



**TRUSTS & ESTATES SECTION**  
THE STATE BAR OF CALIFORNIA

***HEARING PROCEDURES IN PROBATE PROCEEDINGS***

**LEGISLATIVE PROPOSAL (T&E-2010-10)**

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

**FROM:** May Lee Tong, Chair, Trusts and Estates Executive Committee  
Neil Horton, Vice Chair, Trusts and Estates Executive Committee  
David W. Baer, Chair, Litigation Subcommittee

**DATE:** June 6, 2009

**RE:** A proposal to amend §§ 1000 and 1022 of the Probate Code, relating to hearings in probate proceedings

**SECTION ACTION AND CONTACTS**

Date of Approval by Section Executive Committee: June 6, 2009

Approval Vote: Unanimous

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## **PURPOSE**

This proposal would harmonize procedures in probate litigation and general civil litigation by: 1) clarifying that the same general rules regarding the admissibility of sworn written statements (e.g., declarations) that apply in general civil proceedings also apply in probate proceedings; and 2) clarifying that the motions available in general civil litigation (e.g., demurrers, motions for summary judgment, applications for temporary restraining orders and injunctions) are also available in litigation under the Probate Code.

## **ISSUES**

### **I. CLARIFICATION THAT THE SAME RULES CONCERNING THE ADMISSIBILITY OF SWORN STATEMENTS APPLY IN PROBATE LITIGATION AND GENERAL CIVIL LITIGATION.**

Under Probate Code Section 1000, the same rules of practice applicable in civil actions also apply in proceedings under the Probate Code except where *a specific* procedural provision in the Probate Code is inconsistent with the Code of Civil Procedure. The purpose of this “borrowing” statute is to conform probate proceedings as nearly as is consistently possible to general civil proceedings. Thus, for example, the procedures for conducting discovery in civil litigation also apply in probate litigation.

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

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

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

Second, something as basic as the availability of civil motions should not vary from county to county and judge to judge. This is particularly true because local rules usually do not address this issue, in which case only local counsel will be aware of the motion practice followed by a particular probate department or an individual judge.

Third, precluding litigants in probate proceedings from making the motions available in civil practice is inconsistent with the Probate Code's statutory scheme. Since the Probate Code contains no *specific* rule precluding the use of civil motions, under existing Probate Code Section 1000 the nature of civil motion practice in probate litigation and general civil litigation should not differ. The proposed amendment, accordingly, would clarify rather than change existing law.

Finally, no policy justification exists for having such a fundamental difference between probate litigation practice and general civil litigation practice. To the contrary, the basic purpose of Probate Code Section 1000 is to conform probate proceedings as nearly as is consistently possible with civil proceedings.

II. CLARIFICATION THAT SWORN STATEMENTS ARE ADMISSIBLE IN PROBATE LITIGATION TO THE SAME EXTENT AS THEY ARE ADMISSIBLE IN GENERAL CIVIL LITIGATION.

Probate Code Section 1022 simply states “[a]n affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code.” The Executive Committee of the Trusts and Estates Section (TEXCOM) believes that a recent case, *Estate of Bennett* (2009) 163 Cal.App. 4th 1309, misconstrued Section 1022 to imply the converse of what it states, *i.e.*, that affidavits are *inadmissible in all contested probate proceedings*. Alternatively stated, *Bennett* suggests that Section 1022 creates the *sole* exception to the use of declarations in probate proceedings. In contrast, in general civil proceedings, Code of Civil Procedure Section 2009 provides for the admissibility of sworn written statements in six different circumstances:

- in a special proceeding
- to prove the service of a summons, notice, or other paper in an action or special proceeding
- to obtain a provisional remedy, the examination of a witness, or a stay of proceedings
- in uncontested proceedings to establish a record of birth
- upon a motion
- in any other case expressly permitted by statute

In finding that Probate Code Section 1022 is inconsistent with Code of Civil Procedure Section 2009, the *Bennett* opinion concluded that the rules regarding the admissibility of sworn

statements applicable in civil practice do not apply in proceedings litigated in Probate Court. We believe that this conclusion is incorrect and that it will create two broad problems: (1) it will permit a litigant to demand an evidentiary hearing to resolve *every* contested issue and on *every* motion. In civil practice motions are almost always decided on the papers and oral argument as the court only very rarely permits live testimony. Adopting a different rule in probate litigation could substantially delay and add to its cost when, for example, a motion is filed to resolve a preliminary matter such as an application for a restraining order or an injunction, a motion to suspend a fiduciary's powers, a motion to change venue, a motion to compel discovery, etc.; and (2) in so doing, it would make motion practice in probate actions radically different from motion practice in civil actions.

As a general matter, the longstanding rules for the admissibility of affidavits under Code of Civil Procedure Section 2009 are sound, and have long provided for the prompt and efficient resolution of preliminary and provisional matters. Indeed, consistent with this, the legislative history (which *Bennett* did not consider) indicates that the Legislature never intended to make Code of Civil Procedure Section 2009 inapplicable to probate proceedings. Moreover, while Section 1022 sets forth one circumstance in which a sworn statement is admissible, the statute does not specifically state that this is the *only* circumstance in which sworn statements are admissible in probate proceedings. Rather, it is silent on the question of when sworn statements are *inadmissible*. The norm – conforming the practices followed in probate proceedings to the practices followed in general civil proceedings absent a *specific* provision in the Probate Code to the contrary – can be achieved simply by construing Section 1022 as providing for *an* exception to the inadmissibility of sworn statements.

In sum, probate courts should decide the motions referenced above – and many others – *on the papers*. Were a party entitled on request to a full evidentiary hearing on every preliminary issue with oral testimony from witnesses, such requests would be made as a matter of strategy by a party who has greater resources, the weaker case, or more compelling witnesses. In light of *Bennett's* reasoning, trial courts will be reluctant to deny such requests, fearing that to do so would constitute reversible error. In addition, the trial courts are likely to sometimes grant requests for evidentiary hearings on motions but defer conducting any hearing until the trial on the underlying matter. This would defeat the purpose of making a motion in many instances, such as when a litigant seeks immediate relief by way of an injunction or to suspend a fiduciary. Minimally, forcing the Probate Courts to conduct evidentiary hearings on motions whenever requested will make probate litigation more expensive, cause delay, and unduly burden the trial courts.

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

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

**LIKELY SUPPORT & OPPOSITION:**

<u>Support:</u> Both probate and general civil litigators are likely to support this amendment.	<u>Reasons:</u> The amendment avoids confusion by harmonizing procedures in probate and general civil litigation and precludes trial courts from limiting motion practice in probate proceedings.
<u>Oppose:</u> Certain judges	<u>Reasons:</u> Motions can be overused and can sometimes burden the trial courts. Probate judges should have substantial autonomy in fashioning procedures they deem appropriate.

**FISCAL IMPACT:** There is no anticipated fiscal impact.

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

## TEXT OF PROPOSAL

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

1000. Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including ~~discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure~~, *proceedings in connection with motions and discovery provided for under the Civil Code or the Code of Civil Procedure*, apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

SEC. 2. Section 1022 of the Probate Code is amended to read:

1022. An affidavit or verified petition shall be received as evidence: *1) as provided for by section 2009 of the Code of Civil Procedure; or 2) when offered in an uncontested proceeding under this code.*