Memorandum 83-41

Subject: Study L-800 - Probate Law and Procedure (Issues Involved in Opening of Probate)

INTRODUCTION

The Commission has directed the staff to work on ways to substantially improve the existing California probate law with the view to expedite, simplify, and reduce the cost of probate procedure. We commence by examining issues surrounding the opening of probate. This memorandum describes the existing California law governing the opening of probate and then discusses a number of possible reforms.

In considering this material, the staff believes it is useful for the Commission to keep in mind the following questions:

(1) What is the purpose served by a particular probate requirement or procedure?

(2) Is this purpose necessary or desirable?

(3) Does the procedure in fact accomplish its intended purpose?

(4) What is the cost of the procedure in terms of time, money, and complexity?

(5) Can the particular probate procedure be simplified or made optional rather than mandatory?

(6) Can the purpose served by the procedure be achieved in another manner that is simpler or less time-consuming or costly?

In considering whether a particular probate procedure is necessary the Commission should also keep in mind that large amounts of property are transferred at death without estate administration of any kind. Community property may pass from a married person to the surviving spouse by will or intestate succession without administration, subject to optional probate or court confirmation. As far as we know this has been workable. Tremendous amounts of property pass by means of other nonprobate transfers such as joint tenancy survivorship and inter vivos trusts.

This is not to imply that probate is unnecessary or that it does not serve a number of useful purposes in a number of cases. It is to imply, however, that it may be worth questioning and reviewing our basic assumptions about the need for particular aspects of probate procedure.

In this regard we will find the Uniform Probate Code a useful point of reference because it not only questions traditional procedures but also offers alternatives that are carefully worked out and that are in current, and apparently smooth, operation in a substantial number of states.

SOME STATISTICS

In this regard, it will be instructive to examine comparative probate data for California and other jurisdictions. Unitl now, we have not had such data. However, there is currently underway, under the auspices of the American Bar Foundation, an empirical study that includes data for California, Florida, Maryland, Massachusetts, and Texas. Dean Robert A. Stein of the University of Minnesota Law School is directing the study and has been gracious enough to supply us with a manuscript copy of the first data they have analyzed, relating to the role of the attorney in the probate process. Dean Stein will send us other material when it becomes available.

The study collected data in 1975 from a random sampling in selected counties for decedents who had died in 1972. The data was gathered from probate court records, interviews with attorneys, state death tax department records, and interviews with personal representatives (both individual and corporate). The states surveyed do not include a Uniform Probate Code jurisdiction, since the Uniform Probate Code was newly adopted at the time and the investigators did not want to cloud their results by including data from a probate system in transition. The states surveyed do include, however, Maryland (which adopted an early draft of the Uniform Probate Code) and Texas (which has a well-used informal administration system from which some of the concepts for the Uniform Probate Code were drawn). Data from both these states will be useful as evidence of experience in jurisdictions that have attempted to minimize judicial involvement in the probate system.

We will point out data from the American Bar Foundation study where appropriate as we proceed through our review of probate administration. At this point, with the limited information now available relating to the role of the attorney, a number of generalizations are of interest. In all states surveyed except Maryland, personal representatives overwhelmingly engaged an attorney for the probate administration; however, in Maryland personal representatives chose not to be represented by an attorney in 43% of the cases. This phenomenon may be attributable to

the Uniform Probate Code in Maryland, although personal representatives in Texas retain attorneys to the same degree as in other jurisdictions.

An effort was made to ascertain what proportion of the attorney's time was spent on probate services (performed to transfer ownership of property subject to probate) and what proportion on other services such as dealing with taxes, nonprobate assets, and other matters. Surprisingly, in Maryland and Texas with their streamlined probate administration schemes, probate services consumed a higher percentage of attorney time on the average than in California, with a more traditional system of court supervised estate administration--84 and 83% as opposed to 78%. At the time of the study California, Massachusetts, and Texas had extensive state death tax procedures, and a considerable portion of attorney time was spent on such matters--8% in each state.

The lawyer tasks that consumed the greatest percentages of attorney time in estate administration in each state surveyed showed little differences among the states. The tasks that consume the bulk of attorney time in all states are (1) communicating with beneficiaries, (2) the initial conference with interested parties, (3) preparing for initial court hearings, (4) filing documents and obtaining clearances of state death taxes, (5) preparing an inventory of assets, (6) obtaining a final decree, and (7) ascertaining and paying creditors' claims. The data are set out in Exhibits 1 and 2.

The study points out that many of the tasks that require a greater proportion of attorney time in the administration of estates are not related to court appearances. Presumably an equivalent amount of time is consumed in communicating with interested parties or in an initial conference to determine the basic facts concerning the decedent and the estate, whether or not the estate administration is highly supervised by court proceedings. The data raises doubt about the arguments of some proponents of the Uniform Probate Code that reducing court involvement in the probate process would save substantial attorney time by eliminating court appearances where there is no dispute among the parties. The data indicates that savings of expenses in estate administration by the Uniform Probate Code are not likely to be achieved to any significant extent through the reduction in the number of required court appearances. Whatever the estate administration procedures of a state, the attorney must gather information, communicate with beneficiaries, evalu-

ate and pay creditors' claims, determine and pay death taxes, account for expenses of administration, and distribute assets to beneficiaries.

With respect to total attorney's fees charged, California fees were typical of fees charged in other jurisdictions. Texas attorneys seem to charge less on the average than attorneys in other states, which may be the result of the Texas streamlined procedure. This, contrary to the preceding data, would seem to indicate support for the Uniform Probate Code thesis that absence of close court supervision can save a significant amount of attorney time and fees. The data is set out in Exhibit 3.

