decedent's death and *requested to endorse the policies to show the estate representative as named insured* pending final distribution and closing of the estate.

f. [6:55] **Handling debts owed by decedent to others:** Decedent's creditors must be properly notified to *file their claims against the estate*. As a first step, immediately upon issuance of letters, the representative must use "reasonable diligence" to identify and locate the creditors; then actual notice must be given as prescribed by law (see Prob.C. §§9050-9052, *¶8:5.1 ff.*).

Each claim presented should be itemized on the inventory so that a realistic estimate of the estate's cash requirements pending administration may be made.

g. [6:55.1] **Recovering property transferred in fraud of creditors, etc.:** If the estate does not have sufficient assets to pay creditors, proper "marshaling" of decedent's property also may require the representative to maintain legal proceedings *on behalf of decedent's creditors* to recover property that decedent during life conveyed in violation of the Uniform Voidable Transactions Act (Civ.C. §3439 et seq.), gave away in "view of impending death" or transferred pursuant to Health & Saf.C. §18102.2 or Veh.C. §§5910.5, 9916.5 (*¶6:1.2*). [See Prob.C. §9653; *and discussion at ¶15:848 ff.*]

h. [6:55.2] **Decedent's digital assets:** The representative should be encouraged immediately to marshal decedent's digital assets (e.g., email, Facebook, Twitter, and Bitcoin accounts, etc.), and to take reasonable steps to close out those accounts and obtain data stored in them to the extent appropriate.

B. PREPARATION AND FILING OF INVENTORY AND APPRAISAL

1. [6:56] **Nature and Purpose of Inventory and Appraisal:** The "Inventory and Appraisal" is the official public record of all property and property interests decedent owned at death which are subject to probate administration. The representative is "charged" with administering all of the assets listed on the inventory. The inventory and appraisal also serves these specific purposes:

- Advises the heirs and beneficiaries of all assets and their value in decedent's probate estate.
- Advises the court of the content and value of the estate for purposes of determining requisite bond (¶*3:380 ff.*), duration of a family allowance (¶*7:69 ff.*), and other administration matters, such as when assets may be sold.
- Provides a point of reference in computing estate taxes due and in preparing the final accounting incident to distribution.

a. [6:56.1] **Governing law:** The inventory and appraisal process is governed by Prob.C. §8800 et seq. (supplemented by Prob.C. §§400-408 and 450-453, dealing with qualifications and appointment of probate referees).

b. **Representative's role**

(1) [6:57] **Preparing form:** The duty to prepare and timely file the inventory and appraisal is imposed by the Code on the estate representative. [Prob.C. §8800(a); *Estate of Justesen* (1999) 77 CA4th 352, 360, 91 CR2d 574, 579; see also *Estate of Fain* (1999) 75 CA4th 973, 992, 89 CR2d 618, 631-632—personal representative may be personally liable for failing to timely file inventory and appraisal (¶*6:68*)]

- [6:57.1] **Comment:** In practice, the representative's counsel usually prepares the inventory and appraisal (or at least oversees its preparation) for most estates with inexperienced individual representatives.

(2) **Items for personal representative's appraisal**

(a) [6:58] **Usually, only specified "cash" and related assets:** The representative is charged with appraising the "cash" and cash-type items specified in Prob.C. §8901. A probate referee's appraisal is not required for these items because their value is ordinarily self-evident.

authority is granted. As used by the Act, "court supervision" means "the judicial order, authorization, approval, confirmation, or instructions that would be required if authority to administer the estate had *not* been granted" under §10400 et seq. [Prob.C. §10401 (emphasis added)]

(1) [9:3.2] **Impact:** As indicated at the outset, IAEA representatives may take many estate administration actions without first obtaining the court approval, authorization, confirmation or instructions that would otherwise be required under general "estate management" law (Prob.C. §9600 et seq.). Such "court supervision" of *IAEA* actions is required, if at all, only if a "notice of proposed action" must be given (¶*9:29 ff.*) and an objection to the noticed action is timely made (¶*9:62 ff.*). [See Prob.C. §9640—"Nothing in this part [dealing with "estate management"] limits or restricts any authority granted to a personal representative under the [IAEA] . . . to administer the estate"]

(a) [9:3.3] **Distinguish—IAEA representatives still bound by normal fiduciary standard of care:** Although IAEA authority might excuse the need for "court supervision," it does *not* reduce the personal representative's *fiduciary standard of care*. *See* ¶*9:3.14*.

(2) [9:3.4] **Compare—normal "court supervision":** In contrast, personal representatives who are *not* granted IAEA authority must administer the estate under all of the normal "court supervision" rules.

The general rules regarding "court supervision" are codified in Prob.C. §§9610-9613, summarized below (¶*9:3.5 ff.*). But these general rules are subject to more specific "court supervision" statutes, depending upon the nature of the action or transaction in question (e.g., investments, loans, sales, leases, exchanges, certain compromises and settlements, etc.); the specific court-supervised procedures are explained in this Practice Guide in connection with particular estate administration transactions (*see particularly, Chs. 13, 14 and 15*).

(a) [9:3.5] **Powers and duties exercisable without court authorization:** Except where the Code specifically provides a proceeding to obtain court supervision or requires court supervision, the powers and duties of a personal representative may be exercised without court authorization, instruction, approval or confirmation. However, even if court supervision is not specifically required, a personal representative always has the option of requesting court authorization, instructions, approval or confirmation. [Prob.C. §9610]

As a practical matter, the specific court supervision statutes "swallow up" much of a personal repre-

has *all of the powers granted by the IAEA* to administer the estate under the Act, except to the extent that decedent's will withholds any specific powers (Prob.C. §§10404, 10502, ¶*9:6.3*). [Prob.C. §10402]

The powers exercisable under the IAEA are discussed at ¶*9:19 ff.*

(2) [9:3.12] "Limited authority" means authority to exercise all of the powers granted by the IAEA (again, subject to decedent's withholding of specified powers) *except* the powers to:

- Sell real property;
- Exchange real property;
- Grant an option to purchase real property; and
- Borrow money with the loan secured by an encumbrance on real property. [Prob.C. §10403]

(For an explanation of the reasons why a representative might prefer "limited" over "full" IAEA authority, *see* ¶*9:9.2 ff.*)

[9:3.13] *Reserved.*

3. [9:3.14] **Fiduciary Standard of Care:** All personal representatives—whether or not granted IAEA authority—are obligated to exercise "ordinary care and diligence" in the management and control of the estate (Prob.C. §9600; see also *Estate of Davis* (1990) 219 CA3d 663, 671, 268 CR 384, 390—IAEA authority does not relax personal representative's fiduciary duties; *and* ¶*5:24 ff.*). An IAEA representative's powers must be exercised *or not* exercised *subject to this standard of care.* [See Prob.C. §10502—"Subject to the conditions and limitations of this part *and to Section 9600* (duty to manage estate using ordinary care and diligence) . . ." (emphasis added)]

Thus, an IAEA representative is required to exercise a power granted by the IAEA to the extent ordinary care and diligence require the power to be exercised and may not exercise an IAEA power to the extent ordinary care and diligence require that the power not be exercised (Prob.C. §9600(b)). A breach of the applicable standard of care exposes the representative to *surcharge* liability. [See Prob.C. §10502, Law Rev. Comm'n Comment]

B. OBTAINING IAEA AUTHORITY

1. [9:4] **Court Grant of IAEA Authority Required:** Estate representatives have no "inherent" authority to act under the IAEA. Nor may they take IAEA action on mere authority conferred by decedent's will. Rather, to obtain authority to administer the estate under the IAEA, the personal representative "shall" petition the court. [Prob.C. §10450(a); *see* ¶*9:10 ff.*]

- ***FORM:*** The appropriate notations are made on the official form "Letters" (DE-150) at item "3." The Letters form is explained in *Ch. 3*; *see* ¶*3:417 ff.* The form is available online at the California Courts website (*www.courts.ca.gov*).

(1) [9:18.4] **Bond prerequisite:** If bond is required (i.e., not waived in decedent's will or by beneficiaries or heirs), issuance of IAEA letters will be conditioned on posting the requisite bond. [See Prob.C. §10453, *discussed in Ch. 3 at* ¶*3:400.1 ff.*; *see also* ¶*9:9.2 ff.* re impact on requesting "limited" vs. "full" IAEA authority]

C. POWERS EXERCISABLE UNDER THE IAEA

1. [9:19] **Classification of Powers—In General:** An IAEA representative's powers fall into three distinct categories:

- Actions requiring court supervision notwithstanding the grant of IAEA authority (Prob.C. §10501);
- Actions that may be taken only after giving notice of proposed action (Prob.C. §§10510-10538) . . . which in turn will require court supervision if a timely objection is received; and
- Actions that may be taken without giving notice of proposed action and, hence, without court supervision in all cases (Prob.C. §§10550-10564).

APPENDIX: A comparison chart depicting the various categories of IAEA vs. Non-IAEA powers, and cross-referencing to applicable Code provisions when court supervision is required or optionally sought, is included in the Appendix at the close of this Chapter.

[9:19.1] ***PRACTICE POINTER—Fiduciary standard of care:*** As stressed earlier, whether or not court supervision or a notice of proposed action is required, IAEA representatives remain bound by the general fiduciary standard of care—i.e., they must exercise "ordinary care and diligence" in management and control of the estate (*see* ¶*9:3.14*).

Indeed, IAEA representatives are often subject to *stricter* scrutiny during their accountings because many of their transactions lack the court supervision that otherwise would obtain over representatives acting without IAEA authority.

2. [9:20] **Actions Requiring Court Supervision Notwithstanding IAEA Authority:** Some estate administration actions present particularly significant risks of abuse of power or harm to the interests of persons interested in the estate. As to these actions, court supervision is *always* required . . . meaning that, notwithstanding IAEA authority, the representative may properly take the action *only* pursuant to the applicable court-supervised procedures governing the particular action (see Prob.C. §10401, defining "court supervision"; ¶*9:3.1*).

[9:30.1] **Exceptions for certain actions requiring court supervision:** As to any of the actions listed below (¶*9:30.2 ff.*), the notice of proposed action procedure is *superseded* by the requirement of obtaining *court supervision* if the action is *either* (i) specifically withheld from the powers of an IAEA representative granted only *limited* authority, ¶*9:25*; *or* (ii) a "conflict of interest" transaction involving the representative or representative's attorney under §10501(a) and not excepted from the court supervision requirements by §10501(c), ¶*9:21 ff.*

(1) [9:30.2] **Actions *always* requiring notice:** The following actions, regardless of the circumstances, may be taken by an IAEA representative only pursuant to the statutory notice of proposed action procedures (unless, of course, the representative elects to seek court supervision in the first instance, ¶*9:28*; or court supervision is *mandatory* and thus *supersedes* the notice of proposed action procedure) (Prob.C. §§10510-10520):

(a) [9:31] **Sale or exchange of real property:** [Prob.C. §10511]

1) [9:31.1] **Manner of sale:** Subject to the notice of proposed action requirements, any restrictions on IAEA sales imposed by decedent's will, and the Code "conflict of interest" rules requiring court supervision, a representative with *full* IAEA authority may sell estate property (real or personal) either at public auction or private sale, and with or without notice, for the price, on cash or credit terms, and upon such other terms and conditions as the representative "may determine."

Unless a timely objection is made, the requirements applicable to court confirmation of real property sales (*including but not limited to* publication of notice of sale, court approval of agents' and brokers' commissions, sale at not less than 90% of appraised value, and court examination into the necessity for the sale, advantage to the estate and benefit to interested persons, and efforts of the personal representative to obtain the highest and best price for the property reasonably attainable; ¶*13:155 ff.*), as well as the requirements applicable to court confirmation of personal property sales (¶*13:87 ff.*) *do not apply to the sale*. [Prob.C. §10503]

[9:31.2] ***PRACTICE POINTERS:*** Again, however, the seemingly broad flexibility conferred by §10503 does not excuse the representative's adherence to the statutorily-defined

fiduciary standard of care (Prob.C. §9600; ¶*5:24 ff.*): At a minimum, representatives exercising a power of sale under the IAEA should be advised to adequately *expose the property to the potential market*. And, in any event, normal court supervision procedures will apply if a timely *objection* is made to the sale under applicable notice of proposed action steps. [See Prob.C. §10503, Law Rev. Comm'n Comment]

Because of the significant risk of objection to a representative's account reporting an IAEA real property sale, and because of the potential for court-supervised overbidding, prudent representatives often elect to proceed from the outset under normal court supervision procedures for real property sales.

(b) [9:32] **Sale or incorporation of business:** The sale or incorporation of:

- An unincorporated business or venture in which decedent was engaged at the time of their death; or
- An unincorporated business or venture which was wholly or partly owned by decedent at the time of their death. [Prob.C. §10512]

(c) [9:33] **Abandonment of tangible personal property** (per Prob.C. §§9780-9788 authority to abandon tangible personal property where cost of collecting, maintaining and safeguarding same would exceed its fair market value, ¶*13:120 ff.*). [Prob.C. §10513]

(d) [9:34] **Borrowing money or encumbering property:** Borrowing money or placing, replacing, renewing or extending any *encumbrance* upon any property of the estate. [Prob.C. §10514]

(e) [9:34.1] **Grant of option to purchase estate real property** for a period *within or beyond* the estate administration. [Prob.C. §10515]

(f) [9:34.2] **Transferring property to person exercising option to purchase granted by decedent's will:** [Prob.C. §10516]

This power may be exercised under notice of proposed action procedures even though the IAEA representative has only limited authority. [See Prob.C. §10516, Law Rev. Comm'n Comment]

(g) [9:34.3] **Conveyance or transfer of real or personal property to complete decedent's contract to convey or transfer the property:** [Prob.C. §10517]

have IAEA authority. But there are other powers that may be exercised without court supervision by IAEA *and non-IAEA* representatives alike. Thus, Prob.C. §10551 clarifies that, in addition to the expressly listed powers above (¶*9:75 ff.*), an IAEA representative may also, without court supervision or giving notice of proposed action, exercise all other powers that a personal representative not having IAEA authority could exercise without court supervision. [Prob.C. §10551]

For example:

- Voting a security, in person or by general or limited proxy (authorized without court supervision by Prob.C. §9655);
- Insuring the estate and the personal representative (authorized without court supervision by Prob.C. §9656). [See Prob.C. §10551, Law Rev. Comm'n Comment]

[9:84.1] ***CAVEAT*—Fiduciary Standard of Care:** The grant of powers by the IAEA is not intended to be construed as a legislative statement that any particular power or all of the enumerated powers must or should be exercised. Again, keep in mind that IAEA representatives remain bound by the general fiduciary standard requiring them to use "ordinary care and diligence" in the management and control of the estate (Prob.C. §9600). This fiduciary standard may require that a particular power be exercised under certain circumstances and that it *not* be exercised under others. For breach of the §9600 standard of care, the representative is exposed to personal liability notwithstanding the IAEA grant of such power in the abstract.

