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5/5/86

First Supplement to Memorandum 86-38

Subject: Study L-1037 - Estate and Trust Code (State Bar Comments on Estate Management)

The following exhibits to this Supplement contain comments from the State Bar on the estate management provisions in the basic Memo:

(1) Report of Study Team #1 of 4/3/86 (Exhibit 1).

(2) Kenneth Klug letter of 4/8/86 (Exhibit 2).

(3) Memo of the Wells/Brown/Klug team of 4/8/86 (Exhibit 3).

Also attached to this Supplement as Exhibit 4 are redrafted Sections 9980-9983, which have been conformed to the revisions made by our current probate bill (AB 2625). These redrafted sections supersede Sections 9980-9983 in the basic Memo.

This Supplement discusses the comments under the draft sections to which they pertain. For the text of the sections, please refer to the basic Memo.

§ 7203. Verification required

Section 7203 is a general provision, to apply to all of the new Division 7 (administration of estates of decedents). The section requires all petitions, reports, and accounts to be verified, as well as an objection or response to a petition, report, or account. The section is the same as Section 1450 in the guardianship-conservatorship statute. Kenneth Klug comments:

> I see no reason why an objection should be verified. Typically, the objecting party has no facts on which to base the objection, but is raising the objection based on an allegation contained in the petition or accounting. Furthermore, I understand that the reason for requiring a verification of petition is that if there are no objections, the verified petition can be received in evidence and an order can be based thereon. If an objection is filed, a hearing will be held so there should be no reason to require verifications.

The proposed requirement that an objection or response be verified is new as to decedent's estates. The staff is not aware that the comparable requirement applicable to guardianship and conservatorship estates has created any problems. The purpose of the

requirement that the objection or response be verified is, of course, to discourage frivolous or unfounded objections or denials.

If the requirement that an objection or response be verified is changed or modified in Section 7203, a comparable revision should be made in Section 1450 (guardianship-conservatorship law).

Team #1 makes the following comment on Section 7203:

> The section is satisfactory. However, it raises the broader question of who should sign petitions, reports, accounts, objections and responses: whether they should be signed by the attorney and verified by the client in a manner similar to civil pleadings, or whether they should be both signed and verified by the client, or whether they need to be signed by anyone in addition to being verified by the client.

The staff thinks the analogy to civil pleading is the most appropriate, but we are not sure this should be addressed in the statute.

§ 7308. Proof of giving of notice

Section 7308 is another general provision, and authorizes proof of publication to be made by affidavit of the publisher or printer or of the "foreman or principal clerk" of the publisher or printer. Mr. Klug would substitute "any authorized employee" for this language. The staff recommends retaining the language now in the draft. This language is taken from Section 417.10 of the Code of Civil Procedure, applicable to publication of summons. The policy appears to be that only the foreman or principal clerk should be authorized to make an affidavit, and not lower-ranked employees, because of the need for accuracy and veracity in affidavits of publication. The same policy should apply in estate proceedings.

Study team #1 finds Section 7308 generally satisfactory, but would substitute a statutory reference to a "declaration under penalty of perjury" in place of the reference to an "affidavit." However, the accepted code usage is "affidavit." See, e.g., Code Civ. Proc. § 417.10 (proof of service of summons); Prob. Code § 1468 (proof of notice in guardianship-conservatorship proceeding). For this reason, the staff recommends keeping "affidavit," and noting in the Comment that a declaration under penalty of perjury may be used in lieu of an affidavit.

Study team #1 is concerned about the statement in the Comment that "[i]f notice is jurisdictional, it may not be waived." Should this statement be deleted?

§ 7411. Transfer or conveyance of property pursuant to court order

Section 7411 continues provisions in existing Probate Code Sections 841 and 843 by requiring a lease of real property of the estate to recite that it is made pursuant to an order of the probate court authorizing the transaction, and requiring a copy of the court's order to be recorded. Mr. Klug objects to the continuation of these provisions of existing law:

> I see no reason why a lease should be required to contain a provision setting forth that it is made by authority of the court order giving the date of the order. Typically, a personal representative does not want to go to the expense of petitioning the court until the lease is signed. A lease signed before obtaining the court order will contain a provision that it is subject to approval by the court. If the court does not approve the lease, the condition fails, and the lease is ineffective. If the court does approve the lease, the lease is then effective. There should be no need to then revise the lease to state the date of the court order.
>
> Furthermore, recording of the lease is a protection to the tenant, but creates problems for the estate. A recorded lease is a cloud on title which must be cleared up by a quitclaim deed from the tenant . Whenever I represent landlords, I recommend to my clients that the leases not be recorded. The recording requirement should be deleted from the statute, and be subject to the private negotiation between landlord and tenant.

Does the Commission wish to delete the requirements of existing law?

Study team #1 thinks the definition of "transaction" in subdivision (a)(2) of Section 7411 which includes the "creation of a mortgage or deed of trust on real property of the estate" is not broad enough, and suggests adding the words "or other encumbrance" to the definition. Subdivision (a) of Section 7411 is the same as the comparable provision of the guardianship-conservatorship law. If a change is made in Section 7411, the same change should be made in the provision of the guardianship-conservatorship law (Section 2111).

Study team #1 is concerned that subdivision (d) may be too broad. Subdivision (d) gives a transaction carried out by the personal representative pursuant to court order "the same effect as if the decedent were living at the time of the transaction and had carried it out himself or herself while having legal capacity to do so." Subdivision (d) consolidates provisions now scattered throughout the Probate Code, and uses language taken from Section 853. The main issue is whether a conveyance by the personal representative passes after-acquired title, and this depends on the terms of the conveyance, as the Comment to Section 7411 notes.

The present provisions which subdivision (d) replaces are the following:

> Section 786: "Conveyances so made convey all the right, title, interest and estate of the decedent in the premises at the time of his death; and, if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances."
>
> Section 834: "Every mortgage, pledge or deed of trust so made shall be effectual to mortgage, pledge or subject to the deed of trust all right, title, interest and estate which the decedent had in the property described therein at the time of his death or prior thereto, and any right, title or interest in said property acquired by the estate of such decedent by operation of law or otherwise, since the time of his death."
>
> Section 843: "Every lease so made shall be effectual to demise and let the premises described, at the rent, for the term and upon the conditions therein prescribed."
>
> Section 853: "The conveyance or transfer of the executor or administrator shall pass title to the property as fully as if the decedent had executed it while living."

Since the terms of the instrument determine whether after-acquired title passes, the best language appears to be that used in Section 853 and continued in subdivision (d) of Section 7411. The staff would therefore keep the language used in subdivision (d).

§ 9600. Duty to manage estate using ordinary care and diligence

The Comment to Section 9600 notes that "a professional personal representative is held to a higher standard of care based upon its presumed expertise than is a lay personal representative." Study team

#1 asks whether this language should be put in the statute. We have struggled with this issue in the trust context. The present version of our trust bill (AB 2652) reads as follows:

> 16014. (a) The trustee has a duty to apply the full extent of the trustee's skills.
>
> (b) If the settlor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented.
>
> 16040. (a) The trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.
>
> (b) . . . .

Section 16040 is drafted to reflect that trusts are to be administered to accomplish the purpose of the trust as determined from the trust instrument. This is the reason the provision is not appropriate to apply to the administration of a decedent's estate. Section 9600 is drawn from the provision governing administration of a guardianship or conservatorship estate (Section 2401), a provision that is more comparable to administration of a decedent's estate. However, the provisions of Section 16014 (trusts) could be made applicable to administration of a decedent's estate by adding the following new subdivision to Section 9600:

> (b) In determining what constitutes ordinary care and diligence in managing and controlling the estate:
>
> (1) The personal representaive has a duty to apply the full extent of the personal representative's skills.
>
> (2) If the testator, in selecting the personal representative, has relied on the personal representative's representation of having special skills, the personal representative is held to the standard of the skills represented.

If this addition is made to Section 9600, a comparable addition should be made to Section 2401 (guardianship-conservatorship law). On balance, the staff would retain existing Section 9600 and the Comment thereto without change.

§ 9601. Measure of liability for breach of fiduciary duty

The measure of liability of a personal representative under Section 9601 is virtually identical to the measure of liability of a

trustee under Section 16440 (AB 2652). Study team #1 comments as follows:

> It is not clear to us whether the three measures of damage set forth in (a)(1), (2) and (3) are mutually exclusive or whether recovery can be had under more than one of them. Once that question is answered, the first sentence of (a) should be modified to clarify the intention.

The court in determining the measure of liability of the personal representative can select from the measures of liability under paragraphs (1), (2), and (3) of Section 9601 the measure of liability that is appropriate under the circumstances of the particular case. We think that this is clear from the language of the statute. The provision uses the same language as is used in the trust bill and any change made in the language should also be made in the trust bill. The staff proposes to add a new section--drawn from Section 16442 of the trust bill--to make clear that Section 9601 does not prevent resort to any other remedy available against the personal representative under the statutory or common law.

Study team #1 asks whether the reference in (a)(2) to any "profit made by the personal representative" refers to personal profit rather than profit to the estate. It does refer to personal profit. Does the paragraph need revision to make this clearer?

§ 9602. Measure of liability for interest

Study team #1 approves Section 9602.

§ 9603. Liability for exemplary damages

Section 9603 permits the court to impose exemplary damages, not exceeding three times the amount of liability determined under Section 9601, for the personal representative's willful misconduct, fraud, or gross negligence. Study team #1 is concerned about the word "fraud" because Civil Code Section 2234 defines "fraud" very broadly. This problem is resolved by Section 16400 in the trust bill (AB 2652) which replaces Section 2234 and talks in terms of a "breach of trust" rather than a "fraud against the beneficiary."

A more serious problem with Section 9603 is that we have had to delete similar language from Section 16442 in the trust bill because of opposition by the California Trial Lawyers Association. The CTLA was opposed to the three-times-damages cap on exemplary damages.

Study team #1 likes the cap, but this provision would be politically unacceptable, and including it in the new code would jeopardize enactment of the code. The staff recommends that Section 9603 be deleted.

