#L-800 12/29/82

Memorandum 83-5

Subject: Study L-800 - Probate Law (Administration of Estates of Decedents)

At the January meeting, the Commission will commence its study of Division 3 of the California Probate Code. This division relates to the administration of estates of decedents. The first decision to be made is the general approach to be taken in preparing a new Division 3.

The Commission must determine whether it will start with the Uniform Probate Code provisions and make necessary revisions or start with the existing California provisions and make necessary revisions. This decision will be determined to a large extent on whether the Commission believes that the approach of the Uniform Probate Code is better or worse than the approach of the existing California law.

We are indeed fortunate to have Richard V. Wellman present at our January meeting. Professor Wellman is the Educational Director for the Uniform Probate Code and knows more about the code than any other person. The staff has asked him to outline in some detail the scheme of the Uniform Probate Code provisions on probate of wills and administration and the experience in other states that have adopted those provisions. We have also asked him to explain the Succession Without Administration provisions. This will give the Commission an overview and general understanding of the Uniform Probate Code provisions and an opportunity to ask questions.

We have asked Charles A. Collier, Jr., and others, as representatives of the Estate Planning, Trust & Probate Law Section, to give us their view as to the approach that should be taken in preparing a new Division 3. In this connection, Mr. Collier has provided suggestions in writing (Exhibit 1 attached) that indicate that the existing provisions of California law should be retained with any necessary revisions. He suggests a number of possible revisions for further exploration by the Commission.

Exhibit 2 is an article by Honorable Milton Milkes, Judge of the San Diego Superior Court. This article appeared in a recent publication of the California Trial Lawyers Association. The article indicates all is not well with California Probate and Law and suggests that revision

of the existing law is needed to reduce the cost, complexity, and length of probate. You should read this article.

Exhibit 3 is a letter from Michael Richards, Legislative Director, of HALT. HALT is a national organization which includes among its primary functions the promotion of probate reform throughout the country. The letter indicates that HALT is expecially concerned with the percentage system of fee compensation. HALT also believes that the succession without administration scheme is the solution to the problem of probate reform. You should read this letter.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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September 17, 1982

John DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
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Dear John:

The purpose of this letter is to set forth some further thoughts and suggestions with reference to the Law Revision Commission's consideration of Division III, California Probate Code. I hope this letter will be of assistance to you and your staff as you commence work on that Division.

The comments and observations are as follows:

1. Division III of the Probate Code dealing with Probate Administration has evolved over more than 50 years. It represents the accumulated wisdom of the Legislature and interested Bar organizations over that period of time in providing a workable, efficient and comprehensive probate administrative system for California.

2. As you know that system has been constantly reviewed and revised through the legislative process. The Estate Planning, Trust and Probate Law Section, State Bar, for example, is involved in legislation on an annual basis which seeks to clarify and improve that system.

3. There are undoubtedly a number of ways that Division III can be improved but many of these are rather technical changes or corrections.

4. The basic probate system in California does work quite well and I would hope would basically be retained by the Legislature in connection with its overall review of the Probate Code.

5. However, I believe there is a need for an alternate system of probate in California which involves much less court supervision and provides an efficient alternative to the more formal probate concepts in California.

6. As you know there have been a number of simplifications in California Probate Procedure in recent years, such as Probate Code § 202(a) transferring community or quasi-community property outright to a spouse without administration; § 202(c) allowing direct transfer of a surviving spouse's community or quasi-community property to testamentary trustees under the will of the predeceased spouse without probate; § 591 and subsequent, providing for independent administration; § 630, expanding the right to transfer assets without administration by affidavit; and § 650 and subsequent, dealing with the determination of community or quasi-community property interest.

7. There are certainly additional areas for simplification.

8. While the Uniform Probate Code has been considered by various states for more than a dozen years, I believe only about 14 states or less than 1/3 of the states have actually enacted the Uniform Probate Code. A few other states have enacted substantial portions of the Uniform Probate Code but not the code itself. Many other states, I believe, have reviewed it and taken from the Uniform Probate Code certain concepts which were deemed desirable, such as, for example, the durable power of attorney provisions. It is unlikely that many additional states will actually adopt the Uniform Probate Code due to the lapse of years since its introduction.

