

First Supplement to Memorandum 86-55

Subject: Study L-1037 - Estate and Trust Code (Estate Management)

This supplement concerns the provisions of the draft statute attached to Memorandum 86-55 that relate to compensation of agents and brokers. See Sections 10160-10166 on pages 104-110 of the draft statute.

Attached is a copy of a recent case, *Simonini v. Passalacqua*, 180 Cal. App. 3d 400, ___ Cal. Rptr. ___ (1986). In this case, the trial court awarded a commission on a real property sale. The property was not listed with a broker. An offer presented for confirmation was made by a purchaser who was represented by a broker. The purchase agreement and deposit receipt set out the terms of the offer and included a provision for a six percent commission payable to the broker. At the hearing on the confirmation sale, an overbid was made by a purchaser not represented by a broker, and the sale was confirmed to the overbidder.

In the *Simonini* case, the trial court awarded a commission to the broker representing the purchaser whose original offer was returned to the court for confirmation. According to the broker who represented the purchaser who made the original offer, the broker rendered a service to the estate: "By securing the original bid for the subsequent confirmation hearing, an agent serves the interest of the estate by helping to realize the highest possible price for the property being sold." Thus, the argument runs that, in granting a commission, the trial court was following the underlying statutory policy to pay compensation for services rendered to the estate. The service to the estate was that the broker provided an offer which, in effect, established a minimum sale price for the property. On the other hand, the appellate court took the view that to read the statute to allow a commission "would be to reward an agent who produces the low offer with his full commission at the expense of the estate."

In the *Simonini* case, the Court of Appeal held that the Probate Code did not authorize a commission to a broker who does not have a listing contract with the [personal representative] where the property is sold at the confirmation sale to a higher bidder not represented by a broker. The court declined to follow an earlier case which allowed a commission on the theory that the written bid and acceptance was sufficient to satisfy the requirement of a contract between the personal representative and the broker. For a discussion, you should read the attached case.

Section 10164 would change the result in the *Simonini* case. The section applies only when the court confirms a sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker. This is the situation in the *Simonini* case.

Subdivision (b) provides that the court shall allow the compensation determined under Section 10161 on the amount of the original bid to the agent or broker whose original bid was returned to the court. This rule is subject to a special provision dealing with the situation where there is a broker having an exclusive right to sell contract and the original bid is submitted by another agent or broker. Section 10161 provides for compensation in "the amount the court, in its discretion, determines to be a reasonable compensation for the services of the agent or broker to the estate." Subdivision (b) does not require that the agent or broker representing the purchaser making the original bid be one who holds a contract with the personal representative. As indicated above, the *Simonini* case would preclude compensation to the agent or broker in this situation unless the agent or broker has a contract with the personal representative.

What policy does the Commission wish to apply in this situation?

If it is desired to codify the result in the *Simonini* case, Section 10164 should be revised as indicated below:

§ 10164. Compensation where sale made on increased bid by purchaser not procured by agent or broker

10164. (a) This section applies only where the court confirms a sale on increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker.

(b) Except as provided in subdivision--(c) subdivisions (c) and (d), the court shall allow the compensation determined under Section 10161 on the amount of the original bid to the agent or broker whose original bid was returned to the court.

(c) Compensation shall not be allowed to the agent or broker under subdivision (b) unless one of the following conditions is satisfied:

(1) The agent or broker holds a contract under Section 10150, whether or not the contract grants the agent or broker the exclusive right to sell the property.

(2) Another agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property.

(e) (d) If an agent or broker holds a contract under Section 10150 granting the exclusive right to sell the property and the original bid returned to the court is made by a purchaser who was procured by another agent or broker, the compensation determined under Section 10161 on the amount of the original bid shall be divided between the agent or broker holding the contract and the other agent or broker as is provided in any agreement between the agent or broker holding the contract and the other agent or broker. If there is no agreement, the compensation shall be divided equally between the agent or broker holding the contract and the other agent or broker.

The revised Comment to Section 10164 would read:

Comment. Subdivisions (b) and (c) of Section 10164 continue the last sentence of former Section 761 without substantive change. Subdivision (c) makes clear that an agent or broker who procures the purchaser who makes the original bid returned to court is entitled to a commission where there is an overbid only if that agent or broker holds a contract with the personal representative or another agent or broker holds an exclusive right to sell contract with the personal representative. See *Simonini v. Passalacqua*, 180 Cal. App. 3d 400, ___ Cal. Rptr. ___ (1986).