The language deleted from the trust bill was replaced by the following: "The provisions in this article for liability of a trustee for breach of trust do not prevent resort to any other remedy under the statutory or common law." If we delete Section 9603, the staff suggests that we replace it with language similar to the new language of the trust bill:

> 9603. The provisions of Sections 9601 and 9602 for liability of a personal representative for breach of a fiduciary duty do not prevent resort to any other remedy available against the personal representative under the statutory or common law.

§ 9604. Enforceability of promise of personal representative personally to answer in damages or to pay debts of decedent

Study team #1 approves Section 9604.

§ 9610. Extent of court supervision

Section 9610 is a new section which makes clear that a personal representative may act without court authorization unless another provision expressly requires court authorization. This is like Section 2450 in the guardianship-conservatorship law.

Study team #1 would add language to Section 9610 to provide that, in acting without court authorization, the personal representative must act "in accordance with the fiduciary duties" of the personal representative. The staff is willing to put this language in the Comment to Section 9610, citing Section 9600 (duty to use ordinary care and diligence). The staff would not put the suggested language in Section 9610, however, because the section is already subject to Section 9600. If the suggested language is added to Section 9610 but not to other sections, there may be an erroneous implication that the other sections are not subject to the fiduciary duty stated in Section 9600.

§ 9611. Instructions from or confirmation by the court

Under existing law, only the personal representative may petition for instructions. Prob. Code § 588. Section 9611 broadens this authority by permitting a creditor, heir, devisee, or interested

person to petition for instructions, in addition to the personal representative. The Commission has also asked the staff to consider whether there should be a general provision authorizing beneficiaries of the estate to compel a personal representative to file a petition or take other action when the personal representative declines to do so. So long as an interested person has authority to petition for instructions, it seems unnecessary to have any other procedure for compelling a personal representative to act.

Section 9611 is ambiguous in one important respect. The section keeps the provision of existing law that a petition for instructions may be brought only if "no other or no different procedure is provided by statute." This raises the question whether an interested person may seek instructions when there is another procedure provided by statute, but only the personal representative may file a petition under that other procedure. This is not clear under Section 9611, and should be clarified. We think the policy should be that if an interested person is not authorized to file a petition under the statutory proceudre for the particular matter, the interested person should not be permitted to accomplish that indirectly by filing a petition for instructions. We would make this clear by adding the following to the Comment to Section 9611:

> If some other or different procedure is provided by statute and the persons who may petition under that other procedure are limited, as, for example, where only the personal representative may petition, the persons not authorized to petition under that other procedure may not seek instructions under Section 9611.

Study team #1 would relocate Section 9611 at or near the end of Part 5 (estate management). The staff thinks the section is now properly located with other general provisions, since its application is general in nature.

§ 9612. Effect of court authorization or approval

Subdivision (a) of Section 9612 provides that "[u]nless reversed on appeal, a judgment, order, or decree made pursuant to this division is final and releases the personal representative and the sureties from all claims . . . ." Study team #1 notes that a judgment is not necessarily final merely because it has not been reversed on appeal, and thinks the language should perhaps be revised to read: "When a

judgment, order, or decree made pursuant to this division becomes final, it releases the personal representative and the sureties from all claims . . . ." The staff thinks the suggested language is an improvement. However, if the change is made, Section 2103 (guardianship-conservatorship law) should be revised to conform.

Subdivision (b) of Section 9612 provides:

> (b) This section does not apply where the judgment, order, or decree is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment, order, or decree as to any material fact. For the purposes of this subdivision, misrepresentation includes but is not limited to, the omission of a material fact.

The Comment to Section 9612 notes that "[u]nder subdivision (b), the personal representative is not released from liability for transactions which are not fully disclosed to the court."

Study team #1 comments as follows concerning subdivision (b):

> We are very concerned about subparagraph (b) and particularly the last sentence of subparagraph (b). We feel that its inclusion invites trouble. We are also uncertain of the definition of a "material fact." It is our belief that in most complicated accountings and orders of distribution, it is relatively easy to find one omission of what some people may feel is a "material fact." Under this proposed section the order would apparently not become final and be subject to attack for the "omission of a material fact." We feel this is too broadly worded. If subparagraph (b) is to be retained, we recommend that the judgment, order or decree remain final as to all aspects except that aspect pertaining to the "material fact" that was omitted.

The staff recommends that we keep subdivision (b) in its present form, because it merely codifies existing law. See Estate of Anderson, 149 Cal. App.3d 336, 196 Cal. Rptr. 782 (1983); 8 B. Witkin, California Procedure Attack on Judgment in Trial Court §§ 204-07, at 602-07 (3d ed. 1985). In the Anderson case, the court held that extrinsic fraud had been committed by the bank-executor in deliberately misstating or omitting numerous material facts. The court noted that:

> [T]he settlement of an account is not conclusive except as to such items as are included in it and are actually passed upon by the probate court. . . . [149 Cal. App.3d at 347.]

> In this state equitable relief has been granted from final judgments settling the accounts of guardians, administrators, or executors who withheld information that would have enabled the beneficiaries to attack the accounts . . . . The same principle applies to decrees distributing the estate of a decedent adversely to the rights of beneficiaries who have been precluded from pursuing their rights by concealment of facts by the fiduciary . . . and to other probate decrees obtained under similar circumstances. . . . [Id. at 348.]
>
> The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained . . . . [Id. at 349.]

Subdivision (b) of Section 9612 is the same as subdivision (b) of Section 2103 (guardianship-conservatorship) which was reviewed by practicing probate lawyers when it was drafted. The staff is not aware of any problems caused by this provision in guardianship or conservatorship proceedings.

§ 9620. Submission of dispute to commissioner, judge pro tempore, or probate judge

Existing Section 718 permits the personal representative and a creditor to agree to refer a disputed claim to a commissioner, referee, or judge pro tempore. Proposed Section 9620 continues this provision, but expands it to apply to any dispute, not just creditors' claims. Study team #1 is uncertain whether Section 9620 should be so expanded.

By permitting the voluntary submission of disputes in probate to a commissioner, referee, or judge pro tempore, probate procedure will be made consistent with general civil procedure. In civil cases generally, the parties may agree to a voluntary reference (Code Civ. Proc. § 638) or to submission to a temporary judge (Cal. Const. Art. VI, § 21). See also Code Civ. Proc. § 640 (reference to court commissioner). For this reason, the staff favors the broader scope of Section 9620. The reference in Section 9620 to a "judge pro tempore" should probably be revised to read "temporary judge," since that is the new terminology used in the California Constitution.

Study team #1 questions the use of the term "referee" in Section 9620, thinking it may be inappropriate in the probate context. Section 9620 refers to a "referee who is regularly attached to the

court." The staff thinks this must mean a probate referee, who has "[a]ll the powers of a referee of the superior court." Prob. Code § 1301.

§ 9621. Submission of dispute to arbitration

Study team #1 approves Section 9621.

§ 9630. Authority of joint personal representatives to act

Under existing law, if two or more personal representatives have been appointed and one or more are absent from the state or are legally disqualified from serving, the act of the others is effectual for all purposes. Prob. Code § 570. This provision is revised in Section 9630 so that, in such a case, the court may authorize the others to act. The Comment explains that absence from the state does not suspend the power of the absent personal representative to act, so, without a court order, the same number of joint personal representatives must concur in the action as before the departure of the absent one.

Study team #1 is concerned that the new section requires a court order where existing law does not. In fact, the new section requires a court order only if the absent personal representative is to be excluded from decision-making during the absence. The desirability of the new rule is illustrated by the question asked by study team #1 as to what happens when one personal representative lives outside California. A personal representative need not be a California resident. See Prob. Code §§ 401, 420; DeMeo, Petition for Letters and Qualification, in 1 California Decedent Estate Administration § 7.22, at 241 (Cal. Cont. Ed. Bar 1971). It would be absurd to say that a nonresident may serve as personal representative, but has no power to act when not in California. Therefore, a court order should be required if the power to participate in decision-making is to be taken away from the absent representative.

§ 9631. Liability of joint personal representative for breach of duty by another personal representative

Study team #1 tentatively approves Section 9631, subject to Executive Committee review.

§ 9650. Possession and management of decedent's estate

Under Section 9650, the personal representative may leave an estate asset with the person presumptively entitled to it. Study team

#1 asks whether the personal representative is required to account for such property. Under a preliminary draft of the accounting provisions, the personal representative would not have a duty to account for such property. The staff will flag this for further consideration.

Study team #1 asks whether the personal representative has a duty to preserve and maintain an asset left with a third person. A personal representative may be liable for failing to take possession of estate property if the property is thereby lost to those entitled to it. Estate of Boggs, 33 Cal. App.2d 30, 33, 90 P.2d 814 (1939). However, under Section 9650, the property will be in possession of the person who will ultimately receive it. It would appear that the personal representative would have no liability to the person having the property if it is not properly cared for by that person.

§ 9651. Profit or loss to the estate

Two members of study team #1 approve Section 9651. The third member would split the section into two sentences. In its present form, Section 9651 retains the language of the existing statute.

§ 9652. Duty to keep cash invested

Study team #1 approves Section 9652.

§ 9653. Duty to recover property transferred in fraud of creditors

Under existing law, a creditor of the estate may compel the personal representative to recover property transferred by the decedent in fraud of creditors. Prob. Code § 579. The creditor "must pay such part of the cost and expenses of the suit, or give an undertaking" as the court requires. Prob. Code § 580. The draft statute (Section 9653) adds attorney's fees to the costs which may be imposed on the creditor. This addition was made by the Commission at the May 1985 meeting. Mr. Klug thinks this may be unfair to the creditor:

> The creditor has no control over the conduct of the case or the economic settlement. If the creditor seeking to restore assets to the estate is going to pay the costs and expenses of attorney's fees, the creditor should be subrogated to the right of the personal representative to pursue the property directly.

The staff would keep the attorneys' fee provision. The creditor is protected because the court has discretion whether to impose attorneys' fees. The staff thinks it would be inappropriate to permit

the creditor to pursue the property directly. The property should be apportioned among all creditors as are other estate assets.