9. There is a great body of case law which has developed in California relating to the provisions of the Probate Code. To repeal the Probate Code or to make sweeping changes in wording of provisions would cast aside much of that judicial precedent which has been built up over the years.

10. The traditional concept of probate in California as being an in rem proceeding, I believe, is highly beneficial. It has given finality to probate orders and the distribution of probate assets. I have personally been somewhat concerned about the removal of many of the posting requirements under Probate Code § 1200 as they may impact on the concept of in rem jurisdiction. The Commission may wish to consider this point. Hopefully, the Notice of Death and Notice to Creditors which is given at the inception of the probate proceeding is adequate to preserve the in rem jurisdiction for all probate purposes. However, I believe each probate order is deemed a separate order

or proceeding and as such may no longer be covered by the general concept of an in rem proceeding because of the lack of posting.

11. The greatest cause for delay, in recent years, in probate proceedings, has been the problems with the California Inheritance Tax Determination. Los Angeles County, notwithstanding changes in the Probate Code and the Inheritance Tax Law several years ago, for example, has not allowed the closing of a probate estate until the taxes have been determined and paid. This tax determination has often taken months or years in complicated estates. With the repeal of the California Inheritance Tax most probates, under the existing system, should be handled much more expeditiously. Thus, many of the complaints about the slowness of probate should disappear as a result of the repeal of the Inheritance Tax.

12. The letter to you of March 16, 1982, reporting on executive committee discussions and questionnaires indicated general support for a formal opening of probate. I believe this concept is one which should be retained in California. It gives formal notice to all persons who may be interested of the person's death, the fact that there is a court proceeding, and that creditors have limited time in which to file claims. That type of formal opening, of course, is recognized under formal administration pursuant to the UPC.

13. With statutory notice to interested parties of the filing of a petition for probate, most contests are filed before the will is admitted to probate. The Executor or Administrator does not have the burden of defending the will before admission to probate. Under the UPC, where letters can be issued by a Registrar five days after death, the contestant is at a disadvantage, if, as I assume, the Executor then has the duty to defend the will at the expense of the estate.

14. I am not sure what the experience has been in other jurisdictions but there is some concern that if probate is entirely optional, the probate estate may not qualify as a separate tax entity. One of the primary advantages of probate, of course, has been the fact that it does qualify as a separate tax entity allowing the splitting of income in many cases.

15. The short statute of limitations period applicable to probate proceedings is certainly advantageous as well as the

well-defined procedures now contained in the Code relating to enforcement of creditors' claims. That procedure, it would seem, should remain applicable to formal probate in California and to independent administration.

16. As I am sure you are aware, if a creditor's claim is rejected it has to be enforced by a civil action. Consideration should be given to allowing the Probate Court to hear such rejected claims. They could probably be heard much more expeditiously through the Probate Court on its contested calendar than is possible in a normal civil suit. If a civil suit is required, it should be given statutory priority.

17. The resolution of a creditor's dispute by a referee under Probate Code § 718 might be expanded so that it would be more widely utilized.

18. The Commission might also consider the provisions in § 970-977 with reference to payment of the Federal State Tax. Since there is a liability imposed on the Executor by Federal Law for payment of the tax § 974 providing that the federal Estate Tax should be paid out of the estate before final distribution does not seem necessary. However, the court should retain its jurisdiction to prorate the taxes when appropriate.

19. The Commission might also consider clarification of Probate Code § 630. The wording is not particularly clear, but I believe the intent was that persons who are beneficiaries under a will, whether or not within the designated class of close heirs, can have property transferred to them pursuant to Probate Code § 630.

20. The Commission might also give consideration to allowing the transfer of real property under an affidavit procedure such as contemplated in Probate Code § 630.

