

Fifth Supplement to Memorandum 85-71

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

The Commission has received comments on the staff draft of the independent administration provisions from the following:

--The Probate and Estate Planning Subcommittee for Legislation of the San Diego County Bar Association (referred to hereinafter as "San Diego Subcommittee" (Exhibit 1).

--The California Newspaper Service Bureau, Inc (Exhibit 2).

The general conclusion of the San Diego Subcommittee is that the proposed new provisions of the staff draft should be supported by the San Diego Bar Association. However, the Subcommittee makes some particular observations concerning the proposed staff draft. These observations are discussed below.

The California Newspaper Service Bureau does not object to the proposed draft but makes a comment in support of a provision of the staff draft that would add additional language to an existing published notice. This comment is discussed below.

Section 8353. Special administrator

The San Diego Subcommittee wants 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. This is the procedure provided in the existing draft. This matter is discussed in some detail in the Second Supplement to Memorandum 85-71. The staff suggests that we add a new paragraph at the end of the Comment to Section 8353 to make this clear (see Second Supplement). Also a reference to this new paragraph should be made in the Comment to Section 8360.

Section 8361. Notice of hearing

The staff proposes in subdivision (c) of this section to add additional language to the published notice of hearing so that the

published notice of hearing will include the substance of the following statement (revisions suggested by Mr. Collifer included):

The petition requests authority to administer the estate under the Independent Administration of Estates Act. This authority would permit estate transactions without the judicial supervision that would otherwise be required. The petition will be granted unless good cause is shown why it should not be.

As the letter from the California Newspaper Service Bureau, Inc. (Exhibit 2) points out, the increased cost of publication of this additional material should not be a significant consideration in determining whether to require the publication of the additional material. The determination should be made on the basis whether the additional material is needed and will be useful to the person receiving the notice. We mentioned the possible increase in the cost of publication in the Draftsman's Note to Section 8361 because, as you know, the cost of publication is a sensitive issue and has been a matter of concern to the State Bar, the American Association of Retired Persons, and others. Does the Commission believe that there is a need for the additional language in the published notice of hearing?

Section 8363. Increase in amount of bond

The San Diego Subcommittee "tended to agree" with the staff position that the bond provisions proposed for Section 8363 should be compiled with the independent administration provisions of the new code with a textual cross-reference from the general bond provisions to this specific bond provision. The four member team of the State Bar Section (Second Supplement to Memorandum 85-71) questioned whether this provision should be included in Section 8363 or should be compiled in the general bond provisions. See the Second Supplement to Memorandum 85-71 for additional discussion.

Section 8371(c). Sale or exchange of tangible personal property of minimal value without giving advice of proposed action

Despite spirited discussion, the San Diego Subcommittee was unable to arrive at a concensus with respect to the question of whether an exception should be made to the requirement of giving notice of proposed action for selling tangible personal property where

the property in question is of minimal value. The four member team of the State Bar Section (Second Supplement to Memorandum 85-71) made a suggestion that such an exception should be made.

There is precedent for providing an exception for sales of personal property of minimal value. Probate Code Section 2545 (text set out in Exhibit 3 attached) permits sale or exchange of tangible personal property of a guardianship or conservatorship estate without authorization, confirmation, or direction of the court if the aggregate of the sales or exchanges made during any calendar year under this authority does not exceed \$5,000.

Subdivision (c) of Section 2545 limits the use of the section where the property to be sold or exchanged consists of personal effects or furnishings used for personal, family, or household purposes. In case of conservatorship, the conservatee must either consent in such case or lack of the legal capacity to give such consent. In case of guardianship, ward must consent if 14 years of age or over.

If independent administration authority like that proposed by the four member team is to be adopted, the Commission might adopt the \$5,000 limit provided in the guardianship-conservatorship law (instead of the \$2,000 limit mentioned by the four member team) but apply that limit for the entire period of administration (rather than one year) and use the value as determined by the probate referee's appraisal in applying the provision (rather than the value the items bring on sale or exchange).