Subdivision (d) is a new provision that covers the situation where an agent or broker holds an exclusive right to sell contract and the original bid returned to the court is made by a purchaser who was procured by another agent or broker. Former Section 761 failed to cover this situation. If there is an agreement concerning the sharing of commissions, subdivision (d) requires that the court divide the commission as provided in the agreement, rather than requiring the court to "give consideration" to the agreement as under the second sentence of former Probate Code Section 760.

The references to Section 10161 in Section 10164 make clear that the court has discretion to determine the total amount of compensation to be paid and allocated.

CROSS-REFERENCES

Definitions

Court § 29

Property § 62

Respectfully submitted,

John H. DeMouly
Executive Secretary

[180 Cal.App.3d 400]

[No. A018716. First Dist., Div. Two. Apr. 28, 1986.]

BEATRICE SIMONINI, as Conservator, etc., Plaintiff, v.
 THOMAS R. PASSALACQUA, as Executor, etc., Defendant;
 ROMAN CATHOLIC BISHOP OF SANTA ROSA, Intervener and Appellant;
 KEYLAND PROPERTIES, INC., Real Party in Interest and Respondent.

In a partition action involving the estates of two individuals who held a joint tenancy in a parcel of real property, the sole distributee of defendant estate was allowed to intervene based on its expectant interest in the property. The trial court ordered a sale of the property and appointed a referee to appraise and sell it pursuant to the statutes governing private sales of real property by decedents' estates. The property was not listed with a real estate broker or agent. After the referee reported to the trial court that he had accepted an offer from a buyer who was represented by a real estate broker, the intervenor, who was not represented by a broker, overbid the offer at the hearing on the motion to confirm the sale. Thereafter, the referee recommended payment of a commission to the original bidder's broker, and the trial court issued an order granting such payment. (Superior Court of Sonoma County, No. 111732, Kenneth M. Eymann, Judge.)

The Court of Appeal reversed, holding that the payment of the commission was not authorized by the governing provisions of the Probate Code. The court held that the reference in Prob. Code, § 761 (method of calculating broker's commission when sale is made on increased bid submitted at confirmation hearing), to the "agent holding the contract" refers to an agent holding a listing contract as specified in Prob. Code, § 760 (authorizing personal representative to enter into commission contract with broker), as further demonstrated by Prob. Code, § 785, which explicitly distinguishes between a right to a commission growing out of "a contract with the [personal representative]" and a commission which is a "condition of [a] bid." Thus, the court held, only a listing broker is an "agent holding the contract" within the meaning of § 761, and only that listing agent may be awarded a commission for services rendered to an estate where he does not secure the successful bidder. (Opinion by Rouse, J., with Kline, P. J., and Smith, J., concurring.)

[180 Cal.App.3d 401]

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) Decedents' Estates § 97—Sales, Encumbrances, and Leases of Property—Sales of Real Property—Return and Confirmation—Broker's Commission—Payment of Commission to Broker Not Under Contract to Personal Representative.—In a partition proceeding involving the estates of two individuals who held a joint tenancy in a parcel of real property, which was ordered sold by the trial court but was not listed for sale by the referee, the trial court erred in awarding a commission to a broker who represented a prospective buyer of the property whose bid was accepted by the referee but who was overbid at the confirmation hearing. The reference in Prob. Code, § 761 (method of calculating broker's commission when sale is made on increased bid submitted at confirmation hearing), to the "agent holding the contract" means the agent holding a

listing contract as specified in Prob. Code, § 760 (authorizing personal representative to enter into commission contract with broker), as further demonstrated by Prob. Code, § 785, which explicitly distinguishes between the right to a commission growing out of "a contract with the [personal representative]" and a commission which is a "condition of [a] bid." Thus, only a listing broker is an "agent holding the contract" within the meaning of § 761 so as to be awarded a commission for services rendered to an estate where he does not secure the successful bidder.

[See Cal.Jur.3d, Decedents' Estates, §§ 568, 569, 791; Am.Jur.2d, Executors and Administrators, §§ 171, 531.]

(2) Statutes § 49—Construction—Reference to Other Laws—In Pari Materia (Same

Subject Matter)—Avoidance of Nullification of One Statute by Another.—Statutes relating to the same subject matter are to be read together by courts, and reconciled whenever possible to avoid nullification of one statute by another.

COUNSEL

John A. Klein and Margaret K. Butler for Intervener and Appellant.

Mikel D. Bryan for Real Party in Interest and Respondent.