21. The provisions under Probate Code § 650 and subsequent might be modified to eliminate the necessity of sending the list of assets claimed as community or quasi-community property to all heirs. Many clients have objected to that provision and actually prefer a probate rather than having to mail that list of assets to distant relatives, for example.

22. Most states, it is believed, have developed some type of independent administration of estates with minimal court supervision, as an alternative to formal probate. I believe such a dual system in California is desirable.

23. The concept of independent administration, proposed by the State Bar Ad Hoc Committee, was to provide a formal opening of probate and a formal closing. All intermediate steps could be handled without court supervision. The bill, as eventually enacted, did not go as far toward probate simplification as had been proposed by the State Bar in sponsoring that legislation.

24. The independent administration systems in other states might be considered by the Commission and good features from those systems might be incorporated into simplified or independent administration in California.

25. The Commission in considering the present Independent Administration of Estates Act might consider eliminating court supervision of sales or exchanges of real property and the granting of options to purchase real property. If these two items were eliminated from court supervision, the only remaining items that would require court supervision would be allowance of Executors and Administrators' Commissions, attorneys' fees, settlement of accounts, and preliminary or final distributions. Most of those are covered by the final account, report and petition for final distribution. The court would be involved only in the formal opening and closing. Further, the right to waive a final account and report might be statutorily recognized.

26. The Commission might also consider modifying the provisions on advice of proposed action to make the action taken by the personal representative binding on the persons who receive the advice of proposed action and do not object at the time.

27. In short the concept of independent administration, now found in § 591 and subsequent, might be expanded to further reduce court involvement and make the intermediate actions taken without court involvement binding on the parties to whom notice is given.

28. Consideration might also be given to some simplified kind of final report and order of final distribution in estates where independent administration is involved.

29. Attached is a copy of the Preliminary Report of the State Bar Ad Hoc Committee on the Uniform Probate Code-December 1980. Appendix A is an early draft of an independent administration of estates act and contains a number of further simplifications of probate procedures, some of which are mentioned in earlier paragraphs of this letter.

30. Division III also contains the provisions on Trust Administration. The Commission might consider a section which would allow the combining of inter vivos and testamentary trusts. The Commission should also be aware of the fact that in drafting Wills, lawyers frequently have made reference to the trustee powers under § 1120.2 by incorporating that section by reference into the Will or trust document. Consequently, any re-numbering of that section might cause unnecessary confusion and difficulty.

While a number of specific possible modifications have been mentioned applicable to traditional probate and to independent administration, they are mentioned to illustrate areas of continuing concern. The list is not exhaustive.

The Section's Executive Committee looks forward to continuing to work with the Commission and its staff. If you feel some general policy meetings might be helpful before the staff starts to work on Division III, we would be pleased to participate in such meetings.

Sincerely,

Charles A. Collier, Jr.
for
Executive Committee of the
Estate Planning, Trust &
Probate Law Section, State
Bar of California

CAC:sjh

cc: Mary Yen
John McDonnell
Harley Spitler

COPING WITH PROBATE

By Honorable Milton Milkes, Judge
San Diego Superior Court

PROBATE HAS BECOME LENGTHY, COMPLEX AND COSTLY

Some authorities knowledgeable in the area of court management have suggested that the system is near bankruptcy. There are more Superior Court Judges in Los Angeles County than the nation of England. Probate filings, along with domestic relations, rank as the number 1 and 2 in number of filings in the Superior Court. Obviously, therefore, probate has a substantial and significant impact on the court system.

Probate has become one of the high costs of dying. It is now often complex and lengthy. The public's concern regarding probate requires greater effort on the part of the bench and bar to explain probate. There is a need to reduce expense and propose meaningful and acceptable simplification of the administration of decedents' estates and conservatorships.

In the *Estate of Effron* (1981) 117 Cal.App.3d 919, the Court of Appeal opined at pages 925-926:

"The Legislature, after expending enormous energy on attorney's fees in probate proceedings, pointedly examining and re-examining the issue in various contexts, has determined the present statutory system of compensating lawyers is both cost effective and fair. Presumably, the public's interest is served where those bereaved are insulated from negotiating over a lawyer's fee during the traumatic postdeath period. Theoretically, the present system also works in favor of smaller estates, for percentage fees are a financial incentive to lawyers to develop expertise and efficiency in the handling of those estates on a profitable basis, at lower fees than would otherwise be charged, thereby promoting greater access to competent legal services in such matters."

