



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### LEGISLATIVE PROPOSAL (T&E-2007-02) *TRIAL AND APPELLATE PREFERENCE STATUTORY CONFORMITY*

To: State Bar Office of Governmental Affairs

From: Stacey Potts, Chair, Executive Committee,  
Shirley Kovar, Chair, Litigation Committee  
Margaret M. Hand, Member, Executive Committee  
Trusts and Estates Section, State Bar of California

Re: Amendment to Code of Civil Procedure §§36 and 44, to conform the statutes granting trial preference with those granting appellate preference and vice versa

#### **Date of Approval**

##### **Author**

Margaret M. Hand  
Law Offices of Margaret M. Hand  
1939 Harrison Street, Suite 200  
Oakland, California 94612  
Telephone: (510) 444-6044  
Facsimile: (510) 444-7044  
E-mail: [margaret@handlaw.com](mailto:margaret@handlaw.com)

##### **Section Legislative Chair**

Silvio Reggiardo III  
Downey Brand LLP  
555 Capitol Mall, 10th Floor  
Sacramento, CA 95814  
Phone: (916) 441-0131  
Fax: (916) 441-4021  
Email: [sreggiardo@downeybrand.com](mailto:sreggiardo@downeybrand.com)

#### **Digest:**

The Code of Civil Procedure (CCP) provides trial preference to certain types of cases, presumably in recognition that “justice delayed is justice denied.” (*Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1199.) Some types of cases which have statutory trial preference also have statutory appellate and California Supreme Court preference, for example contested election cases. (Compare CCP §35 with §44.) By contrast, none of the types of cases granted trial preference under CCP §36 have statutory appellate or Supreme Court preference.

Presently, Code of Civil Procedure §36 grants trial preference in three instances:

(1) when a party with a significant interest in the litigation is over age 70 and in poor health (CCP § 36(a), preference is mandatory upon the proper showing);

(2) when a party under age 14 has a significant interest in a wrongful death or personal injury action (CCP §36(b), preference is mandatory upon a proper showing, though priority is second to that of §36(a)); and

(3) where a party suffers from an illness or condition likely to cause death within six months (CCP §36(d)), evidentiary standard is “clear and convincing” and preference must serve the interests of justice).

On appeal or petition for review, the above-described parties may move for preference under Rule 19, California Rules of Court, but must prove a non-statutory basis for approval of the motion. Nevertheless, preference is so routinely granted that Justice Kline, Division Three, Court of Appeal of California, suggested a change in the Rules of Court, writing:

. . . to deal with what is a recurring issue and to formalize what is already the practice, “[w]e suggest that the Judicial Council amend the California Rules of Court to make explicit that which is currently only implicit” (People v. Dupuis (1992) 7 Cal.App.4th 696, 701, fn. 4 [8 Cal.Rptr.2d 923]), in this case to provide expressly for appellate calendar preference for ailing or elderly litigants. (*Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1200, footnote omitted, otherwise punctuated as in original.)

In fact a change in the Rules of Court is not the needed remedy. The discrepancy between the trial preferences and the appellate and review preferences are the product of statute. The remedy is to amend the statute that grants appellate and Supreme Court preference so that this statute will parallel that which grants trial preference. Presently, Code of Civil Procedure §44 grants appellate and Supreme Court preference to three categories of cases. The proposed amendment to §44 would add a fourth category: cases granted trial preference under Code of Civil Procedure §36. Such an amendment would give appellate and Supreme Court preference not only to cases involving litigants who are over age 70 and ill, but also to cases described in Code of Civil Procedure §§36(b) and 36(d).