Section 9653 also precribes the manner in which proceeds from sale of any property thus recovered shall be applied. Mr. Klug comments:

> The sale proceeds should first be applied to the administration expenses (i.e. attorneys' fees and litigation costs) related to recovering the property.

The staff thinks this is a good suggestion, and would revise subdivision (d) of Section 9653 as follows:

> (d) If the property is sold, the proceeds shall be applied first to the portion of the costs and expenses of suit, including attorney's fees, that is to be borne by the estate, and then to payment of the debts of the decedent in the same manner as other property in possession of the personal representative. The remainder of the proceeds, after all the debts of the decedent have been paid, shall be paid to the person from whom the property was recovered.

Study team #1 thinks subdivision (a) of Section 9653 is probably satisfactory, although the team had some concern about permitting the personal representative to recover a gift of property made in view of death.

Study team #1 would delete from subdivision (b) the bracketed words "or a judge thereof." The staff will flag this for review after the provisions concerning the powers of a probate judge acting at chambers have been completed.

Subdivision (c) permits the property recovered to be sold for the payment of debts, or assigned to the creditor. Study team #1 would revise the subdivision to make clear that this may be done with a portion of the property recovered. The staff thinks this is a good suggestion, and would revise subdivision (c) as follows:

> (c) The property recovered under this section shall (1) be sold for the payment of debts in the same manner as if the decedent had died seised or possessed of the property or (2) if the court so directs, be assigned to the creditor and credited against the debt in an amount equal to the value of the property as determined by the court. The property may be sold or assigned in its entirety, or in such portion as necessary to pay the debts.

§ 9654. Action by heirs or devisees for possession or to quiet title to real property

§ 9655. Voting rights with respect to corporate shares or memberships or property

§ 9656. Abandonment of valueless property

Study team #1 approves Sections 9654, 9655, and 9656.

§ 9657. Insuring estate assets or personal representative

Study team #1 would make clear in Section 9657 that, if the personal representative purchases insurance as allowed in the section, that is an allowable expense of administration. The staff is willing to include a statement to that effect in the Comment. The staff would prefer not to put it in the statute: If we put the provision in Section 9657 and do not include a similar provision in other powers and duties sections, an implication may be created that those other expenses may not be allowable. Perhaps we need a general provision to the effect that allowable expenses of administration include expenses reasonably incurred by the personal representative in exercising the powers and performing the duties of a personal representative. The staff will flag this for further consideration.

§§ 9700-9703. Deposit of money and personal property with financial institutions

Sections 9700-9703 provide authority for the personal representative to deposit money, securities, and other personal property with various financial institutions. Study team #1 asks whether these sections should make clear that the purpose of these sections is to permit the bond to be reduced. This is true only of Section 9703, which permits money or property to be deposited subject to withdrawal only upon court order. Under proposed Section 8483 (continuing Prob. Code § 541.1), bond may be reduced in such a case. The staff will note in the Comment to Section 9703 that bond may be reduced pursuant to Section 8483.

§ 9704. Direct distribution by depository

Study team #1 approves Section 9704.

§ 9705. Interest on deposits by trust company

Section 9705 provides that when a trust company is a personal representative and deposits estate funds with its own savings department, "it is chargeable with interest thereon at the rate of interest prevailing among banks of the locality on such deposits." This continues existing Section 920.5.

Study team #1 asks:

> whether the personal representative has a duty to maximize the interest earned. The section does not require the personal representative to deposit the money in any particular type of account. The "rate of interest prevailing among banks of the locality" obviously varies depending on which type of account is selected.

Under California case law, the personal representative has considerable discretion to determine which type of account best serves the needs of the estate. In Estate of Buchman, 138 Cal. App.2d 228, 238-39, 291 P.2d 547 (1955), the court noted that local banks did not pay interest on ordinary commercial checking accounts, and held that it was proper for the bank in operating rental property of the estate to deposit rents in such a non-interest-bearing account. In In re Estate of Smith, 112 Cal. App. 680, 685-86, 297 P. 927 (1931), the court reversed a lower court surcharge of a bank-executor, saying:

> Where funds are to be in his hands for a very short time or where practically all of the funds will be required for the immediate needs of administration, deposit in a commercial account subject to check is proper. On the other hand, in cases where there is a substantial sum in excess of the immediate requirements, which sum is to be held over a period which will pemit the accrual of interest on a savings bank deposit, he should be required to safeguard and protect these funds in a manner most advantageous to the estate and to that end it is proper that he should deposit the funds in a savings account rather than in a noninterest bearing commercial account.
>
> . . . The time within which the estate may be distributed, the time of the receipt of the funds and the immediate need for funds in order to meet the requirements of administration, are all factors in determining whether it is proper for the executor of a particular estate to deposit the funds in a commercial account or a savings account.

The staff thinks the law as stated in these two cases is satisfactory. Perhaps reference to the two cases should be made in the Comment to the section.

§ 9730. Investments permitted without prior court order
§ 9731. Investment in federal or state securities with court authorization

Study team #1 agrees with the staff note that the words "and reinvest" and "surplus" are redundant and can be omitted from Sections 9730, 9731, and 9732. Study team #1 otherwise approves Section 9730.

In Section 9731, the second subdivision (b) should be redesignated subdivision (c).

§ 9732. Investment of surplus money as provided in will

Subdivision (a) of Section 9732 permits investment of money in any manner provided by the will if "[a]ll uncontested claims have been paid or are sufficiently secured by mortgage or otherwise." Study team #1 asks whether this permits investment when unpaid claims are not secured but there is sufficient cash aside from that to be invested to pay all uncontested claims. The staff thinks this is not clear. The staff would make this clear by revising paragraph (2) of subdivision (a) of Section 9732 as follows:

> (2) All uncontested claims have been paid or are sufficiently secured by mortgage or otherwise , or there is sufficient cash in the estate aside from cash to be invested to pay all uncontested claims.

Subdivision (d) provides that the court may make its order if no objection has been filed. This changes the language of existing law, which appears to preclude the court from hearing the matter if an objection has been filed. Prob. Code § 584.6. ("the court shall hear the petition if no objection thereto has been filed"). Study team #1 would go still further by permitting the court to order investment of money as provided in the will whether or not there is an objection, noting that the "objections may not be well taken, and the court should be empowered to make the order."

When subdivision (d) was presented to the Commission at the August 1985 meeting, the staff had omitted the language permitting one person to preclude the order by objecting, but the Commission decided to restore the language as it is now found in the section. Does the Commission wish to reconsider this decision?

§ 9733. Purchase of annuity granted in will

Study team #1 approves Section 9733.

§ 9734. Exercise of restricted stock options

Subdivision (c) of Section 9734 concerns notice. The following language in subdivision (c) is enclosed in brackets: "but the court may order the notice to be given for a shorter period or dispensed with." Study team #1 thinks this language should be included in the

section. However, as the staff note indicates, that this will probably go in a general provision.

§ 9735. Purchase of securities or commodities sold short

Study team #1 approves Section 9735.

§ 9760. Operation of decedent's business other than partnership

Under existing law, the court may authorize the personal representative to continue operating the decedent's business. Prob. Code § 572. Under case law, if the personal representative does so without a court order, but acts in good faith and as a cautious and prudent person would act under similar circumstances, the personal representative is not personally liable for expenses of operating the business. In re Estate of Maddelena, 42 Cal. App.2d 12, 18, 108 P.2d 17 (1940). So, although the statute appears to require court authorization, under case law there is not necessarily any penalty for failing to do so. The Comment to Section 9760 acknowledges the case law, and conforms the statute by providing that, if advantageous, the personal representative may continue the decedent's business with or without a court order.

Under Section 10551 of our tentative recommendation on independent administration, a personal representative granted independent administration authority must give advice of proposed action if he or she intends to continue the decedent's business for longer than six months. Study team #1 notes the anomaly of having independent administration be more restrictive than supervised administration.

A staff note to Section 10551 expresses the same view by saying that advice of proposed action should not be required for actions that can be taken under supervised administration without prior court authorization, and that the section will be reviewed after the estate management provisions are completed. Does the Commission agree that the independent administration provisions should be revised to eliminate advice of proposed action for operation of the decedent's business for longer than six months?

§ 9761. Settlement of affairs of decedent's partnership
§ 9762. Personal representative continuing as partner in decedent's business

Sections 9761 and 9762 are drawn from portions of existing Sections 571 and 572. These sections provide that, if the decedent

was in a partnership, the surviving partners must settle the affairs of the partnership and account to the personal representative. The court may authorize the personal representative to continue as a partner under certain circumstances. A staff note to these sections expresses the view that these provisions should not apply where the decedent was merely a limited partner, since death of a limited partner does not dissolve the partnership. See Corp. Code §§ 15520-15521, 15681. Study team #1 appears to agree with the staff view, but suggests further review of these two sections, including their interrelationship.

Section 9762 continues the provision of Probate Code Section 572 that the court may not authorize the personal representative to continue as a partner in the decedent's partnership if to do so would be "inconsistent with the terms of any written partnership agreement signed by all of the partners prior to the decedent's death." Mr. Klug would qualify this by adding the language "unless all surviving partners consent." Mr. Klug amplifies on this as follows:

> If the surviving partners consent to having the personal representative as a partner, there is no public policy reason to prevent that, even if that would be inconsistent with the terms of a written partnerhsip agreement. There are tax implications to the surviving partners if they are forced to dissolve the existing partnership and organize a new partnership which would include the personal representative. Since the decedent, during his lifetime, could have participated in an amendment to the partnership agreement with the consent of all of the surviving partners, the personal representative should be in the same position as the decedent.

The staff agrees with Mr. Klug's suggestion. Mr. Klug goes on to say:

> I would also expand the law to allow the personal representative to commence a business or join in a partnership. This is especially true in the agricultural area where a partnership may be necessary for estate farmland to receive reclamation district water.

Mr. Klug gives an example of how this might arise in page 3 of his letter (Exhibit 2). There is some justification for such an expansion of existing law. On the other hand, the purpose of administration is to close the estate, not to risk the assets of the estate in a new business activity.

