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Memorandum 85-56

Subject: Comments of State Bar Section Concerning AB 196

Attached to this memorandum is a letter from the State Bar Estate Planning, Trust and Probate Law Section Executive Committee raising issues concerning AB 196. A copy of the latest amended version of AB 196 is also attached. We plan to review the concerns of the State Bar at the May Commission meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA

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May 2, 1985

John H. DeMouilly, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: AB 97 and AB 196

Dear John:

Reference is made to our letter addressed to Assemblyman McAlister on April 15, 1985 regarding AB 196, as then amended on March 18.

The comments which follow are based upon AB 196, as amended April 8, and take into account proposed further amendments to Section 591.3 which add subparagraphs (c) and (d) to that section. The Executive Committee of the Section has had a chance to consider a number of items on which we had taken no position as of the time of the April 15 letter. Also, we have developed some suggestions for changes in wording.

In this letter we are commenting only on matters where we had raised issues in our letter of April 15 or had taken no position at that time. As you will recall, that letter approved many of the provisions of AB 196, as amended March 18.

1. Section 7, we understand, will be further amended by deleting proposed Section 248. This change is approved.

2. Sections 9, 10 and 11. These changes allowing independent administration, except for the sale or exchange of real property or the granting of options, has been approved by our Executive Committee.

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3. Section 12. The proposed amendment to Section 591.5(b), found on page 19 at lines 12 through 15, seems to be misplaced. We believe it should be placed in the sections dealing with the basis for removal of a personal representative.

We also believe that a new subsection (e) should be added to Section 591.5 that provides essentially as follows:

"Any person who objects, as provided in this section, to the proposed action shall receive notice of hearing on any petition for court confirmation of the proposed action."

The Executive Committee feels that notice of hearing is appropriate for those who actually object so they would be aware of the filing of the petition. In many cases they would not have requested special notice. They might not otherwise receive notice of the particular petition.

4. Section 13. We would suggest that the introductory clause for Section 591.8 be modified to read as follows:

"Under Sections 591.3 and 591.4 the advice of a proposed action shall be in substantially the following form or in such form as may be prescribed by the Judicial Council:"

We also are suggesting various changes in the advice of proposed action. We are attaching a modified form of advice as a separate exhibit to this letter. Reference is made thereto. One general comment about the form of advice is that we feel the controlling date is the date of mailing of the advice or the date of personal service and therefore the advice itself need not be dated (page 21, line 23). We do not see the need for the signature of an executor, administrator or attorney, or even the listing of the name of the executor, administrator or attorney at the end of the document. All pertinent information is in the advice itself, including the name(s) of the executor, the person to contact and the address where objections are to be sent. Further, we do not see the need for capitalizing the material in paragraph 7 (page 21, lines 19-22).

5. Section 14. We felt that the language in 591.9(a) could be made more explicit by being amended to read as follows:

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"Subject to Sections 591.3 to 591.5, inclusive, and applicable fiduciary duties, an executor or administrator who has been granted authority to administer the estate without court supervision under this article may sell property of the estate either at public auction or private sale, with or without notice, for such price and upon such terms and conditions as the executor or administrator may determine without publication of notice of sale, without court approval of real estate commissions and without the requirement that the sale be not less than 90% of the appraised value. This subdivision applies to any sale made under authority of this article on or after January 1, 1985."

In the alternative, this could be worded as follows:

"Subject to Sections 591.3 to 591.5, inclusive, and applicable fiduciary duties, an executor or administrator who has been granted authority to administer the estate without court supervision under this article may sell property of the estate either at public auction or private sale, with or without notice, for such price and upon such terms and conditions as the executor or administrator may determine. The requirements, applicable to court confirmation of sales of real property, including publication of notice of sale, court approval of broker's commissions and sale at not less than 90% of appraised value, do not apply to sales under independent administration. This subdivision applies to any sale made under authority of this article on or after January 1, 1985."