One other statistic is worth noting. Attorneys were asked whether they heard expressions of dissatisfaction about the probate process or the attorney from personal representatives and beneficiaries. In California attorneys reported expressions of dissatisfaction from personal representatives in 17% of the cases and from beneficiaries in 23% of the cases, with higher proportions in smaller cases and lower proportions in larger cases. This must be compared with 5-10% personal representative dissatisfaction and 7-8% beneficiary dissatisfaction in Maryland and Texas. The complaints were principally of two types: (1) that the proceeding takes too long, and (2) that the proceeding costs too much. In California, 45% of the personal representative complaints and 47% of the beneficiary complaints were that the proceeding takes too long. This is comparable to 52% and 9% for Maryland and 40% and 3% for Texas. In California 15% of personal representative complaints and 10% of beneficiary complaints were that the proceeding costs too much. The Maryland figures are 30% and 0%; the Texas figures are 2% and 2%. The numbers are set out in detail in Exhibit 4.

CALIFORNIA LAW

Existing California Procedure

The theory of California law is that when a person dies, the person's property passes to the person's heirs and devisees, subject to administration. Administration serves a number of functions, including collection of the decedent's property, payment of debts, satisfaction of family support obligations, determination of heirs and devisees, and distribution of property.

Administration of the decedent's estate is commenced either by appointment of an administrator (if the decedent died intestate) or by probate of the decedent's will and appointment of an executor (if the

decedent died testate). Admission of the will to probate and appointment of the executor or administrator is done by court order, following the procedure described below. This procedure we have referred to in earlier Commission discussions as a "formal opening" of estate administration.

Estate administration proceedings are conducted in the superior court of the county in which the decedent resided. At any time after the decedent's death any interested person may file a petition with the court clerk for appointment of an administrator or for probate of the decedent's will and appointment of an executor. The petition must allege the jurisdictional facts (the decedent's death and residence at death), must estimate the value of the decedent's estate (for the purpose, among others, of setting the amount of the bond), and must list the heirs and devisees of the decedent (for the purpose of giving notice of the proceedings).

The court clerk sets the petition for hearing within 30 days. During this period notice of the hearing must be published. Notice of the hearing must also be served personally or by mail on the decedent's heirs and devisees at least 10 days before the hearing. The notice of hearing, in addition, informs the recipients of the right to request special notice of inventory and appraisement of estate assets and of petitions and accounts made during estate administration. It is the publication of notice that gives the court order in the proceeding its so-called "in rem" effect, discussed below.

At the hearing, if no objection is made to the petition, the court may determine the jurisdictional facts, the giving of notice, the estimated value of the decedent's estate, and other relevant facts, such as the authenticity of a will or that the decedent died intestate, by examination of witnesses or by affidavit. Appearance of counsel may be unnecessary by local rule in some courts.

If admission of the will to probate or appointment of the executor or administrator is contested, the contestant must file written grounds of opposition. The contestant in a will contest has the burden of proof and is entitled to a jury trial.

Whether the petition is contested or uncontested, if the court is satisfied with the truth of the allegations in the petition, the court makes an order appointing the administrator or admitting the will to probate and appointing the executor, and fixing the amount of the bond.

When the executor or administrator gives the required bond and signs the oath of office, the court clerk issues letters testamentary or of administration. Thereupon the executor or administrator may begin to administer the estate.

If there is a delay in this procedure for any reason, the court may summarily appoint a special administrator to preserve the estate. The appointment is temporary, pending appointment of the executor or administrator.

Finality of Court Order

It has been said that probate proceedings are "in rem": they are commenced with notice served on persons known to be interested in the estate and published as to persons unknown, and they are concluded by a court order closing administration and confirming the acts of the personal representative. The effect of a probate decree is not completely conclusive, however, and in certain circumstances, the court order remains subject to collateral attack by persons not actually served with notice of the proceedings. The court's assumption of jurisdiction and appointment of an administrator, based on a determination of the decedent's death and residence, is not conclusive in the event of the erroneous assumption of death or if the court order was procured by extrinsic fraud. Prob. Code § 302. In these situations a person not a party to the proceedings may at any later time attack the validity of an act by the executor or administrator.

Moreover, it is only the "formal closing" that gives the proceedings finality. The so-called formal opening and court order appointing an administrator or admitting a will to probate and appointing an executor is subject to direct attack during the probate proceedings not only on appeal, but also by subsequent petition in the probate court. Appointment of an administrator may be revoked upon petition of a person having a prior right to appointment; the court has discretion to refuse revocation only if the petitioner had actual notice of the original application and an opportunity to contest it. Prob. Code §§ 450-453. Likewise, for 120 days after a will is admitted to probate, any interested person who did not have actual notice of the probate proceedings may contest the will. Prob. Code § 380. Moreover, a minor or incompetent person who is not made a party to the proceedings may contest the will at any later time, until four months after the end of the disability.

Prob. Code § 384. Finally, admission of a will to probate is not a conclusive determination that it is the decedent's last will; a subsequent will may be offered for probate at any time. Prob. Code § 385.

REFORM SUGGESTIONS

The California scheme for formal opening of probate described above analytically involves the following basic steps:

(1) Notice to heirs and devisees, personally and by publication; notice to creditors by publication.

(2) Hearing.

(3) Court admission of will to probate and appointment of personal representative.

(4) Giving of bond and issuance of letters.

(5) Commencement of activities by personal representative.

In the ordinary case this scheme operates fairly well and inexpensively. The hearing is perfunctory unless there is a contest of the will or of the appointment of the personal representative, and the bond may be waived by the will or by agreement of the heirs or devisees.

However, the fact that the existing scheme appears to be fairly efficient does not preclude improvements in the scheme designed to save time and expense, where this can be done consistent with protecting the rights of interested persons. There are a number of possible improvements the Commission should consider, most of them suggested by the Uniform Probate Code's "informal probate" scheme. After the Commission makes the basic decisions on approach, the staff will prepare a draft, which will raise more detailed issues for Commission resolution within the broader approach.