The last sentence of Section 9762 requires notice of the hearing on a petition for an order authorizing the personal representative to continue as a partner in the decedent's partnership to be given to those who have requested special notice or have given notice of appearance in the estate, and to the decedent's surviving partners. Mr. Klug thinks notice to the surviving partners should not be required:

> Typically, the surviving partners are not concerned with the probate proceeding. They are not interested in the estate, and are only interested in having the estate participate in the partnership. If they approve the estate's participation in the partnership, notice of hearing should not be necessary. (They probably don't have standing to appear in the matter anyway.)

Certainly they would not object. If the partners do object, they would not consent to the estate being made a partner in the first place, so there would be no hearing. The Probate Court cannot force the surviving partners to accept the estate as a partner, so the partner's rights cannot be prejudiced by their failure to receive notice. Accordingly, no purpose is served by requiring notice to be given to the partners. This provision will cause expense to the estate with no offsetting benefits to anyone.

What is the Commission's view?

§ 9800. Borrowing money, refinancing, and encumbering property

The staff agrees with Mr. Klug's suggestion to revise Section 9800 and the Comment as follows:

> 9800. (a) After authorization by order of court obtained under this chapter upon a showing it would be to the advantage of the estate, the personal representative may borrow money on a note, either unsecured or to be secured by a security interest or other lien upon the personal property of the estate, or any part thereof, or to be secured by a mortgage or deed of trust upon the real property of the estate, or any part thereof, and may give a security interest or other lien upon the personal property of the estate, or any part thereof, or a mortgage or deed of trust upon the real property of the estate, or any part thereof, in order to do ~~either or both~~ any one or more of the following:
>
> (1) Pay the debts of the decedent or the estate, devises made in the will of the decedent, and expenses and charges of administration.
>
> (2) Pay, reduce, extend, or renew a security interest or lien or mortgage or deed of trust already existing upon property of the estate.
>
> (3) Improve, use, operate, or preserve property in the estate.
>
> (b) The personal representative shall apply the money to the purpose specified in the order.

Comment. Subdivision (a) of Section 9800 restates a portion of the first sentence, and all of the third sentence, of former Probate Code Section 830 without substantive change. As used in paragraph (1) of subdivision (a), "debts" includes taxes owed by the decedent or the estate. Paragraph (3) of subdivision (a) is new. For a comparable provision, see Section 2552 (guardianship-conservatorship law).

Subdivision (b) is drawn from the second sentence of subdivision (a) of Section 2551 (guardianship-conservatorship law).

"Security interest" is substituted in Section 9800 for "chattel mortgage" and "pledge" which appeared in former Probate Code Section 830. Under the California Commercial Code, the security interest replaces the chattel mortgage and pledge. See Uniform Commercial Code Comment to Uniform Commercial Code Section 9101.

The word "note" has been substituted in Section 9800 in place of the phrase "note or notes" used in former Section 830. This is not a substantive change. See Section 10 (singular number includes the plural).

Study team #1 concurs with the revision to the introductory clause of subdivision (a).

§§ 9801-9805. Borrowing, refinancing, and encumbering property

Study team #1 approves Sections 9801-9805.

§ 9806. Effectiveness of encumbrance

Under Sections 9800-9806 as under existing law, the court may authorize the personal representative to borrow money using estate property as security. When a surviving spouse elects to have his or her share of community real property administered in the estate, there is a question whether the personal representative may borrow money against that property without consent of the surviving spouse. The result is that if the personal representative wants to borrow money using community real property in the estate as security, some title companies require that the surviving spouse join in executing the deed of trust. Mr. Klug would make clear that the personal representative may encumber all property in the estate, including the surviving spouse's share of community property being administered pursuant to his or her election. Is this good policy?

Study team #1 approves Section 9806 as drafted.

§ 9807. Deficiency in case of foreclosure or sale under security interest or deed of trust

Study team #1 approves Section 9807.

§ 9808. Repeat authorizations

Section 9808 provides that the court may make an order under the chapter as often as the occasion may arise. A staff note expresses the view that this section should probably be deleted, because its absence in other chapters might imply that in those other chapters repeat authorizations are not permitted. Study team #1 agrees with this view.

§§ 9821-9824. Actions and proceedings by or against personal representative

Study team #1 approves Sections 9821-9824.

§ 9825. Costs in action against personal representative

Section 9825 provides that if a judgment is recovered with costs against a personal representative, the personal representative is individually liable for the costs, but the costs shall be allowed from the estate unless the personal representative prosecuted or defended the proceeding without just cause. In Memorandum 86-42, the staff recommends that this provision be replaced with the standard of Section 1026 of the Code of Civil Procedure, which provides that costs are chargeable against the estate unless the court imposes costs on the personal representative personally for mismanagement or bad faith in the action or defense. This recommendation is consistent with the suggestion of study team #1.

§ 9850. Acceptance of deed in lieu of foreclosure
§ 9851. Grant of partial satisfaction or partial reconveyance

Sections 9850 and 9851 provide for authorization by order of court, but put the language "made under this section" in brackets. Study team #1 would delete the bracketed language from Section 9850, but approves Section 9851 as is. This appears to be a drafting question, not a substantive one, and the staff will give this further consideration.

§ 9860. Petition for order

Sections 9860-9868 continue existing Sections 850-853 concerning adjudication by the probate court of property disputes involving persons not otherwise involved in the probate proceeding. Section 9860, like existing Sections 851 and 851.5, permits the personal representative or any claimant to file a petition. A staff note under Section 9860 asks whether this should be expanded to allow any

interested person to petition. Mr. Klug would permit any interested person to petition, since a "petition would be useful for a creditor or heir who wants to ensure that the estate recovers property to which the decedent was entitled." However, study team #1 would not do so. What is the Commission's view?

§§ 9861-9864. Conveyance or transfer of property claimed to belong to decedent or other person

Study team #1 approves Sections 9861-9864.

§ 9865. Abatement of petition if civil action pending

Sections 9860-9868 permit the probate court to adjudicate property disputes with persons not involved in the estate proceeding. Before 1965, such disputes had to be adjudicated in a civil action.

To protect the third person's rights, Section 9865 provides that, if a civil action is pending concerning the same subject as the probate petition, the court "shall" abate the petition until the conclusion of the civil action, unless the court determines that the civil action was filed for delay. A staff note expresses concern that, by narrowly codifying the holding of the Richer case (court need not abate when civil action filed for delay), we may be restricting the language of the case. The Richer case, in effect, read "shall" as "may," giving the court broad discretion to decline to abate the probate matter.

The staff note concludes that we should keep Section 9865 the way it is, with "shall" in subdivision (a) and limited authority in subdivision (b) to decline to abate. Study team #1 disagrees with the staff conclusion, and recommends that "shall" be changed to "may" in subdivision (a) and that subdivision (b) be deleted. What is the Commission's view?

§ 9866. Denial of petition if matter should be determined by civil action

§ 9867. Order

Study team #1 approves Sections 9866 and 9867.

§§ 9880-9882. Purchase of estate property by personal representative

Study team #1 approves Sections 9880, 9881, and 9882.

§ 9883. Petition for order made under Section 9881 or 9882

Sections 9881 and 9882 provide a new procedure for a personal representative to obtain court authorization to purchase property from

the estate when the purchase is authorized in the decedent's will or decedent's heirs or devisees consent. Section 9883 is a procedural section concerning the petition and order. Mr. Klug thinks Section 9883 is unnecessary: "If the will authorizes the personal representative to purchase property, the sale should be made in the same manner as other probate sales; it would probably be sufficient to merely cross-reference those provisions."

The staff agrees that a sale to the personal representative should be made in the same manner as other probate sales, including court confirmation when otherwise required. However, we need Section 9883 because the personal representative may not purchase estate property unless the court authorizes it. It should be made clear in Section 9883 that this procedure is in addition to, not in lieu of, the general requirements for sales of estate property.

Section 9883 requires notice to all heirs and devisees. Mr. Klug thinks the notice need not be this extensive:

> If the will disposes of the entire estate, there is no need to notify heirs at law who would not be interested in the property unless they are also beneficiaries under the will. The provision should be redrafted to exclude the requirement of notice to heirs at law in testate cases. Indeed, the only persons who should be entitled to notice are those persons whose interests are affected by the proposed sale. That is, if the property is the subject of a specific devise, only the devisee need be given notice. If the property is the subject of a residuary devise, only the residuary devisees need be given notice.

The reason for the extensive notice under Section 9883 is that the law has traditionally been hostile to purchases of estate property by the personal representative, presumably because of the potential conflict of interest. If the personal representative wants to purchase estate property under the new procedure, perhaps notice should be extensive so that the personal representative's actions will be subject to maximum scrutiny. Study team #1 recommends deleting the bracketed language in paragraph (1) of subdivision (b). Although this is a drafting question, it implies that study team #1 likes the broadly inclusive notice of subdivision (b). What is the Commission's view?

A staff note under Section 9883 asks whether an interested person should be able to file a petition under the section. Mr. Klug thinks

not: "If the personal representative does not propose to purchase the property, why would anyone else need to file the petition?" Study team #1 agrees with Mr. Klug's view: "[A]n interested person should not be authorized to file a petition under § 9883."

§ 9884. Purchase pursuant to contract of decedent to sell
§ 9885. Option to purchase given in will

Study team #1 approves Sections 9884 and 9885.

§ 9900. Dedication or conveyance of real property or easement with or without consideration

Section 9900 permits the court to authorize the personal representative to dedicate an interest in real property in the estate to any public entity. A staff note suggests that "public entity" may become a defined term. The note points out that the Evidence Code defines "public entity" to include a foreign governmental agency, and says that we probably do not want to include a foreign governmental agency under the dedication provisions of Section 9900. The Wells/Brown/Klug team thinks there may be situations where dedication to a foreign governmental agency is appropriate. This is an important policy question. What is the Commission's view?

§ 9944. Notice of hearing

Under existing law, notice of a petition for court approval of a lease of estate property must generally be given at least 10 days before the hearing. Prob. Code §§ 841, 1200.5. However, if the lease term is to be longer than 10 years, notice is given at least 20 days before the hearing. These notice provisions are continued in brackets in Section 9944, because the general notice provisions have not yet been drafted.

