

#L-1010

3/13/85

Third Supplement to Memorandum 85-12

Subject: Study L-1010 - Probate Code (Personal Representative; Appointment;
Letters; Termination of Authority; Oath and Bond--comments
of State Bar)

Attached to this supplementary memorandum as Exhibit 1 are comments from members of the State Bar Estate Planning, Trust and Probate Law Section Executive Committee and in some cases from the Committee as a whole. We will discuss the comments as we review Memorandum 85-12 at the meeting.

Respectfully submitted,

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Assistant Executive Secretary

EXHIBIT 1

Exhibit 2

Memorandum 85-12

§ 7311:

The use of the word "incompetent" in paragraph (a)(2) is troublesome because that word has certain technical meanings with reference to capacity. We believe a word such as "unsuited" would be preferable. In subparagraph (b), we believe that should be clarified to cover not only the named executor but any successor named in the instrument.

§ 7312:

The language would be improved by deleting the words "by request" in the second line.

§ 7315:

We believe this section is unduly broad and should be deleted in its entirety. The sections referred to the Comment are very narrow. Their application is not really the basis for this broadly worded section.

§ 7345:

The word "nominee" in the title is misspelled.

§ 7346:

Although this section continues in substance the last portion of former § 425, query whether the "request of another creditor" should be modified to read the "request of any other interested party."

§ 7360:

The bond shall be to the State of California. Query whether this is consistent with the beneficiaries of a bond,

for example, in the conservatorship area. If the personal representative has not given the required bond, presumably that person never would be appointed. Therefore, he cannot be removed. The language needs clarification.

§ 7361:

Under subsection (c) should the cost of the bond requested by a devisee or heir to protect that person's interest be a charge against that interest or against the estate as a whole?

§ 7362:

If the personal representative has authority to sell real property under independent administration, the practice in Los Angeles County at present is to require a bond for the full value of the real property in addition to the value of the personal property. This section should perhaps be modified to indicate that the bond shall also include the value of real property if it can be sold under independent administration.

§ 7363:

We are not clear as to the meaning of "an account in an insured savings and loan association." Subparagraph (b) should perhaps be clarified in the introductory language to say that "in effectuating the order of the court pursuant to subsection (a) the petitioner for appointment may do any one or more of the following:".

§ 7364:

This might be modified to refer to a petition rather than to a motion with the petition setting forth the condition of the estate. We believe notice should be given to those then

interested in the estate as to any petition to reduce the amount of bond.

§ 7366:

Query whether these dollar limits on the cost of a bond are necessary since the bonding business is competitive and rates change from time to time.

§ 7367:

Query whether this cross-reference to the CCP is necessary given the fairly detailed provisions of the Probate Code as to probate bonds.

§ 7380:

Subparagraph (b) could be clarified by having the first line read "if either upon the petition for removal or otherwise, the court has reason to believe, etc." This would make it apparent that the court can consider the matter either on information which it obtains or on motion of an interested party. Existing § 521 allows the court to act on its own knowledge and is not dependent upon the filing of a petition.

§ 7386:

The phrase "pursuant to court order" at the end of the sentence should perhaps be moved back to line 2 so that it would read "personal representative pursuant to court order fails to give, etc."

§ 7390:

The Executive Committee opposes the 15 day delay on resignation. We also had some problem with the concept of a vacancy being created because under existing § 520 a person who has

resigned is not relieved of obligations until his or her account is settled.

§ 7392:

Subparagraph (b) refers to "service of notice on interested persons." Presumably this is a mail notice only.

§ 7393:

This again raises the question of the vacancy because of resignation. See the Comment to § 7390.

§ 7395:

Subparagraph (b) refers to the "liability" of the personal representative. Presumably the personal representative also has the ongoing duties to protect the assets of the estate and administer them until a successor is appointed and the resigning personal representative has had his or her account settled.

§ 7410:

The word "section" in the first line, we believe, should refer to "article."

§ 7411:

This should apply both to the nonresident whose is initially appointed as personal representative and to the personal representative who after appointment moves from the State of California. The wording does not seem broad enough since it talks about "acceptance of appointment by a non-resident personal representative."

§ 7430:

The Comment refers to appointment of a special administrator "at chambers." We believe they should be changed to "ex parte."

§ 7432:

Since a bond may not be required of a special administrator in certain cases, this language in subparagraph (a)(1) should perhaps be modified to state the special administrator gives such bond, if any required by the court in such amount as the court directs.

§ 7434:

Subparagraphs (a)(1) and (2) refer to taking possession of all of the assets of the decedent. Is this limited by the introductory clause referring to prescribed duties? A special administrator often acts for a very short period of time and is appointed in one or more specific transactions and is not in a position to take possession of all of the decedent's property. Perhaps that should be recognized in the wording of § 7434. Further, the powers and duties should, we believe, also include the power to act under the Independent Administration of Estates Act in the discretion of the court. Subparagraph (b)(3) refers to a power being exercised only by "leave of court." We believe this language should be changed to "court order."

§ 7435:

Should the word "shall" in the first line be changed to the word "may." That is, should the grant of general powers be automatic in these situations? Once again, there is a question of whether the court should have the discretion to grant

independent powers to a special administrator.

§ 7437:

Subparagraphs (b) and (c) provide for the court making a division of commissions or fees. As a practical matter, these are often divided by agreement between the parties. Perhaps the statute should provide that they should be divided as the parties agree or, if they cannot agree, as the court determines. In subparagraph (d), the word "petition" on the third line from the bottom perhaps should be replaced with the phrase "award of fees to the attorney." This would appear to be better phrasing.