Section 8376. Delivery or mailing of advice of proposed action and copy of form for objecting to proposed action

Although the San Diego Subcommittee believes that the notice period should be standardized to the extent consistent with giving adequate notice, the subcommittee objects to shortening the notice period under Section 8376 to 10 days as suggested by the State Bar four member team.

Section 8380. Effect of failure to object to proposed action

The San Diego Subcommittee appears to support the staff proposal to revise subdivision (b) of Section 8380 to read in substance:

(b) The failure to object is a waiver of any right to have the court later review the action taken unless the person who fails to object (1) establishes that he or she did not actually receive the advice of proposed action before the time to object expired or (2) establishes by clear and convincing evidence that the personal representative violated an applicable fiduciary duty in taking the proposed action.

Section 8391. Form for advice of proposed action

The San Diego Subcommittee strongly believes

--that the form for objecting to advice of proposed action should accompany the advice of proposed action.

--that the form for objection should be referred to in the text of the advice of proposed action.

The Judicial Council form will combine on one sheet (on the face and reverse side of the sheet) the "Advice of Proposed Action" and the "Objection to Proposed Action" and the "Consent to Proposed Action." This not only satisfies the suggestion of the Subcommittee but also permits an advice of proposed action to be drafted and a consent to the proposed action to be executed at the same time so that the proposed action need not be delayed until the time to object has expired. For the Judicial Council form, see the last form attached to the Fourth Supplement to Memorandum 85-71.

Respectively submitted,

John H. DeMouilly
Executive Secretary

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IN REPLY REFER TO:

November 7, 1985

Mr. John H. De Moully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto CA 94303

Re Memorandum 85-71, Independent Administration

Dear Mr. De Moully,

At its meeting of November 4, 1985, the Probate and Estate Planning Subcommittee for Legislation of the San Diego County Bar Association reviewed the subject memorandum and the first through third supplements thereto.

Our general conclusion is that the proposed new provisions should be supported by our association. The following are some particular observations of the subcommittee:

With respect to proposed section 8353, we agree with the observation of the State Bar Section that an applicant for special administration with powers of a general administrator should be able to obtain independent administration authority only a petition with a noticed hearing. We believe that the language of the statute should be amended as necessary to make that rule clear.

The committee tended to agree with the staff position that the bond provisions proposed for Section 8363 should be compiled with the independent administration provisions of the new code. We believe that there should be a textual cross-reference from the general bond provisions to this specific bond provision.

Despite spirited discussion, the committee was unable to arrive at a concensus with respect to the question of whether an exception should be made to the requirement of

giving advice of proposed action for selling tangible personal property where the property in question is of minimal value.

The subcommittee feels that a ten day notice period for an advice of proposed action is too short. A longer period of notice to the advisee seems to be more appropriate, especially considering the fact section 8377 does not merely require that the objection be mailed before the notice period expires, but requires that the objection must be received by the personal representative within the notice period. The subcommittee does feel, however, that notice periods should be standardized to the extent consistent with giving adequate notice.

The issue of the power of the court, on its own motion, to review action taken pursuant to an advice of proposed action is a difficult one, since the desirable goal of giving the court maximum power to achieve justice is in conflict with the desirable goal of achieving finality for the personal representative who has acted in good faith pursuant to an advice of proposed action. The subcommittee supports the staff proposal to amend section 8365 to broaden the power of the court to review the action of the personal representative on its own motion on the additional ground that it appears that the personal representative has violated an applicable fiduciary duty.

The subcommittee strongly believes that the form for objecting to advice of proposed action should accompany the advice of proposed action and that the form for objection should be referred to in the text of the advice of proposed action.

Yours sincerely,



John McEvoy
For the Subcommittee

California Newspaper Service Bureau, Inc.

