

Second Supplement to Memorandum 85-71

Subject: Study L-1028 - Estates and Trusts Code (Independent Administration)

Attached as Exhibit 1 is a report received from a four member team that reviewed the staff draft of the tentative recommendation relating to independent administration. The team will report to the Executive Committee of the Estate Planning, Trust & Probate Law Section which will then formulate its views. In the interest of time, the Commission's staff is sending you the report now, together with our comments on it.

Section 8353

The report urges that this section be revised to make clear that an applicant for special administration with powers of a general administrator can obtain independent administration authority only by petition with a noticed hearing.

Section 8353 is a limitation on the authority of a special administrator to obtain independent administration authority. If a special administrator desires to obtain independent administration authority, the special administrator must petition for independent administration authority under Sections 8360-8364. Section 8361 requires notice of hearing. Accordingly, there is no disagreement as to the policy; the intent of the draft was to require notice of hearing as provided in Section 8361.

We suggest that the following be added as a new paragraph at the end of the Comment to Section 8353:

An applicant for letters of special administration with powers of a general administrator can obtain independent administration authority only as provided in Sections 8360 to 8363, inclusive. The applicant must petition for the authority as provided in Section 8360; notice of the hearing must be given in compliance with the requirements of Section 8361; and the provisions of Sections 8362 and 8363 are applicable. If there is an urgent need for appointment of a special administrator, the petition for independent administration authority can be filed under Article 2 (commencing with Section 8360) after the special administrator has been appointed in order to avoid the delay that necessarily will result from the requirement that notice of hearing be given under Section 8361.

The staff also would add the following after the second sentence of the last paragraph of the Comment to Section 8360: "See also the discussion in the Comment to Section 8353."

Since we anticipate that the definition of "personal representative" will not include a special administrator, the staff also would revise Section 8351 of the staff draft to to add a new subdivision (b) so that the section would read:

8351. As used in this chapter:

(a) "Court supervision" includes judicial authorization, approval, confirmation, and instructions.

(b) "Personal representative" includes a special administrator appointed with the powers of a general administrator.

If it is believed necessary, the following could be added to the text of Section 8353:

A special administrator appointed with the powers of a general administrator may obtain authority to administer the estate under this chapter only as provided in Article 2 (commencing with Section 8360).

The staff believes that the additional language in the Comments and the new definition of "personal representative" is sufficient and does not recommend this addition to the text of the statute.

Section 8363

The team suggests that this section be compiled with the other sections dealing with the bond of the personal representative and would make a cross-reference to this section in the Comment to Section 8360.

The staff believes that this section is more appropriately compiled in the independent administration statute. The section applies only when independent administration authority is sought. Under existing law, the section is compiled in the independent administration statute. It would be easy for the lawyer or court to overlook the section if it were compiled apart from the independent administration statute. We will be sure that we include in the statute text in the general bond provisions a reference to this section if it is continued in the new code as a part of the independent administration statute.

Section 8365(c)

The team questions why subdivision (c) is included in the statute. The subdivision is not needed, but it is a continuation of an existing provision. The staff continued the provision because it does no harm and deals with a sensitive matter--newspaper publication--and we thought that it was easier to include the provision than it would be to explain to representatives of the newspapers that the provision is unnecessary.

Section 8371(c)

The team comments: "We suggest that an exception be made to the requirement of giving advice of proposed action, for selling or exchanging tangible personal property, where the property in question is of minimal value (perhaps \$2,000)." Should sale of an automobile be permitted without giving notice of the proposed action to the persons interested in the estate? Perhaps a particular item of tangible personal property may have minimal monetary value but great sentimental value to a person interested in the estate. On the other hand, the other instances where notice of proposed action is required under Section 8371 involve proposed actions that may have a substantial effect on persons interested in the estate.

Section 8376

The team comments: "We are not entirely happy with the 15-20 day notice periods for the advice of proposed action. If it is possible to institute probate proceedings on ten days' notice, and to notice hearings within the probate proceeding for only ten days, we wonder why it is necessary to give 15-20 days notice on an advice of proposed action." There is some merit to this comment. Formerly, it was necessary to obtain a restraining order to stop a proposed action. The law has been changed so that a proposed action can be effectively prevented by delivering or mailing a simple form for objecting to a proposed action (to be prepared by the Judicial Council and included with the advice of proposed action).

Section 8380(c)

The team comments: "All four participants in the conference call disapprove the limitation of the court's power of review on its own motion. We feel that the court should have power, on its own motion,

to review any action taken by the personal representative, regardless of whether there has been timely objection to the proposed action."