Since this section is intended to be a clarification of existing law, our Executive Committee wondered if it could be added to AB 97 which has an urgency clause attached to it. This section purports to apply to sales made after January 1, 1985, and hence would be retroactive. Normally AB 196 would not be effective until January 1, 1986. If this particular section could be added to AB 97, it would clarify the law at an earlier point in time. Perhaps, however, AB 97 has progressed to the point where such an amendment is no longer possible.

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With reference to 591.9(b), we question why this language is repeated in this subsection since it is also included in 591.4(a) (page 18, lines 4-6). It would not seem necessary to put it in both locations.

6. Section 16. We propose that Section 6147(b) (second paragraph at lines 27-33) of the April 8 version of AB 196 (and the identical provision in AB 97) be modified to read as follows:

"For the purposes of this subdivision, survival 'until a future time required by the will' does not include a requirement that the devisee survive until a future time that is related to the probate of the will or administration of the estate of the testator."

We also suggest that an additional sentence be added to subparagraph (c) at line 36 as follows:

"A requirement that the initial devisee survive the death of the testator or for a specified period of time after the death of the testator shall constitute a contrary intent."

We believe this language if added to paragraph (c) would cover the requirement that the devisee survive the testator, survive for 120 hours, survive for 30 days, etc. You will note it is limited to the initial devisee. It would therefore not affect the rights of a person who is a subsequent taker. We believe the language on page 24, line 20, which talks about surviving the testator until a future time required by the will, is broad enough to cover the situation where a person must survive a specified number of years after the death of the testator, such as where property is left to "A" for a period of ten years measured from the testator's death and at the end of ten years it then goes to "B", if then surviving, etc.

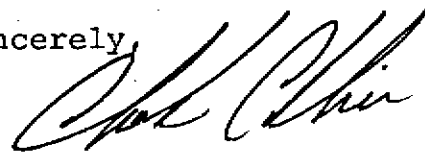
7. Section 17. As indicated in our letter of April 15, we oppose proposed subsection (c) relating to a rule of construction where a class designation is modified by the words "lawful" or "legal". We believe that has been deleted from the bill. As indicated in our prior correspondence, there are many wills in existence which attempt to limit the class by referring to a person's lawful or legal descendants or issue.

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We are sorry for the confusion which arose over this particular provision as we had expressed a contrary view in a letter some months ago. However, on further consideration, we feel that subsection (c) should be deleted from the statute.

We believe all other matters were covered by our letter of April 15. If the changes suggested hereinabove are acceptable to the Commission, the Section would find the bill satisfactory. However, we reserve the right to suggest technical corrections should they seem appropriate as the bill proceeds through the legislative process.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd
Enclosure

cc: Kenneth M. Klug, Esq.
James A. Willett, Esq.
Theodore J. Cranston, Esq.
James V. Quillinan, Esq.
Stanley W. Wieg, Esq.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

Estate of _____

No. _____

(deceased)

ADVICE OF PROPOSED ACTION

(Probate Code Sections 591.3, 591.4)

1. The executor or administrator of the estate of
the deceased is:

(Name) (s)

2. The executor or administrator has authority to administer the estate without court supervision under the Independent Administration of Estates Act (California Probate Code Sections 591-591.8).

3. On or about _____, 19__, the executor or administrator will take the following action:

[Describe proposed action in reasonably specific terms. If the proposed action involves a sale or exchange of real property or an option to purchase real property, include the material terms of the transaction, including any probate inventory valuation of the property on file with the court, any sale price and the amount of or method of calculating any compensation paid or to be paid in connection with the transaction.]

4. If you need more information, you may call:

(Name)

(Telephone number)

5. If you object to the proposed action, you may deliver or mail a written objection to any executor or administrator at the following address: _____

_____. Your objection can be simply stated.

All you need to do is state that you object to the proposed action (specifying the action you object to) and sign your name(s). Alternatively, you may apply to the court for an order preventing the executor or administrator from taking the proposed action without court supervision.

6. Your written objection or the court order must be received before the date specified above, or before the proposed action is taken, whichever is later. If you object, the executor or administrator may proceed with the proposed action under court supervision.

7. If you do not object in writing or obtain a court order preventing the proposed action, you will be treated as if you consented to the proposed action and you may not object after the proposed action is taken.