"We do not wish to minimize the soundness of many of beneficiaries' arguments criticizing the present system. One appellate court from another state, in describing legislative changes in probate, has referred to 'the public outcry over antiquated and expensive probate laws' criticizing the percentage fee system as unnecessary and expensive. It commended the legislature for passing a law which authorizes payment to the attorney for the personal representative on a basis of numerous factors, only one of which is the monetary value of the estate. (See *Matter of Estate of Painter* (1977) 39 Colo.App. 506 (567 P.2d 820, 822).)"

HON. MILTON MILKES

"The Caldron of public dissatisfaction over probate fees, which many view as having been forged through an amalgam of lawyer self-interest and lawyer mistrust, continually bubbles. A recent article in the *Washington Post* bemoaning a $1,908 hourly fee in a probate matter said, in part 'percentage fees . . . for settling estates . . . are generally a ripoff. Some lawyers, to be sure, can't stomach them; but most, . . . think they are just dandy. There is little chance that this legislature (Maryland), or any other, will do anything about this situation this year. But sooner or later lawyers are going to have to accept, or have imposed on them, the revolutionary idea that how much they charge a client should be related to how much work they do.'"

CREATIVE SOLUTIONS ARE NECESSARY

The principal impact in the probate court is the constant unrelenting pressure simply to deal with the volume and numbers. To get through a calendar of 100 cases and the preparation needed before the judge takes the bench does not permit creativity and the planning necessary to improve the probate process in order to give better services to the public. With the present avalanche of litigation and the spawning in our society of contentious parties, the court cannot be creative, but is reactive.

Practicing attorneys, the probate experts with years of experience in this field, are in a better position than the court to promote improvements that will prevent decay. *The ball is in your court;* and if you will excuse a bad metaphor — the ball should be returned to the probate court.

Probate in California is 100 times more costly than in England according to one authority on the subject. The Magna Carta contains language that upon death, the decedent's assets are to be marshalled, creditors paid and a distribution to heirs made within 4 months. It seems that we have regressed since 1215. We seem to perpetuate certain arcane probate procedures.

ARBITRATION MAY BE USEFUL

There are several things that I suggest the probate bar can do to reduce the delay and expenses of probate litigation. In the field of personal injury and business disputes, we now have a system of judicial arbitration. The court may order mandatory arbitration for any controversy which the court determines does not exceed $15,000.

In arbitration, there is a list of knowledgeable attorneys who act as arbitrators. They are paid $150.00 to

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hear those matters which are assigned to them. Rules set forth the procedures.

Arbitration can be binding or non-binding. It can be voluntary or mandatory. Under judicial arbitration, a party who is not satisfied with the decision is entitled to a trial de novo. It is an interesting statistic that only 10% of the cases decided by arbitrators actually proceed to a trial de novo. There is a split of authority among the arbitrators, but many of them believe that once the matter has been assigned to arbitration, there is authority for an award in excess of the $15,000.

There is precedent for arbitration in probate. Probate Code section 718 authorizes, when any claim has been rejected, an agreement to be made in writing with the claimant to refer the matter in controversy to some disinterested person to be approved by the court. The referee is to hear and determine the matter and make his report to the court. The same section provides that by agreement a judge pro tem may decide the claim.

The courts encourage and will assist you in arbitration. The Probate department often sees claims rejected, petitions on the probate calendar to authorize the retaining of special counsel, the approval of fees for counsel, instructions to appeal adverse judgments and ultimately a significant diminution of the estate which belongs to the beneficiaries. All of those unnecessary procedures involving a claim could be avoided under the probate section authorizing arbitration.

