

9/19/80

Memorandum 80-79

Subject: New Topics

In connection with the approval of its Annual Report each year, the Commission considers whether it should request authority to study any new topics. At the time this decision is made, the Commission reviews any letters that have been received since the previous annual review suggesting new topics.

Last year, the Commission reviewed a suggested amendment to the Eminent Domain Law and decided to refer it to the State Bar Committee on Condemnation to determine that committee's views whether the amendment is a matter worthy of Commission study. The State Bar Committee unanimously voted against the suggested amendment. Accordingly, the staff proposes that no further consideration be given to this suggestion.

All of the suggestions received this last year involve topics the Commission already is authorized to study. The staff recommends against adding any new topics to our calendar of topics. The suggestions received and the disposition or suggested disposition are set out below:

(1) William S. Johnstone, Pasadena lawyer, has written suggesting a revision is needed to clarify the procedure for appointment of a successor guardian or conservator. We have prepared a staff draft of a recommendation in response to this suggestion for consideration at the October meeting.

(2) Sanford M. Cipinko, San Francisco lawyer, has written suggesting that the words "all claims" in Code of Civil Procedure § 484.202(b) (the Attachment Law) be clarified. Without going into detail concerning the suggestion, the staff plans to present this problem for Commission consideration when the overall revision of the Attachment Law is considered next year.

(3) Kurt W. Melchior has written suggesting that the provisions of the Evidence Code which permit a privilege to be invoked by "the personal representative" in a wrongful death case should be revised to make it unnecessary to open a probate estate merely to provide a person to claim the privilege in a wrongful death case. If there is no probate

estate, he suggests that the privilege claim should be permitted by any person who has the legal standing to maintain a cause of action for the wrongful death of the decedent and perhaps by any other blood relative of the first degree. See his letter attached as Exhibit 1. It would not be a substantial task to prepare a draft of a recommendation to effectuate this suggestion. Does the Commission wish such a draft to be prepared for its consideration?

(4) Haskell Titchell, a San Francisco lawyer, has written suggesting a need to deal with the problem created where one spouse has a conservator and the other spouse is managing and controlling the community property but is unwilling to support the conservatee spouse. The staff has prepared a staff draft of a recommendation relating to this problem for consideration at the October meeting.

(5) Lawrence Silver, Beverly Hills lawyer, has written suggesting that the Attachment Law be revised to permit an attachment to be set aside if the defendant shows that the attachment is not authorized in view of evidence discovered after the attachment was issued. We will consider this suggestion in connection with our overall study of the Attachment Law which is needed to conform that law to the proposed Enforcement of Judgments Law.

(6) We have received a number of communications urging the need for probate reform. See the letter from Mathew Valencic which is attached as Exhibit 2. See also the article from the San Jose Mercury (Monday, June 9, 1980) attached as Exhibit 3. The staff recommendations concerning priority suggests that some priority be given to the probate law study.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

SEVERSON, WERSON, BERKE & MELCHIOR
ATTORNEYS

TWENTY-FIFTH FLOOR

ONE EMBARCADERO CENTER • SAN FRANCISCO, CALIFORNIA 94111

(415) 398-3344

JAMES B. WERSON
KURT W. MELCHIOR
CLAIRE D. JOHNSON
EDMUND T. KING II
ROBERT L. LOFTS
DENNIS M. TALBOTT
RICHARD B. SCHREIBER
J. MARK MONTOBBIO
JAN T. CHILTON
STEVEN W. WALDO
JOHN H. FELDMANN III
MICHAEL J. BERTINETTI
GERALD J. BUCHWALD
LAWRENCE A. HOBEL
ROBERT A. SPANNER
JOHN W. BERGHOLT
WILLIAM F. MACK
WILLIAM V. MCTAGGART, JR.
ERIC A. BRILL

NATHAN R. BERKE
ERNEST Y. SEVIER
MAURICE E. HIBBERT
RANSOM S. COOK
ROBERT V. MAGOR
BERNARDUS J. SMIT
ROGER S. MERTZ
D. RONALD RYLAND
WILLIAM W. WERTZ
ROBERT J. CATHCART
THOMAS G. WOOD
DONALD J. QUERIO
MICHAEL WISCHKAEMPER
CAROL A. CONSOLVER
CAROL L. WILSON
EDWARD D. HAAS
CARL J. WEST
HOWARD W. ASHCRAFT, JR.
MARK J. KENNEY

WALTER R. SEVERSON
ALLAN L. FINK
OF COUNSEL

July 11, 1980

LOS ANGELES OFFICE
SUITE 3200
707 WILSHIRE BOULEVARD
LOS ANGELES
CALIFORNIA 90017
(213) 887-8870

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Ladies and Gentlemen:

Because of your interest in the administration of the Evidence Code I would like to make a comment about Boling v. Superior Court, (May, 1980) 105 Cal.App.3d 430. The opinion is constructive and helpful, and I believe it to be by in large correct in its reasoning. This opinion addresses, as a matter of first impression, the language of Evidence Code section 1013(c) and rules that in a wrongful death case, the privilege can only be invoked by "the personal representative" in the sense of a representative of the estate under the Probate Code, such as an executor or administrator.