Court Hearing Only Upon Request

A fundamental innovation of the Uniform Probate Code is the procedure that permits an interested and qualified person to obtain, by ministerial act, probate of a will valid on its face and appointment as personal representative, subject to later revocation upon court order following notice to interested persons. This procedure is intended to expedite, and reduce the cost of, estate administration by eliminating the need for a hearing and court appearance in every case, when in fact this may be appropriate in only a few cases. As one of the Comments to the Uniform Probate Code points out: "Informal probate," it is hoped, will serve to keep the simple will which generates no controversy from

becoming involved in truly judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

Under this procedure, opening of probate can be accomplished without judicial intervention. What protections are there to ensure that the admission of the will to probate and the appointment of a personal representative are proper? Under the Uniform Probate Code there are a number of safeguards:

(1) Although admission to probate and appointment of a personal representative are done by ministerial acts, the official responsible for acting (court clerk or other designated court official) must in fact examine the documents submitted by the applicant and ascertain that they appear to be proper on their face. In addition, the officer has discretion to deny probate or appointment of a personal representative in any case, even if everything appears proper on its face, and require judicial proceedings.

(2) Within 30 days after appointment the personal representative is required to give notice to heirs and devisees. Suppose the personal representative fails to do so? The personal representative is liable for fraud, and any actions taken by the personal representative are subject to recission for a period of three years (except transfers to bona fide purchasers).

(3) Any interested person may at any time require a bond or require formal judicial proceedings for probate and appointment of a personal representative.

In making a decision whether such a procedure would be an improvement on existing law, we must attempt to weigh its benefits against its detriments. The benefits are fairly obvious. In the ordinary case where there is no dispute about the will or the personal representative, administration can commence immediately without the delay of prior notice and setting for a judicial hearing and without the need for and cost of a court appearance. This can have the incidental benefit of avoiding the need for appointment of a special administrator to act in the interim pending formal judicial proceedings.

Although the benefits are obvious, their magnitude is not so obvious. The delay under the California scheme before formal probate and appointment is apparently not substantial. Section 327 requires a petition for probate of a will to be set for hearing not less than 10

nor more than 30 days after the petition is filed. Whether these times are adhered to in practice, we do not know, although we assume a 30-day delay is normal. Likewise, the cost of a judicial hearing is not clear. It obviously costs some judicial time and some attorney time, although apparently the matter is ordinarily heard perfunctorily on the uncontested calendar. The statistics described above indicate that one of the probate tasks that consumes substantial attorney time is preparing for initial hearings; in California, this amounts on the average to 10% of the attorney's time in probate. See Exhibit 1. The attorney receives no additional fee for the court appearance, although it is arguable that the statutory fee schedule is based in part on the assumption that the attorney must make an appearance.

What about the detriments of a procedure that allows a person to act, subject to termination upon objection of an interested person? The State Bar, in its 1973 analysis and critique of the Uniform Probate Code states two reasons that initiation of proceedings should be by formal, judicially supervised steps involving notice and hearing:

(1) It gives assurance of finality in probate proceedings.

(2) It protects against dishonest or incompetent fiduciaries.

While these reasons may apply to a formal closing of probate, their application to a formal opening is more problematical. Our analysis of existing California law shows that the court order admitting a will to probate and appointing an executor or administrator is not final and is subject to later contest or revocation by interested persons who failed to receive actual notice. And it appears to us that a person intent upon fraud could as easily fabricate documents and obtain probate and appointment under the California scheme as under the Uniform Probate Code scheme.

The real questions, it seems to us, are (1) whether there is any advantage to giving notice before rather than after appointment of a personal representative, and (2) whether court review of documents, before or after notice, is any greater a safeguard than review by a ministerial officer.

One advantage of giving notice before appointment of a personal representative is that interested persons have a chance to become informed before administration has progressed at all. This may also have the practical effect, as Mr. Collier of the State Bar pointed out in one of his earlier letters to the Commission, of putting a will proponent

and a will contestant on equal footing--the will proponent will not be in the position of an appointed executor having the duty to defend the will at the expense of the estate. An additional advantage of prior notice is that the court or person reviewing the formalities of the petition will be able also to review any proofs of service or notice. Of course, this will not stop a person seriously out to commit fraud, but the fact that the proofs will be reviewed could deter the casual defrauder.

Whether review of documents by a judge is preferable to review by a ministerial officer is not clear. In an uncontested case the review by either is ordinarily limited to an examination of the face of the documents submitted. There appears to be no particular advantage of judge review rather than court clerk review. In the event of a later contest, does the fact that the court has given initial approval to the documents prejudice the contestant (as opposed to a case where a clerk has given initial approval)? Possibly; although it should be noted that under existing California law the contestant is entitled to a jury trial.

In sum, the concept of an informal opening of probate by a ministerial officer, followed by notice to interested persons and an opportunity to contest, offers the potential for expediting administration, cutting judicial time, and reducing costs, somewhat. Given the existing California scheme of relatively short-fused notice and perfunctory judicial review, these savings appear significant but not overwhelming. The quick opening could also avoid the need for appointment of a special administrator in some situations. The loss in this sort of procedure is the lack of prior notice to interested persons--a discernible though not critical diminution of protection. It is certainly arguable that the Uniform Probate Code scheme of long-term liability of a bad actor is better protection for interested persons than some of the procedural devices built into probate.

The question the Commission must decide is whether the tangible benefits offered by the Uniform Probate Code scheme are sufficiently great that they call for giving up the somewhat cleaner California formal opening procedure. It is the cumulative effect of formal opening plus supervised administration that appears to gradually run up the time and expense of California probate. If we are able substantially to improve the rest of California probate procedure, it may be that the formal opening, with some cleaning up, is satisfactory. The State Bar

has taken the position that formal opening and formal closing of probate are essential, but that informal or unsupervised procedures may be practical in between. One alternative that may be practical is an informal opening combined with a formal closing that ensures that all notices were properly given; we understand that in Uniform Probate Code jurisdictions most estates are opened informally but that many elect a formal closing to protect the personal representative.

Notice of Opening Probate

Notice of a hearing to probate a will must be served personally or by mail upon each heir of the testator and upon each devisee, legatee, and executor named in the will. Notice of a hearing to appoint an administrator must be served by mail upon each heir of the decedent. In addition, notice of the hearing must be published in a newspaper of general circulation in the city in which the decedent resided (or if none, in the county) three times with at least five days between the first and last publication. If there is no such newspaper, the notice must be posted at three of the most public places within the community.