Alternatively, rather than using a referee or an order of reference the attorney can be given a specific date and ordered to return with witnesses to the regular probate calendar. The probate judge can hear the matter under the provisions of 718 which permit it to be heard and determined without any pleadings, discovery or jury trial. In other words, the matter is treated basically as a small claims proceeding.

There are contested probate proceedings in which there can be insufficient time in the probate court to hear the matters. For example, section 851.5 proceedings to determine a claim regarding real property or personal property, section 1080 petitions to determine heirships and contested conservatorships are all triable issues. If a jury is waived, I am aware of no provision in law which would preclude the attorneys from stipulating and agreeing in writing to an arbitrator. This can be a probate specialist who prepares a memorandum decision which is referred back to the Superior Court for confirmation.

Many estates are simply too small to merit protracted litigation and its expense. After the arbitrator's ruling, the estate can be promptly closed. The fee of the arbitrator can be paid by the estate.

In a matter this year, a petition was filed to borrow money. It was a convoluted, contested issue in which some of the heirs objected to the terms of the lender. It involved a loan of one and a half million dollars. The terms of the loan were so complex that I called the attorneys in chambers because I did not feel that I could handle it on the regular probate calendar. Both attorneys then stipulated to refer the case to a former Superior Court Judge who would render a report to the Court with a recommendation regarding the terms of the loan.

The question was raised as to what was the proper title for this procedure. Was it an order of reference, the appointment of an arbitrator, an advisor or what have you? I concluded that it was immaterial what the title was, but that their stipulation to the procedure was all that was required. Ultimately we came up with the approach that the role was that of an advisor to the court and that the court could either reject or ratify the recommendation.

Two or three weeks later, the appointed advisor made a short presentation to the court. Based on his recommendation, the terms of the loan were disadvantageous to the estate. Subsequently the parties returned with new terms for the loan which conformed to the suggestion of the advisor and involved creative financing. The petition was then adopted and confirmed by the court. Hours of the court's time were saved and the financial impact to the estate was minimized by this procedure.

It is difficult to understand why it takes so long to close estates. Usually the explanation given is that the estate is in litigation. Much of this litigation could be dramatically reduced by decisions decided by an arbitrator or through a mediator. In a settlement, there are no losers.

REAL ESTATE COMMISSIONS PRESENT A PROBLEM

One of the subjects that has generated considerable concern in probate is the question of the commissions of realtors and brokers in probate sales. According to some of my own statistics, in a one year period the San Diego probate court generates and awards approximately $5,600,000 dollars in real estate commissions. The problem arises when there are three brokers involved. The code sections are quite clear concerning the division of commissions between two brokers, such as the broker bringing the return of sale and the successful overbidding broker. If you add to that the exclusive listing broker, you now have three realtors — the listing agent, the broker procuring the sale and the successful overbidding broker.

Through the Bar Association, I requested that a sub-committee examine this matter and advise me of the authority to promulgate a rule which would create an equitable split between the three brokers. The sub-committee wrote the following advisory opinion:

> "The problem of any single broker losing a commission or having his commission diminished by virtue of a successful overbid is a perplexing one, and there is no uniformly equitable solution. It is the feeling of the sub-committee that there is literally no situation involving probate sales that is not covered by the Probate Code. As this is the case, we do not believe that the court has discretion to establish any local rule which is in contravention of the Probate Code. We feel that the code provisions for allocation of commissions is as equitable as any which might be otherwise promulgated, in any event. The inequity of the situation depends entirely on the relative perspectives of the brokers involved."

While I accept the committee's analysis of the law, nevertheless, I suggest to you that this is an area that requires further consideration. Perhaps it is a matter in which there is a need for more specific legislation regulating this area of the law. There is some dissatisfaction among real estate brokers with the court's award of commissions.