D. MODIFICATION AND REVOCATION OF IAEA AUTHORITY

1. [9:85] **No "Permanent" IAEA Authority—Court Power to Revoke or Modify:** Just as a personal representative's letters may be revoked for cause (¶*14:458 ff.*), so may a representative's authority to act under the IAEA. Likewise, for cause shown, the court may *modify* an IAEA representative's "full authority" by restricting it to "limited authority" (i.e., by revoking the non-court supervised IAEA power to sell, exchange or grant options to purchase estate real property, or to borrow money with the loan secured by estate real property). [Prob.C. §10454(e); see also 20 Cal. Law Rev. Comm'n Rpts. 1001 (1990)]

   - [9:85.1] **Comment—"piecemeal" modifications?** It is unclear whether §10454 empowers the court, for cause, to modify an IAEA representative's authority by limiting IAEA authority to *specific* powers only (i.e., piecemeal exclusion of certain IAEA powers). However, the probate court almost certainly could take such action in the exercise of its generally broad jurisdiction and *inherent equitable authority* (*see generally, ¶3:60.8*).

from decedent's will. In properly exercising the duty to use "ordinary care and diligence" in management and control of the estate (Prob.C. §9600), the representative's "power" to sell may in fact be a *duty* to sell.

a. [13:2] **Statutory power to sell:** The basic statutory authority to sell is found in Prob.C. §10000, which confers on the personal representative, whether in a testate or intestate estate administration, the general power to sell real or personal property of the estate whenever a sale is:

- "Necessary" to pay debts, devises, a family allowance, taxes or expenses of administration (Prob.C. §10000(a)); *and/or*
- Deemed to be "to the advantage of the estate and in the best interest" of persons interested in the estate (Prob.C. §10000(b)).

These two standards represent *independent* grounds for exercising the power of sale; neither is mutually dependent upon the other. Thus, e.g., when estate property is sold because the sale is to the estate's advantage and in the best interest of interested persons, it is irrelevant that the sale is not also "necessary" to pay debts, taxes, etc. [See *Estate of Barthelmess* (1988) 198 CA3d 728, 735-736, 243 CR 832, 836-837]

(1) [13:2.1] **Discretionary, not obligatory:** Sections 10000(a) and (b) do not *mandate* a sale in any particular circumstance. Rather, the representative's *exercise* of the general power of sale where "necessary" to pay estate obligations or where "advantageous" to the estate is a *discretionary* determination that must be made in light of the representative's fiduciary duty to exercise or *not* exercise a power to the extent required by "ordinary care and diligence" (Prob.C. §9600). [See Prob.C. §10000—"Subject to the limitations, conditions, and requirements of this chapter, the personal representative *may* sell . . . in any of the following cases . . ." (emphasis added); and Prob.C. §10000, Law Rev. Comm'n Comment]

(2) **Determining when to exercise statutory authority**

(a) [13:3] **"Necessary" sales:** Whether a sale is "necessary" to pay debts, devises, taxes, expenses, etc. is generally determined when the inventory and appraisal is completed and an estimate of the total cash needs of the estate is made. A comparison of the estate obligations against the value of estate assets and their form—liquid or nonliquid—will determine whether, in the exercise of ordinary care and diligence, assets must be sold.

(b) [13:4] **Sales for "advantage" of estate:** It is more of a judgment call, however, to determine

whether, in the exercise of ordinary care and diligence, a sale *should* be made because it would be to the estate's "advantage" and in the "best interest" of the interested persons (beneficiaries, heirs, creditors, etc.).

1) [13:4.1] **To "preserve" estate:** As a general rule, the decision should be made with a view toward *avoiding obvious losses* to the estate during administration (i.e., estate *preservation*). [See *Estate of Beach* (1975) 15 C3d 623, 639, 125 CR 570, 580; *Layton v. State Bar* (1990) 50 C3d 889, 899, 268 CR 845, 850—attorney/executor suspended from practice for (among other things) failing diligently to attempt selling depreciating estate residence; *Estate of Anderson* (1983) 149 CA3d 336, 352-353, 196 CR 782, 793—executor removed and surcharged for improvidently selling real property to raise cash to pay taxes without considering other alternatives and in disregard of sale's negative tax consequences; compare *Estate of Bonaccorsi* (1999) 69 CA4th 462, 472, 81 CR2d 604, 610—representative not liable for loss incurred by delayed sale of decedent's residence because depreciated value attributed solely to depressed real estate market (*but see* ¶*13:354*)]

2) [13:4.2] **To avoid distributing fractional interests:** However, the representative may also determine that a sale of certain property is to the estate's "advantage" and in the "best interest" of interested persons because a sale will avoid distribution of fractional undivided interests in property devised to several persons or, worse, a partition action. That one of the devisees claims the sale is not in their *own* best interests is not an acceptable reason for overriding the representative's decision to sell—particularly when the other devisees of the property are in favor of the sale. [See *Estate of Barthelmess* (1988) 198 CA3d 728, 735-736, 243 CR 832, 837—sale of home devised to decedent's three children in equal shares confirmed over one child's objection where estate not large enough to equally divide it by giving home to one heir and balance of assets to the others]

(3) **Fiduciary obligation may impose *duty* to sell**

(a) [13:5] **Sales necessary to meet estate obligations:** If an analysis of estate obligations and assets shows that there is insufficient *liquidity* to satisfy estate obligations (approved creditor claims, taxes, family allowance, etc.), proper discharge of the "ordinary care and diligence" standard of care may render the representative's general "power" to sell an affirmative *duty* to sell.

This result is implicit in the representative's broad fiduciary obligation (the representative "*shall* exercise a power to the extent that ordinary care and diligence require that the power be exercised," Prob.C. §9600(b)(1) (emphasis added)); and it is also implied by Prob.C. §10001, which gives "interested persons" the right to *petition the court* to *require* a sale when the representative "neglects or refuses" to make a sale "necessary" to pay debts, devises, taxes, a family allowance or expenses of administration (¶*13:21*).

(b) [13:6] **Sale necessary to avoid losses:** Likewise, a representative contemplating a sale for the "advantage" of the estate may become subject to an affirmative *duty* to sell when necessary to preserve the estate or prevent deterioration in asset value—e.g., in a declining market situation. [See *Estate of Beach*, supra, 15 C3d at 639-640, 125 CR at 580-581; *Layton v. State Bar,* supra, 50 C3d at 899, 268 CR at 850; *Estate of Bonaccorsi* (1999) 69 CA4th 462, 472, 81 CR2d 604, 610 (*discussed further at* ¶*13:4.1 & 13:354*)]

[13:7] ***PRACTICE POINTER:*** Except in one limited situation (where the proposed buyer is the estate representative or representative's attorney, *see* ¶*13:24*), court approval is not required to *put estate property up for sale*. In close cases, however, when the representative is not sure whether exercising the general power of sale would be to the "advantage" of the estate, consider petitioning the court for *instructions* (Prob.C. §9611, ¶*14:265 ff.*). Action taken pursuant to the court's final order of instructions generally insulates the representative and their sureties from risk of surcharge liability based upon an arguably imprudent decision (Prob.C. §7250(a)).

On the other hand, in some cases the court will decline to give instructions, leaving the decision to the representative. Also, of course, the representative cannot *shift responsibility* to the court.

While the judge may take a real interest in the determination, ultimately the representative must determine what is a "necessary" or "advantageous" sale (subject to the court's overview).

b. [13:8] **Testamentary power to sell:** The other source of an estate representative's power of sale is decedent's will. [Prob.C. §10000] The testamentary power may be discretionary or "directive." [Prob.C. §10000(c) & (d)]

(1) [13:8.1] **Discretionary power:** A decedent's will often includes a "general power to sell estate assets." In such cases, the representative has *discretion* to exercise the power of sale as would a representative acting under the ordinary power of sale granted by Prob.C. §10000(a) & (b) (¶*13:2*)—i.e., the representative "may" sell where necessary to pay debts, devises, taxes, etc. and/or where the sale is to the advantage of the estate and in the best interest of interested persons.

Or, the will may confer "authority" to sell *specific property*, but *not* explicitly "require" that the property be sold. [Prob.C. §10000(d)] Here too, the representative has *discretion* to exercise the testamentary power to sell the designated property; and such discretion should be exercised in light of the normal fiduciary standard of care (¶*13:2.1*).

(a) [13:8.2] **Limitation re property subject to vested testamentary option to purchase:** A general discretionary power of sale conferred by will does *not* extend to estate assets subject to a vested testamentary option to purchase. [See *Estate of Hilton* (1988) 199 CA3d 1145, 1180-1181, 245 CR 491, 512-513; *and* ¶*13:245.1*]

(b) [13:9] **Limitation on exercise of discretion by administrator with will annexed:** Ordinarily, an administrator with will annexed has the same authority over an estate as would an executor named in the will. [Prob.C. §8442(a)] However, if the will confers a "discretionary" power or authority upon the executor that is *not conferred by law*, such power or authority "shall not" be deemed to be conferred upon an administrator with will annexed *unless* the will extends the power or authority to personal representatives other than the executor. [Prob.C. §8442(b)]

Accordingly, if the will simply grants the named executor a *discretionary* power of sale (not a *directive* to sell), an administrator with will annexed may only exercise a power of sale as authorized (or required) *by statute*; they derive *no additional or greater power* from the will.

1) [13:9a] **Exception—court authorization:** But an administrator with will annexed *may* exercise

such discretionary power or authority where the court (in its discretion) expressly so authorizes. [Prob.C. §8442(b)]

(Presumably, a petition for instructions would be the appropriate procedure to obtain court authority; *see* ¶*14:265 ff.*)

(2) [13:9.1] **Directive power:** A testamentary power of sale is also conferred when decedent's will *directs* that specific property be sold. [Prob.C. §10000(c)]

(a) [13:9.2] **Not necessarily obligatory:** Ordinarily, such testamentary "directives" impose an *affirmative duty* on the representative to sell the designated property in the manner (if any) designated by the will. [Prob.C. §10002(a)]

However, "ordinary care and diligence" *may* require in certain circumstances that the power *not* be exercised or that it be exercised in some manner *other than as directed by the will* (Prob.C. §9600(b)(2)). Indeed, Prob.C. §10000, which sanctions the exercise of a power to sell under a testamentary "direction," states that the representative "*may*" sell pursuant to such testamentary direction (*not* that the representative "*must*" sell). [See Prob.C. §10000]

(b) [13:9.3] **Court order excusing compliance with testamentary direction to sell:** If, under the then-prevailing circumstances of the estate, the personal representative deems it best *not* to follow a testamentary direction to sell particular property, they may *petition the court* for an order *excusing* the duty to comply with that sale directive. Minimum 15 days' notice of hearing on the petition must be given to the persons and in the manner prescribed by Prob.C. §1220 (¶*3:466 ff.*). [Prob.C. §10002(b)]

The court may grant the petition, relieving the representative of the duty to comply with a testamentary sale directive, upon a finding that doing so would be "to the advantage of the estate and in the best interest of the interested persons." [Prob.C. §10002(b)]

- [13:9.4] **Comment:** The §10002 procedure is particularly valuable as a means of protecting the representative against risk of surcharge should they decide that it is best not to comply with a testamentary directive to sell (*see "practice pointer,"* ¶*13:9.6*).
- [13:9.5] **Example:** A §10002(b) order might be appropriate where the property directed to be sold to pay decedent's debts has greatly *ap-*

preciated in value since the will was executed, the estate is sufficiently liquid to pay the debts without selling that property, and paying the debts with the cash on hand would not adversely affect interested persons (including creditors). [See Prob.C. §10002, Law Rev. Comm'n Comment]

[13:9.6] ***PRACTICE POINTER:*** Construed together, §§10000 (representative "may" sell) and 10002 (representative "shall comply" with testamentary direction to sell) appear to impose a two-fold burden on representatives faced with a testamentary *direction* to sell: In all cases, the representative must first determine whether "ordinary care and diligence" make the directed sale "prudent" under the then-existing circumstances of the estate; if the sale would be prudent, then decedent's direction *must* be followed.

On the other hand, if circumstances have changed since decedent executed the will, such that "ordinary care and diligence" now render it *imprudent* to follow the testamentary directive, the representative should probably decline to exercise the testamentary directive to sell . . . but may do so only pursuant to a *court order* obtained under §10002. The final court order granting a §10002(b) petition generally insulates the representative from liability for failure to follow the testamentary directive (see Prob.C. §7250(a)).

c. [13:10] **Procedural distinctions depending on source of sale authority:** Whether the representative's power of sale derives generally from statute or more specifically from decedent's will determines the formalities that must be followed to effect the sale. Briefly, these are the distinctions:

(1) **Exercise of testamentary power**

(a) [13:11] **Notice of sale discretionary:** If the power of sale—discretionary or directive—is granted in decedent's will, it is *entirely within the representative's discretion* to give or not give notice, whether the sale is at public auction or through private channels. The will need not expressly grant the representative authority to sell without notice. [Prob.C. §§10252(a) & (b), 10303—". . . with or without notice, as the personal representative may determine"; and see *Bagley v. City & County of San Francisco* (1912) 19 CA 255, 271, 125 P 931, 937-938]

(b) [13:11.1] **Mode and manner of sale:** If the will provides for the *mode* of sale, those directions

supersede the statutory provisions otherwise governing the manner of sale: i.e., testamentary directives as to the manner of sale *must* be followed *unless* the representative obtains a court order *relieving* them from the duty to comply with those directions and specifying another method of selling the particular property. [Prob.C. §10002(a) & (b)]

(The procedure for obtaining such an order is the same as that for obtaining a court order relieving the representative of the duty to comply with a testamentary directive *to sell* particular property; *see* ¶*13:9.3*.)