The Wells/Brown/Klug team would not provide a special 20-day period of notice for leases longer than 10 years: "The notice provisions should be uniform throughout all Probate Code sections." The staff agrees that the notice provisions should be uniform.

The Wells/Brown/Klug team prefers a uniform 10-day period rather than some longer period. We will consider this when we address the general notice provisions.

§ 9945. Hearing and order
§ 9946. Terms and conditions of leases

Section 9945 permits the court to authorize a lease "on the terms and conditions stated in the order as provided in Section 9946." Subdivisions (a) and (b) of Section 9946 are cast in terms of what the order may authorize the lease to provide, while subdivisions (c) and (d) are cast in terms of what the lease may provide. For this reason, the Wells/Brown/Klug team would move subdivisions (a) and (b) out of Section 9946 (terms and conditions) and into Section 9945 (order). The staff prefers to keep subdivisions (c) and (d) in Section 9946 and to recast them to make them like subdivisions (a) and (b) (what court may authorize).

Under existing law, an heir or devisee with an interest in the property to be leased may in most cases prevent the court from approving a lease longer than 10 years by objecting at the hearing. Prob. Code § 842.1. However, if the lease is for production of minerals, oil, gas, or other hydrocarbon substances, it is not clear whether an heir or devisee may prevent a lease longer than 10 years. Section 9946 is drawn so that an interested heir or devisee may prevent a lease longer than 10 years, regardless of the purpose of the lease. A staff note under Section 9946 asks whether this is good policy. The Wells/Brown/Klug team approves this aspect of Section 9946 as presently drafted.

§ 9961. Petition

Section 9961 permits the personal representative to petition for authorization to grant a real property option. A staff note asks whether an interested person should also be permitted to petition. The Wells/Brown/Klug team would not do so:

> We see no reason to give an interested person the right to file a petition for granting an option to purchase real property. The grant of an option is in the personal representative's discretion; the personal representative should file the petition. If the personal representative unduly fails to file this petition, a petition for instructions can be filed by any interested person. It would be improper to create an exception to this rule with respect to options, because that exception might imply that in any other proceeding in which the executor fails to petition, an interested person could not seek instruction without express statutory authority.

It is not clear that an interested person may petition for instructions when there is another statutory procedure that only the personal representative may use. This is a defect in Section 9611 that we should clarify. See discussion under Section 9611 supra.

§ 9962. Minimum purchase price

Under Section 9962, if the personal representative gives an option to purchase real property of the estate, the purchase price must be at least 90% of the appraised value. The appraisal must have been made within 90 days prior to the filing of the petition. A staff note asks whether this 90-day period should be increased to one year or some other period longer than 90 days. The Wells/Brown/Klug team recommends increasing the 90-day period to one year.

§ 9966. Final distribution of property subject to option

Section 9966 provides that if an option to purchase real property of the estate extends beyond the administration of the estate, the decree of final distribution shall provide that the property be distributed subject to the option. A staff note asks whether the section should go with the provisions on final distribution, rather than with the option provisions where it is presently located. The Wells/Brown/Klug team would delete this section entirely:

> The option itself is of record, and there is no need to complicate the decree of final distribution by a reference to the option. Other liens against the property are not set forth in the decree of final distribution, and we see no purpose in making a special exception for options.

§§ 9980-9983. Option to purchase given in will

Sections 9980-9983 continue Section 854. The Wells/Brown/Klug team points out that our current probate bill (AB 2625) amends Section 854, and suggests that Sections 9980-9983 be conformed to the bill. This is a good suggestion. These sections are redrafted in Exhibit 4 to this Supplement, and supersede Sections 9980-9983 in the basic Memo.

A staff note after Section 9981 asks whether an interested person should be authorized to file a petition. The Wells/Brown/Klug team would not so revise the section:

> We see no reason why the statute should expressly authorize any interested person to file a petition directing a transfer of the property on compliance with the option. We would prefer to rely on the general language of the statutory authority for petition for instructions.

This poses the same question as under Section 9611 (petition for instructions, discussed above) and 9966, namely: Can an interested person petition for instructions when there is another statutory procedure under which only the personal representative may petition? Section 9611 should make this clear after the policy question is decided.

§ 10011. Court order requiring sale of property

Section 10011 continues existing Section 758 under which the personal representative may be compelled to sell estate property under certain conditions. Notice is given to the personal representative by service of a citation. The Wells/Brown/Klug team would substitute mailed notice to the personal representative in place of service of a citation.

No notice need be given to anyone other than the personal representative. A staff note under Section 10011 asks whether more general notice should be given. The Wells/Brown/Klug team would give notice to all persons interested in the estate.

§ 10013. Discretion of personal representative as to property to be sold and mode of selling

Subdivision (a) of Section 10013 provides:

> (a) The personal representative may use his or her discretion as to which property to sell first. In selling property to pay debts, devises, family allowance, expenses of administration, or taxes, there is no priority as between real and personal property.

A staff note asks whether the second sentence of subdivision (a) be omitted as unnecessary in view of the first sentence of the subdivision. The Wells/Brown/Klug team would retain the second sentence.

§ 10014. Sale of assets, whether real or personal, as a unit

Section 10014 permits several items of estate property to be appraised a sold as a unit. Subdivision (c) of the section provides:

> (c) No private sale of the assets as a unit may be made for less than 90 percent of the sum of the appraised values of the personal property and the sum of the appraised values of the real property, appraised separately, or for less than 90 percent of the appraised value if appraised as a unit.

A staff note asks whether, if the the property is appraised as a unit, the sale has to be for not less than the sum of the appraised

values of each of the units appraised separately. The Wells/Brown/Klug team responds:

> The question raised is more of an accounting problem than a sale problem. It is hard to imagine that a personal representative will sell property as a unit if he could obtain a higher price by selling each item separately. The real problem is when the the purchase price is less than the sum of the two appraised values. Is the reduced sales price for the unit prorated as against each of the items, or should the court allocate the sale proceeds among each of the items? We believe the allocation is best left to the sound discretion of the personal representative.

§ 10016. Independent administration authority not limited

Section 10016 provides that nothing in the chapter on sales limits authority the personal representative has been given under the Independent Administration of Estates Act. The Wells/Brown/Klug team would put this provision in the Independent Administration of Estates Act itself, rather than having to repeat it everywhere the code requires court approval. The staff would retain the provision to make clear that the provisions of the chapter on sales are subject to the provisions relating to independent administration.

§ 10150. Contract with agent or broker

Subdivision (d) of Section 10150 provides that the estate is not liable for a broker's commission "unless an actual sale is made and is confirmed by the court." The Wells/Brown/Klug team would add "or unless the sale is consummated" to this language. The staff does not understand the difference between a sale being "made" and a sale being "consummated."

§ 10151. Contract with auctioneer

Subdivision (c) of Section 10151 (liability for auctioneer's fee) is slightly different from subdivision (d) of Section 10150 (liability for broker's commission): Subdivision (c) of Section 10151 provides that the estate is not liable for an auctioneer's fee "unless the sale is confirmed by the court." Omitted from Section 10151 is the requirement of Section 10150 that "an actual sale" be made." Should language be added to Section 10151 to require that "an actual sale" be made"?

The Wells/Brown/Klug team asks whether auction sales are subject to court confirmation. The answer is yes: Although title to property sold at auction passes upon sale without the need for court

confirmation, the personal representative is responsible for the actual value of the property sold unless the sale is confirmed by the court. Section 10259 (continuing the last paragraph of existing Section 772); see also 1 H. Miller & M. Starr, Current Law of California Real Estate § 2:49, at 296 (rev. ed. 1975); Hudner, Sales of Estate Property, in 1 California Decedent Estate Administration § 14.17, at 511 (Cal. Cont. Ed. Bar 1971).

§ 10200. Sale or surrender for redemption or conversion of securities

Under subdivision (f) of Section 10200, no notice of sale of securities need be given if they are to be sold on an established stock or bond exchange. A staff note asks whether this provision should be expanded so that sale could be without notice when the security has a price quoted in the Wall Street Journal, is an over-the-counter security designated as a national market security, or is a stock or bond sold by a registered broker-dealer in the regular course of business. The Wells/Brown/Klug team would so expand the section.

When the Commission considered sales of securities under the Independent Administration of Estates Act, the Commission determined that the following securities could be sold without giving advice of proposed action:

> (1) Securities sold upon an established stock or bond exchange.
>
> (2) A security designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc., sold through a broker-dealer registered under the Securities Exchange Act of 1934 during the regular course of business of the broker-dealer.

The staff recommends that Section 10200 be expanded to conform to the revision made in the Independent Administration of Estates Act.

§ 10205. Decedent's interest in personal property pledged

Section 10205 provides that "[p]roperty belonging to the estate that consists of an interest in personal property pledged may be sold in the same manner as other personal property." A staff note indicates that the meaning of this section is unclear. The Wells/Brown/Klug team would delete the section "as an unnecessary antiquity."

§ 10259. Passage of title without court confirmation

Under Section 10259, perishable property may be sold without court confirmation, but the personal representative is responsible for the actual value of the property unless the sale is approved or confirmed by the court. Existing law (Section 770) refers to court "approval" of the sale, while Section 10259 refers to the sale being "confirmed by the court as provided in Sections 10260 and 10261." The Wells/Brown/Klug team prefers the existing language "approved" by the court. The CEB book on the subject appears to use the terms "approval" and "confirmation" interchangeably in this context. See Hudner, Sales of Estate Property, supra § 14.61, at 545. The value of keeping the language now in Section 10259 is that, by referring to Sections 10260 and 10261 relating to court confirmation generally, it is clear what procedure is used.

§ 10301. Notice of sale where property appraised at not more than $1,000

Under Section 10301, if the value of real property to be sold is $1,000 or less, the personal representative may post the notice of sale instead of publishing it. A staff note asks whether the $1,000 figure should be increased, noting that the amount was last increased from $500 to $1,000 in 1959. The Wells/Brown/Klug team recommends increasing the amount from $1,000 to $5,000. The staff agrees that the figure should be increased at least to $5,000, and possibly to $10,000. The new procedure in AB 2625 for use of an affidavit to transfer title to real property of small value applies to property worth $10,000 or less. Perhaps the same figure should be used in this context.