[180 Cal.App.3d 402]

OPINION

ROUSE, J.—Intervener Roman Catholic Bishop of Santa Rosa appeals from the trial court's order awarding a commission on the estate sale of certain real property to real party in interest, Keyland Properties, Inc. (Keyland). Intervener contends that the Probate Code¹ does not authorize such a commission. We agree and reverse.

The present controversy evolves out of a partition action involving the estates of two individuals who held a joint tenancy interest in a parcel of real property. Intervener was allowed to intervene in the action because, as sole distributee of defendant estate, he had an expectant two-thirds interest in the property.

On February 2, 1982, the trial court entered a stipulated interlocutory judgment ordering a sale of the real property. The court appointed a referee to appraise and sell the property either in a public sale or by private sale conducted as "private sales of real property of estates of deceased persons as required by law."

The referee did not list the property with a real estate broker or agent. On February 5, 1982, he reported to the trial court that he had accepted an offer to purchase the property

¹Unless otherwise noted all subsequent statutory references are to the Probate Code.

from John Andersen, who was represented by the real estate brokers Keyland, real party in interest on appeal.

A hearing on the motion to confirm the sale to Andersen was held on April 1, 1982. At the hearing intervener submitted an increased bid consisting of a written offer to purchase for \$271,400 over three years or \$222,000 in cash. The trial court confirmed the sale on terms to intervener. Intervener was not represented by a broker, but appeared through his attorney. Although sale to intervener was confirmed at the hearing, an award of a commission on the sale was taken under submission.

On June 1, 1982, the referee wrote the court recommending payment of a commission to Keyland. Intervener petitioned the court to protest the referee's ex parte request, and requested an evidentiary hearing on the matter. No evidentiary hearing was held, and on June 2, 1982, the trial court issued an order granting payment of a real estate commission of \$10,000 to Keyland.

I.

(1a) Intervener contends that the trial court's order awarding a commission to Keyland was erroneous because the Probate Code does not authorize

[180 Cal.App.3d 403]

such a commission. According to Code of Civil Procedure section 873.745, an agent's commission "shall be fixed . . . in the manner provided for private sales of real property in decedents' estates." The right to receive a commission on a probate sale is regulated by statute. (*Estate of Cattalini* (1979) 97 Cal.App.3d 366, 374 [158 Cal.Rptr. 640]; *Estate of Toy* (1977) 72 Cal.App.3d 392, 396 [140 Cal.Rptr. 183].) Sections 760, 761 and 785 govern the award of real estate commissions on the sale of real property in decedents' estates.

On appeal, the main controversy surrounds the interpretation of sections 760 and 761. Section 760 establishes the procedure by which an estate can enter into listing and sales agreement with brokers. At the time of the trial court's order, section 760 provided that "[t]he executor or administrator may enter into a written contract with any bona fide agent or

broker, or multiple group of agents or brokers, to secure a purchaser for any real . . . property of the estate, which contract may provide for the payment of a commission out of the proceeds of the sale.”

Section 761 describes the process of calculating the broker’s commission when the sale is made on an increased bid submitted at the confirmation hearing. “In case of sale on an increased bid made at the time of confirmation to a purchaser not procured by the agent holding the contract, the court shall allow a commission on the full amount . . ., one-half of said commission on the original bid to be paid to the agent whose bid was returned to the court for confirmation and the balance of the commission on the purchase price to the agent, if any, who procured the purchaser to whom the sale is confirmed. If the successful bidder is not produced by a bona fide agent, then the agent holding the contract shall be allowed a full commission on the amount of the original bid returned by him.”

Intervener argues that to comprehend the statutory scheme for payment of commissions under section 761, the language “agent holding the contract” must be understood as the agent holding a listing contract as specified in section 760. Section 761 establishes that an “agent holding the contract” is entitled to a partial commission although the purchaser he had secured was outbid at the confirmation hearing, and in certain cases is entitled to a full commission when the successful bidder is not represented by an agent. Intervener contends that the purpose behind section 761 is to provide compensation for listing brokers who do not secure the successful bidder, but do help produce the final sale by displaying the property for the estate. “The code provides for payment of commissions to both listing brokers and selling brokers in cases in which an increased bid is made at the confirmation hearing. These provisions contemplate compensation for services provided.” (*Estate of Cattalini, supra*, 97 Cal.App.3d 366, 374-375.)