(2) [13:12] **Exercise of statutory power—notice usually required:** In contrast, subject to a few exceptions (¶*13:13 ff.*) sales dependent solely on a *statutory* power to sell must be preceded by statutory notice. [Prob.C. §§10250, 10300]

(a) [13:13] **Exception re certain types of property:** No notice is required for sales of perishable property or other personal property that will depreciate in value if not promptly disposed of, or which will incur loss or expense by being kept. Nor is notice required for the sale of personal property necessary to provide a family allowance pending the receipt of other sufficient funds. [Prob.C. §10252(c) & (d); *see* ¶*13:48*]

Also, in certain circumstances, securities, savings accounts and mutual capital certificates, credit union share accounts and certificates for funds, and subscription rights may be sold without notice. [Prob.C. §§10200(e), 10201(b) & (c), 10202; *see* ¶*13:59, 13:68, 13:68.1, 13:69*]

(3) [13:14] **Compare—court confirmation generally required in either case:** In contrast, the source of a power of sale (strictly statutory or derived from decedent's will) has no effect on the representative's obligation to obtain *court confirmation* of the sale.

Subject to a few *statutory* exceptions, and *unless* the representative is properly acting under the *IAEA* (¶*13:16 ff.*), title does not pass until the sale is reported to and *confirmed by the court*. [Prob.C. §§10260(a), 10308(a); *and see* ¶*13:87 ff., 13:155 ff.* on court confirmation procedures]

(The provisions for *overbidding* at the confirmation hearing also apply whether the sale was made pursuant to statute or under testamentary authority or direction; see Prob.C. §§10262, 10311, discussed later in this Chapter in connection with confirmation hearings.)

(a) [13:15] **Proof of "necessity" or "advantage" not required for sales under testamentary power:** Ordinarily, sales may be confirmed by the court only on a showing of the "necessity" of the sale or the "advantage" to the estate and the "benefit to interested persons." However, the burden is less imposing where the sale is made under a testamentary power: If decedent's will authorizes or directs the property to be sold, the court may confirm the sale *without* "examining into" the "necessity," "advantage" or "benefit" of the sale. [Prob.C. §§10261(a), 10310(a)]

(b) [13:16] **Exception for sales of certain property:** There are a few exceptions to the court confirmation requirements even in *non*-IAEA estate administrations:

- [13:16.1] Under specified circumstances, securities (Prob.C. §10200(b)), mutual capital certificates and savings accounts (Prob.C. §10201(b)), credit union share accounts (Prob.C. §10201(c)), subscription rights (Prob.C. §10202), certain perishable personal property (Prob.C. §10259(a)(1)), and property that necessarily must be sold to pay a family allowance (Prob.C. §10259(a)(2)) may be sold and title will pass without obtaining court confirmation (*see* ¶*13:48, 13:57, 13:68, 13:68.1, 13:69*).
- [13:16.2] Nor, under specified circumstances, is court confirmation a prerequisite to the passing of title to personal property sold at public auction. [Prob.C. §10259(b); *see* ¶*13:87.3*]

d. [13:17] **Greater flexibility for IAEA representatives:** Representatives granted IAEA authority remain bound by the ordinary fiduciary standard of care; thus, as with representatives *not* granted IAEA authority, they must exercise or *not* exercise a power of sale in light of the overriding statutory principle of "ordinary care and diligence." [Prob.C. §9600; *see* ¶*9:3.14, 9:31.2*]

However, the sale *formalities*—including notice and court confirmation—are normally less burdensome for IAEA representatives. As a general rule, and subject to "notice of proposed action" requirements, no court approval is required to exercise a power of sale under the IAEA (Prob.C. §§10503 (¶*9:31.1*), 10537 (¶*9:40*)). [See generally, Prob.C. §9640—"Nothing in this part (dealing with court-supervised estate management) limits or restricts any authority" given IAEA representatives to exercise powers granted by the IAEA]

By the same token, IAEA representatives may properly conduct sales under the IAEA only in accordance with the limitations and procedures imposed by the IAEA. Most significantly:

Such liability is enforceable against the representative's bond or by other proper means of enforcing a civil judgment. [See Prob.C. §10380, Law Rev. Comm'n Comment]

c. [13:284] **Liquidated damages liability for "fraudulent sale" of *real* property:** A personal representative who "*fraudulently sells*" estate *real property* other than as authorized by the applicable Code provisions is personally liable to "the person having an estate of inheritance in the real property" (i.e., the testate beneficiary or intestate heir, as applicable) for *liquidated damages* in an amount equal to *double the fair market value* of the property as of the date of its sale. [Prob.C. §10381]

(1) [13:284.1] **Plus other damages:** This liquidated damages liability is *in addition* to any other damages for which the representative may be liable (e.g., under §10380 (¶*13:283.1*) for neglect or misconduct in connection with the sale). [Prob.C. §10381]

(2) [13:284.2] **Not against sureties:** Section 10381 liquidated damages are recoverable only against the representative *personally*. Sureties on the representative's bond may be reached for damages suffered because of an unauthorized sale only under §10380 (¶*13:283.1*) up to the limits on the bond. [See *Weihe v. Statham* (1885) 67 C 245, 248, 7 P 673, 675-676; and Prob.C. §10381, Law Rev. Comm'n Comment]

C. BORROWING, REFINANCING OR ENCUMBERING ESTATE PROPERTY

1. [13:285] **Preliminary Concerns—The Need to Borrow:** Borrowing may be a viable alternative to liquidating (selling) probate assets where cash must be raised to meet current estate obligations. Most typically, the representative will want to opt for a sale. This is particularly so where the assets available for sale are not specifically devised; sales also are preferable to borrowing because they avoid the added expense of interest charges (where the representative will usually be at the mercy of prevailing interest rates).

Nevertheless, in some cases—especially those involving only a temporary illiquidity—borrowing funds may be the most sensible solution to meeting the estate's cash needs; and, in other cases, some combination of sales and borrowing will be desirable, depending upon the amount of money that must be raised, the feasibility of securing an attractive loan, the available sources of repayment *versus* the nature of property that could be sold instead, etc.

a. [13:286] **Tactical considerations:** The decision to borrow should reflect a consideration of these important factors:

(1) [13:287] **Advantage to the estate?** First of all, would a loan be *advantageous* to the estate? Remember that the representative is bound by fiduciary obligations to use "ordinary care and diligence" to preserve estate assets

. . . which may include taking steps to prevent deterioration in value. [See generally, Prob.C. §§9600-9601; *Estate of Beach* (1975) 15 C3d 623, 639, 125 CR 570, 580; *and discussion in connection with "investments" at ¶13:421 ff.*] With this duty in mind, the representative must decide whether "preserving" the estate would best be promoted by borrowing rather than selling.

Moreover, court approval to borrow is dependent in any case upon a showing that the loan is "necessary" or otherwise would be to the "advantage" of the estate (*see ¶13:304*).

(2) [13:288] **Which option is most expeditious?** Time is always a factor. Thus, the decision may turn, in part at least, on whether there is a ready buyer *versus* how much time it would take to find a loan on suitable terms.

(3) [13:289] **Cost?** What would a sale cost, e.g., in terms of advertisement (exposure to the market), commissions and, if market conditions are depressed, loss of value to the estate? Conversely, balance the "costs of sale" against what a loan would cost: Particularly, what would have to be paid in *interest?*

(4) [13:290] **How much cash is needed?** Generally, the larger the amount needed, the less desirable a loan becomes (e.g., too much interest, and too much estate property put at risk as security). At the same time, it may not be feasible to fund the estate's cash needs strictly through sale if, e.g., there are no readily marketable assets or there is simply not enough estate property that could be sold.

(5) [13:291] **Nature of the estate?** Sometimes the decision will turn on what type of property comprises the bulk of the estate. Readily marketable securities are easily sold, whereas it will be more desirable (typically) to retain real estate likely to *appreciate* in value, particularly if its sale will be costly or time-consuming.

(6) [13:292] **Risks?** Most lenders will require *security*. In this regard, what property is available to post as security? Does it make sense to use valuable property as security and, perhaps, run a risk that the property will *depreciate* before the loan can be paid off? Would it make more sense, instead, to sell at the appreciated value?

(7) [13:293] **Decedent's wishes?** A testamentary directive to sell *must* be respected *unless* a court order is obtained relieving the representative from the duty to comply with that direction (Prob.C. §10002, *see ¶13:9.1 ff.*). The decision to seek relief from such testamentary direction, allowing the representative to opt for a financing ar-

b. [13:348] **Advances from third persons:** In contrast, there is clearly *no* preferential treatment given to third parties who advance money to the estate.

(1) [13:349] **No guaranteed recourse against estate assets:** When the advance is made without a court order, and not pursuant to any legal obligation, no matter the reason for which it is made, the claim is not one for "administration expenses" but simply a "general debt" of the estate without preference or priority (Prob.C. §11420(a)(7)). And, there is no guarantee that the court will approve its repayment in the final accounting. [*Estate of Allen*, supra; *Estate of Hincheon* (1911) 159 C 755, 760-761, 116 P 47, 49-50; but see *Estate of Kirkpatrick* (1952) 109 CA2d 709, 712, 241 P2d 555, 557—repayment of third-party advance out of estate may be approved if reasonably prudent person under similar circumstances would have obtained the loan]

(2) [13:350] **Same result where advance made by estate beneficiary:** Not even a testate beneficiary may claim as a preferred creditor for advances made to improve or maintain estate property, no matter the necessity. A beneficiary who incurs expenses on behalf of the estate does so at their own risk—i.e., against the possibility that the advances will *not* be approved for repayment. The remedy, instead, is to petition the court for an order directing the *representative* to make the necessary expenditures (Prob.C. §9613). [*Estate of Hincheon*, supra, 159 C at 760-761, 116 P at 49-50]

[13:351] ***PRACTICE POINTER:*** Again, in the final analysis, the safest recourse is to decline informal advances in favor of a court order authorizing a loan. In certain cases, e.g., where there are relatively few "interested persons" or a relatively small estate and all parties are in agreement, the representative may choose to accept informal "loans" for an interim period. But, always make sure that the "lender" understands that there is no guaranteed recourse against the estate for repayment; and make sure the representative understands that, by signing an evidence of indebtedness on the advance, they may end up being *personally* responsible for the repayment.

D. LEASING ESTATE PROPERTY

1. [13:352] **Preliminary Considerations—Why Lease?** As with other cash-generating alternatives (sales and borrowing), the propriety of leasing estate real property turns in the first instance on whether it would be *advantageous* to the estate (Prob.C. §§9941, 9942, 9943, 9945; ¶*13:362*). For this purpose, consider the following:

a. [13:353] **To "preserve" the estate:** The representative's primary obligation is to "preserve" estate property rather

than generate income or profit. [See *Estate of Beach* (1975) 15 C3d 623, 639, 125 CR 570, 580, *discussed at ¶13:422 ff.*; *Baker Manock & Jensen v. Sup.Ct. (Salwasser)* (2009) 175 CA4th 1414, 1423, 96 CR3d 785, 791] However, leasing unoccupied real property often serves this very function—i.e., if leased (occupied) the property is less likely to be vandalized or fall into disrepair from sitting idle. The fact that income is generated therefrom is, in this respect, only secondary. Moreover, where the property constitutes a major portion of the estate, income generated through rents may reflect no more than an expected return from the estate assets.

b. [13:354] **Lease vs. sale to raise needed cash:** Quite apart from the above (¶*13:353*), a lease may be a viable option where cash must be raised to discharge estate obligations. Indeed, representatives who fail to lease estate real property when confronted with such expenses may incur *surcharge liability* for breach of their fiduciary duties. [See *Estate of Bonaccorsi* (1999) 69 CA4th 462, 472, 81 CR2d 604, 611—representative surcharged for failing to lease decedent's residence notwithstanding inactive real estate market, high monthly mortgage and maintenance expenses, and fixed, diminishing cash account (rental income could have offset these expenses)]

(1) [13:355] **Preferences of specific devisees:** If the property has been specifically devised, the designated beneficiaries may prefer that it be leased rather than sold.

(2) [13:356] **Market conditions:** But prevailing market conditions will also impact on the decision: i.e., the market might absorb a sale on more favorable terms than it would a lease, or vice versa.

(3) [13:357] **Time considerations:** Also, time factors might play a role: If the obligation (e.g., to pay taxes) must be satisfied immediately, a lease may not be practical (because the income obviously will come in only over a protracted period of time). Conversely, when the cash needs are not immediate, but extend into the future (e.g., to pay family allowance), a lease that will generate periodic income may make more sense.

(4) [13:358] **Tax complications:** In larger estates, *tax implications* become more important: i.e., if the estate is already in a high income tax bracket, it may not be advisable to execute leases which will generate even greater income. Expert advice should be obtained as to whether a sale or lease would yield the most desirable tax consequences.

(5) [13:359] **Amount needed:** Finally, the *amount* of income that must be raised will have to be considered:

[13:420.1] *Reserved.*

(a) [13:420.2] **Transferee's rights under court order pending execution of conveyance or transfer:** Once the court's order is entered (whether or not the instrument of transfer has yet been executed), the person entitled to the conveyance or transfer under that order effectively has the immediate right to possession of the property and the right to hold the property according to the terms of the order "as if the property *had been* conveyed or transferred" as directed by the court. [Prob.C. §857(b) (emphasis added)]

F. INVESTMENTS

1. [13:421] **Introduction—"Duty" vs. "Authority" to Invest:** Many probate estates contain available cash, not immediately needed to pay debts and expenses, and thus which might sit idle pending the time for final distribution and closing; likewise, many probate estates include assets which, in the exercise of good investment judgment, should be liquidated and reinvested to maximize available returns and/or avoid speculation, depreciation and loss. Various investments for the estate, some of which require court approval, are authorized by the Probate Code. But a significant initial issue is whether the representative ever has an *affirmative obligation* to make prudent investments for the estate or to divest the estate of imprudent investments.

   a. [13:422] **Exercise of investment power generally dictated by standard of "ordinary care and diligence":** As discussed earlier, one of the personal representative's primary obligations in discharging the fiduciary duty to use "ordinary care and diligence" in managing and controlling the estate (Prob.C. §9600) is to take reasonable steps to "preserve" the estate during administration.