The ruling clears up an ambiguity in the section and is consistent with my surmise about its meaning over the years. However, the Boling case is a good example of the defect in this formulation, since apparently the late Mr. Boling left no probate estate. Thus it would become necessary to open a probate estate and have an executor or administrator appointed, seemingly for the sole purpose of asserting the privilege post-mortem.

I would respectfully suggest that this is an unintended form of overkill: why need a probate file be opened simply to assert a personal prerogative? This is not within the normal compass of probate administration. Would it not be as simple to allow the privilege on behalf of a dead patient to be asserted by any one of a group including the "personal representative" within the meaning of Boling, by any person who has legal standing to maintain a cause of action for the wrongful death of the decedent, and perhaps by any other blood relative of the first degree?

Thank you for your consideration.

Sincerely yours,


Kurt W. Melchior

KWM:fst



An Organization Of
AMERICANS FOR LEGAL REFORM

August 11, 1980

EXECUTIVE COMMITTEE

Kathy Ekeohall
 Paul Hesse
 Dan Lewick
 Robert Tigner
 Matt Valencia

Assemblyman Alister McAlister
 California Legislature
 State Capitol
 Sacramento, CA 95814

Dear Assemblyman McAlister,

ADVISORY BOARD

Murray Leigh Bloom
Author
 Scott Burns
Journalist
 Norman Dacey
Author

Roberta Ann Funnell
Consumer Advocate
 Kenneth Haugan
Management Engineer

George E. Judd
Business Executive

Donale McWhorter
Prof. of Pol. Science

Jeffrey O'Connell
Law Prof. Author

Fred Rodell (d. 1980)
Yale Prof. of Law

Dr. James D. Rogers
Physician

Paul J. Rosenbaum
Nuclear Physicist

David L. Scull
Maryland State Rep

Blaine Nels Simons
Author Attorney

John E. Smith
Utah State Rep.

Anne Strick
Author

Frank Freeland of the NRTA-AARP, with whom I have been communicating for some time now on the subject of probate reform in California, referred me to you as a legislator concerned with the study of reform proposals. He informed me that you were the initiator and driving force of Assembly Concurrent Resolution 107 regarding the Uniform Probate Code and its relevance for your state.

This organization has a considerable interest in the subject of probate reform in general and in California in particular. Two of our advisors, Norman Dacey and David Scull, have been active probate reform advocates for years-- and both recently appeared on the Phil Donohue show to discuss the subject. Myself and Bob Tigner (HALT's staff attorney) also appeared on the Donohue show a few weeks later (in fact today in California) and we again discussed the issue of probate reform.

HALT's advocacy of probate reform had an important role in the passage of a probate reform bill here in D.C. after several years of stalemate with the lobbying forces of the probate bar. We have also generated considerable interest in the issue in Maryland, where we have worked very closely with Delegate Scull (our advisor again), and we expect a major breakthrough there this coming legislative session.

In California, we expect that our potential impact can be even greater. The issue is certainly ripe there and our membership (composed of extremely active people) there has reached 3,000 and continues to grow rapidly. We have excellent media contacts and Mike Richards (our legislative representative) and I have been working for some time to make contacts with people interested in California probate reform and to gather as much information as we can on the probate system there and the politics surrounding it. We are carefully and deliberately laying the groundwork for a probate reform initiative in your state that we intend to take up soon. I hope that we can count on your interest and cooperation.

In particular, it would be extremely helpful if we could be put in touch with other legislators you know to be interested

in probate reform, or at least who might be sympathetic to the idea. We have found that Dave Scull advice and his help in the Maryland legislature has been invaluable on this issue and on several others. We would like to develop a similar relationship with state legislators elsewhere: it can be a relationship with many mutual advantages. We can supply a considerable amount of public support and media coverage at crucial times (e.g., just before votes on reform legislation in judiciary committees) and we have contacts with people throughout the nation (both within the legal profession and non-lawyers) who have been active and successful in probate reform efforts.

I will send you some additional information about HALT in a separate package, including some reports on our probate activities. And I will keep you on our mailing list; since we will be sending out several things on probate in the near future, especially regarding California. I hope that you will find all these things interesting and that you will be amenable to cooperating with us.

I look forward to receiving a response from you.

Sincerely,


Matthew Valencic
Director

State's lawyers getting rich off probate, author charges

By Doris Miller
Staff Writer

WITH his dapper good looks, carefully clipped snowy-white hair and impeccably tailored gray pinstripe suit, it's easy to mistake Norman Dacey for a distinguished member of the legal profession.

But it would be a ghastly mistake to tell him so.

After all, the famed estate planner has built a national reputation attacking the American system of probate law and the thousands of lawyers he claims are getting rich unfairly because of it.

When Dacey first published "How To Avoid Probate" back in 1965, he

rocked the American Bar Association to its foundation by charging probate law was one of the biggest rackets in the country.