The published or posted notice serves as a notice to creditors as well as to unknown heirs and beneficiaries who were not served personally or by mail. The purpose of the published notice is to alert interested persons to the probate proceedings so that they may take any necessary actions to protect their interests. The publication of notice also enables the distribution of the estate to have in rem effect--to be binding on persons not served with actual notice and to preclude collateral attack on actions done in probate.

Whether the published notice in fact gives notice to heirs and beneficiaries is highly debatable, particularly if the heirs and beneficiaries live out of town. Some creditors, particularly institutional creditors and creditors' associations, may monitor the published notices; however, there is some indication that small creditors may not. The publication is notice to the world, which the courts in the past have held sufficient to satisfy due process requirements not only with respect to creditors but also with respect to unknown heirs and beneficiaries.

One published comment argues that the existing notice requirements do not satisfy the due process standards announced by the United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S.

306 (1950). See Comment, Notice Requirements in California Probate Proceedings, 66 Calif. L. Rev. 1111 (1978). The commentator believes that notice should be personally served on devisees under wills not being offered for probate as well as on devisees under the will being offered for probate, as well as on other persons whose interest in the estate is reasonably apparent to the personal representative. The personal representative should be required thoroughly to search the decedent's records and circumstances in order to identify individuals entitled to notice. This requirement would apply to creditors as well as heirs and devisees. Evidently these additional notice requirements would supplement, but not replace, published notice.

The cost of publication varies with the particular newspaper and the details of the particular estate. A local San Francisco peninsula paper charges 55 cents per line per insertion, or an average of $160-$170 per estate. The time added to probate by the publication requirement is about a week.

Is this expense reducible and can or should it be eliminated? The Uniform Probate Code permits informal probate to proceed without published notice. This is accompanied by a three-year limitations period during which persons who do not receive notice may object to the proceedings and have the distribution set aside; after the three-year period the probate becomes conclusive. Whether this scheme is constitutional has not yet been litigated, so far as we know. For a person who seeks in rem effect, there is the option of formal probate under the Uniform Probate Code, which does involve publication.

The Comment to the Uniform Probate Code states that, "The basic premise underlying all of these time provisions is that interested persons who want to assume the risks implicit in the three-year period of limitations should be provided legitimate means by which they can do so. At the same time, parties should be afforded ample opportunity for earlier protection if they want it." Of course, this does not address the issue of the constitutionality of cutting off rights of unnotified persons after three years. However, it is certainly arguable that three years is a sufficiently long time during which an unknown heir or beneficiary having a legitimate interest in the estate of the decedent should learn of the decedent's death and take action to protect the interest. The three-year limitation period is probably a better protection for unknown persons than publication in a local paper.

In the staff's opinion, this point is made moot by the fact that notice to creditors must be published anyway. Because of this, it makes sense to combine the notices and require publication as to heirs and devisees, as well as to creditors, as is done under existing California law.

Of course, it is arguable that notice should not be published as to creditors either, but beneficiaries should simply assume liabilities. This occurs, for example, where community property passes to a surviving spouse without probate. However, people seem generally satisfied with the existing scheme of publication and four-month claims cut-off (even the Uniform Probate Code adopts this approach), so that change does not seem mandated.

There are a number of possibilities for reducing expenses of publication. Assuming publication gives constructive, though not actual, notice to heirs and devisees, a reduction of the number of publications may be appropriate. Many states require only two publications. Perhaps even one publication would be sufficient.

The existing statutory requirement of 7- and 8-point type for the notice likewise seems unnecessary. A smaller type face would accomplish the same purpose just as well.

The bulk of the published notice is statutory boilerplate relating to the rights and duties of the persons receiving the notice; less than half the notice gives information about the decedent, petitioner, and the time of the hearing. It would seem appropriate in a publication to publish the boilerplate only once, in conjunction with a listing of names, addresses, and hearing dates for the various estates. The publication would be handled by the court clerk. This is a suggestion of Professor Turrentine, Introduction to the California Probate Code, 52 West's Annotated California Codes 39 (1956), who points out that it is done this way in Pennsylvania.

One point the Commission should be aware of in dealing with publication requirements is that any effort to reduce publication is likely to arouse the opposition of the newspaper publishers.

Bond Requirement

Before the executor or administrator is issued letters, the executor or administrator must give a bond. The amount of the bond is the value of the personal property in the estate and the probable value of

the annual income of the estate (in the case of personal sureties, twice the value of the personal property and twice the annual income from real property). A typical bond premium would be 1% of the amount of the bond, although Probate Code Section 541.5 limits allowance for the premium to 1/2% (a limitation evidently ignored in practice). The amount of the bond (and consequently the premium) can be substantially reduced by impounding money and securities of the estate in a bank or trust company, so they are excluded in the computation of the amount of the bond required. The bond may be waived entirely by the will or by agreement of all heirs or devisees.

The function of the bond is to provide a fund for recovery by persons interested in the estate, including creditors, in the event of the failure of the executor or administrator to faithfully execute the duties of the trust according to law. As a practical matter, there is rarely a recovery made on a bond, although it does occasionally occur. Thus, the expense of a bond in the usual case is unnecessary; in the unusual case, however, the bond may be an important protection. Presumably, if bonding rates are set on the basis of actual loss experience, the cost of the bond will reflect the actual risk of loss and will in fact serve the traditional insurance function of spreading the risk. We don't know what the experience of the sureties is and whether probate bonds are in fact a profitable area for them. Competition in the area is indubitably affected by the statutory provision for payment of the bond premium up to 1/2% out of the estate.

The California scheme is that a bond is automatically required unless waived by all heirs and devisees. The Uniform Probate Code informal proceeding reverses this procedure and does not require a bond unless requested by a person interested in the estate whose stake is $1,000 or more. Although theoretically California law and the Uniform Probate Code reach the same point from opposite directions, there is a real practical difference between their approaches. Under the California approach it may be difficult to obtain the consent of all interested persons--anyone who is hesitant may simply refuse to sign. Under the Uniform Probate Code approach, although technically anyone who has any doubts can demand a bond, there may be pressure not to do so and inject a note of disharmony and suspicion in the proceedings.