§ 10305. Sale at public auction

Existing law (Section 781) requires auction sales of real property to be held between 9 a.m. and sunset. Section 10305 reflects the Commission's decision to revise these times to require that auction sales of real property be held between 10 a.m. and 10 p.m. The Wells/Brown/Klug team would permit the sale to be between 9 a.m. and 10 p.m. The staff agrees with this suggestion, because it avoids the possible trap for someone not informed about the change in the law.

§ 10311. Overbid

Section 10311 continues the two-tiered minimum overbid formula of existing law: The overbid must be at least 10 percent greater than the original bid on the first $10,000, and at least 5 percent greater on the excess over $10,000. The Wells/Brown/Klug team would abandon the two-tiered system, and simply require a minimum 5 percent increase regardless of the amount of the original offer. The staff agrees with this suggestion. It will simplify the overbid formula.

§ 10361. Application of purchase money on sale of encumbered property

Existing law (Section 762) requires that when real or personal property is sold which is encumbered, the purchase money shall be applied first to "necessary" expenses of sale. Section 10361 shows the word "necessary" in brackets, and a staff note indicates that the staff would omit the word. The Wells/Brown/Klug team would substitute the word "reasonable." If this substitution is made, conforming changes would be needed in Section 10362. Should not the expenses of sale be paid and the personal representative be liable to the estate for the expenses to the extent they are unreasonable?

The Wells Brown/Klug team would change the order of priority to require that the encumbrance be paid off before paying expenses of sale:

> As a practical matter, the lienholder will not release the lien until the amount secured by the lien is paid. Providing first for payment of sale [expenses] is illogical because there can be no sale without a release of the lien.

This seems like a good suggestion. What is the Commission's view?

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

MEMORANDUM

DATE: April 3, 1986

TO: JAMES V. QUILLINAN
CHARLES COLLIER
JAMES WILLETT
IRV GOLDRING
JAMES DEVINE
JAMES OPEL
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT, TEAM CAPTAIN
STUDY TEAM NO. 1

RE: **REPORT OF STUDY TEAM NO. 1 ON LRC MEMO 86-38 STUDY L-1037 - Estate and Trust Code (Estate Management) New Estate and Trust Code §§7202, 7203, 7308, 7411 and §§9600 Through 9885**

Conference Call: A conference call was held on Tuesday, April 1, 1986. Robert Schlesinger and Richard S. Kinyon did not participate, but the other three members, Charles Collier, W. S. "Gus" McClanahan, , and William V. Schmidt participated.

Study Team No. 1 reviewed the proposed sections of the new code set forth above in chronological order and has the following comments in regard to them.

Section 7202: Satisfactory.

Section 7203: The section is satisfactory. However, it raises the broader question of who should sign petitions, reports, accounts, objections and responses: whether they should be signed by the attorney and verified by the client in a manner similar to civil pleadings, or whether they should be both signed and verified by the client, or whether they need to be signed by anyone in addition to being verified by the client.

Section 7308: The section is satisfactory. We suggest, however, that reference to the "affidavit" in (a)(3) and (4) be changed to refer to a "declaration under penalty of perjury" as it

is more commonly used. The last sentence to the first paragraph of the Comment of the section could then be reversed to state that an affidavit may be used in lieu of a declaration under penalty of perjury.

Our Study Team is also concerned with the last sentence in the third paragraph of the Comment. It states "If notice is jurisdictional, it may not be waived. Estate of Joslyn, 256 Cal. App. 2d 671, 674-76, 64 Cal. Rptr. 386 (1967)." Members of our Study Team did not have time to read this case, but they are concerned because they believe that notice is jurisdictional in many cases, and they know from experience that notice is commonly waived as a practical matter. Such a statement in the official Comment is therefore questioned.

Section 7411: Subsection (a)(2) defines a "transaction" to include "the creation of a mortgage or deed of trust on real property of the estate." We question whether the words "mortgage or deed of trust" are broad enough or whether the words "or other encumbrance" should be inserted into the subsection to broaden it.

Subsection (d) states that a transaction carried out by a personal representative in accordance with a court order has the "same effect as if the decedent were living at the time of the transaction and had carried it out himself or herself while having legal capacity to do so." We wonder whether this language drawn from the guardianship-conservatorship provisions of the code where the ward or conservatee is still living could have any undesirable results when applied to a probate situation where a death has occurred and a different set of procedural rules necessarily come into play. We are concerned that the language used may be too broad.

Section 9600: The second paragraph of the Comment states that a professional personal representative is held to a higher standard of care based on its presumed expertise. Should this language be written into the statute or is it covered by the last sentence of subsection (a)?

Section 9601: It is not clear to us whether the three measures of damage set forth in (a)(1), (2) and (3) are mutually exclusive or whether recovery can be had under more than one of them. Once that question is answered, the first sentence of (a) should be modified to clarify the intention.

We assume that the "profit made by the personal representative" in section (a)(2) is a profit which is personal to the personal representative and accrues to his or her benefit and is not a profit which accrues to the benefit of the estate. The language is not completely clear.

Section 9602: This is a change in the law. As a matter of policy, we feel it is a good change. It states that the personal representative is liable for interest which he actually received or which accrues at the legal rate on judgments, whichever is higher.

Section 9603: We are concerned about the word "fraud" used in this section, particularly in view of existing Civil Code §2234 which reads "every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust." The preceding Civil Code sections refer to a trustee using or dealing with trust property for his own profit, having an adverse position to the beneficiary, gaining an advantage from his position, and other acts which may well not be considered "fraud" in its strictest sense. If Civil Code §2234 and its preceding sections are going to be repealed and not carried over into the new code, then this concern disappears. Lastly, as a matter of policy, we agree that the exemplary damages should be limited to three times the amount of the liability determined under §9601.

Section 9604: Satisfactory.

Section 9610: We feel that the first sentence of the section should be modified to provide that the powers and duties exercised by the personal representative without court authority

instruction, approval or confirmation should be done "in accordance with the fiduciary duties" of the personal representative.

Section 9611: We feel that this section is out of place and perhaps should come at or near the end of those provisions specifically providing for different court procedures. This is a section for instructions which is to apply where no other or different procedure is provided for by statute. It would then logically follow provisions for other or different statutory procedures.

In its present position immediately following Section 9610 which provides for action by the personal representative without court approval, it could be argued that this section requires the personal representative to always seek instructions when he is not empowered to act without a court order.

Section 9612: We feel that the first portion of the first sentence is not completely clear. A judgment is not necessarily final merely because it has not been reversed on appeal. However, this section says that "unless reversed on appeal, a judgment..... is final." Perhaps it should read "When a judgment, order or decree made pursuant to this division becomes final, it releases the personal representative and the sureties from all claims....."

We are very concerned about subparagraph (b) and particularly the last sentence of subparagraph (b). We feel that its inclusion invites trouble. We are also uncertain of the definition of "a material fact." It is our belief that in most complicated accountings and orders of distribution, it is relatively easy to find one omission of what some people may feel is a "material fact." Under this proposed section the order would apparently not become final and be subject to attack for the "omission of a material fact." We feel this is too broadly worded. If subparagraph (b) is to be retained, we recommend that the judgment, order or decree remain final as to all aspects except that aspect pertaining to the "material fact" that was omitted.

Section 9620: This section is not limited to creditor's claims but applies to any dispute. It therefore, for example, could be used in an 851.5 dispute. We question whether the scope of the section should be limited to creditor's claims or should be broadened to include any dispute.

The word "referee" in subsection (a) is questioned by our Study Team. As we understand the word, it is used to refer to a person to whom referrals by the court have been made and who is expected to do certain work or make certain findings and report back to the court. The ultimate decision is then made by the court. We are concerned that the word "referee," as used in this section, may be inappropriate.

Section 9621: Satisfactory.

Section 9630: Subsection (c) changes existing California law. Existing Probate Code §570 states that when two or more personal representatives have been appointed and one or more is absent from the state, the act of the other or others shall be effectual for all purposes. No court order is required. Subsection (c) of this proposed new §9630 permits the court to authorize the remaining joint personal representatives to act. Thus, the new law requires court authorization whereas the existing law does not. This is a question of policy to be decided by the Executive Committee. Subsection (c) also raises the question of two or more personal representatives one of whom resides outside the State of California. Are they to be treated in the same manner as personal representatives all of whom reside in California?

Section 9631: This section rewrites and expands upon that portion of existing Probate Code §920 which states that a personal representative is not liable for the negligence of a co-personal representative except for collusion or gross negligence. The section is new to the commission, and the Executive Committee may

wish to review it. The section seems satisfactory to our Study Team.

Section 9650: Subsection (c) is taken from the Uniform Probate Code. It permits the personal representative to leave real property or tangible personal property with the person presumptively entitled thereto unless the personal representative believes that possession of the property is necessary for purposes of administration. This raises the question of whether the personal representative must account for an asset not in his possession, whether he should inventory such asset, and what duty, if any, he has to preserve and maintain the asset. Our Study Team felt that this question deserved more thought.

Section 9651: This section is taken almost verbatim from the second sentence of existing Probate Code §920. Even though it has been California law since 1931, one member of our Team felt that it could more clearly be stated in two separate sentences, one relating to profit by an increase in the estate, and the other relating to a loss by a decrease in a part of the estate. The other two members of our team felt that it was more important to retain the existing language of the present code as a matter of general policy.

Section 9652: Satisfactory.

Section 9653: After some discussion our Team concluded that subsection (a) was probably satisfactory although we were concerned about the recovery of a gift of property in view of death under subsection (a)(2).

Our Study Team recommends that the bracketed words "or a judge thereof" in section (b) be deleted.

We recommend that subsection (c) be modified to refer to a sale or an assignment of all, or an appropriate portion of, the recovered property.

Sections 9654, 9655 and 9656: Satisfactory.

Section 9657: We recommend that the section be modified to provide that the insurance is a proper expense of the estate.