His view hasn't mellowed since.

"If Al Capone could come back to Chicago, he wouldn't bother with the beer business," says Dacey. "He probably would be a probate lawyer."

Now 72, Dacey is once again hammering at the legal system with his new volume, "How To Avoid Probate — Updated." He stopped in San Jose recently to level a new barrage.

"The system is filled with corrupt practices," he says. "It subjects the

Continued on Page 2C

Continued from Page 1C

beneficiaries to outrageous costs, extreme delays and undesirable publicity. The system here in California needs a complete bulldozing. It's a real cesspool."

Probate is the process used in law to authenticate a person's last will and testament after death. Dacey suggests it also is the process by which some lawyers grow wealthy with a minimum of effort.

Dacey claims California's probate system is among the worst in the nation. And he says the California Bar has tried to block any efforts proposed by a national committee of attorneys to introduce a uniform system and eliminate abuses.

"Frankly, I don't see any hope for adequate reform in my lifetime," says Dacey, smiling devilishly. "I believe it will take at least another 75 years to make it right."

In brief, Dacey believes the lack of uniform probate standards permits lawyers to delay the authentication of a will and extract exorbitant fees in the meantime. His records are filled with examples of cases which he says were allowed to stretch out for years until the lawyers have sucked the estate dry.

Since he believes reform is too far off to benefit most of us, Dacey suggests we all avoid probate completely.

"A living trust is the only fool-proof way to avoid probate," says Dacey. "Under such an arrangement, property is placed in trust before the death of an owner."

By naming a trusted relative as executor, the person making out the will removes the need for an attorney.

Dacey points to a couple of famous California cases that illustrate his point. He says Bing Crosby's first wife, Dixie Lee, did not have a living trust, so her \$1.3 million estate went through probate.

"Well, the probate system went right to work to protect her heirs," says Dacey. "It protected them right out of 8½ percent of the estate."

Learning from his wife's mistake, Crosby established a living trust for his own enormous estate. Dacey says the lack of publicity about the details of Crosby's estate is another benefit of the living trust, which keeps such matters out of the courts.

When the late President Franklin D. Roosevelt died, his estate was valued at about \$1,944,909. After probate and associated fees were

If Al Capone could come back to Chicago . . . he would probably be a probate lawyer

deducted, the estate was reduced to \$840,000.

If it seems probate just soaks the rich, that's a mistake, according to Dacey. He has a large file of cases involving small estates, like the postal employee who left \$4,500 to his two sisters, who received only \$400 each after eight years in probate.

"People think it just happens to millionaires," he says. "That isn't the case. The smaller the estate, the worse it is proportionately. I know of some cases where the entire estate has been consumed."

One particular case Dacey recalls is that of the Texas man who left his stepdaughter \$475,000.

"She waited for it nearly five years and finally had to apply for welfare," says Dacey. "She couldn't get her hands on the money, yet the lawyers could periodically dip into her estate."

One of the real drawbacks to probate is its open-ended nature, says Dacey. He says the national average for settlement of a probate case is two to five years, but he has one in his records that reached an astounding 38 years.

"The longer a lawyer can drag out the case, the better," he says. "He can build up a huge will file to help see him through his golden years."

Lack of privacy is a problem of probate that shouldn't be ignored either, says Dacey. "If a businessman wants to leave his girl friend something in his will, why should his other heirs be subjected to the embarrassment," Dacey asks.

Even worse is the possibility that some unscrupulous type will compile a list of beneficiaries from the probate file and set out to fleece them out of their inheritance, he adds.

Dacey also says some probate lawyers charge as much as 12 times the minimum statutory fee for their services, simply because there's more money in the estate to be grabbed.

To make it simple to follow his advice, Dacey has fattened up his book with nearly 200 perforated tear-out forms, which the reader

can use to exempt almost any conceivable kind of property from probate.

"Only once in 15 years did someone contest one of my forms," says Dacey.

In that case, Virginia Miller of Houston, used one of Dacey's forms to place two pieces of property in trust. An angry relative who was left out of the bequest challenged the trusts. Not only did the Texas Supreme Court uphold the trusts, but the justices noted in their findings that living trusts "often afford greater protection, more privacy and considerable economy."

"There's certainly no reason to

consult a lawyer to fill out the forms," says Dacey. "I would be very disappointed if someone did."

Dacey now feels there's a groundswell of public opinion against the abuses of probate. He says there's a non-profit organization called Help Abolish Legal Tyranny (HALT) in Washington, D.C., which is working for reform and on occasion will send staff lawyers to help people fight some abuses.

Of course, Dacey wants to make sure everybody knows you can't avoid inheritance taxes by avoiding probate. That's another problem entirely.

Now that he has updated his best-selling self-help kit book and spread the word about it on a national tour, Dacey intends to take a long vacation. He'll move to Ireland this summer, where he has a cottage beside a lake.

"I'm just going to sit and watch salmon jump out of the water all day," he says. "And I propose to think nothing but beautiful thoughts about lawyers. I'll even pray for them."
