L-1046

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8/29/86

Second Supplement to Memorandum 86-61

Subject: Study L-1046 - Estate and Trust Code (Nonresident Decedent -- Comments of W. S. McClanahan)

Attached to this Supplement as Exhibit 1 is a letter from W. S. "Gus" McClanahan with comments on the staff draft attached to the basic memorandum (Memo 86-61). We are distributing this letter without staff analysis because the meeting is so close in time. The staff will discuss Mr. McClanahan's points orally at the meeting.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Exhibit 1

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August 25, 1986

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Re: Study L-1046, Memorandum 86-61

Dear Bob:

Thank you for your letter of July 23, asking me to comment on the material in the above-referenced Memo. I am sorry that other duties (including the A.B.A. Convention in New York) have kept me from replying sooner.

I have reviewed the staff draft rather carefully, but I did not do what your staff calls a "line by line" review, or any independent research on the topics involved, because of the lack of time. The comments which follow deal largely with general principles, concepts and policy involved in ancillary administration and non-probate transfers of property of non-resident decedents, rather than the detailed provisions and language of the staff draft.

Chapter 1. No comment.

Chapter 2.

Article 1. No comment.

Article 2.

While the attempt to extend the benefits of the new ancillary administration statutes to all states and foreign countries is desirable, it may be found that it is not practical, under the requirements of the proposed statutes. There are many foreign countries (and perhaps some states) in which the requirements for the admission of a will to probate, or the appointment of a personal representative in an intestate estate, are less formal and less stringent than those in California. Most states, and most countries whose laws are based on the common-law system, will have laws substantially similar to California's

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for the admission of a will to probate, or the appointment of a personal representative. However, those states which have adopted the Uniform Probate Code, have an informal probate which does not require notice and publication as in California. In other words, it is not an "in rem" procedure. It is believed that some countries following the Common-Law system may also have similar informal probate procedures. Would the requirement of Section 12522(a)(2) bar wills admitted by the informal procedure in these states and countries from admission under Section 12522 in California?

Those countries whose laws are based on the Civil Law Sysem also have provisions for the administration of estate which fall short of, and scarcely resemble the California system. In fact, the laws in some of those countries do not include the common-law concepts of "probate", or "admission to probate", in their laws of administration. I have in mind here the concepts of "the universal heir" and "the community administrator". Also, the reading of the will and the distribution of the estate by the executor under the informal supervision of the "Notaire" (a quasi-judicial officer in Civil Law countries). I believe that Louisiana still retains some of these procedures. Here the foreign representative might have difficulty in satisfying the requirements for an "authenticated copy" under Section 12502 and 12521. (I have not had time to do research on this topic.) Would these wills qualify under Section 12522(a)(2)? Would they qualify as authenticated copies under Section 12502 or 12521?

The questions involved here are policy questions. If a will has been admitted or a representative appointed under the laws of the state or country of the decedent's domicile, and the major part of the estate of the decedent is being administered and distributed under those laws, should California set up different and more strict requirements for the administration and distribution of the decedent's California property, which is usually a minor part of the estate?

In considering this question, it should be kept in mind that the ancillary administration in California is usually a small part of the decedent's estate, generally one parcel of real property (the tail, not the dog).

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Another concept to be kept in mind is a term often used recently in construing marital property questions in dissolution proceedings, that is, "the expectations of the parties." Would the expectations of the decedent be that the will he or she made under the laws of state X, as administered in State X, would control the disposition of all of his property? Or would the expectation be that any property he or she owned in California would require different and more formal procedures?

These comments have been addressed to the admission of wills to probate under Section 12522. Probably the same questions could be raised as to the appointment of personal representatives under Section 12512.

As a matter of comity between the several states, I believe that California owes a higher duty to those states to make transfers of the property of decedents domiciled in those states as easy as is possible and practical, than it owes to residents of foreign countries. Drafting statutes which will work in conjunction with the laws of those states is not too difficult; drafting statutes which will work in conjunction with the laws of many or most foreign countries may be impractical and too difficult to undertake.

Since this is a new article dealing specifically with ancillary administration, it appears that some consideration should be given to the bond requirements. If no special provisions are stated, of course the bond requirements for domiciliary estates would apply. But is this the correct approach? In most states, unless the bond is waived (by the will or otherwise), the personal representative will have furnished a bond in the foreign jurisdiction for the full value of the estate (California adds one year's income). If ancillary administration is to be had in California, should the personal representative be required to furnish an additional bond?

As stated previously, the usual situation is that the domiciliary probate includes the bulk of the estate, and the Caliornia property will be one parcel of realty (say an estate of $1,000,000 in State X, and realty worth

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$100,000 in California). Would it not be sufficient if the foreign personal representative furnished the California court with an authenticated copy of his bond in State X?