The disharmony between the types of cases given statutory trial preference and those with a statutory preference for appeal and review cannot be remedied only by amending Code of Civil Procedure Section 44, however. CCP §44 presently provides preference on appeal and Supreme Court review to “probate proceedings,” for which preference there is presently no trial counterpart. (See CCP §44.) Thus, creating complete harmony between the preference statutes requires an amendment to §36 as well. The proposed amendment to this section would give statutory trial preference to “probate proceedings” and would clarify that this phrase means those proceedings necessary for the “speedy settlement of the estates of deceased persons,” which policy is cited as the justification for the already-existing appellate and Supreme Court preference. (*Dougherty v. George* (1951) 101 Cal.App.2d 576, 578, citing *Estate of Heywood* (1908) 154 Cal. 312 (both cases dismissing appeals of probate judgments for want of prosecution).)

In summary, the below proposal would amend Code of Civil Procedure §§36 and 44 to provide statutory preferences to the same types of cases, whether at trial, on appeal or Supreme Court review.

**History:****Pending Litigation:**

None known.

**Likely Support or Opposition:**

The State Bar of California Trusts and Estates Section will support this legislation. There is no known opposition.

**Germaneness:**

The speedy settlement of decedent's estates and resolution of disputes affecting the elderly and ill is of great concern to attorneys practicing in the areas of estates, trusts and conservatorships. Similarly, wrongful death actions in which a party under age 14 has a substantial interest are of concern to attorneys who represent clients in guardianships. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

**TEXT AND COMMENTS:**

SECTION 1. Section 36 of the Code of Civil Procedure is amended to read:

(a) A party to a civil action who is over the age of 70 years may petition the court for a preference, which the court shall grant if the court makes all of the following findings:

(1) The party has a substantial interest in the action as a whole.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

(b) A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to subdivision (a) shall be given preference over a case subject to this subdivision.

~~(c) Unless the court otherwise orders, notice of a motion for preference shall be served with the memorandum to set or the at-issue memorandum by the party serving the memorandum, or 10 days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of 70 years. A party to a probate proceeding may petition the court for a preference, which the court shall grant if the court finds that a preference is necessary to the speedy settlement of the estate of a deceased person.~~

(d) In its discretion, the court may also grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by clear and convincing medical documentation which concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and which satisfies the court that the interests of justice will be served by granting the preference.

*(e) Unless the court otherwise orders, notice of a motion for preference shall be served with the memorandum to set or the at-issue memorandum by the party serving the memorandum,*

*or 10 days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of 70 years.*

(f) Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by a showing of cause which satisfies the court that the interests of justice will be served by granting this preference.

(g) Upon the granting of such a motion for preference, the clerk shall set the matter for trial not more than 120 days from that date and there shall be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Such a continuance shall be for no more than 15 days and no more than one continuance for physical disability may be granted to any party.

(h) Upon the granting of a motion for preference pursuant to subdivision (b), a party in an action based upon a health provider's alleged professional negligence as defined in Section 364, shall receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted.

### **Comment**

This proposal adds to §36 new subdivision (c), giving statutory trial preference to probate proceedings which previously were given statutory preference only for appellate and Supreme Court review. This proposal clarifies that the probate proceedings entitled to preference are those affecting the settlement of a decedent's estate. This proposal also rearranges the statute by renumbering pre-existing subdivision (c) as subdivision (e) and renumbering each succeeding subdivision to accommodate this change. Rearranging the statute in this way groups together those subdivisions which describe the types of cases given statutory preference (subdivisions (a) through (d)) and those subdivisions which describe how motions for preference shall be considered and granted and the effect of their grant (subdivisions (e) through (h)).

SEC. 2. Section 44 of the Code of Civil Procedure is amended to read:

44. Appeals in ~~probate proceedings~~ *cases entitled to preference under section 36*, in contested election cases, and in actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign shall be given preference in hearing in the courts of appeal, and in the Supreme Court when transferred thereto. All these cases shall be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties.

### **Comment**

The proposed amendment would give statutory preference for appeals and Supreme Court review to those cases given such preference for trial. The phrase "probate proceedings" may be deleted from amended §44 because the phrase "cases entitled preference under section 36" will encompass probate proceedings if §36 is amended as proposed. On the other hand, if §36 is not amended as proposed, the phrase "probate proceedings" may not be deleted from §44 without the loss of the preference presently granted those proceedings.