

First Supplement to Memorandum 85-11

Subject: Study L-1000 - Probate Code (Jurisdiction; Probate of Wills;
Contest of Wills--comments of State Bar)

Attached to this supplementary memorandum are two letters from the State Bar Estate Planning, Trust and Probate Law Section concerning the initial draft of the Probate Code revision. Exhibit 1 contains general comments on the drafting style. Exhibit 2 contains specific comments on individual provisions of the draft attached to Memorandum 85-11. We will discuss the specific comments as we review the draft at the meeting.

With respect to the general drafting style comments, the staff has the following observations concerning the points made by the State Bar:

(1) "Whenever there is a change in wording in sections, courts may construe it as a revision of the law rather than merely a clarification of wording." The staff notes that this problem is already addressed by existing Probate Code Section 2, which provides:

The provisions of this code, insofar as they are substantially the same as previously existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments.

(2) The State Bar expresses concern about new provisions that have taken sentences from a number of existing provisions and combined them, citing as examples Sections 7360 (bond required), 7380 (procedure for removal), and 7511 (transfer or conveyance of property pursuant to court order). With regard to these specific provisions, Section 7360 (bond required) generalizes provisions of various sections imposing bond requirements for various types of personal representatives and consolidates miscellaneous bond requirements found scattered about the code in one section; Section 7380 (procedure for removal) likewise consolidates in a single section miscellaneous provisions relating to the removal procedure; Section 7511 (transfer or conveyance of property pursuant to court order) generalizes language found in a number of different sections so that the same language does not need to be repeated each time it is relevant to a transfer or conveyance of property). The Comment to each new section notes precisely its derivation, and the Comment to each old section notes precisely where the replacement material may be found.

Precisely the same sort of consolidation and generalization, with comparable provisions, was done in connection with the guardianship and conservatorship law without problem, and the revision seems to be generally accepted and appreciated by the practicing bar.

(3) The State Bar notes that in some instances sentences are taken from different code sections that seem to be unrelated, citing as an example Section 7620 (petition for order). Section 7620 is simply a complete listing or catalog of matters subject to petition, and avoids the need to duplicate the same general language each time a petition is authorized in the code.

(4) Concern is also expressed over taking an existing section and making it into two or more new sections, making it difficult to relate case law to the new sections. The staff fails to see the problem here. Split sections are easier to use and to amend, and applicable cases can easily be traced to the new location of the language to which they relate through the section Comments.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

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PROBATE LAW SECTION
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March 11, 1985

John H. DeMouly, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Probate Administration - Division 3

Dear John:

As you may recall, at the time the State Bar made its presentation in January of 1983, in opposition to the Uniform Probate Code and in support of retention of the basic structure of Division 3, it was pointed out there are more than 15,000 reported court decisions in California which make reference to sections now found in Division 3. This body of case law is of great help in the interpretation and application of these sections.

While acknowledging that many sections, due to frequent amendments over the years, are awkwardly worded and that some rearrangement of sections is appropriate, the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar, nonetheless urges the staff to retain insofar as possible the existing wording of sections. Whenever there is a change in wording in sections, courts may construe it as a revision of the law rather than merely a clarification of wording. Obviously, we would like to preserve existing law wherever possible as it has been developed through the case system.

We also have concern about proposed new sections which have taken a sentence from a number of different existing sections and combined them into a proposed new section. This will make it very difficult to track the particular history of a section and determine whether case law is applicable. For example, proposed Section 7360 draws language from four different existing sections of the Code. Similarly, Section 7380 as proposed draws language from four different sections of the Code. Also

John H. DeMouilly, Esq.
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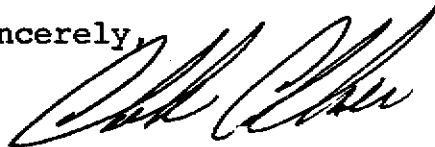
see Section 7511. In some instances, sentences are taken from different code sections which seem to be unrelated. See, for example, proposed Section 7620.

The Executive Committee has also expressed concern over taking of an existing section from Division 3 and making it into two or more new sections. Once again, it makes it difficult to relate case law to a section when it has been divided into a number of new sections.

To the extent that a court in a particular case has interpreted particular language found in the Code, but that language has been changed by the California Law Revision Commission, the precedential value of that case is obviously diminished.

Since there are relatively few policy issues involved in the review and revision of Division 3, we would hope that existing language of sections can be retained wherever possible so as to preserve as much of the case law as possible. We would appreciate your calling our concerns to the attention of the Commission.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

cc: Kenneth Klug, Esq.
Theodore Cranston, Esq.
James Quillinan, Esq.

EXHIBIT 2

Exhibit 1

Memorandum 85-11

§ 7110:

Does this preclude administration of stock certificates, for example, that are physically in California? These generally are classified as intangible property.

§ 7120:

Should the words "sitting in probate" be added after the word "court."

§ 7122:

The jurisdiction of the court sitting in probate should be parallel to that of the court when it is considering trust matters. The reference to actions taken "at chambers" should be changed to "ex parte."

§ 7123:

The reference to actions "at chambers" should be changed to "ex parte."

§ 7130:

We oppose proposed subparts (b) and (c). These would encourage forum shopping, seeking more favorable rules as to fees, administration, procedures, etc., from county to county.

§ 7132:

We believe subpart (b) can be deleted.

§ 7140:

The generalization or broadening of § 1233 does not seem appropriate. The more restrictive language of § 1233

seems preferable.

§ 7145:

Is it contemplated that if a jury, for example, is requested in connection with a Will contest that all issues can be tried by the jury or are there only certain issues which would qualify for determination by the jury?

§ 7210:

The word "of" should be inserted before the word "whether" on the second line of subpart (a).

§ 7230:

The reference to the decedent's Will with a specified date should perhaps be expanded to include Codicils and the dates thereof.

§ 7240:

We believe the mailing requirement should be ten days before the date of hearing, allowing no additional time for the mailing itself.

§ 7245:

The reference in parenthesis should be § 7230.

§ 7271:

In probate often interested parties do not respond to a Will contest. Perhaps the summons should state that the person receiving it is entitled to file an answer within 30 days.

§ 7281:

This same comments relates to the summons and the right of persons to respond.

§ 7282:

We believe the words "before probate" should be added at the end of subpart (a). The section also opposes the elimination of jury trials for Will contests both before and after probate.

§ 7283:

The section opposes the inclusion of reasonable attorneys' fees in connection with a Will contest. There are a number of other areas where there are no provisions for attorneys' fees, such as creditor's claims, objections to accounts, etc.