   Whether this fiduciary obligation imposes an affirmative duty to *exercise* the power to invest necessarily turns on the specific circumstances: In appropriate circumstances, the representative *shall* exercise a power (here, the power to invest) to the extent "ordinary care and diligence" require that the power be exercised, but shall *not* exercise a power to the extent "ordinary care and diligence" require that the power *not* be exercised. [Prob.C. §9600(b)]

   (1) [13:423] **"Reasonable person" standard ordinarily applies:** The general §9600 fiduciary standard of care is consistent with the standard announced in prior case law: As a general rule, the representative is held to "that degree of prudence and diligence which a . . . [person] of *ordinary judgment* would be expected to bestow upon his [or her] own affairs of a like nature." [*Estate of Beach* (1975) 15 C3d 623, 631, 125 CR 570, 574 (quoting from

Estate of Moore (1892) 96 C 522, 31 P 584) (emphasis added); also see *Lobro v. Watson* (1974) 42 CA3d 180, 189, 116 CR 533, 539; and Prob.C. §9600, Law Rev. Comm'n Comment]

(2) [13:424] **Higher standard of care for professional representatives:** A higher standard of care applies to *professional* personal representatives, such as banks and trust companies. Based on their "presumed expertise," they are bound to apply the skill and knowledge ordinarily possessed by such professional fiduciaries in similar circumstances. [*Estate of Beach*, supra; and see Law Rev. Comm'n Comment, supra]

(3) [13:425] **Trustees bound by Uniform Prudent Investor Act standards ("prudent investor rule"):** The Uniform Prudent Investor Act (Prob.C. §16045 et seq., together with Prob.C. §§16002(a) and 16003) codifies the so-called "prudent investor rule"—i.e., the standard of care by which *trustees* are bound.

(a) [13:425.1] **Statutory standards—in general:** Among other things, the Act lists several factors trustees must consider when investing and managing trust assets (e.g., general economic conditions, expected tax consequences and expected total return from trust assets) (Prob.C. §16047(c)(1)-(8)). The Act also requires trustees to diversify investments unless, under the circumstances, it is prudent not to do so (Prob.C. §16048).

Further, the Act requires trustees to incur only reasonable costs and permits a trustee to delegate investment and management functions as specified. The Act explicitly states that trustees owe a duty to trust beneficiaries to comply with the "prudent investor rule." [See Prob.C. §§16046(a), 16050, 16052]

1) [13:425.2] **Modified standards pursuant to trust instrument:** The trust settlor may expand or restrict the "prudent investor rule" by express provisions set forth in the trust instrument. The trustee is *not* liable to the beneficiaries for the trustee's good faith reliance on these express provisions. [Prob.C. §16046(b)]

(b) [13:425.3] **Transitional rule:** The Uniform Prudent Investor Act applies to all trusts existing on and created after January 1, 1996. However, as applied to preexisting trusts, the Act governs *only* decisions or actions occurring after January 1, 1996. [Prob.C. §16054]

(c) [13:425.4] **Compare—trustee's general standard of care:** The Code provides another *general* standard of care by which trustees are bound when the special, more detailed rules applicable to investments and management of trust property (¶*13:425*) may not apply. [See Prob.C. §16040 and Law Rev. Comm'n Comment thereto]

Under this standard of care, trustees must manage the trust property and make trust investments "with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument." [Prob.C. §16040(a)]

(d) [13:426] **Estate representatives *not* subject to "prudent investor rule":** The duties and obligations of estate representatives are *separate and distinct* from those of trustees. Even if the same person (or entity) wears "two hats"—first as executor and then as trustee under a testamentary trust—when exercising its duties as *estate representative*, the fiduciary is *not bound by the prudent investor rule:* i.e., until the estate is closed and the property distributed to the trust, the estate representative is not required to manage the estate assets as if they are already being held under the terms of the trust. [*Estate of Beach*, supra, 15 C3d at 638, 125 CR at 579]

1) [13:427] **Rationale:** An *estate representative* holds and manages estate assets *incidentally* to its performance of the various duties of probate administration (presenting will for probate, locating decedent's assets and beneficiaries, handling creditors' claims, paying family allowance and taxes, and distributing assets to beneficiaries); in its capacity as such, the representative has limited powers.

In contrast, a *trustee's* primary purpose is to serve the trust beneficiaries under the terms of the trust, which typically confers a very broad range of powers. But the duties and powers of the testamentary trustee do not come into play until the estate representative's role is over (i.e., the estate is closed and the assets are distributed to the trust). [*Estate of Beach* (1975) 15 C3d 623, 637-638, 125 CR 570, 579; and see *Estate of McSweeney* (1954) 123 CA2d 787, 793, 268 P2d 107, 111; *Estate of Kampen* (2011) 201 CA4th 971, 988-989, 135 CR3d 410, 423]

(4) [13:428] **Effect—personal representative's "duty" to invest ordinarily a question of "ordinary care and diligence":** Subject to limited statutory rules regarding surplus cash investments (¶*13:433*), the "ordinary care and diligence" standard of care imposes an affirmative obligation on a *lay* personal representative to invest and reinvest estate property *only if* the exercise of "ordinary care and diligence" would require a "reasonable person" in *like circumstances* to invest or reinvest. [Prob.C. §9600 (¶*13:422*)]

The obligation to "preserve" the estate may require the representative to take steps to prevent deterioration in value and an unreasonable drain on estate liquidity (e.g., a *sale*, *exchange* or *abandonment* of property may be prudent under the circumstances). However, the representative is not liable for any decreases in value of estate assets attributable to their "good faith" acts or omissions to act under the circumstances. [See Prob.C. §9601(b), ¶*5:25.2; Estate of Beach*, supra, 15 C3d at 639, 125 CR at 580; *Graham-Sult v. Clainos* (9th Cir. 2013) 756 F3d 724, 746]

Cross-refer: For a general explanation of the personal representative's §9600 fiduciary obligations and liability for breach of fiduciary duty, *see Ch. 5, ¶5:23 ff.*

b. **Representative's "power" to invest**

(1) [13:429] **Pursuant to statute, generally:** Any "duty" to invest on behalf of the estate necessarily must derive from a "power" to invest. Several provisions of the Probate Code empower personal representatives to make certain investments. As will be seen, some investments may be made without court approval, whereas others require a prior court order.

(2) [13:430] **Pursuant to testamentary authority or direction:** Decedents often include a provision in their wills giving the personal representative a broad power to invest. Sometimes the testamentary power is expressly limited to specified investments; and some testamentary investment provisions are stated as a "direction" to invest (even here, however, court approval may be required, ¶*13:459*).

(a) [13:431] Under a broad, general testamentary power to invest, the representative remains bound by the statutory limitations on authorized investments. If required by statute, court approval must still be obtained. (See Prob.C. §9732 on investing surplus funds, *discussed at* ¶*13:459*.)

(b) [13:432] Under a testamentary provision conferring power to make only *specified* investments, court

approval should still be obtained if a statute otherwise authorizes the investment only on court approval. (Again, see Prob.C. §9732, ¶*13:459*.)

If the will authorizes or "directs" investments not otherwise permitted by the statutes, the representative should first consider petitioning the court for *instructions* . . . thus avoiding any risk of surcharge for alleged "negligent" management of the estate. (*See* ¶*14:265 ff.*)

2. **Authorized Investments Not Requiring Court Approval**

a. [13:433] **Obligation to invest cash in interest-bearing accounts:** Surplus cash should not be left idle in the estate. The representative has a *duty* to invest ("shall" invest) all cash in their possession in *interest-bearing accounts* or "other investments authorized by law" *except* to the extent the cash is "reasonably necessary for orderly administration of the estate" and/or to the extent that decedent's will "otherwise provides." [Prob.C. §9652]

(1) [13:434] **Deposits in California "financial institutions" without court approval:** Prior court approval is not required to make deposits of estate funds in an insured account in a California "financial institution." [Prob.C. §9700]

(a) [13:434.1] **Eligible "financial institutions":** The eligible California "financial institutions" are those defined by Prob.C. §40: a state or national bank, a state or federal savings and loan association *or credit union*, or "like organization." [Prob.C. §40]

The authorized "accounts" in such institutions include checking accounts, savings accounts, certificates of deposit, share accounts, mutual capital certificates, and "other like arrangements." [See Prob.C. §21]

(Also see Prob.C. §22 (defining "account in an insured credit union"); and Prob.C. §23 (defining "account in an insured savings and loan association").)

Selecting the appropriate account or accounts is a question of analyzing the then-existing circumstances of the estate. *See* ¶*13:437 ff.*

(b) [13:434.2] **Withdrawals without court order:** Withdrawals from such accounts may likewise be made without prior court approval unless otherwise provided by court order (*see* ¶*13:436 ff.*). [Prob.C. §9700; *and see* ¶*6:22 ff.*]

which the estate may be distributed, the time of receipt of the funds, and the immediate need for funds to meet estate administration requirements are all relevant factors.

For example, where a substantial surplus sum is on hand (in excess of immediate administration requirements) and that sum is to be held over a period of time, the representative should ordinarily deposit the surplus in an account (including the purchase of a certificate of deposit where appropriate under the circumstances) that would both *safeguard* the funds *and allow a rate of interest* on the funds that is advantageous to the estate. [See Prob.C. §9705, Law Rev. Comm'n Comment; *Estate of Smith* (1931) 112 CA 680, 685-686, 297 P 927, 930; also see *Layton v. State Bar* (1990) 50 C3d 889, 896, 268 CR 845, 848—attorney/executor suspended from practice for (among other things) allowing dividends to remain in *noninterest* bearing brokerage account]

(b) [13:438] **No "absolute" duty to diversify:** As earlier discussed, estate representatives are not bound by the "prudent investor rule." Thus, even when the estate has substantial surplus cash on hand, there is apparently no "absolute" duty to diversify the deposits or investments . . . unless an "ordinary person" would do so in managing their own affairs under similar circumstances. [Cf. Prob.C. §9600; and *Estate of Beach* (1975) 15 C3d 623, 125 CR 570]

1) [13:438.1] **Compare—insured account "ceiling":** But deposits with any single institution should always be limited to the federally insured ceiling (currently $250,000 per insured bank). Additional deposits within the insured limits may be made with as many authorized financial institutions as necessary.

2) [13:438.2] **Comment:** Banks and savings and loans offer a variety of interest-bearing deposit accounts, with sometimes wide-ranging yields. Apart from questions of "diversification," it is unclear whether the representative is required to "shop around" deposit accounts or choose between available interest-bearing accounts in a single financial institution: i.e., is the representative under a duty to obtain the "best possible" investment return—e.g., in a higher earning market rate account or CD vs. an ordinary passbook account? If there is a substantial difference in interest rates among the possible accounts, does a representative who invests only in a passbook account risk possible surcharge?

Again, the fiduciary standard of care must be exercised in light of the estate's then-existing circumstances; a broad rule of liability one way or the other undoubtedly should not apply. [See *Conservatorship of Pelton* (1982) 132 CA3d 496, 501-502, 183 CR 188, 192]

[13:438.3] ***PRACTICE POINTER:*** If in doubt, the option of obtaining *prior court authorization* (pursuant to Prob.C. §9703, ¶*13:436 ff.*, or a §9611 *petition for instructions*, ¶*14:265 ff.*) should be seriously considered.

(c) [13:439] **Interest liability of trust company representatives who deposit in own company:** Generally, a *trust company* personal representative may, in the exercise of "reasonable judgment," deposit estate money in an account in any department of the corporation or association of which it is a part. However, if it does so, the trust company is chargeable with *interest* thereon at the *rate prevailing* on such deposits among "banks of the locality." [Prob.C. §9705(a)]

Exception: Where it is to the estate's "advantage," the trust company representative may deposit such cash as is "reasonably necessary" for orderly estate administration in a *non-interest bearing* checking account maintained in a department of the corporation or association of which the trust company is a part. [Prob.C. §9705(b)]

(d) [13:440] **Name on account:** The account (or accounts) should be opened in the personal representative's name *in their capacity as estate representative* (i.e., as administrator or executor for the estate). Advise the representative *not* to make estate deposits into a personal account (in the representative's name alone); otherwise, the representative is subject to personal liability for losses incurred from the bank's failure or insolvency. [See generally, Prob.C. §9657—representative "shall not make profit by the increase, nor suffer loss by the decrease or destruction *without their fault*, of any part of the estate" (emphasis added)]

[13:441] *Reserved.*

(4) [13:442] **Compare—other investments with cash surplus:** Surplus cash not deposited in an eligible interest-bearing account must be invested in "other investments authorized by law" except to the extent that decedent's will otherwise provides. [Prob.C. §9652] These

- No application has been made for appointment of a personal representative;
- Appointment of a general personal representative is delayed at the commencement of probate;
- The proposed general personal representative's bond is insufficient, or letters are otherwise granted "irregularly";
- There is a vacancy in the office of general personal representative because the representative has died, resigned or been removed from office, or their powers have been suspended;
- An appeal is taken from an order revoking probate;
- A will contest is pending;
- A lawsuit must be brought or maintained on decedent's cause of action; or
- The general personal representative cannot act "for any other cause." [See Prob.C. §8540, Law Rev. Comm'n Comment]

b. [14:7.2] **Court discretion:** The probate court has full *discretion* to determine whether the "circumstances" of the estate warrant a special administration and, if warranted, to appoint a special administrator to exercise "any powers that may be appropriate under the circumstances for the preservation of the estate." The appointment may be for a "specified term, to perform particular acts, or on any other terms specified in the court order." [Prob.C. §8540(a) & (b); see *Smith v. Shewry* (2009) 173 CA4th 1163, 1169, 93 CR3d 436, 440—special administrator appointed for sole purpose of obtaining Medi-Cal benefits for decedent, with "no authority to disburse property [or] take possession of any assets"]

(An order granting or revoking letters of special administration, with or without general powers, is *not appealable*. See Prob.C. §1303(a), ¶*14:51a*.)

3. [14:8] **Powers and Duties of Special Administrator:** The nature and scope of a special administrator's powers and duties are generally dictated by the circumstances necessitating the appointment and, as with the appointment itself, lie within the probate court's broad discretion. In an "appropriate" case, the court may grant a special administrator the full powers, duties and obligations of a general personal representative (Prob.C. §8545). But more often, a special administrator's authority is limited.

As developed below (¶*14:9 ff.*), some powers are automatically conferred on special administrators unless otherwise prescribed by the order of appointment (Prob.C. §8544(a)); certain other powers may be exercised by special administrators with leave of court obtained during the administration (Prob.C. §8544(b)).

a. [14:9] **"Special" powers, duties and obligations:** Unless the court *expressly* grants "general" powers (¶*14:17*), a special administrator has only those powers conferred by statute or by the terms of the order of appointment. These special (or "limited") powers are tailored to the particular situation necessitating a special administration (alleged in the petition, *see* ¶*14:37 ff.*). They do *not* include the broad authority conferred on general personal representatives (e.g., to pay creditor claims, to prepare and file the inventory and appraisal, to make distributions, etc.). [Prob.C. §8544]

(1) [14:10] **Impact on liability exposure:** A special administrator's potential liability is a natural consequence of the scope of their powers. Special administrators given the full powers of a general personal representative (¶*14:17*) are subject to the full range of liabilities of a general personal representative (to beneficiaries and heirs *as well as to creditors*) for any breach of fiduciary duty to preserve and protect the estate or any other dereliction in fulfillment of a representative's obligations.