The difference between California law and the Uniform Probate Code is not substantive but a difference of degree or bias in the system. The Uniform Probate Code approach is simpler and entails less paperwork, without entailing a substantial loss of protection in any case where a person is concerned. Although not a critical point in the whole process, the staff believes the Uniform Probate Code approach is worth considering for adoption in California. Such an approach would undoubtedly arouse the opposition of the insurance industry.

Finality of Court Order

Despite the fact that a will is admitted to probate only upon court order following service and publication of notice of hearing, a will admitted without contest may be subsequently contested within 120 days after the order admitting the will to probate. Prob. Code § 380. Moreover, whether a will is contested or uncontested, another will of the decedent may subsequently be probated even if inconsistent with the will first probated. Prob. Code § 385; Estate of Moore, 180 Cal. 570, 182 P. 285 (1919).

The State Bar has stated that a major benefit of the California formal opening scheme is the finality and in rem effect it gives. But there is no finality or in rem effect given to probate of a will. The dissenters in the Moore case (cited above) point out the advantages of considering the probate of a will, the time to contest which has elapsed or which has successfully withstood a contest, as a proceeding in rem and a conclusive determination that the document is the last and only will of the decedent.

Professor Evans, draftsman of the Probate Code, codified the Moore case in Section 385, but questioned its wisdom. He was concerned that a court order admitting a will to probate, or declaring the intestacy of the decedent, and a distribution of property pursuant thereto, should be final so that the distributees do not hold property as trustees in the event of the subsequent probate of a will leaving the property to others. "Undoubtedly there should at least be some statute limiting the time within which a will could be offered for probate after an estate has been distributed." Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 617 (1931).

Like California law, the Uniform Probate Code system of informal probate does not preclude probate of a subsequent will. However, the

Uniform Probate Code gives some protection to distributees (and to bona fide purchasers). In an informal probate, the distribution becomes final three years after the decedent's death; a transfer from a distributee to a bona fide purchaser is final even if it occurs before the expiration of three years. In addition, the Uniform Probate Code provides the opportunity for more finality through formal probate proceedings involving notice and court order. In formal probate proceedings the order of distribution is conclusive after the time for appeal has expired, notwithstanding a later discovered will.

The staff believes the Uniform Probate Code takes the correct approach--the law should either (1) provide formal proceedings and give the proceedings finality or (2) provide informal proceedings that lack finality but that protect bona fide purchasers and have a reasonable limitation period. Within the context of the existing California formal probate scheme, the staff recommends that a court order admitting a will to probate or declaring the intestacy of the decedent be subject to a later probated will only during the pendency of the probate proceedings. Once there is a court order closing the estate and a distribution to heirs or devisees, the order and distribution should be final.

This would be consistent with Probate Code Section 1021, which provides that the court decree of distribution is conclusive. It is also consistent with Probate Code Section 322. As enacted in 1931, Section 322 provided that the rights of a bona fide purchaser derived from a person claiming property by succession could be impaired by a will of the decedent if the will is probated within four years after the decedent's death. The section was amended in 1953 to make clear that "This section does not limit the finality of any decree of distribution in the estate of the decedent."

Respectfully submitted,

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TABLE 6.1

Attorney's Services: Percent of Total Attorney Time Spent on Particular Services (1) Entire Sample (2) Estates Smaller Than $60,000 (3) Estates Larger Than $60,000 with Individual Representatives (4) Estates Larger Than $60,000 with Corporate Representatives (5) Estates Handled by Specialists in Administration

	California					Florida					Maryland					Massachusetts					Texas				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
Probate Services	78	80	67	76	79	87	88	73	76	87	84	85	75	76	79	76	75	72	57	78	83	85	68	59	82
Initial Conferences	9	10	6	5	9	16	16	8	8	13	17	19	6	18	18	15	15	8	5	14	13	14	4	6	11
Initial Hearings	10	11	3	10	10	14	15	7	5	14	9	10	5	1	6	6	6	5	7	7	16	17	9	10	18
Asset Collection Open Deposit Box	2	2	3	2	2	4	4	4	2	5	3	3	4	6	2	4	4	2	1	5	1	.9	8	2	2
Inventory Preparation	6	6	7	7	6	4	4	6	4	5	6	6	9	4	9	7	7	9	1	6	15	15	13	15	15
Family Allowance Statutory Selection	.1	.2	.2	.7	.3	.2	.2	.4	0	.3	.1	.2	.1	.4	.6	.1	.1	0	2	1	.2	.2	.03	.09	.1
Creditors' Claims	4	4	3	3	5	6	6	4	5	4	5	5	4	.8	4	5	5	3	6	5	2	2	2	2	2
Interim Accounts	.5	.5	.6	2	.6	1	1	2	3	1	1	.8	4	3	2	.1	.1	1	.4	.1	.4	.4	.4	0	.6
Realty Sales	2	2	2	1	3	4	4	2	9	3	3	3	3	10	3	7	7	7	10	7	3	3	3	2	3
Personality Sales	1	1	2	3	2	1	1	1	3	1	.9	.8	1	2	1	1	1	.7	.5	2	.5	.4	2	.5	.4
Final Account	11	12	9	8	11	2	2	2	3	3	11	11	10	5	9	7	7	7	3	7	2	2	1	6	2
Spouse's Election	.1	.1	.8	.3	.4	.1	.1	.1	0	.1	.2	.2	.1	.008	01	.001	0	0	.4	.003	.4	.3	.6	.6	.6
Disclaimers	.1	.04	.2	0	.03	.2	.1	.1	0	.3	.2	.2	.1	1	.3	.2	.2	.4	.8	.4	.1	.04	.4	.3	.2
Accounting Work	2	2	5	2	2	2	2	5	.4	2	3	3	6	.09	3	2	2	4	.1	1	.6	.5	1	.3	.2
Communication with Beneficiaries	12	12	11	16	12	15	15	13	18	14	13	14	12	17	10	15	15	15	13	18	18	19	12	8	16
Transfer--Reregister Asset	2	2	5	2	2	2	2	5	.4	2	3	3	6	1	2	1	1	2	.1	1	4	4	6	3	4
Partial Distribution	.5	.5	.4	3	.7	.7	1	2	2	.5	.5	.3	2	.4	.7	.5	.4	2	1	.1	.5	.5	.6	.9	.4
Final Decree and Distributions	6	6	6	8	6	6	6	5	5	7	3	3	3	.8	3	3	3	3	.8	4	2	2	2	2	2

TABLE 6.1 (Cont.)