THE INTERESTS OF MANY ARE INVOLVED IN PROBATE

The companion of simplification is predictability. Probate is very procedural. In many aspects, probate is possibly the most detailed department of the Superior Court. I do not think it

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is ever appropriate to exhalt form over substance. Nevertheless, in probate there are statutory requirements which must be followed in order to protect not only the petitioner who may be the representative but all of the heirs, creditors and the taxing agencies. In this regard, probate cannot be equated with two party litigation. There are other rights and parties involved. With the hope that definitive rules minimize the complexity of probate, the probate examining staff of our court on their own time have prepared and submitted to me the first comprehensive review of the local probate rules since 1975. These rules are now under study by the Rules Committee of the Superior Court.

LIGHTER MOMENTS

Probate also has its lighter moments. The probate department sometimes receives rather bizarre correspondence. For example, there was a conservatorship matter in which an octegenarian of 89 contested her need for a conservator for her estate and person. She stood up in court on the date of the hearing and requested that she have an attorney appointed for her. I did that and several weeks later I received this letter from her which indicated not only her literary talents, but also that she had not lost her marbles.

"My attorney's argument on my behalf was brilliant. Unfortunately for me the brilliant parts were his occasional flashes of *silence*. His argument was both *original* and *good*. What was original was not *good* and what was good was not *original*. Please assign me new counsel."

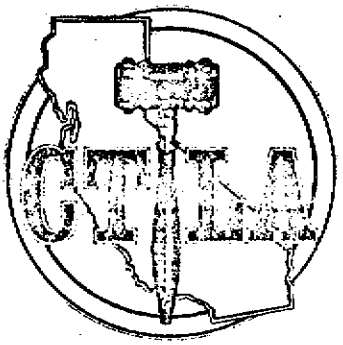
A nonagenarian wrote me this letter:

"For fifty years I practiced criminal law in the State of Ohio. I am now retired and living in La Jolla. I see no need to retain an expensive probate attorney in San Diego. I request that you probate the following holographic will. 'I leave everything to my lovely wife. I appoint her as the Executrix of my estate. She is to serve without *bail*."

One of my more interesting holographic wills which received some media attention involves "Chica" the cat. This is the handwritten will which I read in open court.

"To Whom It May Concern:

Being of sound mind, I blew most of it — Surprise! Surprise! Any bits and pieces that can be salvaged should be spent on my only *real* friend. My little cat, "Chica" for her upkeep, comfort, and health." ■



Memo 83-5

EXHIBIT 3

HALT

An Organization Of

AMERICANS FOR LEGAL REFORM

California Law Revision Commission
c/o John H. Demoully
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Palo Alto, CA 94306

Dec. 14, 1982

PROBATE REFORM IN CALIFORNIA

I was recently informed that the California Law Revision Commission is studying reform of the procedures by which estates are administered under California probate law. Since I cannot attend your meeting on probate in January, I offer this written statement as testimony in lieu of a personal appearance.

I HALT-AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM

HALT is a non-profit educational organization with 107,000 members nationwide: 20,000 are California residents. All members receive a series of manuals, one of which is an in-depth guide on probate procedures. Additionally, HALT promotes probate reform throughout the country. We now are promoting probate reform in the state of Maryland. Ohio and California are targeted for reform in the near future.

II CURRENT PROBLEMS WITH CALIFORNIA PROBATE

Several of HALT's California members have requested information from us regarding how to probate a will, how to avoid lawyers and probate, and how to avoid paying legal fees based on a percentage of an estate's value. The high cost of probating an estate– particularly the expense of legal fees– is the most constant complaint of citizens that is lodged with HALT. Some of the most common questions we hear regarding fees are: "How can I avoid paying an attorney a percentage of the estate's value? Can I do the work myself? If I do some of the work will the legal fees be reduced?"

The Percentage System of Fee Computation

California is one of many states that uses a percentage system of compensation for fees in probate. The use of a percentage system of fee computation-whether "limited" to the personal representative or used by both personal representatives and lawyers-is abused not only in California, but wherever it exists. In practice, probate attorneys tell our members that California law requires them to charge a percentage as their standard fee regardless of the time required to probate an estate or the complexity of the work involved.