Sections 9700, 9701 and 9703: We assume that the purpose of these sections is to permit the personal representative to reduce his bond. However, that purpose is not stated in the language of any of the three sections. Should it be?

Sections 9702 and 9704: Satisfactory.

Section 9705: This section raises the question of whether the personal representative has a duty to maximize the interest earned. The section does not require the personal representative to deposit the money in any particular type of account. The "rate of interest prevailing among banks of the locality" obviously varies depending upon which type of account is selected.

Section 9730: Satisfactory.

Section 9731: Please note that this section has two subsection (b)s. The second subsection (b) should be relettered subsection (c).

In reply to the note of the staff contained at the bottom of page 33 of the memo pertaining to Sections 9730, 9731 and 9732, we agree that the word "invest" alone is sufficient as opposed to "invest and reinvest." We also agree that the word "moneys" is sufficient as opposed to "surplus moneys."

Section 9732: It is not completely clear to our Study Team that the words "or otherwise" contained in subsection (a)(2) provide for the situation where there is sufficient cash to pay all uncontested, unpaid claims.

Subsection (d) prevents the court from making an order if an objection has been filed by an interested person. We recommend that the subsection be modified to permit the court to make the order after considering any objections made by an interested person. The objections may not be well taken, and the court should be empowered to make the order.

Section 9733: Satisfactory.

Section 9734: We recommend that the bracketed language in subsection (c) be included in the section. This bracketed language refers to the power of the court to dispense with notice or to set a shorter period.

Section 9735: Satisfactory.

Section 9760: Note that subsection (b) allows the personal representative, with or without prior court authority, to continue the operation of the decedent's business without any time limitation. Under current law an Advice of Proposed Action is required for the continuance of the decedent's business for a period of more than 6 months. This is a policy question to be decided by the Executive Committee.

Sections 9761 and 9762: We agree with the note of the staff that the application of these two sections where the decedent was only a limited partner should be reviewed. Consideration should be given to limiting §9761 to the situation where the decedent was a general partner. The interaction of these two sections should also be considered. The provision in a written partnership agreement that the partnership will not dissolve on the death of a partner is also a matter that should be considered in reviewing these sections.

Section 9800: The words "in order to do either or both of the following;" at the end of the first sentence of subsection (a) should be revised to read "in order to do any or all of the following:".

Sections 9801, 9802, 9803, 9804, 9805, 9806 and 9807: Satisfactory.

Section 9808: We agree with the recommendation of the staff that the section should be deleted.

Sections 9821, 9822, 9823 and 9824: Satisfactory.

Section 9825: Our Team has not had an opportunity to review Memorandum 86-42. We, therefore, do not know why the staff recommends that this section not be included in the Estate and Trust Code. If the section is retained, we believe that consideration should be given to charging these costs to the estate and not to the personal representative individually.

Section 9850: We recommend that the bracketed language in subsection (a) be deleted.

Section 9851: Satisfactory.

Section 9860: We feel that this section is satisfactory. In answer to the question raised by the staff, we feel that only the personal representative or a claimant, and not an interested person, should be able to file a petition under this §9860. This section generally provides for those matters set forth in existing Probate Code §850 and 851.5.

Sections 9861, 9862, 9863, 9864: Satisfactory.

Section 9865: Contrary to the recommendation of the staff, we recommend that the word "shall" in subsection (a) be changed to "may." If this change is made, subsection (b) can be deleted. This is a question of policy which should be discussed by the Executive Committee.

Sections 9866, 9867: Satisfactory.

Section 9868: Existing Probate Code §853 states that the order (under 850 and 851.5) shall be prima facia evidence of the correctness of the proceedings and of the authority of the executor of administrator or other person to make the conveyance or transfer. This language is not in proposed §9868. The staff asked the question whether the provisions of 9612 and 7411(d) are

adequate to replace the language of the former §853 that is not continued. Our Study Team did not have before it §7411(d).

Section 9880: Satisfactory.

Section 9881: This section is new, but we feel that it should be adopted as a matter of good policy.

Section 9882: Satisfactory.

Section 9883: This section is satisfactory. We recommend that the bracketed words in subsection (b)(1) be deleted. In answer to the question of the staff posed on page 66 of the Memorandum, we feel that an interested person should not be authorized to file a petition under §9883.

Sections 9884 and 9885: Satisfactory.

Respectfully submitted,

STUDY TEAM NO. 1

By:

WILLIAM V. SCHMIDT
Captain

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April 8, 1986

Mr. James V. Quillinan
Diemer, Schneider, Jeffers, Luce & Quillinan
444 Castro Street, Suite 900
Mountain View, California 94041

Re: LRC Memorandum 86-38

Dear Jim:

Enclosed are my personal comments on the first half of the foregoing LRC memo. For convenience, I will refer to page number.

Page 7, Section 7203(b). I see no reason why an objection should be verified. Typically, the objecting party has no facts on which to base the objection, but is raising the objection based on an allegation contained in the petition or accounting. Furthermore, I understand that the reason for requiring a verification of petition is that if there are no objections, the verified petition can be received in evidence and an order can be based thereon. If an objection is filed, a hearing will be held so there should be no reason to require verifications.

Page 8, Section 7308(a)(4). Is "the foreman or principal clerk" an adequate designation. I recommend substituting the language "any authorized employee".

Page 9, Section 7411(c). I see no reason why a lease should be required to contain a provision setting forth that it is made by authority of the court order giving the date of the order. Typically, a personal representative does not want to go to the expense of petitioning the court until the lease is signed. A lease signed before obtaining the court order will contain a provision that it is subject to approval by the court. If the court does not

approve the lease, the condition fails, and the lease is ineffective. If the court does approve the lease, the lease is then effective. There should be no need to then revise the lease to state the date of the court order.

Furthermore, recording of the lease is a protection to the tenant, but creates problems for the estate. A recorded lease is a cloud on title which must be cleared up by a quitclaim from the tenant. Whenever I represent landlords, I recommend to my clients that the leases not be recorded. The recording requirement should be deleted from the statute, and be subject to the private negotiation between landlord and tenant.

Page 24, Section 9653(b), relates to creditors seeking to have assets recovered for the benefit of the estate. The requirement that the creditor pay the costs and expenses of suit and attorneys' fees or give a bond for that purpose may be unfair to the creditor. The creditor has no control over the conduct of the case or the economic settlement. If the creditor seeking to restore assets to the estate is going to pay the costs and expenses of attorneys' fees, the creditor should be subrogated to the right of the personal representative to pursue the property directly. Subdivision (b) deals with the manner in which the sale proceeds are applied. The sale proceeds should first be applied to the administration expenses (i.e. attorneys' fees and litigation costs) related to recovering the property. Should the executor be required to account for the sale proceeds? In view of your recent experience in this matter, you probably have as much expertise as anyone on the problems related to recovering estate property for the benefit of the creditor.

Page 44. I recommend adding the following language to Subdivision (b): "unless all surviving partners consent." If the surviving partners consent to having the personal representative as a partner, there is no public policy reason to prevent that, even if that would be inconsistent with the terms of a written partnership agreement. There are tax implications to the surviving partners if they are forced to dissolve the existing partnership and organize a new partnership which would include the personal representative. Since the decedent, during his lifetime, could have participated in an amendment to the partnership agreement

with the consent of all of the surviving partners, the personal representative should be in the same position as the decedent. I would also expand the law to allow the personal representative to commence a business or join in a partnership. This is especially true in the agricultural area where a partnership may be necessary for estate farmland to receive reclamation district water.

An example of how this might arise would be as follows: suppose the decedent leased the property to relatives for cash prior to death. If the relatives already own farmland, they may be receiving the maximum entitlement to water and/or payments from government set-aside programs. The economics of farming (and changed in federal programs) may be such that the other family members may not be in a position to renew the lease after it expires. The family (and the estate) are frequently better off if all of them can join in partnership and farm the property together. The partnership may entitle them to additional water on the estate land at a reduced cost, and may entitle the estate to participate in government programs which make farming economical. Thus, the statute ought to permit the representative to commence a business or to join in a new or existing partnership.

Section 9762(g). The last sentence of this provision requires that notice of hearing be mailed to each of the surviving partners. Typically, the surviving partners are not concerned with the probate proceeding. They are not interested in the estate, and are only interested in having the estate participate in the partnership. If they approve the estate's participation in the partnership, notice of hearing should not be necessary. (They probably don't have standing to appear in the matter anyway.) Certainly they would not object. If the partners do object, they would not consent to the estate being made a partner in the first place, so there would be no hearing. The Probate Court cannot force the surviving partners to accept the estate as a partner, so the partner's rights cannot be prejudiced by their failure to receive notice. Accordingly, no purpose is served by requiring notice to be given to the partners. This provision will cause expense to the estate with no offsetting benefits to anyone.

Page 45, Section 9800. The last line of the first paragraph should be changed to "any or all" rather than

"either or both." Subdivision (1) should include taxes and debts of the estate among the purposes for which funds might be borrowed. Subdivision (2) applies only to existing mortgages, and does not apply to existing unsecured debts of the estate. The comment makes it clear that "debts" include taxes owed by the decedent. It is not clear that debts include taxes owed by the estate (e.g. estate taxes, property taxes, income taxes, etc.).

Page 49, Section 98069(a)(2). Add "including the share of property belonging to the decedent's surviving spouse administered pursuant to Section 649." As you know, some title companies have taken the position that on an estate sale the surviving spouse must join in the execution of the deed. They similarly take the position that a surviving spouse must join in the execution of a deed of trust. That position is contrary to the election which the surviving spouse makes to probate the survivor's share of the community property. In some cases, probating both halves of the community property may be a substitute for a conservatorship proceeding for the survivor. The statute should make it clear that when community property is subject to administration, and the court makes an order with respect to that property, the personal representative has full power with respect to the property.

Page 58, Note. I believe any interested person should be authorized to file a petition under Section 9860. Specifically, the petition would be useful for a creditor or heir who wants to ensure that the estate recovers property to which the decedent was entitled.