	California					Florida Texas					Maryland					Massachusetts					Texas				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
Discharge of Representative	2	2	1	1	2	6	7	5	6	7	2	2	2	3	2	2	2	1	.4	1	.8	.8	.3	3	.9
Qualify Testamentary Trustee	.03	.01	.1	.4	.04	.2	.1	.1	.4	.1	.03	.03	.04	.004	01	.05	.04	.04	2	.1	.2	.2	.01	.3	.2
Liquidity Planning	.1	.1	.2	2	.1	.1	.1	.5	.4	.2	.1	.02	.6	3	.2	.03	.02	.3	2	.03	.1	.04	.8	.5	.2
Other Special Hearings	2	3	1	1	2	1	1	.8	.6	2	.4	.4	.6	.5	.4	.1	.1	.7	2	.04	.4	.4	.6	.4	.2
Tax Services	15	15	21	17	16	9	8	23	20	10	21	21	21	21	24	16	15	20	30	15	18	16	27	35	17
Decedent's Last Income Tax	.5	.4	.8	2	.6	.2	.2	.5	1	.1	1	1	2	.7	1	1	1	1	2	1	.2	.2	.4	.1	.3
Federal Estate Tax	2	1	9	4	1	1	1	11	10	2	4	4	10	10	5	1	1	8	12	2	3	2	11	19	4
State Death Tax	8	8	6	3	8	2	1	2	3	2	.4	.3	.9	.7	.7	8	8	5	6	8	5	5	4	7	7
Fiduciary Income Tax	.4	.2	2	.7	.3	.4	.2	2	1	.5	.6	.3	3	1	.9	.5	.4	2	.8	.9	.2	.1	.5	.4	.2
Beneficiaries' Income Tax	.01	0	0	.3	0	.03	.03	.05	.2	.01	.2	.1	.5	0	.3	.1	.1	.2	.02	.01	.1	.06	.7	.3	.1
Post Mortem Tax Planning	.2	.03	1	2	.1	.2	.1	1	1	.3	.2	.03	1	1	.4	.4	.3	.5	.1	.04	.3	.2	.6	2	.2
Special Valuation Problems	.5	.4	1	1	.5	.1	.03	1	2	.1	.2	.1	.6	1	.2	.1	.1	.5	3	.1	.4	.2	2	.9	.5
Tax Apportionment	.1	.1	.6	.2	.1	.5	.6	.3	0	.8	.1	0	.3	2	.3	.02	.02	.04	.7	.05	.06	.02	.2	.3	.04
Tax Waivers	1	.2	.2	.3	.6	.3	.3	.2	.5	.2	.1	.04	.5	.4	.1	4	4	.7	.9	2	2	2	2	.5	2
Contested Tax Matters	.4	.4	.3	1	.5	.01	.01	0	0	0	.02	0	.07	.9	.02	.01	0	.1	3	.02	.04	.01	.3	.2	.07
Non-Probate Services	12	13	5	4	12	7	8	6	4	8	14	16	4	5	24	2	2	3	5	3	9	9	6	13	9
Life Insurance	1	1	1	.3	1	1	1	2	.4	1	2	2	1	.05	1	.9	.8	2	.4	1	1	1	1	1	.8
Annuities	.1	.1	.2	.2	.2	.01	0	.1	0	.01	.3	.3	.2	.06	.4	.01	0	.3	0	.02	.3	.3	0	.07	.5
Joint Tenancies	2	2	2	.04	2	.3	.3	.3	1	.2	1	1	.2	.7	2	.8	.8	.5	.4	.9	.08	.02	.5	.6	.06
Powers of Appointment	.01	0	0	.5	.01	0	0	0	0	0	0	0	0	0	0	.006	0	0	2	.01	.04	.04	0	0	0
Revocable Trusts	.1	.2	.02	0	.2	.02	.01	0	.4	.03	.01	0	.03	.2	.01	.1	.1	.04	3	.2	.3	.3	.4	2	.3
Pension/Profit Sharing	.2	.2	.04	0	.2	.1	.1	.4	0	.1	2	2	.4	.8	4	.3	.3	.5	.2	.1	.3	.4	.03	.2	.4
Totten Trusts	.7	.8	.1	.1	1	.1	.1	.03	0	.1	.04	.05	0	0	0	0	0	0	0	0	.001	0	.01	0	0

TABLE 6.1 (Cont.)