On the other hand, if granted only *limited* powers, special administrators are potentially liable only for a breach of duty in exercising the authority *specifically granted* and the duties inherent therewith; and, in any event, they are *not* proper parties to actions on claims against the decedent. [Prob.C. §8544(c)]

(a) [14:10.1] **Optimum protection from liability where appointment limited to "particular act":** Moreover, if appointed to perform only a *particular act* (Prob.C. §8540(b); e.g., to complete a certain business transaction), special administrators have *no general duty to protect the estate*: i.e., in such circumstances, they are not liable for the care of the entire estate. [Prob.C. §8544(d)]

(2) [14:11] **Special powers *automatically* conferred:** *Except* to the extent the order of appointment prescribes other terms, special administrators have the power to do *all* of the following *without further court order* (Prob.C. §8544(a)):

(a) [14:11.1] **Possession and preservation of estate:** They have the power to take *possession* of all real and personal property of the decedent and preserve it from damage, waste and injury (*see generally,* ¶*6:1 ff.*). [Prob.C. §8544(a)(1); compare *Smith v. Shewry* (2009) 173 CA4th 1163, 1169, 93 CR3d 436, 440 (order appointing special administrator for sole purpose of collecting Medi-Cal benefits appropriately withheld authority to take possession of decedent's assets or disburse property)]

[14:11.2] ***PRACTICE POINTER:*** Before special administrators take any action affecting estate property—especially valuable personal property—they should ensure that the property is properly *inventoried* among the assets of the estate. In particular, caution special administrators *not to move* any probate assets until they are inventoried. Failure to account for assets allegedly in the special administrator's charge is a substantial liability trap.

(b) [14:11.3] **Collection of income:** They may collect all claims, rents and other income belonging to the estate. [Prob.C. §8544(a)(2)]

(c) [14:11.4] **Litigation:** They may commence and maintain or defend suits and other legal proceedings involving the estate (*Ch. 15*). [Prob.C. §8544(a)(3)]

(d) [14:11.5] **Sales:** And they may sell *perishable* property (¶*13:48*). [Prob.C. §8544(a)(4)]

(3) [14:12] **Special powers exercisable on court order:** In addition, *except* to the extent the order of appointment prescribes other terms, special administrators are empowered to do all of the following *upon prior court order* (Prob.C. §8544(b)):

(a) [14:12.1] **Borrowing and hypothecation:** They may borrow money or lease, mortgage or execute a deed of trust on real property "in the same manner as an administrator" (*Ch. 13*). [Prob.C. §8544(b)(1)]

(b) [14:12.2] **Paying secured debts:** In *statutorily-specified circumstances* where necessary to *avoid foreclosure*, they may pay the interest due or all or any part of an obligation secured by a mortgage, lien or deed of trust on estate property (*see* ¶*14:13 ff.*). [Prob.C. §8544(b)(2)]

(c) [14:12.3] **Other court-authorized powers:** And they may exercise other powers conferred by court order. [Prob.C. §8544(b)(3)]

(4) [14:13] **Special procedure for authority to pay debts to avoid foreclosure:** Absent a grant of "general" powers (¶*14:17*), a special administrator has the authority to pay the interest and principal obligations on *secured debts* of the estate only where "there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation" *and a prior court order* approving the payments is obtained (¶*14:12.2*). [Prob.C. §8544(b)(2)]

Section 8544(b)(2) prescribes the procedure to be followed:

(a) [14:14] **Petition and notice:** Either the special administrator or an "interested person" (¶*3:83.1 ff.*) must petition the court for an order authorizing the payments. No particular period or form of notice is prescribed; but the court is empowered to require whatever notice it "deems proper." [Prob.C. §8544(b)(2)]

(b) [14:15] **Scope of order; payment of unaccrued interest:** The special administrator may pay the debt only pursuant to the terms prescribed by the court's order . . . including, if authorized, the payment of unaccrued interest as it comes due. [Prob.C. §8544(b)(2)]

(c) [14:16] **Duration of power:** The order effectively empowers the special administrator to continue making payments as prescribed (including future interest, ¶*14:15*) until a successor personal representative is appointed, unless the order is earlier set aside for good cause shown or modified on petition presented in the same manner as for the original order. [Prob.C. §8544(b)(2)]

b. [14:17] **"General" powers, duties and obligations:** Occasionally, where the special administration will extend over a lengthy or indefinite period of time (e.g., pending a will contest or pending appeal from an order appointing, suspending or removing an executor or administrator), the full grant of powers of a general personal representative is warranted. There are no specific circumstances requiring a grant of general powers; rather, the Code leaves the matter within the court's discretion. [Prob.C. §8545]

[14:18] ***PRACTICE POINTER:*** The decision to seek general powers should reflect the proposed special administrator's willingness to assume the companion duties and obligations: As indicated, a grant of general powers carries with it the full *obligations* of a general personal representative and, hence, the full range of potential *liability* (including liability to decedent's creditors) (¶*14:10*).

In many cases, the special administrator will eventually be appointed general personal representative . . . so the liability risks will not weigh heavily in the decision on the nature and scope of powers to seek. But where a special administration is needed only for a limited period of time to respond to a particular "emergency," and especially where the proposed special administrator probably will *not* go on to become the administrator or executor, the better course is to request only *limited* powers or the power to perform only a *particular act*; this approach effectively insulates the

special administrator from open-ended liability to beneficiaries, heirs and creditors (*see* ¶*14:10.1*).

(1) [14:19] **Grounds for grant of general powers—court discretion:** The Code leaves it up to the court to decide what circumstances warrant a special administration with the full powers of a general personal representative. The court *may* grant special administrators "the same powers, duties, and obligations as a general personal representative *where to do so appears proper.*" [Prob.C. §8545(a) (emphasis added)]

The Law Revision Commission offers these examples of "appropriate" circumstances for a grant of general powers (see Law Revision Comm'n Comment to §8545):

(a) [14:20] **Will contests:** When the special administrator is appointed pending determination of a will contest (*Estate of Massaglia* (1974) 38 CA3d 767, 113 CR 751); or when a will contest is instituted after appointment of a special administrator.

(b) [14:21] **Appeal from revocation of probate:** When an appeal is taken from an *order revoking probate of a will*.

(c) [14:22] **Appeal from order appointing or removing personal representative:** When the special administrator is appointed pending appeal from an order appointing or removing the general personal representative (¶*14:452 ff.*).

(2) [14:23] **Scope of general powers:** Ordinarily, a special administrator with "general" powers has the same authority and is subject to the same obligations as a general personal representative.

For example, unless otherwise limited by the court, a special administrator with general powers may *pay bona fide creditor claims and expenses of administration and taxes*, *may make distributions* to the same extent as any other general administrator (*Estate of Buchman* (1955) 132 CA2d 81, 105, 281 P2d 608, 624), and may otherwise administer the estate pending the outcome of litigation and until termination of their appointment (¶*14:52*). [See generally, *Dodson v. Greuner* (1938) 28 CA2d 418, 421, 82 P2d 741, 743]

(a) [14:24] **IAEA authority:** A grant of "general" powers also renders the special administrator eligible for a grant of *IAEA authority*. [Prob.C. §10405; *see* ¶*9:7*] Special administrators given IAEA authority may exercise any of the powers authorized by the IAEA (subject to notice of proposed action requirements) as if they were in fact general personal representatives.

(b) [14:25] **Practical limitations:** Typically, the circumstances necessitating a special administration impose certain *practical* limitations on the scope of activity a special administrator may engage in. For example, a proposed sale of estate property may be deferred pending resolution of a will contest or a title dispute involving that property.

(3) [14:26] **Distinguish—no greater powers:** Notwithstanding the reasons for the special administration, a special administrator with general powers has *no greater* authority than would be exercisable by a general personal representative. For example, special administrators must follow normal procedural requirements and are bound by the usual Code provisions for selling estate property, borrowing money, paying claims and spending estate funds. Otherwise, special administrators act at their peril . . . risking *surcharge* for unauthorized acts. [*Estate of Massaglia* (1974) 38 CA3d 767, 774, 113 CR 751, 756]

[14:27-28] *Reserved.*

4. **Procedure to Obtain Appointment**

a. [14:29] **Petition for appointment of special administrator:** A special administration is initiated by filing a petition requesting appointment of a special administrator (or "letters of special administration"). For this purpose, the Judicial Council form Petition for Probate is used (this is the same form used to open a probate generally, ¶*3:76 ff.*).

FORM: The Petition for Probate (DE-111) is reproduced in *Ch. 3; see Form 3:A*.

(1) [14:30] **Concurrent probate may be requested:** When the need for special administration arises before a formal probate has been opened, the petition requesting appointment of a special administrator may be accompanied by a request to admit decedent's will to probate or, in intestate cases, to appoint a general administrator. In this event, the petition effectively requests immediate appointment of a special administrator *pending* appointment of a general personal representative.

(2) [14:31] **Completing petition:** For the most part, the same rules apply that govern completion of the petition commencing a regular estate administration. These are discussed in detail at ¶*3:90 ff. However*, note the following points *specially* applicable to a petition for letters of special administration:

(a) [14:32] **Designating special letters request:** Be sure to check the "Letters of Special Administration" box in the caption part of the form. And indicate that

Without a court order, the representative is exposed to *personal liability* (surcharge) should the estate suffer loss from an unprofitable business. [See *Estate of Maddalena* (1940) 42 CA2d 12, 18-19, 108 P2d 17, 20-21] The court might "ratify" the representative's business decisions, actions and expenditures after the fact . . . but there is no guarantee that it will do so (the court would have to find that continued operation of the business was to the "advantage" of the estate and in the "best interest" of interested persons, Prob.C. §9760(b); and it would have to find that the specific actions taken and expenditures made were a proper exercise of the representative's fiduciary duty, Prob.C. §9600); *also see* ¶*14:88*.

On the other hand, acting under a prior court order, the representative generally is protected from liability for acts or omissions authorized or approved in that order. [See Prob.C. §7250]

(4) [14:86] **Compare—power to liquidate (sell):** If the representative decides to liquidate and sell the decedent's business interests and its assets, the issue is one of *selling* estate property rather than continuing *operation* of the business. In this case, the detailed rules for *sales* apply (Prob.C. §10000 et seq.); *see thorough discussion in Ch. 13*.

(5) [14:87] ***Caveat*—testamentary direction or power to operate business:** In testate cases, decedent may have included a will provision authorizing or "directing" the continuation of their business by a named executor. However, representatives acting under such a testamentary power should consider *obtaining court authority* in any event; acting in the place of decedent without court authority poses a *serious risk*—and the representative does so at their *own peril*.

(a) [14:88] **"Preserving" estate vs. "continuing business":** Certain acts by an estate representative are necessarily authorized to properly discharge the representative's duty to "preserve" the estate (e.g., urgent repairs or selling perishable property). However, it is impossible to gauge by *foresight* where one crosses the line from necessary "preservation" to active "continuation" of the business. In the latter case, only a *court order* can validate the representative's acts; and if the court determines after the fact that the acts were *improper*, the representative is exposed to *personal liability* therefor. [See *Estate of De Rome* (1917) 175 C 399, 401, 165 P 919, 920; *Estate of Girard* (1952) 110

CA2d 203, 206, 242 P2d 669, 671; compare *California Employment Stabilization Comm'n v. Hansen* (1945) 69 CA2d 767, 770, 160 P2d 173, 175—representative not personally liable for claims based on continuation of business pursuant to court order]

(b) [14:89] **Testamentary directives may now be outdated:** The decedent's testamentary directives are not themselves conclusive of the estate representative's authority to act because circumstances may have changed since the will was drafted: i.e., it may now be *improvident* to take the action directed by the will, given *current* business conditions and the *current* status of the estate.

(c) [14:90] **Prior court order protects against surcharge:** As stated, a court order defining the extent of the representative's authority over the business is the best safeguard against risk of surcharge for "bad" business decisions and breach of fiduciary duty (Prob.C. §7250(a), ¶*14:85.6*). No lesser precautions should be taken even when the continued operation of the business is authorized or directed in decedent's will.

(6) [14:91] **IAEA authority distinguished:** Representatives who were granted IAEA authority are empowered to continue operating decedent's unincorporated nonpartnership business without a prior court order and *without giving notice of proposed action* for *up to six months* after letters first issue. [Prob.C. §10534(b)(1) & (2), ¶*9:37*]

On the other hand, notice of proposed action must be given to continue operating the business *beyond six months* after the date letters were first issued; and to continue as a general partner in any partnership in which decedent was a general partner at the time of death. Under the notice of proposed action rules, a court order will be required *only if* a timely and proper objection is made to the proposed action. [Prob.C. §10534(d), ¶*9:37.1; and see ¶9:42 ff. on notice of proposed action procedure*]

By the same token, adherence to the §10534(d) notice of proposed action requirements fully empowers an IAEA representative to continue running decedent's business (subject to the general fiduciary standard of care and any court order issued upon objection to the notice); the representative need not obtain further court authority under Prob.C. §§9760-9763 (governing representatives without IAEA authority). [See *Estate of Davis* (1990) 219 CA3d 663, 670-671, 268 CR 384, 389-390 (decided under predecessor statutes but same principle apparently applicable under current law)]

the extent of decedent's interest in the corporation at the time of death. Notably, the responsibilities of a majority or controlling shareholder are to be contrasted with those of a minority owner. (In this regard, and on a majority shareholder's fiduciary responsibilities to other shareholders, see *Jones v. H.F. Ahmanson & Co.* (1969) 1 C3d 93, 110-112, 81 CR 592, 600-602; also see Friedman & Fotenos, *Cal. Prac. Guide: Corporations* (TRG), Ch. 6.)

Lack of a controlling interest suggests limited responsibility, since the estate representative is presumably not in a position to dictate management decisions or corporate policy. But the situation is quite different where decedent had a controlling interest which has passed on to the estate.