Survey of percentage Fees Shows Abuse

HALT recently surveyed probate practices in the state of Maryland. Our focus was to examine what fees were charged for what services. Maryland uses a percentage system of compensation for personal representatives. Attorneys are supposed to charge a reasonable fee. What we found, however, was that Maryland probate attorneys charged close to, exactly, or slightly more than the percentage fee currently allowed the personal representative to administer an estate. Despite attorneys' widely varying statements of services rendered, the legal fees charged approximated the maximum percentage allowed in Maryland law. It was clear in many cases that the time required to perform the various services was minimal. Still, fees were based on a percentage of the estate's value, regardless of the time spent or the complexity of the work involved.

California Fee System Poses Same Problem

California's fee provision is different from Maryland law. However, the same complaints emerge from California as they do from Maryland. The percentage system of fee computation allows attorneys to charge fees that do not reflect the amount of work required to perform the various probate tasks.

The Complexity of California Probate Law

At the same time, the myriad administrative procedures in California probate law prevent citizens from understanding and mastering the tasks required of personal representatives. The constant court supervision of estate administration has effectively served only one function: that of keeping probate the exclusive domain of probate attorneys. The trouble lies in acquiring the specific knowledge of administrative procedures within a short period of time. In California this is not a simple task.

Probate court officials refuse to help citizens answer the most basic questions concerning how the probate process works. Typically, the probate court's response to basic inquiries is to say "ask your lawyer." Worse still, useful information about the probate process is not available at the probate court. Most personal representatives feel compelled to hire an attorney. Only much later do they realize that the fees may not be warranted by the work performed.

Underlying these complaints is the concern that California probate is too complex, that it takes too long for heirs to receive inheritances, and that the probate court system is another unwieldy bureaucracy— but one which serves the interests of attorneys more than the citizenry.

III SUGGESTED REMEDIES

Eliminate the Percentage System of Fee Computation

The basic problems with California probate--cost, complexity, delay, and lack of useful consumer information--require systematic and comprehensive reform. First, the percentage system of compensation should be replaced with a reasonable fee provision such as UPC provision #3-719. While it is presumed that competition exists in the legal field, the percentage system of compensation has served as a price-fixing mechanism that makes comparison shopping for legal services futile. As long as a percentage system of fee computation exists, it will continue to be difficult in many areas to find an attorney who will probate a will for a fee based on the actual amount of work required.

Because the work involved in each estate differs according to a number of factors, but not strictly according to an estate's value, any vestige of a percentage system should be removed. While the presumed intent of limiting fees through the use of a percentage system is good, the evidence in Maryland and elsewhere points to the abuse of set percentages as a means of determining reasonable legal' or personal representatives' fees.

As it stands now, members of HALT shopping for a probate lawyer frequently are told probate fees will be charged according to the percentage allowed by law. There is little incentive to help administer an estate when an attorney can charge the same percentage fee whether the personal representative does most, some, or none of the various tasks involved. Because legal fees are not strictly tied to actual services little competition has emerged in the probate field.

Recommend Informal Procedures— Succession without Administration

Second, but equally important, is reform of substantive probate law. As long as the process requires numerous different forms, procedures, and court appearances, Californians will continue to hand over the entire process to a third party.

Informal procedures in which many of the tasks can be eliminated entirely or waived by the consent of all interested parties are needed. The new Succession without Administration Act, proposed this year by the Uniform Law Commissioners, makes probate extremely easy while providing for the necessary protection of heirs, creditors and the state. The Act is an extention of the concept of the Uniform Probate Code. However, it contains several advantages over the UPC itself--it is succinct and more easily understood, it still solves the basic problems encountered by the average citizen, and it is very "saleable" to the public.

The Succession Without Administration Act would eliminate required inventories, final accounts, formal appraisals, bond, lengthy waiting periods, and other impediments to expeditious administration. Instead, all heirs would jointly determine for themselves what is necessary to properly settle the estate.

The use of the procedure requires the consent of the heirs. They jointly assume full responsibility for the proper transfer of assets, they pay taxes and debts, and distribute the remainder. In word and intent the Act keeps probate very simple. Without the numerous notice and reporting requirements of current law, the probate court would become a forum to resolve conflicts rather than an overseer of each and every step in the probate process.