This, of course, raises another question as to the case where the bond is waived (by the will or otherwise), and State X has not required a bond in the domiciliary probate. Should California require a bond in the ancillary proceeding, despite the waivers?

If it is claimed that a bond is required to protect local creditors, it should be noted that in most ancillary proceedings, there are no local creditors. Unless the decedent has recently lived in or carried on business in California, there are usually none of the creditors found in a domiciliary proceeding (the butcher, the baker and the candlestick maker, etc.).

Another concept that might be considered in this new procedure section, is who may act as personal representative. California has long barred non-resident corporate fiduciaries from acting as personal representative in domiciliary estates in California. (Probate Code Section 480, Financial Code Section 1502). Should that prohibition be applied to a bank or trust company which is a foreign representative, to prevent it from acting as ancillary personal representative in California? Take the example stated above, if the Last National Bank is acting as personal representative in an estate of $1,000,000 in State X, is there any reason why Last National Bank should not be permitted to act as ancillary personal representative of the $100,000 parcel of California realty? A non-resident corporate fiduciary would certainly perform as well as a non-resident individual, and such occasional appointments would pose a minimal financial loss, if any, to the California banking business.

Article 3.

If the will can be admitted, or the personal representative qualified under Article 2, I see no objection to the provisions of Article 3. It might be kept in mind however, that it would be easier for the California courts to control, or to redress a wrong, if the domiciliary probate is in one of the states, than if it is in a foreign country.

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Chapter 3.

Article 1.

I have no special comments on this Article, except as the comments on Chapter 2 above may apply.

Article 2.

I find myself in the same position as the staff as to this procedure. I have had no experience with it.

I do not know how often a court in a foreign jurisdiction would enter a final order specifically distributing California real property. However, if this article is enacted, I expect that it would be used wherever the occasion occurs. If the foreign representative has knowledge of this law (if enacted), he would probably take whatever steps were necessary to cause the court in the foreign jurisdiction to specifically distribute the California real property.

In speculating what a foreign court might do, lets turn the facts around. Suppose the domiciliary administration is in California and the decedent owned real property in Wyoming, which has such a statute. Would the California court, on a petition requesting that the Wyoming real property be distributed, make such an order, if the Wyoming property had not been inventoried in California? And would the California court accept an inventory including Wyoming real property?

Under the wording of Section 12560, "xxx a final order for distribution made in the foreign jurisdiction xxx," a question arises as to the content or wording of the foreign order which might be required by a California court to invoke the provisions of this statute. Would the foreign order have to refer specifically to the California real property? If so, would a reference in the foreign order to "the property located in Santa Ana, California", or "the decedent's property in Santa Ana, California", or "the decedent's property in California", or "the California property" be sufficient? Would a final order including a residuary clause and an omnibus clause, such as, "all the rest, residue and remainder of the estate, of whatever kind or nature and wherever situated, including any property of the estate or of the decedent not now known to the petitioner," be sufficient to cause the California court to invoke the provisions of this statute?

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Should the phrase in Section 12560 be amplified to read: "xxx final order for distribution of the entire residue of the estate of the decedent made in the foreign jurisdiction xxx"?

With all of these questions, I think the concept of Article 2 is a worthwhile addition as part of the general plan of the Commission to make California property more easily and readily available to foreign representatives, heirs and devisees in their administration of a non-resident decedent's property.

Article 3.

This new section appears to be a valuable addition to the methods for foreign personal representatives to deal with California property. I have not analyzed it in detail for the lack of time, and hence have no comments.

Chapter 4.

I did not have time to review or analyze this chapter, and hence have no comments.

With reference to the suggestion in the last paragraph of Memo 86-61, I would favor the procedure recommended in the law review article. These small deposits in a bank in another state can be very troublesome. Probably most of us have had one or more experiences where it took a lot of time and paperwork to get the account released to the local representative or heirs.

I believe California should adopt a system of waiving publication and, after a reasonable waiting period, allow the local bank to pay out on receipt of some reasonable proof of entitlement.

In summary, I believe you and the staff have produced a good statutory system for ancillary administration. Perhaps I should say, a good start, since I believe these proposed provisions will be expanded as time goes on. I would like to see California have a good system of ancillary administration, as liberal as it can be made within practical limits, for two reasons: (1) it will benefit the persons in other states who

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have to use it, and (2) it may rub off on other states to adopt similar statutes which make it easier for California personal representatives, heirs, devisees and attorneys when we encounter ancillary administration.

Looking at the length of these comments, I feel like quoting Pascal, "I apologize for writing you such a long letter, I did not have time to write a shorter one."

Sincerely,

W. S. McCLANAHAN

WSM/hj