(a) [14:145] On the one hand, even with a controlling interest, the estate does not necessarily possess the same degree of discretion held by decedent; the "estate is simply the stockholder and not the corporation." [*Estate of Massaglia* (1974) 38 CA3d 767, 779, 113 CR 751, 759] "The power of the estate is simply to act as a stockholder . . . Its power is to vote the stock, not to run the corporation." [*Estate of Winder* (1950) 99 CA2d 83, 85, 221 P2d 193, 194] Moreover, "the probate court may not become directly involved in running the business affairs of a corporation which has a separate legal existence." [*Estate of Massaglia*, supra]

(b) [14:146] On the other hand, the estate representative's conduct with respect to the corporation is subject to judicial scrutiny. "[T]he representative must act with the same degree of care that a prudent shareholder would have used, vis-a-vis the business of the corporation. It is the general duty of an administrator to at least exercise that degree of prudence and diligence which one of ordinary judgment would use in connection with his own affairs." [*Estate of Massaglia*, supra, and cases cited therein; also see generally, *Estate of Behr* (1957) 149 CA2d 84, 86, 307 P2d 937, 938—where corporation, wholly owned by estate, was found to have been mismanaged, executor who took no action and exercised no rights as a shareholder with respect to corporate mismanagement, breached duty of care owed to estate]

 [14:147] ***PRACTICE POINTER:*** When the estate owns a controlling corporate interest, a relatively high measure of responsibility may be assigned to the estate

representative. Therefore, it is ordinarily advisable for the representative to seek court authorization for retention of the interest and any participation in the business, as well as advice on or determination of the responsibilities which may be expected to attend such participation. [*Estate of Bonaccorsi* (1999) 69 CA4th 462, 468, 81 CR2d 604, 608 (quoting text)]

7. [14:148] **Assuming Control of Decedent's Law Practice:** An active member of the California State Bar may be appointed by the probate court to assume control of a deceased attorney's law practice. [Prob.C. §9764]

   a. [14:148.1] **Compare—disabled attorneys:** An active member of the California State Bar also may be appointed to oversee the law practice of a *disabled* attorney. The appointment procedure is analogous to that used in the case of a deceased practitioner. [See Prob.C. §2468]

   b. [14:148.2] **Compare—economic interest held in trust:** Active members of the California State Bar may even be appointed to take control of a deceased (or disabled) attorney's law practice when the economic interest therein has been transferred to an inter vivos trust. The appointment procedure is the same as that used generally for deceased (or disabled) practitioners. [See Bus. & Prof.C. §17200(22), (23)]

   c. [14:148.3] **"Practice administrator":** An attorney appointed to take over the practice of a deceased lawyer is referred to as a "practice administrator." [Prob.C. §9764(i)]

      (1) [14:148.4] **Powers and duties:** A practice administrator may be granted one or more of the express statutory powers listed in Bus. & Prof.C. §6185, for the purpose of managing, winding up and/or dissolving the deceased attorney's practice. [See Prob.C. §9764(c)] (The powers sought must be "specifically listed" in the order appointing the practice administrator; *see* ¶*14:148.28*.)

         (a) [14:148.5] **Taking control of business assets, files, etc.:** A practice administrator may be authorized to take control of the deceased attorney's operating and client trust accounts, business assets, equipment, client directories and law practice premises. [Bus. & Prof.C. §6185(a)(1)]

         In addition, they may be authorized to control and review client files. [Bus. & Prof.C. §6185(a)(2)]

         (b) [14:148.6] **Notifying clients:** The practice administrator may be ordered to contact each reasonably ascertainable and locatable client for the purpose of informing them of the deceased attorney's death, as well as of the practice administrator's appointment. [Bus. & Prof.C. §6185(a)(3)]

(a) [14:277] **Standing limited to personal representative:** A §9611 petition may only be filed by the *personal representative—not* by any other "interested person." [Prob.C. §9611—expressly stating, "upon petition *of the personal representative*" (emphasis added); *Estate of Webb* (1969) 269 CA2d 172, 174, 74 CR 710, 712—beneficiary's stepchild may not file for instructions]

1) [14:277.1] **Compare—interested person's Prob.C. §9613 remedy for order "directing" representative:** When a third party "interested person" is concerned that the representative's proposed action or failure to act might injure the estate, their remedy is to file a petition under Prob.C. §9613.

Following a §9613 petitioner's showing that the estate will suffer "great or irreparable injury" if the petition is not granted, the court may direct the personal representative "to act or not to act concerning the estate" and may prescribe such terms and conditions as deemed appropriate under the circumstances. (Minimum 15 days' notice of hearing on the petition must be given to the persons and in the manner provided by Prob.C. §1220, ¶*3:466 ff.*) [Prob.C. §9613; also see Prob.C. §9630(d)(2), ¶*14:272.1*—joint personal representative's petition for order directing representatives to act or not to act]

A petition and order under §9613 do *not* preclude the representative from petitioning for instructions under §9611. [Prob.C. §9611(a)]

(b) [14:278] **Not for advice on questions of law:** The court will not "instruct" the representative on a question of law. [*Estate of Schneider* (1944) 62 CA2d 463, 465, 145 P2d 90, 91—representative sought court's advice as to applicability of Retail Sales Tax Act to airplanes used in decedent's flying school]

(c) [14:279] **Business management of wholly owned corporation:** The court will not "instruct" a representative holding all of the stock of a corporation as to how to conduct the corporation's affairs. This is a matter for the corporation's board of directors (*see* ¶*14:141*). However, as indicated, a petition for instructions may be used for an order directing the representative how to *vote* the stock (¶*14:270*). [*Estate of Winder* (1950) 99 CA2d 83, 85-86, 221 P2d 193, 194-195]

[14:280] *Reserved.*

[See Prob.C. §12540, Law Rev. Comm'n Comment; *and detailed discussion of distributions in Ch. 16*]

(a) [14:401.3] **Not where "primary" estate insolvent:** But again, distribution of the "ancillary" property *must* be made to the *sister-state representative* if the estate in the "primary" probate is *insolvent*. [Prob.C. §12542, ¶*14:388.4*]

6. [14:402] **California Representative's Responsibilities re Foreign Assets:** If a California decedent left personal property in another jurisdiction, the California estate representative may be able to obtain delivery for administration in the California probate (e.g., under the other state's counterpart to Prob.C. §12570 summary collection, ¶*14:305 ff.*). Otherwise, however, and in all cases of out-of-state *realty*, an ancillary proceeding in another jurisdiction may have to be commenced (unless the other state has a summary distribution procedure for real property; see, e.g., the Arizona statute, ¶*14:298*).

a. **No authority over out-of-state property**

(1) [14:403] **Authority limited to California property:** An estate representative's authority extends no further than the jurisdiction where their letters issued. [CCP §1913(b); *Smith v. Cimmet* (2011) 199 CA4th 1381, 1392-1393, 132 CR3d 276, 284; but see Prob.C. §12570 et seq. (¶*14:305 ff.*)—out-of-state representative may compel delivery of California personal property pursuant to Prob.C. §12570 "summary collection"]

Accordingly, California representatives have no authority over property in other states; they are required to account for, "preserve" and "manage" foreign assets only *if and when* those assets are *delivered to California* and thus become subject to a California administration. [*Estate of Barreiro* (1932) 125 CA 752, 767, 14 P2d 786, 792]

(2) [14:404] **No standing to sue on estate's behalf in other jurisdictions:** The same rule limits a California representative's *right to sue* in a representative capacity in a jurisdiction other than California. Generally, their authority to sue is confined to the state where letters issued; there is no standing to sue as estate representative in a foreign jurisdiction. [CCP §1913(b); but see *Canfield v. Scripps* (1936) 15 CA2d 642, 647, 59 P2d 1040, 1042—if representative does sue outside state and obtains judgment without objection to their standing to sue, judgment is res judicata in later suit in state of their appointment]

(a) [14:405] **Exceptions:** Two limited exceptions to this rule have been recognized:

1) [14:406] The representative may sue outside the jurisdiction on claims arising out of transactions

b) [14:441] **Notice to law enforcement and welfare agencies:** Notifying law enforcement officials and public welfare agencies in "appropriate locations" of the missing person's disappearance. [Prob.C. §12406(b)(2)]

c) [14:442] **Professional investigators:** Engaging the services of an investigator. [Prob.C. §12406(b)(3)]

2) [14:443] **Costs of search:** If the missing person is not found, the costs of a court-ordered search must be paid by the missing person's estate. On the other hand, if there is no administration (because the search finds the missing person alive), the court has *discretion* to order *petitioner* to pay the costs (e.g., where a reasonable search would have located the missing person in the first instance *before* the petition was filed, it would be equitable to require petitioner to pay the costs of the court-ordered search). [Prob.C. §12406(c)]

(2) [14:444] **Order for estate administration:** Upon finding that the missing person is presumptively dead under §12401, the court must:

- Appoint a personal representative for the missing person's estate in the manner governing estates of deceased persons (and, when appropriate, order admission of the will to probate); *and*
- Determine the missing person's date of death (*see* ¶*14:414*). [Prob.C. §12407(a)(1) & (2)]

Except as discussed below (reappearing missing person's rights, ¶*14:445 ff.*), the appointed personal representative must then administer the missing person's estate in the same general manner and method of procedure, and with the same force and effect, as provided for the administration of deceased persons' estates. Thus, the representative is bound by the normal fiduciary standard of care (Prob.C. §9600); and all the usual estate administration steps and obligations apply (creditor claims, inventory and appraisal, etc.). [Prob.C. §12407(b)]

5. [14:445] **Rights if "Missing Person" Reappears:** Generally, a final decree of distribution in an estate administration operates "in rem" (as against the world) to conclusively determine who is entitled to the estate property and what the respective distributive shares in the estate are. [Prob.C. §11605; *see* ¶*16:414 ff.*]

The same result ordinarily obtains pursuant to a final decree of distribution in a missing person's estate administration—i.e., once

or defeated by a later will offered for probate, have standing to contest the later will. [*Estate of Plaut* (1945) 27 C2d 424, 425, 164 P2d 765, 766]

Probate of the earlier will is not a prerequisite to contesting the later will. Nor does it matter that the contestant would not take by intestate succession if the challenged will were set aside. [*Estate of Arbuckle* (1950) 98 CA2d 562, 566, 220 P2d 950, 953; but see *Estate of Rodda* (1957) 152 CA2d 300, 302, 313 P2d 582, 583-584—legatee of prior *lost will* that could not be found or probated as a lost will had *no* standing because not an heir at law, ¶*15:51*]

(3) [15:35] **Beneficiaries under later will:** Conversely, if the interest of a beneficiary under a later will may be impaired or defeated by probate of an earlier will, the beneficiary has standing to contest probate of the earlier will. [*Estate of Powers* (1979) 91 CA3d 715, 719,154 CR 366, 367; *Estate of O'Brien* (1966) 246 CA2d 788, 792-793, 55 CR 343, 346]

(4) [15:36] **Creditors of heirs:** An heir's creditors may have an "interest" in the estate if decedent's will disinherits the debtor-heir. However, such creditors have standing to file a contest only if they have perfected a *judgment lien* at the time the property would pass to the heir if the will were set aside. Conversely, an heir's general unsecured creditors (no judgment lien) apparently have no standing to file a will contest. [See *Estate of Harootenian* (1951) 38 C2d 242, 250, 238 P2d 992, 997]

(a) [15:37] **Comment:** In an early case finding that an heir's disclaimer of any interest in the estate (Prob.C. §275) could constitute a "fraudulent conveyance," the California Supreme Court held that a nonjudgment creditor could exercise the debtor-heir's right to contest a will over the debtor's objection. [*Estate of Kalt* (1940) 16 C2d 807, 814-815, 108 P2d 401, 404] However, the Code now provides that a statutory disclaimer is "not a fraudulent conveyance" (Prob.C. §283, ¶*16:508*). Hence, the continued viability of *Kalt* is very doubtful; but, aside from *Harootenian*, supra, there are apparently no later reported cases dealing with an heir's creditors as "interested persons."

(5) **Personal representative**

(a) [15:38] **Executor under earlier will admitted to probate:** The executor appointed under a will duly admitted to probate has an affirmative obligation to *defend* that document against subsequent contests. [Prob.C. §8250(b); *Estate of Dunton* (1936) 15 CA2d

729, 731, 60 P2d 159, 160; *In re Corotto* (1954) 125 CA2d 314, 320, 270 P2d 498, 502] By the same token then, the executor appointed under an earlier will admitted to probate has standing to contest a later will that, if admitted to probate, would defeat the testator's intentions reflected in the earlier will. [*Estate of Costa* (1961) 191 CA2d 515, 517-518, 12 CR 920, 922; *Estate of Denman* (1979) 94 CA3d 289, 292, 156 CR 341, 343—same rule applies to representative appointed as administrator with will annexed]

1) [15:39] **Compare—later will not affecting dispositive provisions:** On the other hand, absent a showing that the later testamentary instrument would thwart the testator's *dispositive* intentions under the earlier will (i.e., conflicting devises), the executor generally does not have standing to contest the subsequent document. It makes no difference that the subsequent instrument seeks to replace the executor with someone else; i.e., the threatened loss of a right to executor's compensation is not a sufficient "pecuniary interest" conferring standing. [See *Jay v. Sup.Ct. (Bank of America Nat'l Trust & Sav. Ass'n)* (1970) 10 CA3d 754, 758-759, 89 CR 466, 469—executor lacked standing to contest codicil that named someone else as executor but made no changes to dispositive provisions of prior codicil; *Estate of Sobol* (2014) 225 CA4th 771, 782-784, 170 CR3d 569, 578-580—executor not an "interested person" with standing to contest codicil that revoked executor's nomination, replacing him with coexecutors, but made no change in disposition of testator's property]

(b) [15:40] **Proposed executor under will offered for probate:** A person designated by decedent to be executor has no "duty" to defend a contest *before* admission of the will to probate and their appointment as executor. [Prob.C. §8250(b); *Jay v. Sup.Ct. (Bank of America Nat'l Trust & Sav. Ass'n)*, supra; *Estate of Perreira* (1961) 191 CA2d 369, 371, 12 CR 589, 590; compare *Doolittle v. Exchange Bank* (2015) 241 CA4th 529, 545, 193 CR3d 818, 830—successor trustee obligated to defend contest by acceptance of inter vivos trust on trustor's death] However, the nominated executor probably has the "right" (optional) to interpose a defense if they choose.