Established 1934

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PUBLIC NOTICE ADVERTISING

LOS ANGELES—SACRAMENTO
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November 8, 1985

California Law Revision Commission
4000 Middlefield Road
Palo Alto, California 94303-4739

RE: Study L-1028, Aug. 14, 1985, Staff Draft-Independent
Administration of Estates. Memorandum 85-71

Members of the Commission:

We are fascinated with your staff's continuing fascination with the cost of notifying the public via newspaper publication. Their fascination accords an importance to "cost" that ignores the importance of an informed public.

The most recent version of your proposed Estates and Trusts Code (Memorandum 85-71) revises section 8361 to add the statement reproduced below to the published Notice of Hearing (Section 7230) whenever the petition for appointment of personal representative contains a request to administer an estate under the Independent Administration of Estates Law.

The new language reads:

"The petition requests authority to administer under the Independent Administration of Estates Law. This authority would permit estate transactions without the judicial authorization, approval, confirmation, or instructions that would otherwise be required. The petition will be granted unless good cause is shown why it should not be."

The following comment appears in the "DRAFTSMAN'S NOTE" to Section 8361:

"...This statement gives the person receiving the notice more information concerning the nature of the petition, but it may increase the cost of publication because it adds four or five lines to the material that must be published."

Your draftsman's preoccupation with cost seems misplaced given the trivial increment in publication expense represented by the

few extra lines added to the notice by the new statement. If your draftsman considered the information conveyed by the statement to be of trivial importance, it would have been more to the point to have made that observation.

We believe your commission is properly concerned that all interested parties be advised that IAEA trades off the protection provided by court supervision in favor of expediting the probate process.

Newspaper publication is the most effective method of alerting a community at critical junctures to actions which will have long term significance. Newspaper publication is not a substitute for personal service when notice should be given to a known individual, but newspaper notice has no equal in alerting a community to events which will impact the lives of its members--few or many. And, once alerted, the community is a dynamic and powerful force for educating, protecting, and communicating with its individual members.

California newspapers are their communities' communications systems. Newspapers should be looked upon as an available, useful, and economical method of communicating with the public.

A public notice published in a community newspaper creates a public record available to all. It is invaluable in preserving the credibility of our legal system by eliminating the feeling of alienation which results when the system is perceived as being closed and inaccessible to the public.

Equally important, an informed public can serve to frustrate the efforts of those unscrupulous individuals who would seize an opportunity to unjustly enrich themselves at the expense of the unsophisticated and to the embarrassment and liability of those professionals whose services are of the highest ethical standards.

To focus on "cost" alone--whether trivial or substantial--abstracted from these other considerations, overlooks the importance of the probate process to each member of society and ignores the role which the public can play in preserving the integrity of probate proceedings.

Sincerely,



Michael D. Smith
General Manager

Probate Code Section 2545

§ 2545. Sale or other disposition of tangible personal property

(a) Subject to subdivisions (b) and (c) and to Section 2541, the guardian or conservator may sell or exchange tangible personal property of the estate without authorization, confirmation, or direction of the court.

(b) The aggregate of the sales or exchanges made during any calendar year under this section may not exceed five thousand dollars (\$5,000).

(c) A sale or exchange of personal effects or of furniture or furnishings used for personal, family, or household purposes may be made under this section only if:

(1) In the case of a guardianship, the ward is under the age of 14 or, if 14 years of age or over, consents to the sale or exchange.

(2) In the case of a conservatorship, the conservatee either (i) consents to the sale or exchange or (ii) the conservatee does not have legal capacity to give such consent.

(d) Failure of the guardian or conservator to observe the limitations of subdivision (b) or (c) does not invalidate the title of, or impose any liability upon, a third person who acts in good faith and without actual notice of the lack of authority of the guardian or conservator.

(e) Subdivision (b) of Section 2543 does not apply to sales under this section.

(Added by Stats.1979, c. 726, § 3.)