One critical difference between supervised probate and Succession Without Administration is the unlimited liability feature of the expedited procedure. Rather than limit estate liability to the actual value of the estate, the new procedure would make all heirs responsible for all valid debts, regardless of whether or not they exceed the total value of the estate.

The different treatment of estate liabilities stems from a need to protect creditors' rights without requiring court supervision of probate. While it is not the only approach to protect creditors' rights, requiring heirs to accept unlimited liability seems to be less onerous than at first appearance. If the heirs agree there is no need to fear insolvency, the Act may be used. If doubts remain over an estate's solvency any heir may require the use of supervised administration, with the benefit of limited liability.

If clear explanations of the benefits and drawbacks are provided all heirs, Succession Without Administration should not produce difficulty for the average citizen asked to choose between various probate procedures.

If the Commission should find the unlimited liability provision onerous, perhaps a compromise would be to allow limited liability as is found in supervised probate, but require an inventory of estate assets for the few estates in which creditors can verify to the court that a debt has not been paid. However, I defer to the Uniform Law Commissioners who have studyied the various issues of this provision in greater detail.

Protection of the State

Concern about the protection of state interests also is ill-founded. While the collection of California estate tax revenue is now limited to the Credit Estate Tax, there is no evidence regardless of what estate tax is levied, that court supervision of probate produces greater compliance with tax laws. Anyone who avoids probate through the use of a living trust currently avoids court supervision while retaining tax liability. This has not created a greater incidence of non-compliance with tax laws, nor should it--one bureaucracy to review proper tax collection should be enough. Of course the normal penalties for tax evasion would still apply.

The Act is not novel. It is based on the system currently in use in Louisiana. There is no evidence (that I know of) that the procedure is not working. For our part, HALT has received no complaints from our members about Louisiana's probate system.

Key to Reform is Consumer Information

The key to the new procedure is proper notice of how it works. Good consumer information is vital to the protection of heirs' rights. Clear and concise information on how Succession Without Administration avoids probate, with a careful description of its benefits and drawbacks, should be part of any law that makes a change in current procedure. As it stands now, the lack of such information forces choices upon heirs that may not be in their best interests. Many people believe, for example, that the law requires one to hire an attorney to probate a will.

Providing for such a guide also is not novel. The District of Columbia recently passed a law requiring that instructional materials be made available to the public. Maryland is about to pass a similar law next year. The cost of such a manual can be offset by charging a nominal fee for its purchase at the probate court.

Along with good instructional materials, over-the-counter assistance from probate court personnel would enable personal representatives to answer the basic questions about how the process works. Any question relating to what procedures must be followed and how they are accomplished should be answered by the court.

IV CONCLUSION

Because California lags behind many other states that already have informal procedures in place, the reforms needed are substantial. However, political opposition to serious reform in the legislature should be considered in any reform that is proposed. That is, of various reforms which purport to make probate less costly, less complex, and less time-consuming, the one that will muster the needed citizen support should be promulgated.

Succession Without Administration is precisely the kind of probate reform which could gain substantial public support, particularly among senior citizen organizations. It closely resembles California's Section #650, the community property non-probate transfer, a provision that is very popular with our members, and that I'm sure is popular with all Californians fortunate enough to be able to use it.

The new Succession Without Administration procedure, along with a reasonable fee provision, are the two critical reforms needed in California. The UPC in its entirety, or just Article III, would greatly reduce current problems with the California Code as well. But if a choice is to be made in the Commission's study, and ultimate recommendation, a free-standing version of the Succession Without Administration Act goes a long way towards answering the public demand for meaningful reform. It is easily translated into a short list of tasks that are quickly digested, and it enables citizens to do probate independently of lawyers. A reform which does less will not be actively supported by Californians. And without citizen support meaningful probate reform will not occur in the state.

Thank you for the opportunity of providing the Commission with the views of HALT, inc.

Sincerely Yours,

Michael Richards

Michael Richards
Legislative Director

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