In contrast, a designated (but not yet appointed) executor may not *initiate* a will contest before probate,

unless they otherwise have standing as an "interested person" (e.g., testate or intestate beneficiary). Again, the potential loss of a right to executor's commissions is not a sufficient "pecuniary interest." [*Jay v. Sup.Ct. (Bank of America Nat'l Trust & Sav. Ass'n)*, supra; also see *Estate of Baird* (1987) 196 CA3d 957, 965-966, 242 CR 246, 250-251 (citing *Jay* with approval in holding that would-be executrix had no "pecuniary interest" for purposes of appealing probate court's denial of her motion to revoke letters testamentary issued to someone else)]

(6) [15:41] **Assignee or estate of proper contestant:** The right to contest a will survives to the contestant's estate; similarly, it is assignable. Hence, a proper contestant's assignee or a deceased contestant's estate representative has standing to pursue the contest in the original (assigning or deceased) contestant's place. [*Estate of Clark* (1928) 94 CA 453, 460, 271 P 542, 545 (assignee); *Estate of Field* (1952) 38 C2d 151, 155, 238 P2d 578, 580 (administrator of estate of testator's widow); *Estate of Davies* (2005) 127 CA4th 1164, 1173-1174, 26 CR3d 239, 246-247 (beneficiary's surviving spouse and executrix)]

(a) [15:42] **Limitation—"heir-hunting" assignments:** "Professional" heir hunters typically send the potential heir or beneficiary a contract whereby a portion of the heir's expectancy is assigned in return for the information and effort that may be necessary to obtain it. However, an assignee has no greater rights than their assignor; if the assignor would not have had standing, the assignee may not file the contest either.

Moreover, the court is likely to be suspicious where a purported assignee otherwise has no connection with the testator's estate . . . since California has a strong public policy favoring full disclosure and adequate consideration as prerequisites to enforcement of "heir-hunting" contracts and assignments. The assignment may be invalidated or modified by the court if it is unreasonable, not supported by adequate consideration or otherwise violates a statute or public policy. [See Prob.C. §11604(b), (c); *Estate of Molino* (2008) 165 CA4th 913, 921-922, 81 CR3d 512, 518—assignments void as against public policy because they gave assignee power to hire counsel and control litigation; compare *Estate of Collins* (1968) 268 CA2d 86, 91-92, 73 CR 599, 602-603—assignment to nonlawyer who furnished legal services held illegal, so assignee had no standing to contest]

Marriage of Modnick (1983) 33 C3d 897, 905, 191 CR 629, 633; *Marriage of Stevenot* (1984) 154 CA3d 1051, 1068-1069, 202 CR 116, 128-129]

3) [15:219] **Application—"fraud" by executor:** An executor stands in a fiduciary relationship with the estate beneficiaries and heirs (¶*5:23 ff.*). Accordingly, the executor has a duty to disclose all material facts and refrain from taking unfair advantage of the beneficiaries and heirs. Concealment and misrepresentation that induce the heirs not to contest the will are grounds for setting aside the probate for reasons of extrinsic fraud or mistake. [*Estate of Sanders* (1985) 40 C3d 607, 614, 221 CR 432, 436]

- [15:220] During decedent's life, while acting as her conservator, Executor (decedent's nephew) arranged for decedent to change her will to substitute himself for decedent's grandchildren as major testate beneficiary. During probate, he consistently concealed these facts from the grandchildren and their mother and in fact led them to believe that the will left the entire estate to them. He compounded the deception by assuring the family they had no reason to contact probate counsel or to attend the probate hearing. "This conduct . . . [seemed] clearly intended to prevent appellants from appearing to contest the will." It amounted to "extrinsic fraud" for purposes of setting aside the prior orders for probate and final distribution. [*Estate of Sanders*, supra, 40 C3d at 617-619, 221 CR at 438-439; also see *Larrabee v. Tracy* (1943) 21 C2d 645, 649-651, 134 P2d 265, 268-269]

  a) [15:220.1] **Compare—Prob.C. §7250 "fraud" ground applicable to representative's liability:** Pursuant to Prob.C. §7250, the personal representative may be held liable after any probate order (including an order admitting a will to probate) becomes final upon proof of *fraud, conspiracy or material misrepresentation in the procurement of the final order*. In such circumstances, the personal representative loses their §7250 immunity for acts or omissions authorized, approved or confirmed by the order. [Prob.C. §7250(a), (c)]

The summons may be "directed to" (served on) minors or incapacitated persons, or the personal representative of a deceased person entitled to receive notice. [See Prob.C. §8271, Law Rev. Comm'n Comment]

- [15:225] Note carefully that the *executor* or *administrator with will annexed* must be served, since after appointment they have a *duty to defend the will*. [See Prob.C. §8250(b), ¶*15:38*]

FORM: Again, the general *civil* "summons" form should *not* be used for this purpose (*see* ¶*15:196.1*). Rather, service must be made by the Judicial Council form Summons (DE-125) for probate proceedings. This form is available online at the California Courts website (*www.courts.ca.gov*).

(5) [15:226] **Response:** As in preprobate contests, the respondents have 30 days to respond to the petition (¶*15:199 ff.*). [Prob.C. §8271(a)]

(6) [15:226.1] **Effect of failure to timely respond:** A person's failure to file a timely response to a revocation petition has essentially the same consequences as in a preprobate contest. [See Prob.C. §8271(c); cf. Prob.C. §8251(c); see *Estate of Moss*, supra, 204 CA4th at 534, 139 CR3d at 104]

6. **Post-Pleading Procedures Before Trial**

a. [15:227] **General rules of civil procedure govern:** Except as otherwise provided in the Probate Code, the general rules of civil procedure govern *discovery* and other pretrial matters in will contests. [See Prob.C. §1000(a), and generally, Part 2, commencing with §307 of the Code of Civil Procedure, and CCP §2016.010 et seq. (Civil Discovery Act); *Forthmann v. Boyer* (2002) 97 CA4th 977, 987, 118 CR2d 715, 722—"there is no question but that the discovery procedures found in the Code of Civil Procedure are available for use in probate proceedings"; *Mota v. Sup.Ct. (Villalobos)* (2007) 156 CA4th 351, 355, 67 CR3d 303, 305 (same) (citing text)]

(Also see *Holm v. Sup.Ct. (Misco)* (1986) 187 CA3d 1241, 1245-1249, 232 CR 432, 435-437 (*discussed at* ¶*15:128.1*)—probate court has no power to expand methods of civil discovery beyond those authorized by statute and hence may not, under guise of a discovery order, authorize autopsy of decedent's body in a will contest; *Estate of Gallio* (1995) 33 CA4th 592, 597, 39 CR2d 470, 472-473 (*discussed at* ¶*6:1.4*)—state constitutional right of privacy precludes discovery of *living* person's will; *Fortunato v. Sup.Ct. (Ingrassia)* (2003) 114 CA4th 475, 482-483, 8 CR3d 82, 87-88 (*discussed at* ¶*6:1.11*)—public policy favoring full and frank disclosure in probate proceedings (Prob.C. §§8870-8873) does not outweigh confidentiality conferred

b. **Compare—attacking the order**

(1) [15:765] **Appeal:** An order determining the persons to whom distribution should be made is appealable. [Prob.C. §1303(f); *Estate of Justesen* (1999) 77 CA4th 352, 358, 91 CR2d 574, 578, fn. 4; *Estate of Jones* (2004) 122 CA4th 326, 331, 18 CR3d 637, 640]

[15:766] *Reserved.*

(2) [15:767] **Equitable relief after finality:** Also, a claimant who was denied the opportunity to present their claim on account of "extrinsic fraud" may invoke the court's *equitable powers* to set the decree aside—at *any* time, even after the order has become final. [*State of California v. Broderson* (1967) 247 CA2d 797, 804-805, 56 CR 58, 63; *and see generally*, ¶*15:216 ff.*]

(3) [15:768] **CCP §473(b) set-aside motion:** Further, "defaulting" parties (i.e., persons not filing a written statement of interest at or before the hearing, ¶*15:707*) may be entitled to obtain relief from the order under CCP §473(b). *See* ¶*15:711*.

(4) [15:769] **No motion for new trial:** On the other hand, the Code specifically *forbids* motions for new trial in all probate proceedings other than will contests and cases where the right to jury trial is expressly granted. [Prob.C. §7220; *and see* ¶*15:715* (no right to jury trial in §11700 proceedings)]

F. OTHER ACTIONS INVOLVING THE ESTATE

[15:770] Scattered throughout the Probate Code are miscellaneous provisions authorizing the maintenance of actions by or against estate representatives and conferring a wide range of specific remedies. These sections are summarized below with reference, where appropriate, to other chapters in this Practice Guide where the specific action is discussed in greater detail.

1. [15:771] **General Authority to Maintain or Defend Actions:** Aside from the statutes authorizing *specific* actions by or against the estate or the personal representative of the estate, the Code confers general authority to maintain or defend actions involving the estate, as follows:

a. [15:772] **Personal representative's powers:** The personal representative has explicit authority to (1) *commence and maintain* actions and proceedings "for the benefit of the estate"; and (2) *defend* actions and proceedings brought against the decedent, the personal representative, or the estate. [Prob.C. §9820]

This power may be exercised *without* court supervision (court approval, instructions, confirmation, etc.). [See Prob.C. §9820, Law Rev. Comm'n Comment]

[15:773] ***CAVEAT—Fiduciary Standard of Care:*** Section 9820 does not compel the representative to commence litigation (or defend against it) in any particular circumstance. As with all "estate management" powers, the personal representative must exercise "ordinary care and diligence" in determining whether to exercise a power to litigate or defend litigation under §9820 (see Prob.C. §9600, and general discussion of the *fiduciary standard of care* at ¶*5:23 ff.*).

If in doubt as to whether it would be appropriate to exercise the power conferred by §9820, the representative may seek *instructions* from the court (Prob.C. §9611, ¶*14:265 ff.*). [See Law Rev. Comm'n Comment, supra]

(1) [15:774] **Pro per personal representative?** A nonattorney personal representative may not prosecute a *general civil (nonprobate) action* in pro per on behalf of the estate. [*Hansen v. Hansen* (2003) 114 CA4th 618, 621, 7 CR3d 688, 691]

It is unclear, however, whether a nonlawyer representative of a decedent's estate may appear in pro per on behalf of the estate in matters *within probate* proceedings; or whether nonlawyer executors or administrators may represent themselves in probate proceedings affecting their personal rights (e.g., on a petition for executor's compensation). [See *Hansen v. Hansen*, supra, 114 CA4th at 622, 7 CR3d at 691-692 (noting but not deciding those issues)]

For a discussion of this issue in the context of an in pro per trustee, see ¶2:116.20 ff.

(2) [15:775] **Suit by heirs/beneficiaries on behalf of estate under "special circumstances":** While Prob.C. §9820 only authorizes the personal representative to bring suit on behalf of the estate, under *special circumstances* a decedent's heirs or beneficiaries may file suit on their own. [See, e.g., *Olson v. Toy* (1996) 46 CA4th 818, 824, 54 CR2d 29, 33—decedent's heirs under will had standing to maintain action to invalidate trust and compel delivery of trust assets where "special circumstances" of trustee doubling as estate representative existed (¶*15:866*)]

[15:776-782] *Reserved.*

b. [15:783] **"Interested person's" petition for order directing personal representative:** Conversely, an "interested person" (Prob.C. §48, ¶*3:83.1 ff.*) may petition the court for an order *directing the personal representative to act or not to act* concerning the estate whenever it appears that the estate

tive's removal. These issues are discussed in detail at ¶*14:452 ff*.

4. [15:787] **Actions to Surcharge Representative (Proceedings Relating to Accountings):** Estate administration always involves a "final" accounting (or, if the accounting is waived, a final report) (Prob.C. §10951); and may also involve various "interim" accountings (on court's own motion or motion of an interested person, Prob.C. §10950(a); any time after one year from date of issuance of letters or last accounting, upon petition of any interested person, Prob.C. §10950(b); when the representative resigns or is removed from office, Prob.C. §10952; upon a representative's death or incapacity, Prob.C. §10953).

   Every representative is chargeable on settlement of their accounts with all of decedent's estate coming into their possession and with all of the estate's "income, issues and profits." Each representative is responsible for their own negligence, mismanagement and misconduct during the administration and may be held accountable ("surcharged") therefor. [See generally, Prob.C. §§9601-9603, 9631 (*discussed at* ¶*5:25 ff*.); *Estate of Massaglia* (1974) 38 CA3d 767, 774-775, 113 CR 751, 756-757; *Estate of Spirtos* (1973) 34 CA3d 479, 487-489, 109 CR 919, 924-925]

   Actions to compel accountings, objections to accountings and grounds for surcharge are discussed in detail in *Ch. 16*.

5. [15:788] **Actions Relating to Representatives' Bonds:** Various proceedings affecting bond—to reduce bond, to increase bond, to hold sureties liable on the bond, or to substitute and discharge a surety—are available. Briefly:

   a. **Action upon bond (against surety) for representative's neglect or misconduct**

      (1) [15:789] **Liability of surety and procedures, generally:** The surety on a representative's bond is liable for the representative's acts of neglect, mismanagement or misconduct committed in their representative capacity, which cause loss to the estate. Thus, beneficiaries (or a successor representative on their behalf) injured by the neglect or misconduct may proceed against the surety for damages. [See generally, CCP §§995.020, 996.410-996.495; Prob.C. §9822]

         (a) [15:790] **Extent of liability:** Judgment of liability on a bond obligates the representative and surety *jointly and severally*. If the judgment does not fully exhaust the bond, the surety remains vulnerable on future claims against the bond until the bond is entirely exhausted. [CCP §996.460(a), (c)]

            Once the representative's liability is established, the surety is responsible to the extent of the bond furnished. Further, if the surety fails to make payment,

Also, as stated above (¶*15:832*), the released surety remains liable on its bond for prerelease liabilities of the representative. [CCP §996.150]

[15:836-839] *Reserved.*

6. [15:840] **Miscellaneous Actions Against Representatives:** In addition to the proceedings discussed above (¶*15:771 ff.*), the following actions, in an appropriate case, may be maintainable *against an estate representative*:

   a. [15:841] **Suspension of representative's powers without removal from office:** The representative's powers may be temporarily suspended, in whole or in part, for a time, upon petition demonstrating that they are likely to take some action that would "jeopardize unreasonably" a person's interest in the estate. [Prob.C. §9614; *see detailed discussion at* ¶*14:513 ff.*]

   [15:842-844] *Reserved.*

   b. [15:845] **Action against representative for unauthorized or fraudulent sale:** See Prob.C. §9880 et seq. ("conflict of interest" sale to representative or representative's attorney without obtaining required court approval, ¶*13:24 ff.*); Prob.C. §10380 (neglect or misconduct enforceable against representative's bond, ¶*13:283.1, 15:817*); Prob.C. §10381 (liquidated damages liability for fraudulent real property sale, ¶*13:284 ff.*).