[180 Cal.App.3d 404]

Intervener points out that the term “contract” in sections 761 and 785 refers to the listing contract described in section 760. He contends that the connection between the term

“contract” and the listing contract described in section 760 is made explicit in the last paragraph of section 785. In this paragraph the right to a commission “to which an agent may be entitled by virtue of a contract with the executor or administrator” is distinguished from a “condition of the bid that a certain amount thereof be paid to an agent by the executor or administrator” Thus, intervener claims that only a listing broker is an “agent holding the contract” within the meaning of section 761 and only that listing agent can be awarded a commission for services rendered an estate where he does not secure the successful bidder.

Keyland argues that the term “agent holding the contract,” as set forth in section 761, applies to both the listing broker and the broker acting on behalf of a prospective purchaser who submits an offer which is accepted by an estate and returned to the court as the original bid for the confirmation hearing. The rationale for this reading of the statutory scheme is that “[b]oth types of brokers are rendering services to the estate under contract and are entitled to a commission under . . . Sections 760 and 761.”

Keyland maintains that, as the agent of the original bidder, Andersen, it entered into a contract with the court-appointed referee for the purchase of the estate property. This contract was a purchase agreement and deposit receipt setting out the terms of Andersen’s offer to buy the property and including provision of a six percent commission payable to Keyland. According to Keyland, this contract rendered a service to the estate. “By securing the original bid for the subsequent confirmation hearing, an agent serves the interests of the estate by helping to realize the highest possible price for the property being sold.” Thus, the argument runs that, in granting a commission under section 761, the court was following the underlying statutory policy to pay compensation for services rendered to the estate.

II.

(2) It is a cardinal rule of statutory construction that statutes relating to the same subject matter are to be read together and reconciled whenever possible to avoid nullification of one statute by another. (*Kalina v. San Ma-*

teo Community College Dist. (1982) 132 Cal.App.3d 48, 53 [183 Cal.Rptr. 12].) (1b) In order to reconcile sections 760 and 761, we conclude that the language "agent holding the contract" (§ 761) refers specifically to the agent under a listing contract as described in section 760.

Section 761 provides for two alternative ways of awarding commissions where there is an overbid at the time of confirmation. If the purchaser is

[180 Cal.App.3d 405]

"not procured by the agent holding the contract" (the agent with whom an estate may enter into a listing agreement under § 760), then the section permits a division of the commission between the listing agent and the agent representing the successful bidder. Alternatively, where the successful bidder has no agent then the "agent holding the contract shall be allowed a full commission on the amount of the original bid returned by him." (§ 761.)

The underlying rationale for these provisions is to compensate agents for the services they render to the estate. (*Estate of Cattalini, supra*, 97 Cal.App.3d 366, 375.) Where one agent has contracted to list the property and market it he has rendered services to the estate. The value of his commission will be reduced if the offer he produces is overbid at confirmation by a purchaser represented by a second agent.

In the case before us Keyland rendered no services to the estate. It represented Andersen in presenting his offer to the referee. The only contractual agreement between Keyland and the estate was a provision for a commission contained in Andersen's offer, which offer was accepted by the referee, but rejected by the court.

Keyland relies on *Estate of Baldwin* (1973) 34 Cal.App.3d 596 [110 Cal.Rptr. 189], for the proposition that there was a contract be-

tween Keyland and the estate based upon the purchase agreement and deposit receipt signed by the referee which provided for a six percent commission to Keyland. The challenge to the commission in *Baldwin* was made precisely on the grounds that a written bid and an acceptance signed by the agent (who was also the unsuccessful bidder) and by the coexecutrices was insufficient to satisfy the requirement of a written contract under section 760. The court concluded that the bid and acceptance was adequate and proceeded to approve an allocation of the commission under section 761 between the agent and the agent of the successful overbidder. *Baldwin*, however, has been criticized on other grounds by another division of this district. (*Estate of Toy, supra*, 72 Cal.App.3d 392, 395 [criticizing the *Baldwin* court's decision to permit an unsuccessful bidder who was acting as his own agent to collect a commission in his capacity as real estate broker].)

Keyland claims that it was sufficient service to the estate for them to provide Andersen's offer which, in effect, established a minimum sale price for the property. Whatever incidental benefit this may have conferred on the estate, we cannot conclude that it was a benefit envisioned by the Legislature when it authorized payment of a full commission to the agent who returns the original bid. (§ 761.) Such a commission would only be justified where the agent who obtained the original bid was the listing agent. To read the

[180 Cal.App.3d 406]

section as Keyland proposes would be to reward an agent who produces the low offer with his full commission at the expense of the estate.

The order directing payment of real estate commission is reversed and the matter remanded to the trial court for further proceedings consistent with this opinion.

Kline, P. J., and Smith, J., concurred.