	California					Florida					Maryland					Massachusetts					Texas				
	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
Other Services	14	13	14	15	14	18	19	11	11	14	12	13	7	13	12	7	8	5	8	4	12	12	17	16	10
Closely Held Business	.4	.3	1	.5	.3	.03	0	.3	2	.02	.1	0	.7	2	.1	.01	0	.4	.5	.01	.4	.4	.8	1	.1
Partnership Interests	.1	.03	.4	.5	.04	.1	.1	.2	0	0	.1	.2	0	0	.2	.004	0	0	1	.01	.05	.02	.2	.5	.02
Social Security Medicare	1	.8	.7	.4	1	1	1	1	.4	1	2	1	1	.09	.6	.8	.8	.4	.4	.4	.5	.6	.4	.3	.2
Investments	.3	.2	.7	.08	.1	.1	.01	.7	.6	.09	.1	.1	.7	.8	.1	.1	.1	.2	.8	.1	.3	.3	.6	2	.3
Casualty Insurance	.1	.1	.04	.1	.1	.6	.6	.1	.1	.4	.2	.2	.05	0	.01	.004	0	0	.1	0	.1	.1	.1	.06	.007
Other Services	4	4	6	7	3	6	6	5	3	5	3	4	2	1	4	6	6	3	5	3	2	2	6	3	2
Allowance of Attorney Fees (Texas Only)																					2.9	3.1	.4	1.6	2.1
Extraordinary Executor Fees (Texas Only)																					.8	.9	.5	1.1	1.1
Real Property Title Filing (Texas Only)																					7.6	8.8	3.9	.9	7.8
Supervision of Ancillary Administration (Texas Only)																					3.8	4.6	.6		4.2
(N) #1	(247n)					(271n)					(263n)					(251n)					(271n)				
(N) #2	(129n)					(166n)					(90n)					(144n)					(157n)				
(N) #3	(73n)					(54n)					(85n)					(48n)					(70n)				
(N) #4	(30n)					(22n)					(16n)					(28n)					(29n)				
(N) #5	(172n)					(166n)					(91n)					(117n)					(139n)				

Because of rounding, columns may not add to 100, and category totals may not precisely equal the sum of the category items set forth.

Exhibit 2

TABLE 6.2

Services consuming the greatest proportions of attorney time (all estates)

	California	%	Florida	%	Maryland	%	Massachusetts	%	Texas	%
1	Communication with Beneficiaries	(12)	Initial Conferences	(16)	Initial Conferences	(17)	Initial Conferences	(15)	Communication with Beneficiaries	(13)
2	Final Account	(11)	Communication with Beneficiaries	(15)	Communication with Beneficiaries	(13)	Communication with Beneficiaries	(15)	Initial Hearings	(16)
3	Initial Hearings	(10)	Initial Hearings	(14)	Final Account	(11)	State Death Tax	(8)	Inventory Preparation	(15)
4	Initial Conferences	(9)	Discharge of Representative	(6)	Initial Hearings	(9)	Inventory Preparation	(7)	Initial Conferences	(13)
5	State Death Tax	(8)	Final Decree and Distribution	(6)	Inventory Preparation	(6)	Realty Sales	(7)	State Death Tax	(5)
6	Final Decree and Distribution	(6)	Creditors' Claims	(6)	Creditors' Claims	(5)	Final Account	(7)	Transfer--Re-register Assets	(4)
7	Inventory Preparation	(6)	Realty Sales	(4)	Federal Estate Tax	(4)	Initial Hearings	(6)	Realty Sales	(3)
8	Creditors' Claims	(4)	Asset Collection Open Deposit Box	(4)	Realty Sales	(3)	Creditors' Claims	(5)	Federal Estate Tax	(3)
9	Realty Sales	(2)	Inventory Preparation	(4)	Final Decree and Distribution	(3)	Tax Waivers	(4)	Final Account	(2)
10	Transfer--Re-register Assets	(2)	Transfer--Re-register Assets	(2)	Accounting Work	(3)	Final Decree and Distribution	(3)	Tax Waivers	(2)

Exhibit 3

TABLE 8.4

Attorneys' Fees, Estates Having Known, Non-Zero Values Only, by Probate Estate Size Categories

All Estates		$1 - 9,999		$10-19,999		$20-29,999	
Amount	% Probate	Amount	% Probate	Amount	% Probate	Amount	% Probate
MA $1,603	CA 3%	CA $292	CA 7.2%	TX $487	TX 3.5%	TX $584	TX 2.4%
CA $1,911	TX 4.1%	FL $413	MD 9.9%	CA $653	CA 4.4%	CA $987	CA 4.0%
MD $2,276	MD 5.8%	MD $415	MA 12.7%	FL $715	FL 5.0%	FL $1268	FL 5.4%
TX $2,560	MA 7.8%	MA $422	TX 16.0%	MD $878	MD 6.1%	MA $1430	MA 5.8%
FL $2,791	FL 8.4%	TX $501	FL 18.5%	MA $925	MA 6.1%	MD $1796	MD 7.0%

$30 - 59,999		$60 - 99,999		$100 - 499,999		$500,000+	
Amount	% Probate	Amount	% Probate	Amount	% Probate	Amount	% Probate
TX $1211	TX 2.8%	TX $1783	TX 2.4%	MA $3937	TX 2.2%	CA $20,614	CA 1.5%
CA $1784	MD 4.2%	MD $2009	MD 2.7%	TX $4127	CA 2.3%	MA $20,880	TX 1.7%
MD $1852	CA 4.4%	CA $2450	CA 3.1%	CA $4627	MD 2.6%	MD $29,258	MA 2.0%
FL $2317	FL 5.2%	FL $3406	MA 4.4%	MD $5051	MA 2.8%	FL $32,882	FL 2.6%
MA $2475	MA 6.2%	MA $3495	FL 4.6%	FL $6308	FL 3.2%	TX $30,716	MD 3.3%

Exhibit 4

TABLE 10.7

Percent of estates in which attorney reported hearing expressions of dissatisfaction about the probate process or the attorney from representatives (estates where attorney served as sole representative excluded)

	California	Florida	Maryland	Massachusetts	Texas
	%	%	%	%	%
Entire Sample (N)	17 (232n)	7 (200n)	10 (206n)	8 (226n)	5 (254n)
Solo Practitioners	29 (80n)	3 (68n)	12 (52n)	7 (87n)	7 (90n)
2-9 Attorney Firms	7 (127n)	7 (105n)	9 (127n)	9 (97n)	3 (135n)
10-30 Attorney Firms	46 (9n)	17 (21n)	0 (18n)	13 (20n)	5 (15n)
31+ Attorney Firms	0 (16n)	0 (6n)	15 (9n)	0 (22n)	2 (14n)
Estates Less Than $60,000	18 (128n)	5 (120n)	10 (99n)	8 (142n)	5 (153n)
Estates $60,000+ Individual Representative	11 (75n)	25 (57n)	12 (92n)	6 (49n)	9 (72n)
Estates $60,000+ Corporate Representative	8 (32n)	7 (23n)	8 (17n)	0 (37n)	4 (29n)
Attorney Specialist in Administration	12 (172n)	8 (149n)	8 (99n)	9 (121n)	5 (139n)
Attorney Non-Specialist in Administration	34 (56n)	5 (50n)	11 (106n)	7 (106n)	5 (113n)