7. [15:846] **Miscellaneous Actions by Representatives Against Other Parties:** In addition to those proceedings discussed above (¶*15:771 ff.*), a host of other actions may be available to estate representatives, either individually or jointly with the heirs and devisees, *against third parties*. Common examples:

   a. [15:847] **Action for partition:** Prob.C. §9823 (authorizing independent partition action where estate includes an undivided interest in property co-owned with others); and Prob.C. §§11950-11956 (probate partition proceeding when two or more heirs or beneficiaries are entitled to undivided interests in estate property). *See detailed discussion at* ¶*14:225 ff.*

   b. [15:848] **Action to recover "fraudulently conveyed" property for benefit of creditors:** On application of a creditor of the decedent or the estate, the personal representative "shall" (*must*) commence and prosecute an action "for the benefit of creditors" to recover decedent's real or personal property conveyed or transferred during lifetime under the circumstances set forth below. [Prob.C. §9653; *Silva v. Sup.Ct.* (1948) 83 CA2d 521, 525, 189 P2d 314, 316-317]

      (1) [15:849] **Lifetime conveyances subject to §9653 action:** Decedent's lifetime conveyances or transfers subject to a §9653 recovery action include:

(b) [15:857] **Compare—representative's suit absent creditor request:** If there are insufficient assets to pay creditors and the decedent made a "voidable transfer" or "gift in view of impending death" (Prob.C. §5700 et seq.), the representative must take action to recover the subject property *even in the absence of a creditor's request*. [*Goldstein v. Prien* (1956) 143 CA2d 123, 126-127, 299 P2d 344, 346; and see Law Rev. Comm'n Comment, supra]

(c) [15:858] **Attorney fees and costs of suit:** Creditors who request the representative to bring a §9653 action "shall" pay that portion of the litigation costs and expenses and attorney fees, or give an undertaking to the representative for such purpose, as the representative and creditors agree or, absent agreement, as the court "orders." [Prob.C. §9653(b)]

(d) [15:859] **Disposition after recovery of property:** Property recovered in the §9653 action must be sold for the payment of debts in the same manner as if decedent had died holding title to or in possession of the property; for this purpose, the property may be sold in its entirety or in such portion as is necessary to pay the debts. [Prob.C. §9653(c); and see generally, Prob.C. §10000(a) (authority to sell where "necessary" to pay debts), ¶*13:2 ff.*]

The sale proceeds must be applied first to pay the litigation costs and expenses (including attorney fees) and then to pay decedent's debts "in the same manner as other property in possession of the personal representative" (*see* ¶*8:249*). [Prob.C. §9653(c)]

Any balance of the sale proceeds remaining after all of decedent's debts have been paid must be paid to the person from whom the property was recovered. [Prob.C. §9653(c)]

[15:860-864] *Reserved.*

(4) [15:865] **Section 9653 remedy not exclusive:** Nothing in the language of §9653 suggests it is intended to provide an exclusive remedy. Where appropriate, "interested persons"—including creditors—may pursue voidable transaction claims in the probate proceeding under Prob.C. §850 (¶*15:555 ff.*). [*Estate of Myers* (2006) 139 CA4th 434, 442-443, 42 CR3d 753, 759]

c. [15:866] **Action to obtain possession or quiet title:** The heirs or devisees may jointly as between themselves, or jointly with the personal representative, maintain an independent civil action for possession of property or to quiet title to property against any third person (but *not* against the personal

days' notice of hearing on the petition must be given to the persons and in the manner provided by Prob.C. §1220, which in turn requires delivery (personally, electronically or by mail) pursuant to Prob.C. §1215 (¶*3:466 ff.*). [Prob.C. §9830(c)]

(3) [15:897] **Option to obtain prior court approval:** Even when a particular settlement or compromise may properly be made without court approval, the representative always retains the *option* of obtaining prior court authorization. [Prob.C. §9830(b)]

(a) [15:898] **Procedure:** Such "elective" court authorization is obtained under the same procedures applicable when court authorization is *required* for the particular settlement or compromise—i.e., the representative must proceed pursuant to Prob.C. §§9836-9837 (¶*15:932 ff.*), *not* by a petition for instructions. [Prob.C. §9830(b)]

[15:899] ***PRACTICE POINTER—Advisability of Obtaining Court Approval:*** A settlement made without prior court authority *might* be binding on the estate if (when ultimately reported in the representative's accounting) it is found to be "fair and honest" and in the best interests of the estate. [See *Treharne v. Loftin* (1984) 153 CA3d 878, 886, 200 CR 668, 673 (disagreeing with *See v. Joughin* (1937) 18 CA2d 414, 64 P2d 149)] However, like all estate management powers, the power to settle or compromise a claim, or *not* to settle or compromise a claim, must be exercised with "ordinary care and diligence" (Prob.C. §9600). Whether a particular settlement or compromise properly discharges the representative's fiduciary standard of care may be a close judgment call, indicating that prior court approval normally *should* be obtained even if not otherwise "required."

Without *prior* court approval, the representative lacks the protection afforded by Prob.C. §7250, under which the representative and representative's sureties generally are insulated from liability for actions taken (or not taken) in accordance with final probate court orders (¶*15:960*). In other words, there is no "guarantee" that the court will "ratify" a settlement on behalf of the estate *after the fact* . . . leaving the representative exposed to *surcharge* liability for an improvident settlement to the detriment of interested persons. [*Treharne v. Loftin,* supra, 153 CA3d at 886, 200 CR at 673; see also *Goldberg v. Frye* (1990) 217 CA3d 1258,

1264-1265, 266 CR 483, 486-487—court approval of compromised estate claim protects representative from subsequent liability]

[15:900-904] *Reserved.*

c. [15:905] **Settlements and compromises expressly requiring court approval:** Subject to the right of IAEA representatives to settle or compromise claims without prior court approval (¶*15:920*), *all* of the following settlements or compromises on behalf of the estate may be made *only* pursuant to prior court order (Prob.C. §§9831-9835):

(1) [15:906] **Settlement or compromise before expiration of creditor claim-filing period:** Unless the time for filing creditor claims has expired (*see Ch. 8*), a prior court order is *required* to compromise or settle a claim, action or proceeding by or for the benefit of, or against, the decedent, the personal representative or the estate. [Prob.C. §9831]

(a) [15:907] **Compare—extension, renewal or modification of obligations:** Section 9831 does *not* require prior court authorization to *extend, renew* or *modify* the terms of an obligation owing to or running in favor of the decedent or the estate (Prob.C. §9830(a)(2), ¶*15:894*). [See Prob.C. §9831, Law Rev. Comm'n Comment]

(*But see* ¶*15:908*.)

(2) [15:908] **Settlement, compromise, extension, renewal or modification affecting real property:** Ordinarily, prior court authorization is required for a compromise, settlement, extension, renewal or modification affecting (a) *title to real property*, (b) an *interest in real property* or a *lien or encumbrance* on real property, or (c) an *option to purchase real property* or an *interest* in real property. [Prob.C. §9832(a)(1)-(3)]

(a) [15:909] **Exception—renewal, extension or modification of certain real property leases:** If it is to the estate's "advantage," the representative may, *without* prior court approval, extend, renew or modify a real property lease having an unexpired term of no more than one year where, under the lease as extended, renewed or modified (i) the rental amount is not more than $5,000 a month and the term does not exceed one year, *or* (ii) regardless of the rental amount, the lease is from month-to-month. [Prob.C. §9832(b)]

The maximum one-year term for this purpose *includes* any term by which the lessee could extend the lease under a right to extend granted in the lease (i.e.,

have brought actions on the claims. (The statement must also identify any real or personal property that is security for a claim, whether by mortgage, trust deed, lien or other encumbrance.) [Prob.C. §10900(b)(3)]

[16:116.16-116.20] *Reserved.*

c. [16:116.21] **General guidelines for account reporting:** Scattered throughout the Code are various provisions impacting the matters that must be disclosed in the accounting process. In addition to the requirements of §1060 et seq. (¶*16:116a ff.*), these statutes should be kept in mind when preparing any account:

(1) **Charges and credits**

(a) [16:117] **Property, income and profits of estate:** Personal representatives are generally chargeable in their accounts with all estate property that comes into their possession. They may not profit personally from any increase in the estate during administration and, thus, must account for all of the income, issues and profits of the estate, including the proceeds of property sold during administration. [Prob.C. §§1060 et seq. (¶*16:116a ff.*), 9600, 9650(a)(1) & (2), 10005(a); *and see* ¶*15:787 ff.*]

(b) [16:117.1] **Losses to estate:** Personal representatives are not chargeable with losses occasioned by a decrease in value or destruction of any assets of the estate *except* to the extent the losses resulted from a breach of the representative's fiduciary duty. Nor are representatives chargeable with losses sustained when estate property is sold for less than its appraised value, provided the sale was properly conducted pursuant to Code requirements (*see Ch. 13*). [Prob.C. §§9657, 10005(b)]

- *Cross-refer:* When the estate suffers loss from a representative's breach of fiduciary duty, the representative is exposed to *surcharge liability*. Surcharge issues are explained in detail at ¶*16:177 ff.*

(c) [16:117.2] **Allowance of expenses of administration:** The personal representative "shall be allowed" on the account "all necessary expenses in the administration of the estate, including, but not limited to, necessary expenses in the care, management, preservation, and settlement of the estate." [Prob.C. §11004]

(2) [16:118] **Cash receipts and disbursements:** As noted above (¶*16:117 ff.*), each account must show the

amount of money received and expended by the representative since the most recent prior account was filed. [Prob.C. §§1061-1062]

(a) [16:119] **Cash properly invested:** Each account should show that, for the period covered by the account, the representative kept all estate cash in their possession properly invested in compliance with Prob.C. §9652. As a general rule, surplus cash not reasonably necessary for "orderly estate administration" must be deposited in *interest-bearing* accounts or invested as authorized by law, except to the extent that decedent's will otherwise provides. [Prob.C. §9652; *see detailed discussion at ¶13:433 ff.*]

1) [16:120] **Investment obligations of trust company representatives:** A bank trust company personal representative may, in the exercise of "reasonable judgment," deposit estate funds in an account in any department of the corporation of which it is a part. But in such event, the trust company is ordinarily chargeable with interest on the deposit at the rate prevailing among banks "of the locality" on such deposits. [Prob.C. §9705(a); and see, e.g., *Estate of Smith* (1931) 112 CA 680, 683-685, 297 P 927, 929-930]

However, when deemed to be to the estate's "advantage," a bank trust company personal representative may properly deposit in a *noninterest*-earning checking account with its own company the amount of cash "reasonably necessary" for orderly estate administration. (In this case, of course, the trust company's account should report the *reasons* why a noninterest-earning deposit was to the estate's "advantage.") [Prob.C. §9705(b); *see ¶13:439*]

(b) [16:121] **Supporting documents:** The personal representative must keep all "documents" (e.g., cancelled checks, invoices and receipts) supporting the account. These documents must be *produced for inspection and audit* by the court or interested persons if so ordered by the court or if an interested person files a written request therefor with the clerk and serves a copy on the personal representative. [Prob.C. §10901]

[16:122] ***PRACTICE POINTER:*** Section 10901 contains no express time limits on the duty to retain and produce supporting documents. As a matter of prudence, however,

objection expired *and failed to object*. [Prob.C. §10590(a)(1) & (c)]

OR

- [16:176.4] The person *waived notice* or *consented* to the proposed action pursuant to Prob.C. §§10582-10584 (¶*9:72.1 ff.*). [Prob.C. §10590(a)(2)]

Cross-refer: For a detailed discussion of court review of IAEA actions, *see* ¶*9:72 ff.*

f. [16:177] **Surcharge litigation:** Objections to accountings commonly raise *surcharge* claims against the representative for purported acts of misconduct, neglect, waste, mismanagement or other breach of fiduciary duty. These grounds fall under the general category of "all matters relating to an account" which may be contested "for cause shown." [See Prob.C. §11001; *Estate of Fain* (1999) 75 CA4th 973, 991, 89 CR2d 618, 631 (citing text)]

The personal representative "is an officer of the court and occupies a fiduciary relation toward all parties having an interest in the estate." [*Estate of Sanders* (1985) 40 C3d 607, 616, 221 CR 432, 437 (internal quotes omitted); *Estate of Seifert* (2005) 128 CA4th 64, 68, 26 CR3d 560, 562 (*discussed further at* ¶*3:230.1 ff.*)]

(1) [16:178] **Statutory limitations on liability:** Preliminarily, note these provisions under which the representative is statutorily protected from liability:

(a) [16:178.1] **General "good faith" protection:** Liability for a loss or other injury to the estate occasioned by the representative's failure to exercise "ordinary care and diligence" (Prob.C. §9600) may be excused if the court finds that the representative otherwise acted "reasonably and in good faith under the circumstances" and that relieving the representative from liability in whole or in part would be "equitable." [Prob.C. §9601(b); *Estate of Kampen* (2011) 201 CA4th 971, 988, 135 CR3d 410, 423]

(However, even if the court declines to impose surcharge liability under the authority of §9601(b), interested persons adversely affected by the representative's breach may still pursue their *other* statutory or common law damages remedies. See Prob.C. §9603, ¶*5:25.6, 16:204.5*.)

(b) [16:179] **Protection for "good faith" mistakes in taking possession of nonestate property:** A representative who in "good faith" takes possession of property "reasonably believed" by the representative to be part of the decedent's estate may

not be held criminally or civilly liable to any person if it turns out that the property is not part of the estate. However, the representative must make reasonable efforts to determine the true nature of and title to such property taken into their possession. [Prob.C. §9651(a) & (b); *also see ¶1:47.22 ff., 6:2.1* on probate *attorney's* duty to "investigate" assets of the estate]

Property which is later determined *not* to be part of the estate must be delivered to the person(s) legally entitled thereto together with all its rents, issues and profits received by the representative, *less* expenses incurred in its protection and maintenance or in the collection of its rents, issues and profits. For this purpose, the representative has the discretionary right to "request court approval before delivering the property" to someone else. [Prob.C. §9651(c); *and see more detailed discussion at ¶6:3.10 ff.*]

[16:180] *Reserved.*

(c) [16:181] **Corepresentative's breach of fiduciary duty:** As a general rule, when there are two or more personal representatives for the estate, one representative is not liable for a breach of fiduciary duty committed by another representative. [Prob.C. §9631(a)]

Liability for one representative's breach must be borne by the other representatives only where they are in some manner (actively or passively) *also at fault*. Specifically, the Code holds a personal representative liable for a corepresentative's breach of fiduciary duty where:

- The personal representative *participates* in a breach committed by the other representative; or
- The personal representative *improperly delegates* estate administration to the other representative; or
- The personal representative *approves, knowingly acquiesces in or conceals* the other's breach of fiduciary duty; or
- The personal representative's *own negligence enables* the other representative to commit the breach; or
- The personal representative *knows or reasonably should have known* from available information that the other representative has committed a breach of fiduciary duty and *fails to take*