Section 8365 makes the authority to independently administer the estate subject to "the applicable fiduciary duties" of the personal representative. Accordingly, the Commission might wish to revise the first sentence of subdivision (c) of Section 8380 to read:

(c) Notwithstanding subdivision (b), the court may review the action of the person representative on its own motion where it appears that the personal representative has violated an applicable fiduciary duty or where necessary to protect the interests of creditors of the estate or the interests of a heir or devisee who, at the time the advice was given, lacked capacity to object to the proposed action or was a minor or was unborn.

The persons who suggested that that court review be limited to exclude review on the petition of a competent person who actually received the advice of proposed action believe that otherwise the personal representative runs a serious risk of being surcharged when someone later objects to an action taken that appeared to be appropriate at the time the action was taken without objection but is questionable at the time the court reviews the action. E.g., stock is sold which later substantially increases in value.

Section 8391

The team suggests that the form for objecting to advice of proposed action be included with the advice of proposed action. This is required by Section 8376(d). Like Mr. Collier, the team notes that the form prescribed for advice of proposed action under Section 8391 does not refer to the form for objecting to advice of proposed action which is to accompany the advice of proposed action. This is a good point; the staff has proposed a revision of the form in Section 8391 in recognition of the merit of this point. See the First Supplement to Memorandum 85-71.

Respectfully submitted,

John H. DeMouly
Executive Secretary

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September 5, 1985

Mr. John H. De Mouilly
California Law Revision Commission
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Re: Memorandum 85-71, Independent Administration.

Dear John:

Please find enclosed a copy of our Team B's report on Memo 85-71.

The Section's Executive Committee has not had an opportunity to review the report. At the September LRC meeting we will have final comments if they differ from or add to the enclosed report.

Look forward to seeing you in Sacramento. I will not be able to attend September 12. Ted Cranston will cover that day. I will be there on Friday, the Thirteenth.

Very truly yours,

James V. Quillinan
Attorney at Law

JVQ/h1
Encl.

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August 30, 1985

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Re: LRC Memo 85-71, Independent Administration

Dear Jim:

Team B has reviewed LRC Memo 85-71, and Messrs. Goodwin, Homer, Rogers and I discussed the same yesterday in a lengthy conference call. Our consensus is that the proposed new provisions in general represent an improvement and that they do not do great violence to the concerns expressed by Chuck Collier in his letters to John De Moully of March 11 and August 13.

We do have a few concerns and suggestions with respect to the new Sections, as follows:

1. Section 8353

We do not think that independent administration should be conferred on the basis of an ex parte application. The Section should be clarified, to require that the applicant for letters of special administration with powers of a general administrator can obtain independent administration authority only by petition with a noticed hearing.

2. Section 8363

We think that this Section should be placed with other sections dealing with bond of the personal representative, and that the Section should not be buried in the independent administration sections. We recognize that this particular Section bears upon the question of whether the independent administration authority should include the power to sell real property, and accordingly, it would be appropriate to cross-reference this Section in the Comments to Section 8360.

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SEP 3 - 1985

Diemer, Schaefer, Jeffers,
Law Firm

3. Section 8365(c)

We wonder why this subsection is needed. It seems obvious that if the personal representative does not take advantage of independent administration, he is back to the normal procedure. If this subsection is to remain, the Comment should explain why it is there.

4. Section 8371(c)

We suggest that an exception be made to the requirement of giving advice of proposed action, for selling or exchanging tangible personal property, where the property in question is of minimal value (perhaps \$2,000).

5. Section 8376

We are not entirely happy with the 15-20 day notice periods for the advice of proposed action. If it is possible to institute probate proceedings on ten days' notice, and to notice hearings within the probate proceeding for only ten days, we wonder why it is necessary to give 15-20 days' notice on an advice of proposed action.

6. Section 8380(c)

All four participants in the conference call disapprove of the limitation of the court's power of review on its own motion. We feel that the court should have power, on its own motion, to review any action taken by the personal representative, regardless of whether there has been timely objection to the proposed action.

7. Section 8391

We suggest that the form for objecting to the proposed action (to be prepared pursuant to Section 8392), when promulgated, should be enclosed with the form of advice of proposed action. At such time as the Section 8392 form of objection exists, the Section 8391 form should refer to it and include it as an attachment.

James V. Quillinan, Esq.
August 30, 1985
Page 3.

Except as qualified by the above comments, we like the new Independent Administration provisions. We do feel strongly about our points No. 1 and No. 6, and we urge that they be given careful attention.

Sincerely yours,



K. Bruce Friedman

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