Page 65, Section 9883. There is probably no purpose served by this section. If the Will authorizes the personal representative to purchase property, the sale should be made in the same manner as other probate sales; it would probably be sufficient to merely cross-reference those provisions. Subdivision (b)(1) requires notice to be given to all heirs and devisees named in the petition for probate of will. If the Will disposes of the entire estate, there is no need to notify heirs at law who would not be interested in the property unless they are also beneficiaries under the will. The provision should be redrafted to exclude the requirement of notice to heirs at law in testate cases. Indeed, the only persons who should be entitled to notice

are those persons whose interests are affected by the proposed sale. That is, if the property is the subject of a specific devise, only the devisee need be given notice. If the property is the subject of a residuary devise, only the residuary devisees need be given notice.

Page 66, Note. I cannot imagine any reason why an interested person should be authorized to file the petition. Certainly, if the personal representative proposes to purchase the property, the personal representative may file the petition. If the personal representative does not propose to purchase the property, why would anyone else need to file the petition?

Very truly yours,

Kenneth M. Klug

Kenneth M. Klug

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April 8, 1986

M E M O R A N D U M

TO: James V. Quillinan

FROM: Kenneth M. Klug

RE: LRC Memo 86-38

The following comments are those of the Wells/Brown/Klug Team on proposed Section 9900 et. seq. For convenience, I will refer to the page of Memo 86-38 to which our comments relate.

Page 68. We see no reason to exclude a foreign government agency. While this is not a burning issue, there may be situations where such a dedication may be appropriate.

Page 73. Section 9944(c). We recommend staying with a ten-day notice. The notice provisions should be uniform throughout all Probate Code sections. The LRC should consider the manner of notice as a separate issue, and once the manner of notice is decided upon, it should be consistent to avoid traps. (For convenient estate administration, we believe that a ten-day mailing of notice is preferable to ten-day C.C.P. service of notice, which adds mailing time for distance. The added time may delay hearing of petitions. While it is recognized that ten days' mailing may not provide sufficient time for an objector to prepare and file written objections, the policies of the Probate Courts allow for an automatic continuance on verbal request. Since ten days is adequate time for persons to receive mail and make a response (i.e., request a continuance) no one's rights will be prejudiced by a ten-day mailing requirement on notice.

Page 74. Section 9946(a) and (b). Both of these subdivisions deal with the order, and would be more properly located in Section 9945.

Page 76. Note. We believe that an heir or devisee should be permitted to prevent an order authorizing a lease exceeding ten years for the purpose of production of minerals, oil, gas and other hydrocarbon substances. As a practical matter, any co-owner of mineral rights can prevent drilling for oil and gas: oil companies will not drill unless they have all of the interests tied down. The heir should not be in a worse position because his or her interest is subject to probate administration than if he or she owned the mineral rights outright. Furthermore, experience has shown that most people who are approached by the prospect of an oil and gas lease willingly sign the oil company's form (perhaps induced by the euphoria of the get-rich-quick prospect). Few individuals realize that the standard oil company leases are highly negotiable, and that substantial protective provisions can be obtained for both the landowner and the owner of the mineral rights. These provisions are negotiable even where there is no other oil company interested in the property. Typically, oil companies will not bid against each other or attempt to develop another company's play. Thus, it is not likely that the probate bidding procedure will obtain the best deal, and experience has shown that one heir who is a tough negotiator can obtain the best deal for everyone. It would be unfair to allow the Probate Court to authorize a lease of one heir's interest over that heir's objection, because that would deprive the heir of the right to negotiate his or her own lease.

Page 77. Note. We see no reason to give an interested person the right to file a petition for granting an option to purchase real property. The grant of an option is in the personal representative's discretion; the personal representative should file the petition. If the personal representative unduly fails to file this petition, a petition for instructions can be filed by any interested person. It would be improper to create an exception to this rule with respect to options, because that exception might imply that in any other proceeding in which the executor fails to petition, an interested person could not seek instruction without express statutory authority.

Page 68. Note. We recommend increasing the 90-day period to one year.

Page 80, Section 9966. We recommend deleting this section. The option itself is of record, and there is no need to complicate the decree of final distribution by a reference to the option. Other liens against the property are not set forth in the decree of final distribution, and we see no purpose in making a special exception for options.

Page 81, Section 9981(b) and (c). These provisions should be redrafting to conform with the options contained in AB 2625.

Page 81. Note. We see no reason why the statute should expressly authorize any interested person to file a petition directing transfer of the property on compliance with the option. We would prefer to rely on the general language of the statutory authority for petition for instructions.

Page 84. Note. We believe all persons interested in the estate should be given notice of hearing on a petition for an order requiring that the property be sold.

Page 84, Section 10011(b). We believe that notice of hearing should be given to the personal representative. We see no reason why a citation need be served on the personal representative, and we would delete that requirement.

Page 86. We believe the second sentence of subdivision (a) should be retained as is. It clarifies that the "which" in the first sentence applies equally to real and personal property, and is not limited to "which items of personal property" or "which items of real property."

Page 87. Note at top of page. The question raised is more of an accounting problem than a sale problem. It is hard to imagine that a personal representative will sell property as a unit if he could obtain a higher price by selling each item separately. The real problem is when the purchase price is less than the sum of the two appraised values. Is the reduced sales price for the unit prorated as against each of the items, or should the court allocate the sale proceeds among each of the items? We believe the allocation is best left to the sound discretion of the personal representative.

Page 87, Section 10016. Is this provision a duplication of the language contained in the Independent Administration provisions? Should this language also apply to leases, etc? We believe that the general language should be contained in the independent administration provisions rather than spotted throughout the Probate Code.

Page 88, Section 10150. We recommend that the language "or unless the sale is consummated." be added to the end of subdivision (d). Well-drafted sale agreements provide that no commission is payable unless the sale is consummated, and we believe that that provision should be statutory.

Page 89, Section 10151. Add "or unless the sale is consummated." following subdivision (c). We also have a question of whether or not Section 10151(c) is practical. This provision deals with auction sales. We don't believe auction sales are subject to confirmation, as title normally passes upon receipt of the bid price.

Page 96, Note No. 1. We believe that the provision should be expanded as recommended by the note.

Page 98. We recommend deleting Section 10205 as an unnecessary antiquity.

Page 111, Section 10259(b). Change "confirmed" to "approved." Since this section deals with personal property, title to which passes without court confirmation, the personal representative should be relieved of responsibility for the actual value of the property when the sale is approved by the court.

Page 118. Note. We recommend raising the amount to $5,000.00.

Page 121, Section 10305(b). A sale at public auction should be between the hours of 9:00 in the morning and 10:00 in the evening. This is necessary in desert communities where the temperature can we well over 100° by 10:00 a.m. Moving the sale time to 9:00 a.m. would allow for cooler heads to prevail.

Page 128. We recommend an overbid amount of 5 percent across the board, rather than the two-tier present

structure. This will reduce the required amount of overbid on small sales by as much as $500.00, and will encourage bids. On larger sales, the calculation of the overbid amount will be easier.

Page 137, Section 10361(a)(1). We recommend substituting the word "reasonable" for the bracketed word "necessary". We believe that subparagraph (1) and subparagraph (2) should be reversed. As a practical matter, the lienholder will not release the lien until the amount secured by the lien is paid. Providing first for payment of sale proceeds is illogical because there can be no sale without a release of the lien. The proposal simply puts the horse before the cart.

Very truly yours,

Kenneth M. Klug

Kenneth M. Klug

cc: Irwin D. Goldring
James C. Opel
H. Neal Wells III
Hermione K. Brown

Exhibit 4

CHAPTER 16. OPTION TO PURCHASE GIVEN IN WILL

§ 9980. Option to purchase given in will

9980. (a) When an option to purchase real or personal property is given in a will, the person given the option has the right to exercise the option at any time within the time limits provided by the will. For the purposes of this section, if a time limitation in the will is measured from the death of the testator, that time shall be extended by the period between the testator's death and the issuance of letters testamentary or of administration with the will annexed or by six months, whichever is the shorter period.

(b) When an option to purchase real or personal property is given in a will admitted to probate, the court may make an order under this chapter directing the personal representative to transfer or convey the property to the person given the option upon compliance with the terms and conditions stated in the will.

Comment. Section 9980 continues subdivision (a) and a portion of the first sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Definitions
- Court § 29
- Person § 56
- Personal property § 57
- Personal representative § 58
- Real property § 68
- Will § 88

Effect of court authorization or approval § 9612
Transfer or conveyance pursuant to court order § 7411

§ 9981. Filing of petition; persons who may file; time for filing

9981. (a) To obtain an order under this chapter, the personal representative or the person given the option to purchase the property shall file a petition within any time limits provided in the will.

(b) Subject to subdivision (c), if the option given in the will is exercisable under the terms of the will after the time that the estate would otherwise be closed, the property subject to the option shall be distributed subject to the option.

(c) If the will does not provide a time limit for exercise of the option, the time limit is one year from the death of the decedent.

Comment. Subdivision (a) of Section 9981 continues a portion of the first sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change. Subdivisions (b) and (c) of Section 9981 continue subdivisions (c) and (d) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202
Definitions
  Person § 56
  Personal representative § 58
  Property § 62
  Will § 88
Verification required § 7203

Note. Should an interested person be authorized to file a petition under Section 9981?

§ 9982. Notice of hearing

9982. Notice of the hearing on the petition shall be given for the period and in the manner required by [Section 1200.5].

Comment. Section 9982 continues the third sentence of subdivision (b) of former Probate Code Section 854.

CROSS-REFERENCES

Clerk to set matter for hearing § 7202
Verification required § 7203

§ 9983. Protection of rights of creditors

9983. The court shall not make an order under this chapter unless one of the following requirements is satisfied:

(a) The court determines that the rights of creditors will not be impaired by the making of the order.

(b) The court requires a bond in an amount and with such surety as the court shall direct or approve.

Comment. Section 9983 restates the fourth sentence of subdivision (b) of former Probate Code Section 854 [as amended by AB 2625] without substantive change.

CROSS-REFERENCES

Definitions
  Court § 29
Granting of option to purchase real property §§ 9960-9966