TABLE 10.8

Percent of estates in which attorney reported hearing expressions of dissatisfaction about the probate process or about the attorney from beneficiaries

	California	Florida	Maryland	Massachusetts	Texas
	%	%	%	%	%
Entire Sample (N)	23 (169n)	12 (206n)	8 (167n)	6 (198n)	7 (172n)
Solo Practitioners	17 (60n)	11 (66n)	4 (40n)	7 (72n)	3 (56n)
2-9 Attorney Firms	19 (101n)	13 (117n)	11 (107n)	5 (86n)	11 (91n)
10-30 Attorney Firms	48 (7n)	13 (17n)	10 (15n)	0 (18n)	3 (12n)
31+ Attorney Firms	45 (15n)	0 (6n)	0 (5n)	5 (22n)	0 (13n)
Estates Less Than $60,000	24 (94n)	11 (148n)	7 (68n)	6 (116n)	7 (94n)
Estates $60,000+ Individual Representative	13 (59n)	36 (36n)	12 (84n)	4 (45n)	6 (51n)
Estates $60,000+ Corporate Representative	19 (32n)	12 (22n)	1 (17n)	9 (38n)	4 (27n)
Attorney Specialist in Administration	26 (136n)	15 (140n)	13 (86n)	4 (113n)	9 (99n)
Attorney Non-Specialist in Administration	14 (44n)	8 (66n)	4 (79n)	7 (85n)	5 (71n)

TABLE 10.11

Types of complaints received from representatives

1. Proceeding takes too long: % of all representatives' complaints

	California %	Florida %	Maryland %	Massachusetts %	Texas %
Entire Sample (N)	45 (28n)	48 (26n)	52 (22n)	26 (12n)	40 (15n)
Solo Practitioners	37 (15n)	44 (9n)	74 (6n)	2 (5n)	70 (8n)
2-9 Attorney Firms	45 (11n)	64 (14n)	33 (15n)	52 (6n)	3 (5n)
10-30 Attorney Firms	100 (2n)	26 (3n)	*	0 (1n)	0 (1n)
31+ Attorney Firms	*	*	0 (1n)	*	0 (1n)
Estates Less Than $60,000	45 (22n)	53 (9n)	53 (11n)	26 (9n)	40 (9n)
Estates $60,000+ Individual Representative	50 (6n)	46 (15n)	43 (10n)	67 (3n)	57 (5n)
Estates $60,000+ Corporate Representative	100 (1n)	50 (2n)	0 (1n)	*	0 (1n)

* indicates no response in the category

2. Proceedings costs too much: % of all representatives' complaints

	California %	Florida %	Maryland %	Massachusetts %	Texas %
Entire Sample (N)	15 (28n)	1 (26n)	31 (22n)	27 (12n)	2 (15n)
Solo Practitioners	15 (15n)	0 (9n)	21 (6n)	42 (5n)	0 (8n)
2-9 Attorney Firms	23 (11n)	100 (14n)	41 (15n)	2 (6n)	0 (5n)
10-30 Attorney Firms	0 (2n)	0 (3n)	*	100 (1n)	0 (1n)
31+ Attorney Firms	*	*	0 (1n)	*	100 (1n)
Estates Less Than $60,000	13 (22n)	0 (9n)	33 (11n)	27 (9n)	0 (9n)
Estates $60,000+ Individual Representative	44 (6n)	0 (15n)	28 (10n)	33 (3n)	0 (5n)
Estates $60,000+ Corporate Representative	0 (1n)	50 (2n)	0 (1n)	*	100 (1n)

* indicates no response in the category

TABLE 10.12

Types of complaints received from beneficiaries

1. Proceeding takes too long: % of all beneficiaries' complaints

	California %	Florida %	Maryland %	Massachusetts %	Texas %
Entire Sample (N)	47 (26n)	55 (26n)	9 (14n)	50 (10n)	3 (10n)
Solo Practitioners	66 (7n)	43 (10n)	0 (6n)	56 (4n)	0 (3n)
2-9 Attorney Firms	38 (15n)	72 (13n)	7 (7n)	41 (4n)	4 (6n)
10-30 Attorney Firms	100 (1n)	0 (3n)	50 (1n)?	*	0 (1n)
31+ Attorney Firms	5 (3n)	*	*	0 (2n)	*
Estates Less Than $60,000	43 (15n)	56 (15n)	6 (2n)	49 (5n)	0 (5n)
Estates $60,000+ Individual Representative	81 (7n)	54 (8n)	35 (10n)	100 (2n)	23 (4n)
Estates $60,000+ Corporate Representative	93 (5n)	29 (3n)	0 (2n)	33 (3n)	0 (1n)

* indicates no response in the category

2. Proceeding costs too much: % of all beneficiaries' complaints

	California %	Florida %	Maryland %	Massachusetts %	Texas %
Entire Sample (N)	10 (26n)	4 (26n)	*	23 (10n)	2 (10n)
Solo Practitioners	0 (7n)	0 (10n)	*	0 (4n)	0 (3n)
2-9 Attorney Firms	0 (15n)	7 (13n)	*	59 (4n)	0 (6n)
10-30 Attorney Firms	0 (1n)	0 (3n)	*	*	0 (1n)
31+ Attorney Firms	48 (3n)	*	*	0 (2n)	*
Estates Less Than $60,000	11 (15n)	4 (15n)	*	23 (5n)	0 (5n)
Estates $60,000+ Individual Representative	0 (7n)	0 (8n)	*	0 (2n)	* (4n)
Estates $60,000+ Corporate Representative	0 (5n)	0 (3n)	*	0 (3n)	100 (1n)

* indicates no response in the category